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22 May 2002.

Ms Karen Struthers MP
Chair
Legal Constitutional and
Administrative Review Committee
Parliament House
George Street,
BRISBANE Qld. 4000.

Dear Ms Struthers,

Thank you for your letter of the 19th April 2002 enclosing the Issues Paper relating to amendments to the Queensland Constitution.

I have discussed the matter with my son and daughter-in-law, Salvatore and Deborah Vasta both of whom are barristers. They compiled a draft commentary to which I made some minor additions and amendments.

The enclosed document is the final result and I agree with the observations contained therein .

Thank you for giving to me the opportunity of making submissions on this subject matter.

Yours faithfully,

ANGELO VASTA.

Submission to: Legal, Constitutional and Administrative Committee

From : Mrs. Deborah Vasta
Mr. Salvatore Vasta

Regarding :

- *Issue 45(b)* – **(Should further consideration be given to) mechanisms for investigating complaints against the Judiciary.**

- *Issue 49* – **In the event that a tribunal is established to inquire into the conduct of a judge, should only specific allegations against the judge be referred to the tribunal? If so,**
  (a) should these allegations confine the jurisdiction of the tribunal?
  (b) are the words suggested by the QCRC appropriate, namely that the resolution should state full particulars of the grounds on which it is proposed to remove the judge? If not what other words would be more appropriate?

- ***Issue 45(b) – (Should further consideration be given to) mechanisms for investigating complaints against the Judiciary.***

In Queensland, there is currently no formal procedure for lodging a complaint about a judicial officer's misconduct where such behaviour does not warrant removal from office. The accountability of such officers is limited to the mechanisms as stated on page 33 of the Issues Paper. It is submitted that these traditional limitations do not adequately extend to address the nature and diversity of conduct that may be called into question. Nor do they inspire confidence in the public, that a genuine complaint will be acknowledged and remedied.

A perusal of the *NSW Judicial Commission's Annual Report* shows that most complaints against the judiciary stem from dissatisfaction with the outcome of a judicial decision. (For eg, complaints of bias-32%, failure to give a fair hearing- 25%, incompetence-14%, inappropriate statements -12%). Other areas of complaint were collusion 7%, discourtesy 6%, other reasons3% and delay 1%. Statistics indicate that, of the 87 complaints made during the July 2000- June 2001, 83 were examined and dismissed.

In establishing the Commission, it was perhaps anticipated that the Conduct Division's role would be seen as an alternative procedure to the appeal process. Section 20(1)(f)) of the legislation seems designed to combat this tendency, and 37 of the 83 dismissed complaints were found to be "subject to adequate appeal or review." Another 44 complaints were dismissed as "consideration was unnecessary and unjustifiable" (section 20(1)(h)). Only one complaint was considered frivolous, vexatious and not in good faith.

The fact that the Commission is regularly utilised as an alternative to the appeal process, or that the procedure gives rise to a large number of unnecessary complaints should not deter the Qld government from adopting the N.S.W. process. Legislation can adequately address these concerns. As the statistics show, the NSW legislation provides for an effective filtering process of complaints.

The main goal, to promote judicial accountability through effective complaint handling, is not diminished by the large proportion of dismissed complaints.

It is of great significance that there were four complaints that were not dismissed. Although of a minor nature, these complaints were found to have merit and arrangements were made to avoid a recurrence of the problem. Without the complaints mechanism in place these conduct issues would not have been addressed.

The mere fact that a process exists by which an individual can lodge a complaint against the seemingly "untouchable" judiciary inspires faith in the judicial system. Although open to abuse as we have seen by the NSW statistics, the process itself is not encumbered and the legislation ensures that complaints can be examined and

dismissed within a short period of time. According to the NSW Annual Report, 72% of complaints were finalised within 3 months with 97% finalised within 6 months.

Furthermore, the very availability of the process acts to motivate judicial officers to remain accountable. Last year in NSW, seven complaints alleging collusion (with legal practitioners) were dismissed. It is doubtful a judicial officer would even consider engaging in such behaviour, knowing that the conduct is open to examination. The deterrent nature of the process cannot be ignored.

With respect to membership of such commission it is submitted that Qld adopt similar representation, ie, the official heads of jurisdiction of the state courts as well as members appointed by the Governor. The 1987 Report of the Judicial System to the Constitutional Commission, concluded that retired judges should not be exclusively involved in the process of investigation of a complaint against a judicial officer. With respect to the membership of a judicial tribunal the report recommended at paragraph 5.62: -

> "The committee takes the view that the service on the judicial tribunal should be regarded as an ordinary incident of judicial service. There is no justification for leaving the responsibility to retired judges. By drawing its membership from amongst serving judges of all superior courts the tribunal would be likely to reflect the standards observed generally throughout the Australian judiciary. As the Qld legislation stands, it is undesirable for retired judges to be exclusively involved in the process of investigating the conduct of a judicial officer."

The other functions of the Commission, that is, assisting the Courts to achieve consistency in sentencing, and organising the continuing education and training of judicial officers, would also bring enormous benefits to the Qld judicial system.

RECOMMENDATIONS-

- That the spirit of the NSW Judicial Commission legislation establishing mechanisms for investigating complaints against the Judiciary be adopted, including the processes involved in lodging a complaint and the representative membership of the Commission.

- It would perhaps be prudent however to also consider providing for circumstances should one member of the commission themselves be the subject of such a complaint.

- It is further submitted that all hearings of complaints be held in private, including hearings of serious complaints. (The NSW legislation provides for the hearing of serious complaints to be made in public, although there is a discretion not to do so.). The community is entitled to expect manifest integrity and public confidence in the hearing of complaint. However this must be balanced with the basic principles of justice and the independence of the judiciary. Once certain allegations against a judge are made public that judge's reputation can be irreparably damaged irrespective of the outcome of the Commission's

inquiry. Moreover, the public's confidence in the judiciary will be accordingly undermined.
To the writers' knowledge there have been no allegations of serious complaints to date, so the desirability of a public hearing has not yet been tested. History has taught us however, that in the surrounding political climate a 'trial by media' usually accompanies such inquiries.
The Commission of Inquiry into Mr Justice Vasta remained front-page news for the entire 43 days. The recent media coverage of allegations of impropriety levelled at Mr. Justice Kirby further demonstrates the danger of airing serious complaints in a public forum.
In the event that a serious complaint is substantiated at a private hearing and requires consideration of parliamentary removal from office, the matter is brought into the public domain when the Attorney –General lays such report before Parliament. Any public scrutiny of serious allegations prior to the Commission's findings would ultimately result in a denial of the basic principles of justice and erode the judiciary's independence.

- The Commission should not examine an allegation if it is appropriate that another body considers at the complaint first. For example, if the complaint deals with taxation matters, the Australian Tax Office must consider the matter before the Commission does so. It is only when all proper avenues of redress have been exhausted that the Commission should make inquiries.
(The Commissioner of Taxation and the Administrative Appeals Tribunal subsequently cleared Mr. Justice Vasta of the allegations of tax shams, which represented six of the eight matters relied upon to warrant his dismissal.)
Similarly, the Commission should not entertain a complaint of a criminal nature until it has been investigated by the police and a decision as to whether a prosecution will be launched has been made. That is not to say that a decision against prosecution of a criminal matter shackles the role of the Commission. The Commission may in certain circumstances be asked to look at the behaviour of the judge notwithstanding there being no criminal case to answer.

- Once the report is tabled and Parliament has been addressed, the judicial officer should be given a fair opportunity to show why removal from office is inappropriate or would be unjust. It is then necessary to allow Parliament a "cooling off" period to enable proper reflection of the extremely serious matters raised. Fair and balanced consideration can only be given to the issues once removed from the potentially highly politicised environment and media frenzy. A conscience vote on the matter is essential to ensure that the issue does not become politicised.

- The judicial officer, against whom any serious complaint is made, should be provided with all reasonable costs necessary to permit proper legal representation at any inquiry into the conduct of such judicial officer (and at any appeal therefrom). Failure to do so would detract from the capacity or inclination of some judicial officers to defend themselves. It also strikes at the heart of the principle of judicial independence.

- If other appropriate bodies consider the complaint at the first instance, the Commission has that bodies assistance. If the members of the commission or tribunal represent the heads of the state's jurisdictions (as opposed to retired members of the judiciary), and that the complaints are heard in private, then there are sufficient safeguards. It is submitted that there be no avenue of appeal from the Commissions findings as the safeguards ensure fairness and the ultimate responsibility for the fate of the judicial officer (if removal is contemplated) will be the Parliament itself.

- ***Issue 49 – In the event that a tribunal is established to inquire into the conduct of a judge, should only specific allegations against the judge be referred to the tribunal? If so,***
  (a) should these allegations confine the jurisdiction of the tribunal?

The first role of the tribunal is to investigate complaints.

Section Four of the Parliamentary (Judges) Commission of Inquiry Act 1988 relating to Mr Justice Vasta, provided that the commission inquire and advise whether:

> "(a) in the opinion of the members of the Commission <u>any</u> behaviour of the Honourable Justice Angelo Vasta since his appointment as a Judge of the Supreme Court constitutes such behaviour, as <u>either of itself or in conjunction with any other behaviour</u>, warrants removal from office as a judge of the Supreme Court."

The original focus of the investigation was to determine (a) whether there was anything improper in Mr. Justice Vasta's meetings and discussions with the then Commissioner of Police, Sir Terrence Lewis, and (b), whether there was anything improper on the part of the judge in the conduct of his duties. The Commission found when considering these matters, that there was nothing improper in the behaviour of the judge.

(The sensational media coverage of the public hearings suggested that the judge, who was of Sicilian decent, might have had sinister links. This further demonstrates the dangers of irresponsible reporting in the media and reinforces the argument that all hearings should be in camera.)

Having regard to the nature of complaints before the NSW Commission during the last year, it appears that most complaints relate to the performance of judicial officers

in exercising their duties. It therefore follows that most initial investigations would be limited to these allegations.

If that were the case for Mr. Justice Vasta, the inquiry would have been completed within two days- the time taken for the Commission to conclude the initial focus of its investigations. Unfortunately, "any behaviour, of itself or in conjunction with other behaviour," vastly extended the inquiry of the Commission. What followed over the next 41 days was a wide-ranging examination dealing with issues far removed from those that originally gave rise to the inquiry. It is fair to describe the inquiry as an inquisition into an extremely wide variety of aspects of the judge's life. None of the matters related specifically to the performance of Mr. Justice Vasta's duties as a judge.

As noted in the Issues Paper on page 39, the Tribunal itself expressed concern at the width of their inquiry. It is therefore submitted that the allegations raised restrict the jurisdiction of the tribunal, although further relevant matters may be considered.

If, during the investigation, other matters then arise which should form the basis for another allegation, then the process should begin again. There must, however be some focus to the fresh allegation(s). For example, if the initial complaint were one of sexual harassment, it would not be sufficient for a complaint to state in broad terms "the judge seems to be very friendly with a lot of women". Such a statement leads to a fishing expedition for which no judge could ever adequately defend themselves.

If the allegation dealt with a specific behaviour, such as "the Judge propositioned secretary A in his Chambers, then the inquiry should focus solely on that question. If, in the investigation, it was discovered that the Judge had been downloading pornography on his computer, this could not be considered in the investigation of the complaint (unless it constituted some sort of corroborative evidence). A complaint relating to the downloading of pornography on a computer in chambers would have to be treated as a totally different complaint and the process started over for that complaint. This prevents the "ambushing" of a Judge and allows him to know what case he must meet.

RECOMMENDATIONS-

- That the tribunal's jurisdiction should be limited to investigating specific allegations referred to it. In doing so, further relevant matters can be considered.

- If during the investigation, other matters should arise which form the basis of a fresh allegation(s), then these can be referred to the tribunal which would define the new jurisdiction of the tribunal.

((b) are the words suggested by the QCRC appropriate, namely that the resolution should state full particulars of the grounds on which it is proposed to remove the judge? If not what other words would be more appropriate?

The legislation in respect of Mr. Vasta required the Commission of Inquiry to make findings of fact and express an opinion as to whether the judge should be removed from office, that is, whether the behaviour warranted the judge's removal. The finding that a judicial officer should be removed is the role solely for Parliament and should never be delegated to a statutory body.

In contrast, Section 28 of the NSW Judicial Officers Act approaches the issue as follows: -

> "If the Conduct Division decides that a serious complaint is wholly or partially substantiated, it may form an opinion that the matter could justify Parliamentary consideration of the removal of the judicial officer complained about from office."

Section 29 then requires the Commission's report to set out findings of fact and it's opinion as to whether the matter could justify parliamentary consideration of removal from office. In this manner, the legislation quite properly preserves Parliament's role in deciding the ultimate constitutional question whether the findings of fact do justify removal from office.

In reporting it's findings and concluding that Mr. Justice Vasta's behaviour did indeed warrant his removal office, the commission simply stated it's opinion, that the eight matters "viewed in conjunction with one another warrant the removal of the Judge from office." There is no indication of the relative weight given to the different matters and, with every respect, no convincingly argued conclusion; merely a stated opinion.

Consequently, the government simply adopted that conclusion and formally moved parliament for his removal.

RECOMMENDATIONS-

- That legislation establishing a tribunal limit it's functions to requiring the tribunal to investigate and report on findings of fact in relation to a complaint against a judicial officer, and not form or express an opinion as to whether the matter complained of could justify parliamentary removal. Although the NSW legislation goes one step further and permits the Commission to give an opinion as to whether the behaviour could warrant removal, it is submitted that the tribunal's functions then become dangerously close the role expressly reserved for Parliament, subtly influencing an outcome and blurring the divisions of power. It must be remembered that the tribunal is not a disciplinary body.

- In laying a report before Parliament it is submitted that the full particulars of the grounds on which it is proposed to remove the judicial officer be stated. The issue

of the parliamentary removal of a judicial officer from office is a drastic one and the procedure must not be taken lightly. Failure to give full particulars would not only lead to a grave miscarriage of justice, but is a denial of the basic right to be fully informed of the findings. How is a judicial officer to defend himself in an address to Parliament if he is not fully appraised of the allegations he faces? Also how is Parliament to know what is the full basis for this extraordinary procedure unless the full particulars are given? If there are a number of particulars, the tribunal should be required to state which it considers to be the most relevant. If any of the particulars fail, then the motion must also fail.

Conclusions

The legislation establishing the Commission of Inquiry into Mr. Justice Vasta was flawed: it utilised unfair and unreasonable procedures and consequently breached the fundamental concept of the independence of the judiciary. No doubt the legislation was ad hoc and the ramifications had not been fully considered by the Queensland Parliament prior to the passing of the Act. In fairness, the situation was virtually unprecedented in Australia and was certainly exceptional. There is no doubt that this matter was carefully considered by the NSW Parliament before it passed the Judicial Officers Act.

These lessons of the past should not be ignored in considering our own legislation. After all, those who forget the past are bound to re-live it.

D M VASTA

S P VASTA