BOOK REVIEW*

The Australian Judiciary
by ENID CAMPBELL and H P LEE
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A strong and independent judiciary is essential to a free and democratic society. A nation whose judiciary is weak, servile or corrupt, inevitably tends to lapse into anarchy or despotism. The importance of the judiciary as an instrument of government is such that citizens, particularly those who play any part in the public affairs of the nation, should have an informed understanding of the position of the judges and of the issues to which their situation gives rise.

In this work, Professors Campbell and Lee have explained, clearly and with full supporting detail, the nature of the court system in Australia, the role of the judiciary, the conditions of judicial office and the standards of judicial conduct. They have discussed the importance of the reality and perception of judicial independence and some of the controversial questions relating to the judicial office.

Two of those questions are of cardinal importance – how judges should be appointed, and how they should be removed or otherwise disciplined, should this become necessary.

As the authors point out, the current Australian mode of judicial appointments presents opportunities for political considerations to intrude into the process.[1] They go on to say that this is particularly true of appointments to the High Court of Australia ('High Court').[2] Some appointments have been made to the High Court in the past for political reasons, and it would be lamentable if that were to occur in the future, but fortunately, all justices appointed to the High Court in recent years have been well qualified for the position.

This has not always been true of other courts. Some Attorneys-General, with the aim of securing a representative judiciary and in particular what is called 'gender balance', have passed over able and experienced barristers in favour of persons less well qualified. The office of judge is so important, and the capacity of an incompetent judge to do harm is so great, that it ought to be obvious that merit should be the sole criterion for appointment. One writer, cited by the

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* Sir Harry Gibbs PC GCMG AC KBE. Justice of the High Court of Australia, 1970–81; Chief Justice of the High Court of Australia, 1981–87.

1 Enid Campbell and H P Lee, *The Australian Judiciary* (2001) 76.

2 Ibid.

authors, complained that 'merit' has not been defined,[3] but its meaning is clear. In the words of the authors it means an outstanding level of 'professional ability, intellectual capacity, experience and integrity.'[4]

The authors refer to proposals to reform the process of judicial selection, particularly to the suggestion that an Attorney-General should be advised by a judicial commission or should be obliged by statute to engage in a consultative process.[5] If some Attorneys-General continue, for sociological or political reasons, to appoint persons who are clearly not the best qualified, some such method of control will be necessary.

There is an additional consideration in relation to the High Court. In principle, it seems undesirable that the Commonwealth government should have the sole say in appointing justices to a court that determines the limits of the powers of both the Commonwealth and the States. The present requirement that the Attorney-General of the Commonwealth should consult with the Attorneys-General of the States will be only as effective as the Attorney-General of the Commonwealth wishes to make it. There is much to be said for the view that the States should be entitled to play a real part in the selection of justices, perhaps by obliging the Commonwealth to make appointments from a list of names provided by the States, or by giving a majority of States a veto of Commonwealth appointments.

The procedure adopted in Tasmania to advertise appointments to the Supreme Court is not only futile (since it is inconceivable that persons eligible for appointment would be overlooked) but also undesirable (since it detracts from the dignity of the office and since many persons worthy of appointment would have good reasons for not answering an advertisement). There is, however, an argument in favour of advertising for positions as magistrates.

Although the power to remove a judge for misconduct or incapacity lies with the relevant parliament, it seems to be rightly recognised that a parliament would not be a suitable tribunal to find the facts on which a decision of that kind should be based. The procedure adopted in the case of Angelo Vasta, and eventually in the case of Lionel Murphy, of appointing three senior judges (active or retired) to determine the issue is an appropriate method of dealing with the situation, which one hopes will rarely arise. Of course that would not be necessary if the judge had been convicted of a serious offence and the conviction had not been disturbed on appeal.

The question of how complaints against judges, not involving serious misconduct, should be dealt with is much more difficult, since independence must be balanced against accountability. There was a time when complaints of this kind could be dealt with satisfactorily by a Chief Justice, but that may not now always be the case since courts are so much larger and complainants more demanding. In New South Wales, a Judicial Commission has been established to examine complaints against judges. Its establishment was widely criticised but,

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3 Barbara Hamilton, 'Criteria for Judicial Appointment and "Merit"' (1999) *Queensland University of Technology Law Journal* 10, 22, cited in Campbell and Lee, above n 1, 79.

4 Campbell and Lee, above n 1, 95.

5 Ibid 83–6.

according to the authors, the furore has now abated.[6] However, as the authors point out, doubts have been raised about the constitutional validity of a proposal to establish a similar system for federal judges.[7] If those doubts are well founded, the question would arise whether State legislation would also be constitutionally invalid on the principle of *Kable v Director of Public Prosecutions for New South Wales*.[8]

Another method has been found of dealing with a judicial officer or quasi-judicial officer who is thought to be unsatisfactory – that is to abolish the tribunal of which the officer is a member and to create a new tribunal to which the officer is not appointed. Although in Australia the abolition of one tribunal and the creation of another in its place has not been done as a covert means of effecting a removal, there are great objections in principle to removing a judicial officer from office in this way, even when the tribunal is abolished for valid reasons. I have always thought it remarkable that although there was considerable criticism of the treatment of Staples J in this way, there was hardly a whisper of objection to the similar treatment of Dunphy and Joske JJ (not Foster J as the authors note)[9] for, after all, they were judges with life tenure whereas Staples J was a member of the Federal Conciliation and Arbitration Commission, which was not a judicial body.

Although the authors have dealt in a balanced way with these and many other questions that arise in relation to the judiciary, they make one or two observations which I cannot accept. The authors say '[a]s Chief Justice Antonio Lamer of Canada pointed out, judicial independence is not an end in itself. It is essential for "the maintenance of public confidence in the impartiality of the judiciary"'.[10] The authors have assented too readily to that statement by the Canadian Chief Justice. Independence is no doubt essential for the maintenance of public confidence but more importantly it is an end in itself, for independence is an essential condition of the judicial office. A judge who is not independent can be influenced to give an unjust decision; we have seen this happen not infrequently in less fortunate countries.

The authors state that a judge travelling to a view should not be accompanied by any of the parties, their legal representatives or witnesses.[11] That statement needs qualification. There is no reason why a judge should not travel to a view with the lawyers concerned in the case, provided of course that representatives of all sides are in the party.

These are minor criticisms. The book, dealing, as it does, with almost every question that arises in relation to the judiciary, should be a most useful work for lawyers and law students. It should also be invaluable to those working in the media and, through them, may serve to give the general public a more informed

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6 Ibid 120.
7 Ibid 123.
8 (1996) 189 CLR 51.
9 Campbell and Lee, above n 1, 33, n 54.
10 Ibid 51.
11 Ibid 139.

idea of the questions concerning the judiciary that inevitably arise from time to time.