Legislative Assembly

21/03/2002

Courts Legislation Amendment Bill

Hansard

Extract

Second Reading

Mr DEBUS (Blue Mountains—Attorney General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts) [1.18 p.m.]: I move:

That this bill be now read a second time.

This bill provides for amendments to a range of courts legislation to ensure that there can be no doubt about the validity of appointing a judge to another judicial office, or appointing a judge as an acting judge in another court. It has been the practice in New South Wales since at least 1976 to occasionally appoint judges from one court to acting appointments in other courts and tribunals. Similarly, acting judges in one court have been given concurrent appointments as acting judges in another court. There have also been instances where magistrates have received acting appointments as District Court judges. Last year four District Court judges had commissions as acting judges in the Supreme Court. Currently there are two acting judges holding concurrent commissions in the Supreme Court and District Court. There is also one magistrate acting as a District Court judge.

Two issues have been identified concerning the validity of such appointments. The first is whether currently serving judges are "qualified" to be appointed as judges or acting judges in another court. While the courts legislation generally requires that in order to be qualified for appointment as a judge a person should be a legal practitioner of at least seven years standing, it does not specifically include currently serving judges within the definition of persons qualified to be appointed as judges or acting judges. The approach in the past has been to assume that currently serving judges retain their prior status as barristers or solicitors—both of whom are qualified to be appointed provided they have practised for the required period—and are therefore qualified to be judges or acting judges. It is proposed to put this issue beyond doubt by an amendment to provide that a "qualified person" includes a person who holds or has held judicial office, whether in New South Wales or some other Australian jurisdiction.

The second and more significant issue is whether appointment as an acting judge in another jurisdiction may operate in some circumstances to impliedly surrender or vacate the original appointment in accordance with the doctrine of incompatibility of office. The Law on this subject is set out in the following passage from Chitty, Prerogatives of the Crown, 1820, page 87:

> A person may ... lose an office merely by the acceptance of another office incompatible with that he already holds. Offices are incompatible, and cannot be holden together, when, from the nature or extent of the different duties and businesses attached to them, they cannot be properly and effectually executed by the same person; or when they are subordinate to, or interfere with each other, which creates a legal presumption, that they will not be executed with impartiality and honesty. Thus, an admiral commanding on a station loses his right to officiate there, by accepting a command on another station to which he is appointed. A Judge of the Court of Common Pleas loses his office by being appointed, and by becoming a Judge of the Court of King's Bench ... And where the offices are incompatible, the office which the party first held is impliedly surrendered or vacated, by the acceptance of the new situation."

It may be argued that an acting appointment from an inferior court to a superior court in the same appellate line—say from District to Supreme Court—would not give rise to the doctrine, provided the acting judge was not intended to hear appeals from the inferior court. This is the situation with the current appointment of District Court judges to the Supreme Court, but not to the Court of Appeal or Court of Criminal Appeal. However, it would be better to put the issue beyond doubt and to cure any defect in previous appointments by legislative amendment.

There is nothing inherently problematic about the proposal that a judge of one court might act as a judge of a higher court in the same appellate line. Decisions of single judges of the Supreme Court are subject to appeal to the Court of Appeal and to the Court of Criminal Appeal. Yet Supreme Court judges not uncommonly sit for part of the time as appeal judges and part of the time as first-instance judges. The principles of bias and fairness operate to ensure that judges do not sit on appeals in respect of their own decisions. As I say, the bill is being introduced to put these issues beyond doubt and I commend it to the House.