Spec 43.1

No 21

JUDGES' CHAMBERS,
DISTRICT COURT,
LAW COURTS COMPLEX,
GEORGE STREET,
BRISBANE, Q. 4000
15 November, 2002.

Ms K Struthers MP,
Chair,
Legal, Constitutional and Administrative Review Committee,
Parliament House,
Brisbane.

Dear Ms Struthers,

Re: Entrenchment of the Queensland Constitution.

I refer to your letter to the Chief Judge of 25th October, which invitation was passed on to other judges of the District Court. I would have been interested in attending the discussion on 28 November, but I expect on that day to be away from Brisbane, on circuit in Townsville.

In these circumstances, I hope you will accept a short personal submission in writing from me, concerning entrenchment, particularly as it might affect the District Court. I am aware of the submission from the Chief Judge, which she has circulated, but the views expressed therein do not reflect the unanimous opinion of the members of the Court, at least in some respects.

With regard to entrenchment generally, it is my view that this is generally undesirable, at least in a State constitution. If anything is to be entrenched, it should be only the most fundamental generalisations. Anything else is an attempt to impose on the future the political fashions of today. History shows that this is undesirable. In my opinion, experience has shown that the most important practical disadvantages of entrenchment are those that emerge after something has been entrenched.

I would particularly oppose any suggestion that an age limit for judges should be entrenched. Although I agree that there should be a fixed retiring age for judges, essentially for the reasons set out in your committee's Report No. 36, there is no reason why that should be entrenched. The fixing of a particular retiring age should be a matter of legislative judgment from time to time. There is no magical correct age for judicial retirement. At present in Australia some states use 70, others 72, while in England the age is 75. As people become healthier, and life expectancy goes up, one would expect that in time such age limits may be increased. In any case, the legislature should be free to do so, or for that matter to reduce the limit, although that should not be done retrospectively, ie, so as to affect existing judges. No age limit should therefore be entrenched.

On a related topic, I (and I believe some other judges of this court) were particularly disappointed in one aspect of your Report No. 36, namely the rejection of the idea that the retiring age should not apply to acting judges. If it did not, retired judges would be able to be appointed as acting judges, even if beyond the set retiring age limit. I would urge reconsideration of the Committee's approach to this matter.

There is no particular virtue in consistency of application of a compulsory retirement age. The reasons which were put forward by the Committee in support of a compulsory retiring age would

necessarily not apply in circumstances where a person beyond the compulsory retirement age was being appointed on an acting basis. The suitability of such a person for judicial office would necessarily be assessed; presumably no person would ever be appointed as an acting judge without the suitability of that person for judicial office being properly assessed.

A person who had until recently been a permanent judge would be a person whose suitability for judicial office would be particularly susceptible of effective assessment. Because the appointment would be for a short term only, there would be no real risk of significant deterioration during the term of the appointment.

A person who has been a permanent judge is the ideal person to serve as an acting judge. Although it is appropriate to have a compulsory retirement age, in the past, when there was no compulsory retirement age, not infrequently judges were able to continue to perform satisfactory and indeed valuable judicial work well after the current compulsory retirement age in Queensland of 70 years. Two famous examples are Lord Denning in England and Sir Edward McTiernan in Australia, both of whom continued to sit into their 80's.

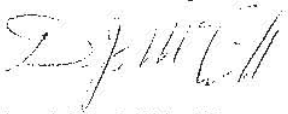
A judge who had just or recently retired from a permanent position would also be highly familiar with the relevant court procedures, including internal procedures which other persons considering an acting appointment would not be familiar with, so there would be less in the way of training required for such a person, and greater confidence could be reposed in a capacity properly to discharge the duties of office.

Retired judges have been used in other states as acting judges, and so far as I am aware the experience in other states has been wholly satisfactory. The Committee should investigate how this has worked in other States from various points of view.

One practical advantage, in an era where there is considerable competition for scarce public resources, is that a retired judge is the least expensive choice for appointment as an acting judge, since the real cost of appointment is the difference between that person's pension and the judicial salary during the period of the acting appointment. If anyone else is appointed, the real cost is the whole amount of the judicial salary. In effect, when an acting judge is required the taxpayer is saved the cost of the pension to the retired judge by appointing a retired judge rather than someone else. That in itself should not be a reason to adopt a procedure which is otherwise unsatisfactory, but in circumstances where it is submitted there is nothing unsatisfactory in appointing as an acting judge a retired judge who is in fact still capable of performing the functions required of a judge, this can properly be seen as a legitimate benefit of such an arrangement.

I would therefore urge the Committee to reconsider this matter, and support the adoption in Queensland of something like the New South Wales provision. Perhaps I should add that at 52 I am one of the younger members of the court, so that this is not a matter of immediate concern to me personally, but I am making this submission because I believe it is right. I also believe that such views are shared by at least some other members of the District Court.

Yours faithfully,



D. J. McGill DCJ