"THE NATIONAL JUDICIARY"

THE SYDNEY INSTITUTE,
WEDNESDAY 9 JUNE 2004
MURRAY GLEESON

The Australian court system, and the Australian judiciary, are divided along the same federal lines as the legislative and executive branches of government. At the time of the Federal Union, each of the uniting colonies had its own court system, headed by a Supreme Court, from which appeals lay to the Privy Council. Following Federation, those Supreme Courts were continued as State Supreme Courts. The Constitution required the creation of what it described as a Federal Supreme Court to be called the High Court of Australia. That new court was established in 1903. For most of the twentieth century, there were appeals from State Supreme Courts and from the High Court to the Privy Council, although these were limited in certain respects, and were gradually abolished. The process of abolition was completed in the 1980s. In what follows I will make no further reference to the Privy Council, although its existence was a feature of the legal landscape over most of the twentieth century, and its disappearance from the landscape had major consequences for the role of the High Court.

Until the creation of the Federal Court of Australia and the Family Court in 1976, apart from the High Court itself there were few federal judges. The creation of those courts and, more recently, the Federal Magistracy, has resulted in a large increase in the number of federal judges, but even today the State governments of New South Wales, Victoria, and Queensland, appoint more judicial officers than the federal government. The State of New South Wales appoints about one quarter of Australia's judicial officers. The largest single judicial group in the nation is the New South Wales magistracy. The Federal Court competes with State Supreme Courts for recruitment of judges. Furthermore, judges sometimes move from a State Supreme Court to the Federal Court, and vice-versa. A number of the present members of the Federal Court were recruited from State Supreme Courts. One member of the New South Wales Court of Appeal was formerly a Federal Court judge, and another was formerly a member of the Supreme Court of Western Australia. There are seven members of the High Court, and five of us were previously members of State Supreme Courts. Like the first Chief Justice of the High Court, I was formerly a State Chief Justice. So far, we are the only two that have made that move. Some States have legislation which provides for the appointment as acting judges of judges from other States. When I was Chief Justice of New South Wales, there was a fairly regular interchange between the New South Wales Supreme Court and the Supreme Court of the Northern Territory, which was pleased to have the assistance of New South Wales judges to assist in that court's appellate work.

There has also been interchange between members of the Supreme Courts of New South Wales and Western Australia. In one case, the Court of Appeal of New South Wales was comprised of the Chief Justice of Western Australia, and Judges of Appeal from Victoria and Queensland. This cross-fertilisation is a good thing. Fifteen years ago it was virtually unheard of, although Territory courts often drew their members from State courts. It should be encouraged and facilitated. I would like to see more of it.

The recently established National Judicial College, which is headed by a State Chief Justice[1], is intended to cater for both Federal and State judicial officers. There are national institutions representing, or including, the judiciary, such as the Judicial Conference of Australia, and the Australian Institute of Judicial Administration. There is an annual conference of judges of the State and Territory Supreme Courts and the Federal Court. There is also a Council of Chief Justices of Australia and New Zealand. I am the Chairman of that body. Its members include the Chief Justice of New Zealand, and the Chief Justices of the Federal Court, the Family Court, and all State and Territory Supreme Courts. We met twice a year, and have plenty to discuss.

At the end of the 19th century, there were few models of federalism available. Switzerland was quickly rejected, and that left only the United States and Canada. Like Australia, those countries had a common law tradition. Their legal and judicial systems were

inherited from the United Kingdom. One of the interesting features of the history of the federal movement is the importance which the framers of the Constitution attached to the fact that, in most respects, they had in mind following the United States, rather than the Canadian, model of federalism. This was seen as an important inducement to the colonies to join in the new federal union. The Canadian model centralized power to an extent greater than the United States model. At the time, the central government in Canada had a veto over provincial legislation. In the distribution of legislative power, the Provinces were given power with respect to specified topics, and the residual power remained with the Federal Parliament. In the United States, as in Australia, it was the other way around. The Federal government in Canada appoints the judges of the superior courts of the Provinces.

In the United States, the judiciary was, and remains, de-centralised. The position was once described by Sir Laurence Street as follows:[2]

> "When the original thirteen States combined to form the United States and adopted their Constitution, there were marked differences in quality between their respective court systems. In some States even the judges were not qualified lawyers. There were strong political currents discernible within some of the State systems, particularly in the Southern States. It was impossible to have any confidence in either the capacity or the willingness of the individual State systems to uphold and enforce the Constitution which the thirteen States had adopted and the laws to be made by the United States Congress ...
>
> In this background, a system of federal courts was established expressly for the purpose of upholding and enforcing the rights stemming from the Constitution."

The federal courts, of course, included the United States Supreme Court. In Australia, until 1976, most federal jurisdiction was exercised by State courts. From the outset, in the United States there was a strong and separate federal judiciary. Federal judges in the United States were, and still are, appointed for life. In many States, the judges are elected. The legal system of the United States is not integrated, as is the Australian legal system. The Supreme Court of the United States does not have a general jurisdiction to hear appeals from State Supreme Courts, and there is no common law of the United States. There is, on the other hand, a common law of Australia[3]. This is a consequence of the role of the High Court as the ultimate court of appeal with a general jurisdiction to hear appeals from decisions both of federal courts and of State Supreme Courts.

The jurisdictional complexities in the United States court system are notorious. The United States judiciary is far less homogeneous than the Australian judiciary. In Australia, judges of the Federal Court and the State Supreme Courts come from similar professional backgrounds. They are appointed in a similar manner, although by different governments. As I mentioned earlier, their Canadian counterparts are all appointed by the Federal government.

It was not inevitable that, after Federation, judicial authority would be divided along federal lines in the same manner as

legislative and executive authority. From time to time, since Federation, some people have questioned the appropriateness of that division, and argued for an integrated Australian court system and judiciary. In 1927, in evidence he gave before a royal commission on the Constitution, Sir Owen Dixon argued in support of a single system of courts equipped by the Constitution with authority to determine all legal rights regardless of their source[4]. He developed that idea further in a lecture given in 1935[5]. He said:

> "What seems to me to be the greatest departure from English principle was the establishment of a new jurisdiction, called 'federal jurisdiction'. Superficially, no doubt, it appeared a natural thing for the new government to include courts of justice of its own. ... But neither from the point of view of juristic principle nor from that of the practical and efficient administration of justice can the division of the courts into State and Federal be regarded as sound. ... The court administering the law should all derive an independent existence and authority from the Constitution. Some practical difficulties would occur in carrying such a principle beyond the superior courts, but it is not easy to see why the entire system of superior courts should not have been organised and erected under the Constitution to administer the total content of the law."

Sir Owen went on immediately to acknowledge practical difficulties that would have arisen if such a course had been adopted at Federation. These would have included agreeing on arrangements for funding and administering the courts, and appointing their members.

Over the twentieth century, others have advanced proposals for integration of the Australian court system, to a greater or lesser degree[6]. Some of those proposals were a response to the creation

of the Family Court and the Federal Court, and to apprehensions about jurisdictional problems that might arise, especially because of a tendency of some Federal Governments to confer upon federal courts exclusive jurisdiction in relation to issues arising under Federal law. One proposal, for example, involved the creation of a national intermediate appellate court to hear appeals from the Federal Court, the Family Court, and State Supreme Courts, subject to a final appeal to the High Court. Since then a number of States have followed the lead of New South Wales in creating a permanent Court of Appeal within their own Supreme Court structures. Reference to the Australian Law Journal shows that, in the 1970s and 1980s, a good deal of judicial energy, especially at a State level, was devoted to proposing alternatives to what was foreseen, as a likely expansion of the federal judiciary.

The Constitutional Commission established in December 1985 examined the structure of the Australian judicial system. I gave evidence to that Commission as a barrister. Although I have not checked the transcript, I recall being asked about the possibility of competition for jurisdiction between State and federal courts. My recollection is that I said that, from the point of view of a practitioner, such competition might be a good thing. It would be unbecoming of me now to promote such competition, but if, in a little more than four years time, someone asks me whether I have changed my mind, the answer will probably be no. Competition between common law courts is no novelty. It was particularly

vigorous in England in the days when judges received a share of filing fees. The Constitutional Commission delivered its Final Report on 30 June 1988. In its report, the Commission considered recent legislation for the cross-vesting of jurisdiction, which had been adopted as a practical expedient to solve what were said to be problems arising from the creation of the Federal Court and the Family Court. The Commission supported the idea of cross-vesting in principle, but referred to doubts about the constitutional validity of the legislation, and recommended that the Constitution be amended to authorise it[7]. The proposal for constitutional amendment was not taken up. Ultimately, the High Court[8] declared certain aspects of cross-vesting to be invalid. References to that decision almost invariably fail to mention the warning that had been given in the Report of the Constitutional Commission. That form of cross-vesting which is provided for specifically in the Constitution, and which was vigorously pursued throughout the 20th century, vesting of federal jurisdiction in State courts, remains in full effect.

Whether the supposed jurisdictional problems anticipated at the time of the creation of the Federal Court were ever likely to be as widespread as was sometimes represented may be open to question. The Australian Law Journal of October 1982, referring to a proposal for integration of the national court system, records the Chairman of the Commonwealth Law Reform Commission, Justice Kirby, as expressing misgivings about the proposal, and as saying that the number of instances where litigants had gone to the wrong

court, or had not been able to find a remedy, was minute[9]. That, I should say, accords with my own experience in practice as a barrister. Assertions of jurisdictional complexity are sometimes made for a polemical purpose, and some of them should be treated with caution. Such complexity as exists in Australia is as nothing compared to the United States.

Now that the Federal Court has become an established, and flourishing, part of the Australian judiciary, governments and the profession have adjusted to the jurisdictional consequences, and the sky has not fallen in. Proposals for Constitutional change by way of complete or partial integration of the court system appear to have receded from view. It is interesting to consider why this is so. My purpose is not to advocate revival of those proposals, but, rather, to consider the significance of their apparent, even if temporary, disappearance.

In recent years, there has been increasing political interest in the appointment of judges. I have complained in the past that this has not been accompanied by a corresponding increase in interest in the subject of education and professional development of judges, and I will return to that. Interest in the matter of appointment of judges may be accompanied by a corresponding reluctance on the part of governments, Federal or State, to hand over the power of making appointments. The New South Wales Government, for example, might not be enthusiastic about delivering to the Federal

Government the power to appoint all judges or magistrates who administer the law of New South Wales. As a matter of history, one of the reasons for the establishment of the Federal Court was a desire on the part of the Federal Government to appoint the judges who interpret and apply Federal statutes. The corollary as to the appointment of judges who interpret and apply State laws is obvious. Governments also have different policies in relation to aspects of court administration, court funding, and terms and conditions of judicial office. For example, under the Constitution it is not possible for the Federal Government to appoint acting judges. On the other hand, some States, especially New South Wales, have made extensive use of acting judges. A term of service as a acting judge of the New South Wales State Supreme Court seems now to be a conventional method of easing Federal Court judges into retirement. Federal judges must now retire at 70. New South Wales judges must retire at 72, but may continue as acting judges to 75. Movement of personnel between State and Federal courts is a force for uniformity in the terms and conditions of judicial office, but there is not complete standardisation. As recent events in Victoria have shown, there are significant differences in the approaches of governments to judicial remuneration. Models of court administration vary considerably between jurisdictions. The South Australian model is unique. Leaving it to one side, in general, federal courts have much greater administrative autonomy than State courts. This is not the occasion to go into the reasons for that, or

the merits of the different systems, but the differences are substantial.

It seems inevitable that, if there were, by Constitutional amendment, either a complete or a partial integration of the Australian court system and judiciary, it would be necessary to establish a Commission to deal with appointment of judges. This is a not a new idea. It was proposed in 1935 by Sir Owen Dixon[10], and again in 1977 by Sir Garfield Barwick[11]. An interesting question is whether it would be a practical political possibility. Consider, for example, the High Court. It would be one thing for a Federal Government to surrender, to a Federal Commission, the power to nominate members of the High Court. It would be another thing for the Federal Government to agree to a majority of the members of that Commission being appointed by State and Territory governments. Sir Garfield Barwick's proposal was separate from any suggestion for integration of the Australian judicature. He said that in the case of all governments, State or Federal, the power to advise the Executive Government on the suitability of persons for judicial appointment should be vested in a body consisting of judges, practising lawyers, and lay people "likely to be knowledgeable in the achievements of possible appointees". Whether his ideas as to the composition of such a Commission would be widely shared outside the legal profession may be a question.

Ideas of this kind are likely to be stimulated by developments now happening in other places. Major transformations of the judicature have recently occurred in New Zealand, and are about to occur in the United Kingdom. Methods of judicial appointment are of political and public interest quite apart from any question of integration of the court system; although, if there were complete or partial integration, it would be impossible to ignore the subject.

Perhaps another reason why integration seems to have been put on the back burner is that fairly recent experience has shown that transitional problems associated with changes to the structures of courts can cause major difficulties. The creation of the Court of Appeal within the Supreme Court of New South Wales caused internal problems that lasted for years. They had not completely disappeared by the time I was appointed as Chief Justice of that Court. I hope I can say they had disappeared completely by the time I left it. Similar difficulties have been experienced in other courts. The Federal Court has never created its own internal Court of Appeal.

Perhaps, also, the present system works reasonably well; at least well enough to discourage people from facing the formidable legal and political difficulties associated with constitutional change. One of the benefits of federalism is that it encourages a form of diversity, and even competition, which, properly managed and directed, is a source of vitality and strength. It is not obvious to me

that it would be a good thing if all Australian judges and magistrates were appointed, and all Australian courts administered, from Canberra. As I explained earlier, there is already a substantial degree of commonality, and interchange, within the Australian judiciary. We are not nearly as diverse as our United State counterparts, but, unlike the Canadians, we are appointed by different governments, and governments of different political colours. That may be no bad thing.

I will conclude on a point I mentioned earlier. I hope, and expect, that a major force for unity within the Australian judiciary will be the National Judicial College. It has the strong support of the Council of Chief Justices. It is a national, not a federal, college. The Federal government and some State governments are behind it. At present, some others are not. I hope that will change. In advocating government support for a formal system of judicial training and continuing legal education, I have repeatedly stressed the close connection between judicial recruitment and judicial training. I understand why governments want to see greater diversity in the judiciary. But they cannot complain about the near monopoly enjoyed by a particular professional class if the members of that class enjoy a huge natural advantage because their experience equips them to be judges, and because governments provide no facilities to train others to be judges. So long as governments adhere to the old-fashioned idea that new judges are thrown in at the deep end, they cannot complain that judicial office

is available only to experienced swimmers. Successive New South Wales governments have been leaders in the field of judicial education. The Judicial Commission of New South Wales, of which I was President for almost 10 years, does work that has gained it an international reputation. It supports the National Judicial College. There is enormous scope for development in the field of judicial education, and tackling that issue on a national basis seems to me to be the best way of promoting greater unity without sacrificing the advantages of diversity.

---

1 Chief Justice Doyle of South Australia.

2 Street, "The Consequences of a Dual System of State and Federal Courts" (1978) 52 ALJ 434 at 435.

3 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563.

4 *Royal Commission on the Constitution*, (1927), *Minutes of Evidence*, 76 et seq.

5 Reproduced in Dixon, *Jesting Pilate* (1965) LBC 38 at 52-53.

6 eg Else-Mitchell, "The Judicial System - The Myth of Perfection and The Need for Unity" (1970) 44 ALJ 516; Ellicott, "The Need for a Single All-Australia Court System", (1976) 52 ALJ 509; Burt, "An Australian Judicature", (1982) 56 ALJ 509; Street, "Towards and Australian Judicial System", (1982) 56 ALJ 515; cf Moffitt, "Comment on the Proposal for Creating and Australian Court of Appeal", (1983) 57 ALJ 167.

7 Final Report, 1988, Vol 1, 6-36.

8 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

9 56 ALJ 501 at 503.

10 Dixon, *Jesting Pilate*, op. cit. at 54.

11 Barwick, "The State of the Australian Judicature", (1977) 51 ALJ 480 at 494.