JOURNAL OF JUDICIAL ADMINISTRATION

Volume 31, Number 4

2022

ARTICLES

Judicial Education in Australia: A Contemporary Overview – *Gabrielle Appleby, Jessica Kerr, Suzanne Le Mire, Andrew Lynch and Brian Opeskin*

Recent decades have seen judicial education in Australia gain acceptance and momentum in both provision and diversity. Institutional supports and resourcing for judicial officers at all levels have become common across the nation. But it is now timely to reflect critically on this progress. This article takes a step towards assessing the provision of judicial education, and where there might be opportunities to enhance this in the future. Central to that task is an empirical study of judicial education available to the members of 25 Australian courts over a three-year period, from 2015/2016 to 2017/2018. The article concludes with four recommendations for reform: (1) the adoption of a standard taxonomy for national reporting on judicial education; (2) increased alignment between judicial education and judicial lifecycles, from pre-appointment to pre-retirement; (3) the need to better meet the judicial education needs of judicial officers working in smaller jurisdictions or regional settings; and (4) an imperative for further empirical research on whether judicial education offerings are currently meeting the needs of judicial officers, courts, and the public they serve. 187

The Veil of Judicial Appointment in Australia: Why Opaque Selection Promotes an Independent Judiciary – *Sebastian Mazay*

The opaque judicial selection process in Australia theoretically maintains an independent and impartial judiciary. Application of game theory modelling from the field of economics reveals that opaque selection is more likely to result in the selection of non-partisan judges in the long run. Partisan judges pose a significant risk to judicial independence as they are beholden to political parties. In Australia, consultation, shortlisting, conventional considerations and selection of judges are protected through Cabinet confidentiality as well as broadly defined administrative discretions. This article compares Australian processes to the public selection and scrutiny processes of the United States. It finds that the publication of judicial selection increases the likelihood of retaliatory partisan court appointments. ... 207

Making Judges in a Recognition Judiciary – *Jessica Kerr*

Judiciaries in Commonwealth jurisdictions like New Zealand are still constituted through the "recognition" of pre-existing merit within the pool of senior lawyers. The state does not take proactive responsibility for the generation of competence to judge in advance of appointment. That is, increasingly, a pressure point for the long-term maintenance of justified public confidence. This article considers the ongoing sensitivity in discussing judicial professional competence, and the value in confronting that sensitivity prior to the moment of "recognition", when the veil of judicial independence descends. Developments in judicial appointments, oversight and post-appointment education speak to mounting

pressures on the inherited model but cannot wholly relieve those pressures. To do so requires the embrace of specialised professional preparation for judging. In exploring the scope for legitimacy-enhancing change within the existing New Zealand system, the article advocates greater academic engagement with the professional lives of future judges. 217

Reform to the Law of Consent: A Tale of Two States – *Anthony Gray*

There has recently been detailed consideration of the reform of rape laws in two Australian jurisdictions. The results of these deliberations have been mixed. New South Wales has adopted an affirmative consent model, in line with two other Australian jurisdictions, while Queensland has declined to do so, but nudged the law slightly further in this direction. This article discusses the evolution of rape law, highlights recurrent difficulties with the law in this area, and discusses the recent reforms. It suggests further improvements to the law in Queensland, given evidence of the misuse of the mistake of fact defence. The subject matter of this article is considered relevant to how criminal trials for alleged sexual offences are conducted, including the instructions given to juries. Respectfully, it might potentially cause some reflection from members of the judiciary in relation to such matters, difficult as they are. 229

VOLUME 30 – 2021–2022

Table of Authors 251

Index 255