AAL/ALRC Seminar:

Public confidence, apprehended bias, and the modern federal judiciary

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I want to talk about one case that raises a number of points: It concerns the late Guy Andrew, a judge of the Federal Circuit Court who had been the only judge of that court in Townsville. His story suggests that in some cases, the appearance of bias might be linked to judicial welfare. The lesson for the future is that a greater focus on welfare might have broader benefits.

Judge Andrew joined the bench in March, 2019, and was found dead in bushland outside Brisbane in October last year after he was moved from Townsville to undergo counselling. He was moved after his conduct during a family law case known as Adacot & Sowle was criticised by an appeal bench of the Family Court.[1] The appeal court overturned his original decision and ordered a retrial because of what can accurately be described as an extraordinary case of apprehended bias.

But in the light of what happened to the judge, his conduct can be characterised in a different way: it was also a strikingly clear sign that something was seriously wrong with the judge - something that was more fundamental than bias.

The unanimous judgment of the appeal bench of the Family Court contains extracts of the transcript of the original decision that cover seventeen pages. They show the judge had been engaged in extended verbal jousting with lawyers for one of the parties. His conduct was described by the appeal bench as "cruel, insulting, humiliating and rude".

Judge Andrew's body was found last October. In September, the reasons published by the appeal bench of the Family Court had been reported widely in the media.

I have no criticism of the appeal court or of the media. They were both doing their jobs. My criticism is reserved for an institutional gap - the absence of a federal judicial commission - that

[1] Adacot & Sowle [2020] FamCAFC 215

could potentially have led to a different outcome. There might have been another way of addressing not just bias, but the welfare of a judge.

My friend Nicola Berkovic, who is legal affairs correspondent with The Australian, reported that Judge Andrew had been the subject of two complaints. If a federal judicial commission had been in place at that time, consider what might have happened:

1) Judge Andrew had been on the bench only since March, 2019. A federal judicial commission, if modelled on the NSW commission, would have functions that include mentoring and judicial education. Judges, of course, do what they can to help each other. But they are judges first and mentors second.

An important institution needs to have institutional support for the welfare of its key figures, particularly those who are isolated from their fellow judges. Hopefully, the government's design for its promised federal judicial commission will include such a function.

2) The second point is this: a federal judicial commission might have been able to deal with concerns about the judge's conduct before they reached the point where there was a need for an appeal and retrial.

I am aware of two instances where judicial officers in NSW have resigned and left the bench quickly after being informed that aspects of their conduct were to be examined by a conduct division of the Judicial Commission. An adverse report by a conduct division is the first step in the process of removing a judge from the bench.

That mechanism, which protects litigants, is only possible because conduct divisions are required to abandon their inquiries once a judicial officer leaves the bench. The downside of this approach - and it is a downside - is that it deprives complainants of the satisfaction of seeing their complaint upheld.

However it strikes me as more important to protect all future litigants as quickly as possible from judicial officers whose conduct or capacities are no longer of the required standard.

3) The third point is this. The appeal bench of the Family Court clearly reached the correct decision when it ordered a new trial. But it was only able to do so, in my view, after reading

down the rule that means litigants waive their right to complain about bias if they fail to raise the issue when it becomes apparent during the trial.

There was no application during the trial for the judge to recuse himself - to disqualify himself from the matter. The appeal court, however, unanimously pointed to the fact that one of the lawyers who had been bullied had reminded the judge that he had described the lawyer as a disgrace.

In light of that and the whole of the judge's remarks, the appeal court said it doubted, even if the offensive remarks had been raised with the judge, whether "it would have afforded his Honour the opportunity to correct the impression those remarks had made".

This looks like a strained, but necessary, technique aimed at avoiding the rule[2] that would otherwise have meant it would not be possible to argue that the decision was infected by bias - which it most certainly was.

Why not simply abandon the rule that means the right to complain about a biased judge can be waived?

In their book The Australian Judiciary,[3] Enid Campbell and HP Lee make the point that the rule against bias is a fundamental pillar of natural justice. If that rule can be waived by parties to litigation, one of the basic features of the judicial process can be compromised. That cannot be right.

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[2] Vakauta v Kelly (1989) 167 CLR 568 at 572
[3] Cambridge University Press, 2001, page 146