Chapter 5 : The Australian Experience

5.01 The Australian system of the protection and determination of judicial remuneration has been discussed in detail in the Mason Report, whose author is himself former Chief Justice of Australia. It suffices for this short chapter to provide some supplementary information which may be of assistance in understanding and putting into comparative perspective the Australian experience in this regard.

5.02 As pointed out in the Mason Report, the salaries of federal judges and some state judges in Australia are protected by constitutions or statutes from reduction. However, it should be noted that the Depression before the Second World War did generate pressure for the reduction of judicial remuneration. This episode in Australian legal history has been described in various sources. The Honourable Leonard King, Chief Justice of South Australia, wrote –

> These clauses [in the International Bar Association Code of Minimum Standards of Judicial Independence (discussed in chapter 2 of the present report)] relating to the personal independence of judges emphasize a very important aspect of judicial independence, namely, that the judges' personal income should be determined in a way which removes any possibility of influence over judicial decision-making. Traditionally, this aspect was cared for in Westminster system countries by statutory provisions, which by convention assume the status of constitutional guarantees, that a judge's salary could not be reduced during his tenure of office. So rigidly was this guarantee observed that in Australia, during the Great Depression, when public service salaries and pensions were reduced as a general economy measure by 10 per cent, the judges' salaries could not be reduced without their consent. They did in fact consent, so far as I am aware, in every jurisdiction.[1]

5.03 Commenting on the experience of the same period, Professor Geoffrey Sawyer of the Australian National University wrote –

> When economic crisis compelled Australian and other British Commonwealth governments to carry out general reductions of wages and salaries in 1930-1, there was a good deal of debate about the constitutional validity and political morality of attempts to apply the reductions to

---

[1] Leonard King, "The IBA Standards on Judicial Independence: An Australian Perspective", in Shimon Shetreet and Jules Deschenes (eds), *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff, 1985), chapter 34 (p 403) at p 410.

> judicial salaries. Some judges protected by constitutional restrictions voluntarily returned an appropriate part of the salary; others refused to do so, though in some cases the refusal may have been based on disagreement with the deflationary policy as well as the higher ground of social principle. This writer's estimate of opinion in Australia at the time is that most people did not think the security of judicial tenure was affected at all by a universally applied deflationary measure. Professional opinion among lawyers strongly supported judicial objections to the measure, but this was partly due to the fact that judicial salaries had failed to keep pace with earlier inflations, so that they should not have been made to suffer from deflation as well. The episode made it clear that the high prestige of the judiciary was not inconsistent with a good deal of popular and political indifference to the material claims of judges.[2]

5.04 The early 1930's were not the only period in Australian legal history in which reductions of judicial salaries occurred despite the constitutional and statutory protection. Other episodes were mentioned in the judgment of Drummond J in *North Australian Aboriginal Legal Aid Service Inc v Bradley* –[3]

> Periods of depression and financial stringency have also led, on occasion, to various of the Australian Parliaments acting to reduce judicial salaries; it appears, however, that only the Tasmanian Parliament has legislated (as recently as 1986) to reduce, on a temporary basis, the salaries of serving Supreme Court judges, as opposed to future appointments. See [George Winterton, *Judicial Remuneration in Australia* (Australian Institute of Judicial Administration, 1995)] at pp 21 and 22. As appears from this same passage, economic conditions have also resulted in voluntary reductions in judicial salaries, most recently in Western Australia in 1983.

---

[2] Geoffrey Sawyer, *Law in Society* (Oxford: Clarendon Press, 1965), pp 92-3.

[3] (2002) 192 ALR 701 (Federal Court of Australia). In this case, a majority of the Federal Court of Australia upheld the validity of the appointment of a magistrate which was challenged on the ground that there was at the time of his appointment no valid determination of his remuneration as required by the law. Drummond J dissented from the majority on this issue.

5.05 Further empirical details on instances of reduction of judicial remuneration in Australia are provided by Professor Winterton's comprehensive study of judicial remuneration in Australia –[4]

> Victoria reduced judicial salaries in 1895,[5] as did Queensland in 1903 and 1921,[6] and Tasmania in 1986.[7] Moreover, virtually all Australian judges, including justices of the High Court, accepted a voluntary cut in salary during the Great Depression, as did Western Australian judges at a time of economic stringency in 1983.
>
> While a mandatory reduction in salary would obviously contravene s. 72(iii) of the Commonwealth Constitution, State Constitutions offer no such entrenched guarantee, although legislation in some States and Territories contains limited provision against the reduction of judicial salaries. Nevertheless, it is a well-accepted constitutional convention that judicial salaries should not be reduced during a judge's term of office, unless perhaps when necessary on economic grounds and as part of a non-discriminatory measure applying to all "public servants" (in the widest sense), including Members of Parliament. However, even in such circumstances, it is preferable for judges to be requested to accept a voluntary reduction in salary, as did most Australian judges in 1931, and Western Australian judges in 1983.[8]

5.06 It appears from the above that in Australia, there is flexibility in the practice with regard to judicial remuneration, although relevant constitutional and statutory provisions prohibiting the reduction of judicial salaries appear to be rigid or unqualified. Another point to be noted about the Australian experience is that although there is a well-developed system of remuneration tribunals (most of which deal with the salaries of judges as well as holders of other public

---

[4] George Winterton, *Judicial Remuneration in Australia* (Melbourne: Australian Institute of Judicial Administration, 1995), pp 22-23. (In the extract below, some of the lengthier footnotes in the original text have not been reproduced.) Professor Winterton of the University of New South Wales is a leading scholar of Australian constitutional law. His study on judicial remuneration was commissioned by the Australian Institute of Judicial Administration.

[5] The reduction applied only to future appointees.

[6] The reduction applied only to future Chief Justices.

[7] Reduction of Salaries (Members of Parliament and Judges) Act 1986 (Tas.). The reduction was temporary, the maximum period being one year.

[8] [My own footnote:] The author then refers to para 2.21(c) of the Universal Declaration of the Independence of Justice (set out in chapter 2 above of the present report), which provides for the non-reduction of judicial salaries except as a coherent part of an overall public economic measure.

office),[9] sometimes their recommendations are not accepted by the Government, and as a result controversies occasionally occur. As pointed out in the Mason Report, in 1982 legislation was enacted to override the determination of the Statutory and Other Offices Remuneration Tribunal in New South Wales on grounds of economic restraint;[10] the recommendations of the Judicial Remuneration Tribunal in Victoria "were often overridden by the Government, leading to controversy";[11] and in 1988, the Commonwealth Remuneration Tribunal recommended a large increase in judicial remuneration which was rejected by the Government, and "there was significant public controversy about the remuneration of the judiciary".[12]

5.07 Writing about the 1988 incident in 1995, Professor Winterton commented that the Remuneration Tribunal's report of 18 November 1988 had "such detrimental repercussions for the relationship between the Commonwealth Government and the federal judiciary that it is doubtful whether the resulting judicial bitterness has yet dissipated".[13] Giving detailed justifications, the report recommended an 80% increase in the salaries of federal judges. There was strong opposition to the recommendations. Critics pointed out that if implemented, the Chief Justice's salary would exceed that of the Prime Minister by $75,000 (Australian dollars) a year.[14] As recounted by Professor Winterton –[15]

> In May 1989, the Government finally announced that "in the current economic climate" it was "unable to accept the level of increases recommended" by the Tribunal. It then took the questionable – but not unprecedented – step of requesting the members of the Tribunal in their individual capacity to report by June on several matters relating to federal judicial remuneration, the principal being whether the Government was correct in believing that there was an "inequity" between the salary of Federal Court judges and those of the Queensland Supreme Court, the most highly paid State judges. The Government was obviously seeking the legitimizing imprimatur of the Remuneration

---

9 At the Commonwealth (federal) level, in the states of New South Wales, Western Australia, South Australia and Tasmania, and in the Australian Capital Territory and the Northern Territory, there exist remuneration tribunals whose jurisdiction extends beyond judges to include other senior holders of public office. On the other hand, remuneration tribunals that deal only with judicial remuneration exist in Victoria and Queensland. See generally Winterton (n 4 above), pp 43-75; www.remtribunal.gov.au and the links it provides to remuneration tribunals in the states.

10 Mason Report, para 4.32.

11 Ibid, para 4.47.

12 Ibid, para 4.19.

13 Winterton (n 4 above), p 46.

14 Ibid, p 49.

15 Ibid, pp 50-51 (with footnotes omitted).

> Tribunal for a decision essentially already taken, namely to raise federal judicial salaries to a level which would give Federal Court judges parity with their most highly paid State colleagues. ... Nevertheless, (the individual members of) the Tribunal accepted the task and, while confirming that their previous assessment regarding the appropriate level of judicial remuneration remained unchanged, reported as expected. They found an "inequity" ... in the relative salaries of Queensland Supreme Court judges and justices of the High Court and the Federal Court.

In order to address the inequity, the members of the Tribunal recommended increases that were more modest than those originally recommended by the 1988 report; their new recommendations were accepted and enacted into law in December 1989.[16]

5.08 A recent controversy regarding judicial remuneration in Victoria is noteworthy.[17] In response to Victoria's Judicial Remuneration Tribunal's proposal of a 13.6% salary increase for state judges, the State Government announced in April 2004 that it was not acceptable because it was "not in line with community expectations". The Government was much influenced by the fact that persons in other occupations, such as teachers and nurses, would only be granted a 3% pay rise. The Government's position was severely criticised by the judges and the legal profession, who argued that the rejection of the recommendation would mean that Victorian judges would be paid significantly less than federal and New South Wales judges, and the prestige of the Victorian courts would suffer. The Chief Justice of Victoria and the Law Council of Australia accused the Government of threatening the independence of the courts. In May 2004 a compromise was reached whereby the judges would receive several smaller pay increases in phases so that in four years' time, their salaries would be brought in line with those of federal judges.

5.09 ***Summary of this chapter*** **:** In Australia, an unqualified rule against the reduction of judicial remuneration exists at the federal (Commonwealth) level and in some of the states. However, the practice has not always coincided with the strict legal position and has been more flexible. During the Great Depression, voluntary reductions of judicial salaries occurred across the country. Other instances of reduction include that in Victoria in 1895 (regarding future appointees), in Queensland in 1903 and 1921 (regarding future Chief Justices), in Western Australia in 1983 (a voluntary reduction at a time of economic stringency), and in Tasmania in 1986 (a temporary (one-year)

---

[16] Ibid, p 51.

[17] The following is based on newspaper reports in April and May 2004 in several Australian newspapers, including The Age (Melbourne), Herald Sun (Melbourne), Courier Mail (Queensland), and Australian Financial Review.

reduction introduced by legislation for serving Supreme Court judges). Remuneration tribunals now exist both at the federal level and in all the states and territories. The remuneration tribunals at the federal level and in New South Wales, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory are "generalist" bodies that deal with the salaries of judges as well as those of other senior holders of public office (such as senior civil servants, ministers, Members of Parliament and holders of statutory offices), while the remuneration tribunals in Victoria and Queensland are concerned exclusively with judicial remuneration. The system has apparently worked well on the whole, although there have been occasional controversies when a remuneration tribunal's recommendation was not accepted.