Around the Nation: Tasmania

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AGE IS NO GUARANTEE OF INDEPENDENCE

The *Act for the Administration of Justice in New South Wales and Van Diemen's Land 1823* (4 Geo IV, c 96), passed on 19 July 1823, and known as the *New South Wales Act 1823*, empowered His Majesty, as a temporary measure, to institute a court of judicature in Van Diemen's Land. An Imperial warrant, *Warrant for Charter for Supreme Court in Van Diemen's Land*, issued on 18 August 1823, authorised separate Royal Letters Patent under the *New South Wales Act*, which became the First Charter of Justice for Tasmania, issued under the warrant on 13 October 1823.

However, it took approximately five months for the Letters Patent to be delivered to Hobart Town by Chief Justice Pedder on board the *Hibernia*, and to Sydney Town by Chief Justice Forbes on the *Guilford*. Both vessels arrived at their destinations in March 1824, but the reading of the Charter at Government House in Tasmania, and in the market place in Hobart, on 7 May 1824 as well as the first sitting of the Supreme Court in Hobart on 10 May 1824, all occurred some days before the Letters Patent authorising the establishment of the Supreme Court of New South Wales were proclaimed in Sydney on 17 May 1824.

Before 1824, New South Wales was the seat of the Court of Criminal Jurisdiction and the Court of Civil Jurisdiction established by the First Charter of Justice of 1787 and the civil court of record called the Supreme Court established by the Second Charter of Justice of 1814. The jurisdiction of those courts extended to Van Diemen's Land in 1823, but unlike the Supreme Court enabled in New South Wales by the Third Charter of Justice of 1823, they did not, respectively, have the powers of courts of Oyer and Terminer and General Gaol Delivery, or of the courts of Kings Bench, Common Pleas and Exchequer, or the equitable jurisdiction of the Lord Chancellor of Great Britain. On the basis then that both the Supreme Court of New South Wales and the Supreme Court of Van Diemen's Land were established pursuant to the respective Charters of Justice of 1823, the Tasmanian Supreme Court was the first to proclaim itself and sit. It is therefore the oldest Supreme Court in Australia and will celebrate its bicentenary on 10 May 2024.

But age is no guarantee of judicial independence. It is unarguable that the Court is less independent now than it was almost two centuries ago.

The original Charter of Justice provided:

> And we do hereby ordain appoint and declare that there shall be and belong to the said Court the following Officers that is to say a Registrar, a Prothonotary, a Master, and a Keeper of Records and such and so many other Officers as to the Chief Justice of the said Court for the time being shall from time to time appear to be necessary for the administration of Justice.

Towards the end of 1939, in breach of an assurance given to Crisp CJ by the then Attorney-General that judges would continue to recommend the appointment of their staff, judges associates were brought under the *Public Service Act 1923* (Tas), without notice to the Court. An advertisement appeared in the Tasmanian Government Gazette placing the judges' staff under the Secretary to the Attorney-General's Department with no notice given to Acting Chief Justice Clarke Jnr. Something which his Honour later wrote in a letter to the Attorney-General was "unmoral". Despite protestations by the Court, the decision was never reversed although the assurance was again respected as to associates.

Then, in 1989 the Registrar of the Court was made a *Tasmanian State Service Act 1984* (Tas) employee and this was again a change wrought without notice to the Chief Justice, Green CJ, by the enactment of s 5J of the *Supreme Court Act 1959* (Tas). This was done despite undertakings given by the then Premier Field and Attorney-General Patmore to the Chief Justice that they would consult with the judges before doing so. Green CJ in a letter to Patmore dated 3 August 1989, described this as a grave breach of "constitutional propriety". Prior to this the Registrar was appointed by the Governor.

Judicial pensions were abolished by the Bacon Labor Government by the *Superannuation (Parliament, Judicial and Statutory Legal Officers) Reform Act 1999* (Tas). That Act replaced Supreme Court judges' pension entitlements with 9% superannuation contributions, payable by the Government under s 8 of the *Supreme Court Act 1887* (Tas).

The replacement of judicial pensions with a 9% Government superannuation contribution, 175 years after Chief Justice Pedder took his seat, was the result of the Bacon Government's "determination that it was Tasmanian Government Policy to provide employer superannuation contributions uniformly at the superannuation guarantee rate to all *Tasmanian Government employees*" (emphasis added).

In the intervening 24 years no other State or Territory Government has followed suit, with the result that the judges of the Supreme Court of Tasmania are alone among the over 500 serving superior and intermediate court judges in Australia, who are all eligible for statutory indexed pensions.

The Court is currently embedded with the Tasmanian Department of Justice in terms of budget and support services. It is referred to as an "Output Group". Despite a memorandum of understanding reached in 1989 between Green CJ and then Attorney-General Patmore, that the judges would be consulted on the preparation of the budget allocation for administration, the Court has no input of any consequence into the budgeting process.

Another concerning incursion into judges' rights is the provision of networked computer services to the Court by the Department of Justice. The potential for departmental staff to access judge's email and draft judgments and sentences is intolerable. An issue of relevance into the future is the development and introduction of an integrated point-to-point client management system currently being developed by the Department. Of concern, given the number of parties involved in the process, as with any such system, is security and confidentiality of information.

In a paper presented in 2012 to the University of Melbourne – Public Forum by the Hon Marilyn Warren AC (former Chief Justice of Victoria) titled *Courts and Our Democracy – Just Another Government Agency?*, Warren CJ wrote of the not dissimilar situation in Victoria:

> For many years the courts have been concerned about the fact that IT services are encompassed within the mega Department of Justice. The concern was heightened with the announcement of the previous government of the CenITex proposal for the centralization of IT resources. In a nutshell, the Supreme Court informed the government that it would not participate in the CenITex process. It was seen to go to the very heart of the independence of the Judiciary. The Supreme Court was prepared to "pull the plug" and return to typewriters. As matters stand, there is a potential capacity for the operators of the Department of Justice IT system to look into the judgments of judges before they are delivered. That is to not to say it occurs, nonetheless, the potential is dangerous and offensive.

It is imperative therefore as the Supreme Court of Tasmania approaches its 200th anniversary that these truths are borne steadily in mind and that the Court should be vigilant to ensure that not only should there be no further erosion of the hallmarks of constitutional integrity but that lost elements of judicial independence be restored. As Warren CJ wrote in her paper "Without the courts, there will be no civil society or democracy. It is fundamental to our democratic society that the courts be protected and separated from the Executive".

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