Judicial Conference of Australia

Acting Judges And Judicial Independence*

Justice Ronald Sackville** • 28 February 2005

Judicial independence is one of those safeguards that Australians take for granted. We are reminded from time to time of its importance when we see what happens in countries where Judges are beholden to government. But we tend to assume that an independent judiciary it is not under any threat in Australia.

The Bill now before the Victorian Parliament concerning acting Judges does pose

a genuine threat to judicial independence. I do not mean this in some theoretical or abstract sense. The proposed legislation, if passed, constitutes a practical threat to the integrity of the judicial system in Victoria.

It is fundamental to judicial independence that Judges enjoy security of tenure until they attain retirement age. The reason is obvious. If Judges are appointed for a fixed term, there is a danger that they will be seen as attempting to curry favour with the Government of the day in order to obtain reappointment for another term.

Security of judicial tenure is built into Chapter III of the Australian Constitution. That is why there can be no acting Judges appointed to Federal courts like the Family Court or the Federal Court of Australia. Victoria, however, does not have the same constitutional protection for its State courts.

The Bill, if passed, allows the Governor-in-Council to appoint as many acting Judges of the Supreme Court 'as are necessary for transacting the business of the Court'. Acting Judges are to hold office for a term of five years.

The Bill does not set any standards for determining when it is 'necessary' to appoint acting Judges. Presumably this judgment is to be made by the Governor-in-Council which, in practice, means the Cabinet and, specifically, the Attorney-General of the day.

This means that the Attorney-General could refrain from replacing tenured Judges of the Supreme Court as they retire and simply substitute acting Judges. If the Attorney-General was so minded, he or she could make so many acting appointments that the character of the Supreme Court (and the other Victorian courts) would be completely changed. The Court could consist predominantly of acting Judges.

Under the Bill, an acting Judge is eligible for appointment for a second (or subsequent) five year term, but is not entitled to reappointment. Continuation in office depends upon the Executive Government forming a favourable view of that Judge's judicial performance. Indeed, the decision might be made on any ground the Attorney-General thinks appropriate. In an age when judicial decisions can be the subject of intense public controversy, particularly where sentencing of criminal offenders is concerned, how is the appearance of independence to be maintained when an acting Judge makes difficult and potentially controversial decisions towards the end of his or her term?

The problem is even worse when pension entitlements are taken into account. An acting Judge has no pension entitlements. However, if an

acting Judge is appointed as a permanent Judge his or her service as an acting Judge is to count for pension purposes.

This means that an acting Judge coming to the end of his or her five year term of appointment has a double incentive to be appointed a Judge of the Court. Appointment will not only mean a secure tenured position, but the Judge will receive credit (presumably) for five years service as an acting Judge for pension purposes. This amounts to a notional sign-on bonus that could be worth hundreds of thousands of dollars.

What if an acting Judge is hearing a case in which the government is a party when a permanent vacancy in the Court is about to be filled? If the government wins and the acting Judge is later appointed as a permanent Judge, will the losing party accept that the two events were unrelated?

The Bill also provides that an acting Judge must not engage in legal practice or paid employment while undertaking the duties of a Judge unless the Attorney-General approves. The legislation does not incorporate any guidelines for the exercise of the Attorney-General's discretion. What factors are to be taken into account? Is the grant or refusal of approval to be made public? Is the Attorney-General to give reasons?

The practical result is that an acting Judge may be beholden to the Attorney-General of the day because of permission that has been granted to continue in legal practice.

I am aware that the Attorney-General has prepared "draft guidelines" apparently designed to limit the circumstances in which acting Judges can be appointed. The guidelines say, for example, that the use of acting Judges should generally be restricted to cases where there are temporary listing difficulties in the Court.

Two things should be said. First, these guidelines, if they are implemented, mean that the Attorney-General intends to implement a much more limited scheme than was foreshadowed at the time the Bill was first introduced into Parliament and a much more limited scheme than the Bill would permit.

Secondly, the guidelines are fundamentally flawed. They are apparently not intended to be legally binding on anyone. They could be withdrawn or altered at a moment's notice. Even if the guidelines ameliorate some of the problems with the Bill, and the present Attorney-General scrupulously follows them, who is to say what his successor will do with the sweeping powers conferred by the Bill?

Judicial independence is too vital an element in our democratic society to be dependent on the discretion of the Executive.

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