SUPREME COURT OF QUEENSLAND

19th Pacific Regional Judicial Conference, Tumon, Guam

Tuesday 9 November 2010, 11.30am

"Handling judicial complaints: the Queensland experience"

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Chief Justice

I begin by thanking Chief Justice Torres for this conference, and for giving me this berth to speak this morning.

My experiences in Port Vila, hosted by Chief Justice Vincent Lunabek and in Tonga, with then Chief Justice Tony Ford, emphasized these features: first, the collegiality of our joint mission whichever be our jurisdiction; second, that resources vary among the jurisdictions, and there is an obligation of mutual assistance; and third, that in some of our jurisdictions, judges have had to, and have, displayed conspicuous courage in supporting both the independence of the judiciary and the separation of powers, for which there has been generally no call in jurisdictions like mine where on one view we rather regrettably take the rule of law for granted. Those of you offer a very good example to the rest of us.

Personally, I have over my last few years as Chief Justice of Queensland forged friendships in the Pacific which will for me endure. They have illuminated the nature of the judicial role, and the nature of the role of Chief Justice. And beyond that, they have introduced me to wonderful human beings, and for that I am immensely grateful.

I turn to my topic, which is very different from the topic addressed by the two preceding speakers.

We Judges rightly and regularly proclaim our independence from the other branches of government, most recently Sir Albert Palmer this morning. That is important in terms of public confidence in our process and outcomes. Our citizens are reassured to know that our court processes are free from impermissible external influences.

A corollary of that independence is accountability. We achieve that accountability in various ways, including by conducting our proceedings in public, by giving reasons for our decisions, and through the process of appeal. In those ways, our judicial work can be, and is, scrutinized, though largely by our colleagues. We obviously cannot allow judicial independence to become any sort of shield from the sort of broader scrutiny I now proceed to mention. The authority of the courts depends ultimately on public confidence in our judgments, and Sir Albert reminded us of Felix Frankfurter's sentiment in that regard. As part of that, the people must have confidence in the probity and appropriateness of judicial conduct, and confidence that any perceived slippage from those high standards will be properly dealt with, properly including transparently.

I wish to speak this morning about the treatment of complaints in Australia, and particularly Queensland. Australian jurisdictions have always been astute to avoid any erosion of judicial independence through the complaints process. Judges must be confident that frivolous complaints will be rejected summarily. They should also not be distracted from their work by the pressure of having to meet pointless complaints. They must know that if a serious complaint is made, bearing on their retaining office, it will be independently dealt with, and by a body in tune with the nuances of judicial life, and dealt with in a timely way.

Complaints of conduct warranting removal, and complaints of less grave behaviour, obviously warrant different approaches.

I deal separately with our experience of complaints of conduct which if established would warrant removal from office, and unsatisfactory conduct which would warrant a less grave response.

A. Conduct warranting removal

1. Removal under the Constitution

One of the obviously fundamental assumptions underlying judicial independence is that judges act with integrity. A judge is liable to be removed from office for proved

misbehaviour justifying removal. That regrettably has occurred in Queensland, and Chapter 4 of the Constitution of Queensland 2001 provides the applicable mechanism, that is, the finding of an independently constituted tribunal which reports to the Parliament. Removal occurs if the Legislative Assembly accepts the tribunal finding, and the Governor in Council acts on an address of the Parliament.

The mechanism worked satisfactorily on the two occasions in recent decades it needed to be invoked. In those cases, in the late 1980's, commissions of inquiry were set up under the Parliamentary (Judges) Commission of Inquiry Act 1988. One judge was removed in 1989, and the other exonerated.

The constitutional provisions have since been streamlined, now providing expressly (s 61) that the tribunal must be established by legislation, that it must comprise three former judges of a State or Federal superior court (other than a judicial colleague of the judge under investigation), and for the applicable standard of proof of any misbehaviour justifying removal from office, that is, on the balance of probabilities.

2. The investigatory role of the Crime and Misconduct Commission

Queensland judicial officers are, additionally, potentially subject to a separate regime, and this distinguishes this Australian jurisdiction. The Queensland Crime and Misconduct Act 2001 provides for the investigation of 'official misconduct', comprising (s 15) either the commission of a criminal offence or a disciplinary breach providing reasonable grounds for the termination of an appointment. This extends to judicial officers. Respecting judicial independence, the legislation provides (s 58) that an investigation by the CMC into the alleged conduct of a judicial officer may only proceed in accordance with conditions and procedures settled in continuing consultation between the Chair of the CMC and the Chief Justice. (Were the complaint to concern the Chief Justice, it would be the President of the Court of Appeal who would consult with the CMC's Chair: s 26(2) Supreme Court of Queensland Act 1991.)

That body can avoid a problem to which Chief Justice Higgins adverted yesterday, as to who promotes a complaint of conduct warranting removal. If the Crime and Misconduct Commission were of the view that such misconduct could be proved, that independent body would prefer a charge before the Tribunal.

In my 12 years as Chief Justice, I have had to consider only very few such cases. Bearing in mind the State has approximately 150 judicial officers, that is reassuring. My inquiries from time to time over that period, of the Attorney-General, the Chief Judge, the Chief Magistrate, the Director of Public Prosecutions and the Chair of the CMC and its predecessor the CJC, have not suggested any level of complaint of concerning frequency or gravity. Most of the complaints to the CMC which do not come to me are explained by litigants' dissatisfaction with the outcome of their cases. Their avenue for any challenge is by way of appeal.

B. Unsatisfactory conduct but not warranting removal

There is a spectrum of judicial behaviour warranting critical or adverse assessment, but not removal. It begins with discourtesy in the courtroom, such as impatience or brusqueness or inappropriate comment. It extends to unfairly criticising a witness, failing to give a fair hearing, and perceived bias. Then there would be unreasonable delay in delivery of judgment. Those are illustrative examples. Unless persistent or extreme, that sort of conduct would not ordinarily warrant removal from office, and there are at present adequate ways of dealing with it.

In Queensland, judicial peer pressure may facilitate a resolution in such a case. There are other expedients. It may be necessary to assist an otherwise conscientious judge, burdened with a number of ageing reserved decisions, by allocating further time out of court for judgment preparation. Ultimately, the response to this level of unacceptable conduct would ordinarily fall to the relevant head of jurisdiction.

Another way of dealing with this category of complaint is more structured. The Magistrates Court of Queensland has developed and published a formal complaints protocol. It advises how to lodge a complaint, specifies how it will be examined, and promises the party making the complaint a decision in writing, and within a prescribed timeframe. The Family Court of Australia has a similar protocol.

I considered setting up a protocol in the Supreme Court of Queensland some years ago, of that variety, but saw no need because of the minimal extent of complaints made to me, and because I feared that having such a protocol could serve to generate frivolous complaints. Also, if you have such a protocol, your resources must be such as to ensure you can and do comply with it.

There is however a risk that absent a formal complaint mechanism, legitimate complaints may not be made, for reasons of timidity, fear or ignorance.

The State of New South Wales has had a judicial commission for many years, and it is a respected body which operates effectively without undermining judicial independence or judicial esteem. It is adequately funded by the New South Wales government, and its board is chaired by the Chief Justice of that State. Its role is dual: judicial education and the treatment of complaints. It would be a worthy model for any State complaints body. Importantly, it is resourced to carry out the necessary enquiries. A Chief Justice rarely is, and in terms of perceptions, it is generally unpalatable to have one judge, even a Chief Justice, investigating another with whom he or she sits.

Pressure for change

There is some level of agitation in Australia for the establishment of a national judicial complaints body.

Some years ago I suggested there was no need, so far as Queensland is concerned, on the basis our system appears to work adequately. As I said on another occasion:

> "….my perception is that our present system in Queensland works both satisfactorily and well. Comparatively few complaints of arguable judicial misconduct arise. They are appropriately dealt with by existing mechanisms: investigation by the independent CMC, with an appropriate safeguard to ensure protection of judicial independence; the availability of a constitutional tribunal to examine conduct arguably warranting removal; and the intervention of a head of jurisdiction in situations of less grave departure. In the last instance, the reasonable assumption and assurance is that the head of jurisdiction will possess the moral authority within the court to command acceptance for advice given, and the resultant position."

Part of my then concern attending the establishment of another formal complaints handling body rested in the likely generation of a host of unwarranted complaints, and disposition of the judicial time necessary to deal with them. A judge cannot afford to let an unjustified complaint go unanswered, and even answering a dressed-up frivolous complaint can be consumptive of resources, dredging back through diaries, official records, files, transcripts, etc.

The current position of the Queensland Judges

But acknowledging the increasing pressure around our nation, and ultimately in the interests of accountability and transparency, my colleagues and I unanimously resolved on 24 June 2010 in these terms:

> "The Judges of the Supreme Court of Queensland, having noted:
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> (a) the longstanding success of the Judicial Commission of New South Wales,
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> (b) the proposal by the Government of Victoria to create a similar body,
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> (c) the recent Senate report recommending the establishment of a federal judicial commission modelled on the Judicial Commission of New South Wales,

(d) the resolution of the Judicial Conference of Australia supporting the establishment in each jurisdiction of a structured system for dealing with complaints against judicial officers, and

(e) that a structured system of judicial education can lead to a reduction in the circumstances which give rise to complaints against judicial officers,

have resolved that they would support the establishment in Queensland of a body which both:

(a) provides for judicial education, and

(b) deals with complaints against judicial officers,

and in those roles is based on and mirrors, in its functions and constitution, the Judicial Commission of New South Wales."

Ideally, Judges would always act appropriately, and there would be no complaint. But we live in the real world. Even allowing for external commissions and tribunals, the role of the head of jurisdiction, and of peer pressure, remain very important, important in forestalling the development of problems, and resolving them should they arise. So is judicial development in the area of proper judicial behaviour. Various jurisdictions have developed sets of ethical guidelines. In Australia they have been produced by the Australasian Institute of Judicial Administration with the imprimatur of the Council of Chief Justices of Australia and New Zealand, and they are available on-line.