The University Visitor in Western Australia

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This paper traces the history and operation of the University Visitor concept in Western Australia. It examines and documents the exercise of the visitorial jurisdiction in the State, and it places recently expressed doubts about the continued utility of this concept in their historical context and in the context of a wider national and international debate.

INTRODUCTION

In March 1994, Sir Francis Burt[1] delivered an address[2] in which he expressed doubts about the continued utility of the University Visitor concept. In advocating its abolition, he described it as 'a mischievous anachronism'.[3] Although his remarks were prominently reported in the academic press[4] and triggered a sequence of correspondence and responses,[5] his address excited little public comment elsewhere. Yet societal concern about the establishment and preservation of appropriate standards touching all facets of tertiary education has rarely been higher. Similarly, the control and regulation of large bureaucracies amid increasing popular demands for moral and legal

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2. F Burt *The University Visitor* First Ordinary Meeting of UWA Graduates Assoc (Perth, 18 Mar 1994).
3. Id, 10.
4. C Simmonds 'Ex-governor of WA Queries Place of University Visitor in Modern World' *Campus Review* 24 Mar 1994, 2.
5. A Bain, Murdoch University *Campus Review* 7 Apr 1994, 8; H Oxley, University of Canberra *Campus Review* 21 Apr 1994, 8.

accountability at both individual and institutional levels are important themes of societal concern which have emerged from the 1980s to take us through the 1990s into the twenty-first century.

This paper briefly reviews the nature of the visitorial jurisdiction and describes the principal concerns associated with its continued operation. It documents the history and operation of this concept in Western Australia and places the doubts voiced by Sir Fancis Burt in their historical context, and in the context of a wider national and international discourse. In offering a perspective which is essentially West Australian, this paper suggests the contemporary relevance of his address.

THE CONCEPT

The University Visitor concept evolved from English medieval ecclesiastical law as a mechanism for the resolution of internal university disputes, and for the regulation and control of universities.[6] Ecclesiastical foundations were liable to visitation by the relevant bishop for the purposes of supervising their activities. Subsequently, the concept was preserved with the development of civil corporations of an eleemosynary nature, particularly the colleges within the universities of Oxford and Cambridge in the twelfth and thirteenth centuries. The Visitor of an eleemosynary[7] corporation was originally appointed by the founder of a particular institution to ensure its government and administration in conformity with the founder's wishes and intentions. The Visitor, therefore, was a means of perpetuating the founding philosophy of an eleemosynary institution and he or she was expected to resolve disputes and exercise jurisdiction according to this overriding principle. The Visitor now also serves as a reminder of the close association between the early Church and early institutions of higher learning.

The extensively quoted judgment of Sir John Holt in *Philips v Bury*[8] in 1694 has been described as 'the locus classicus of the law of visitors, repeatedly applied for the last 300 years'.[9] The following dictum from his judgment indicates both the essence of the office, and suggests the current source of concern:

6. See eg JL Caldwell 'The Visitor and the Visited: Judicial Review of Universities' (1982) 1 Canterbury L Rev 307; JW Bridge 'Keeping Peace in the Universities: The Role of the Visitor' (1970) 86 L Quart Rev 531; RJ Sadler 'The University Visitor: Visitorial Precedent and Procedure in Australia' (1981) 7 Uni Tas L Rev 2; PM Smith, 'The Exclusive Jurisdiction of the University Visitor' (1981) 97 L Quart Rev 610.
7. 'Of or dependent on, alms; charitable' *The Concise Oxford Dictionary* 7th edn (Oxford: OUP, 1985). Universities are still considered eleemosynary in nature: see eg S Robinson 'The Office of Visitor of an Eleemosynary Corporation: Some Ancient and Modern Principles' (1994) 18 Uni Qld L Journ 106.
8. (1694) 90 ER 198, 215.
9. *R v Lord President of the Privy Council, ex parte Page* [1992] 3 WLR 1112, 1119.

> The office of Visitor by the common law is to judge according to the statutes of the College, to expel and deprive upon just occasions and to hear appeals of course. And from him and from him only the party grieved ought to have redress; in him the founders have reposed so entire confidence that he will administer justice impartially that his determinations are final and examinable in no other court whatsoever.

The essential function and features of the university visitor today remain substantially unchanged and the traditional common law approach has been recognised and applied in *Murdoch University v Bloom and Kyle,*[10] in which Sir Francis Burt as Chief Justice delivered the leading judgment. It has also been unequivocally endorsed in England, most recently in 1992 by the House of Lords in *R v Lord President of the Privy Council, ex parte Page,*[11] where Lord Griffiths suggested that 'the value of the visitorial jurisdiction is that it is swift, cheap and final'.

The principal issue raised by the continued recognition of the visitorial jurisdiction concerns its relationship with the jurisdiction of other courts and, specifically, the finality of Visitors' decisions and the extent to which they should be subject to judicial review in a climate of accountability. The traditional common law view is that matters properly falling within the competence of the Visitor may not be decided by the courts. The Visitor's decision will not be subject to judicial review, except in instances of error of law on the face of the record.[12] It has, therefore, been suggested that:

> One of the difficulties is undoubtedly that the visitorial jurisdiction is being used today in circumstances outside the contemplation of those judges who gave the recognition of the common law to the visitorial control and supervision of eleemosynary foundations.[13]

Notwithstanding the support of the House of Lords for this concept, some jurisdictions in Australia have seen fit to modify or abandon it. Commenting in 1983 on the exercise of visitorial jurisdiction in Melbourne University, McLaughlin observed:

> The sticking point of this jurisdiction these days, however, is its purported exclusivity. There is a long line of English authority which establishes that the courts will not interfere in any matter within the Visitor's jurisdiction, and any question of a domestic nature is essentially one for the Visitor, whose decision upon it is final.[14]

In advocating that university procedures be subject to review by the courts, he argued that:

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10. [1980] WAR 193.
11. Supra n 9, 1116; Lord Browne-Wilkinson, 1125.
12. *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424.
13. Smith, supra n 6.
14. S McLaughlin 'Up Against the Law' (1983) 8 Leg Serv Bull 140-142.

> The crux of the case is the issue of public interest. Universities are no longer private cloisters They are publicly funded statutory bodies directed towards public education and research. The public has an interest in the conduct and control of these bodies, to see that they are governed fairly and properly. This public interest or accountability is served in a variety of ways and supervision by the courts in disputed matters is one appropriate means by which the public interest is safeguarded.

This view prevailed in Victoria when the Administrative Law Act 1978 (Vic) was amended in 1985 to provide for the Visitor to have concurrent jurisdiction with the courts.[15] More recently, in 1994, almost coinciding with Sir Francis Burt's address, the New South Wales government abolished all except the ceremonial functions of its Visitors.[16]

WESTERN AUSTRALIAN VISITATIONS

1. Introduction

The Governor of Western Australia is the Visitor for The University of Western Australia, Curtin University[17], Edith Cowan University[18] and Murdoch University by virtue of the respective founding statutes.[19] However, this legislation offers little real guidance or definition of the Visitor's role and functions. The earliest statute appointing a Visitor was also the most general, namely:

> The Governor of the State of Western Australia shall be the Visitor of the University, and shall have authority to do all things which appertain to Visitors as often as to him shall all seem meet.[20]

The subsequent enactments providing for a Visitor in 1966, 1973, and 1984 each also defined 'the Governor' to mean 'the Governor of the State and not the Governor acting with the advice and consent of the Executive Council.'

The Murdoch University Act (1973) contains the further unique provision that:

> The Visitor has the right from time to time and in such manner as he thinks fit to

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15. Administrative Law (University Visitor) Act 1985 (Vic). Cf JW Shaw 'Disputes Within Universities: The Visitor or the Courts ?' (1986) 29 Aust Uni Rev 1.
16. University Legislation (Amendment) Act 1994 (NSW).
17. Formerly Western Australian Institute of Technology.
18. Formerly Western Australian College of Advanced Education.
19. University of Western Australia Act 1911 (WA) s 7; WA Institute of Technology Act 1966 (WA) s 27 (now Curtin University of Technology: see Amendment Act 1986); WA College of Advanced Education Act 1984 (WA) s 42 (now Edith Cowan University: see Amendment Act 1990) and Murdoch University Act 1973 (WA) s 9.
20. University of Western Australia Act 1911 (WA) s 7.

> direct an inspection of the University, its buildings and general equipment and also an inquiry into the teaching, research, examinations and other work done by the University.[21]

Western Australian vice-regal[22] archival records disclose 14 attempts[23] to invoke the visitorial jurisdiction. In addition, Alexander[24] identifies an earlier visitation[25] to The University of Western Australia in 1923.

Of the 15 petitions[26] identified (see Table 1, p 151), eight involved The University of Western Australia, three involved Murdoch University, two involved the Western Australian College of Advanced Education and two involved Curtin University of Technology. With two exceptions, all petitions have involved some aspect of university management or administration. The two exceptions related to the conduct of student guild affairs. Of the 15 petitions, four were dealt with on the basis that the Visitor did not have jurisdiction; four were abandoned or lapsed for want of further particulars after the initial inquiry; and two did not proceed because the Visitor's intervention was sought prematurely. In the remaining five matters, jurisdiction was exercised in three cases by the Visitor with the assistance of an assessor, and in two cases without an assessor.

2. No jurisdiction

The first[27] recorded attempt to invoke the visitorial jurisdiction in Western Australia, Case A, occurred in 1923. A graduate sought to invoke the authority of the Visitor to challenge a University Senate decision not to award a degree with Honours. Alexander's account of this matter in his history of The University of Western Australia[28] suggests uncertainty at the

21. Murdoch University Act 1973 (WA) s 9.
22. The authors wish to acknowledge the advice and assistance of the Official Secretary to the Governor, and his staff, in preparing this paper. It is emphasised that responsibility for any errors or omissions remains the responsibility of the authors and that the views and interpretations in this paper are also those of the authors, except where specifically indicated.
23. The numerical sequencing of the records located suggests that there may have been three more petitions or attempts to invoke the visitorial jurisdiction which cannot be further identified and for which records cannot be located.
24. F Alexander *Campus at Crawley* (Melbourne: FW Cheshire for UWA Press, 1963) 278-279, 475, 478. No vice-regal archival records for this case have been located.
25. Case A. Individual cases have been allocated an identifying letter which is intended to preserve the anonymity of the respective petitioners, except where petitioners have already been publicly identified elsewhere.
26. 'Petition' (hence also 'petitioner') is used loosely in this paper to refer to any document by which the visitorial jurisdiction was first sought to be invoked.
27. Although *The West Australian* ('Governor Gives Historic Ruling' 8 May 1980) reported that Sir Wallace Kyle's decision in *Bloom and Kyle* supra n 10 'was the first time in WA that a Governor had been called on to adjudicate in an internal university dispute'.
28. Supra n 24, 278-279.

Table 1: Applications made to the Governor of Western Australia as Visitor: 1923-1993

PETITIONER	NATURE OF ISSUE OR DISPUTE	SUCCESSFUL PARTY AND/OR OUTCOME	YEAR
CASE A	Refusal to admit to honours degree	Respondent jurisdiction declined	1923
CASE B	Application for 12 months' study leave refused — 6 months' leave approved	Respondent Pet. dismissed	1979/80
CASE C	Refusal to allow enrolment in a non - award course	Petition not pursued	1980
CASE D	Assessment of Masters Degree — fail grade challenged	Formal petition not lodged	1981
CASE E	Exclusion from Faculty of Medicine	Respondent Pet. dismissed	1982/83
CASE F	Request for leave without pay refused	Respondent Pet. premature- jurisdiction declined Pet. dismissed	1984/85
CASE G	Allegations of procedural irregularities at a Guild meeting	Formal petition not lodged	1987
CASE H	Promotion and appointment of academic staff	Respondent Pet. dismissed	1988
CASE I	Refusal to award PhD and assessment of thesis	Respondent Pet. dismissed	1988
CASE J	Rent rebate on use of University property	Jurisdiction declined	1989
CASE K	Withholding degree	Pet. premature - avenues of appeal not exhausted; Degree subsequently awarded	1990
CASE L	Withholding degree	Petitioner did not proceed	1990
CASE M	Allegations of procedural irregularities at Guild elections	Matter lapsed	1991
CASE N	Overseas student claimed to have been misled	Formal petition not lodged	1991/92
CASE O	Expulsion for cheating — plagiarism	Respondent Pet. dismissed	1993

time about the function and role of the Visitor. He records that:

> The Visitor virtually sought advice from the Senate as to whether his undefined appellate jurisdiction extended to a review of action taken by it against a student of the University or to a graduate (as in the case in question) who questioned the propriety of the Senate's action in respect to his submission for a higher degree.

He reports that the Senate was unanimous in its opinion that The University of Western Australia Act 1911 did not contemplate that appeals would lie to the Visitor in such situations. It appears that the Visitor accepted this advice and accordingly declined jurisdiction. However, it is tempting to speculate that in similar circumstances today a different decision would be reached on the question of jurisdiction, and different procedures would be followed, although the outcome might be the same.[29]

The more recent cases provide insights into the practice of this jurisdiction which are more useful. In 1989, in Case J,[30] the Visitor accepted the submission of The University of Western Australia that the petitioner, a former staff member and PhD student at the university, did not have standing to invoke the visitorial jurisdiction because he was no longer a student or member of staff. The petitioner had been occupying a university residence and claimed to have fallen into arrears in his payment of rent through circumstances beyond his control and because of alleged but unspecified unconscionable conduct on the part of the University. He argued, therefore, that in all the circumstances he should be relieved of the obligation to pay the arrears.

In two other instances (Cases F[31] and K[32] respectively), jurisdiction was declined because the petitioners had not exhausted all internal avenues of appeal. In Case F, in October 1984, the petitioner was a senior lecturer when he was offered the position of Chief Electoral Officer of Western Australia. He sought leave without pay for three years to accept this appointment. However, this application was refused by the Vice-Chancellor and, in December 1984, he petitioned the Visitor for review of the decision arguing that it was —

- detrimental to the University;
- detrimental to the community because the decision effectively prevented the direct application of his area of expertise in an area of considerable public interest and importance; and
- detrimental to him as an individual and caused him to suffer 'experiential' and financial loss.

He also argued that he had in effect exhausted all internal avenues of

29. Eg Cases D, I, K and L.
30. File ref 11.1.17.11. File references relate to vice-regal archival records.
31. File ref 11.1.17.7. Case F was also briefly summarised in *The Australian* 13 Mar 1985.
32. File ref 11.1.17.12.

appeal by having previously appealed the Vice-Chancellor's decision without success to the University Senate Staffing Committee, and that it was thus pointless appealing to the Senate in these particular circumstances. The Visitor rejected this argument and, in January 1985, declined to exercise his jurisdiction notwithstanding that the Senate was not due to meet until late February 1985, more than three weeks after the petitioner's new appointment was due to have commenced. The petitioner was subsequently advised that the Senate had refused his appeal and he lodged a fresh petition with the Visitor in early February without knowing, ironically, that on the same day the Governor in Council had revoked his appointment to the position of Chief Electoral Officer. The second petition was rejected by the Visitor on the grounds that there was no longer a dispute that needed resolution, and because it would be inappropriate to pursue an issue which had become hypothetical.

Case K is also instructive. Although jurisdiction was declined, the possibility of later visitorial intervention may have stimulated the respondent institution to acknowledge the justice of the substantive claim. In April 1990, through his solicitors, the petitioner wrote to the Visitor complaining about the withholding of a degree. The dispute arose because of the restructuring of existing courses necessitated by the introduction of new courses. He had been told that successful completion of particular units of study would make him eligible to graduate but was subsequently informed that he needed another unit to graduate. The institution objected to the Visitor taking jurisdiction because there were still internal avenues of appeal open to the petitioner. The Visitor accepted this argument, and interestingly, was subsequently informed that the degree would be awarded and that the institution had made an error in withholding it. It is interesting to speculate upon the extent to which the final decision may have been influenced by the possibility or expectation that a further refusal was likely to be scrutinised by the Visitor.

3. Discontinued applications

Successive Visitors have received six enquiries about invoking the visitorial jurisdiction, each of which apparently lapsed for want of further action by the petitioner after the Visitor's initial response.

These include Cases G[33] and M,[34] both of which were initiated by students and involved student guild issues. In Case G in 1987, the Visitor's intervention was sought to resolve alleged irregularities in student guild affairs and specifically to determine the validity of a particular guild meeting. The matter lapsed after the Visitor replied that he could not consider the

33. File ref 11.1.17.8.
34. File ref 11.1.17.16.

submission until all internal avenues of redress had been explored and exhausted. In Case M (1991), the Visitor's intervention was sought to resolve allegations of irregularities in connection with student guild elections. The enquiry seemed to contemplate that the Visitor would institute an enquiry but made no specific requests. It lapsed after the petitioner failed to respond to the Visitor's request for further information identifying the dispute he wished to submit for consideration.

Other matters which simply appear to have lapsed through lack of action by the petitioners after the initial approach include Case C,[35] in 1980, concerning the university's refusal to allow the petitioner to enrol in a non-award computer science course; and Case D (1981),[36] involving alleged procedural irregularities in the examination and failing of a Master of Arts thesis. Similarly, in Case L,[37] in 1990, the petitioner also alleged that his degree was being improperly withheld but the matter lapsed after the Visitor replied that the issue appeared to be within his jurisdiction and requested further particulars. In Case N (1991),[38] an overseas graduate student claimed that he had been misled concerning the status of the course for which he was enrolled and sought US$5 000 to cover his travel costs, telephone costs and other incidental expenses associated with attempting to study in Perth. This matter also lapsed after the petitioner failed to respond to the Visitor's request for more information.

4. Jurisdiction exercised without an assessor

In cases where the petition has been sufficiently complete to disclose an issue within the visitorial jurisdiction, and where there have been issues of fact to be determined, the Visitor has adopted the practice of appointing an assessor to assist and advise him. However, where there are no issues of fact, this practice has not been followed.

Thus, in Case H,[39] the petitioner sought in June 1988 the assistance and intervention of the Visitor in relation to an academic appointment for which he had been an unsuccessful applicant. There had been three candidates for a position advertised internally. The petitioner alleged that the person to whom the position was offered was, in fact, the least qualified and that it should have gone to either of the other two candidates.The Visitor concluded that:

> Nothing placed before His Excellency has persuaded him there is any reason to doubt that the Selection Committee's decision was made genuinely and honestly

35. File ref 11.1.17.3A (Folio 2, 28 Apr 1980).
36. File ref 11.1.17.5.
37 File ref 11.1.17.13.
38. File ref 11.1.17.15.
39 File ref 11.1.17.9.

> for reasons which it properly considered.[40]

He emphasised that in reaching this conclusion he was making no determination on the respective and relative merits of the academic qualifications of the applicants for this position. His conclusion was rather:

> That having regard to the selection criteria and the procedures followed no basis is revealed on which the genuineness of the decision could reasonably be questioned. Whether or not the decision was the best decision is a matter for the Selection Committee and not for the Visitor to determine.

The Visitor accepted that the applicants were not interviewed and that the views of the referees were not sought. He said, however, that although interviews and opinions of the referees are often useful aids to the selection process, they are not obligatory procedures. In this case, the three applicants were also already members of the staff and the failure to interview and to approach referees was not a matter which would justify the Visitor's intervention. There was, therefore, no justification for him to intervene in the decision to appoint the successful applicant.

Similarly, in Case I,[41] which also commenced in June 1988, the petitioner requested the Visitor to investigate his claims that examination of his PhD thesis had been 'irregular and unfair' and to redress what he believed to be a serious miscarriage of justice. No formal hearing was required and no substantial issue of fact arose and, in September 1988, having reviewed the grounds of complaint seriatim, the Visitor dismissed the petition in the following terms:

> Nothing has been placed before me which would reasonably call in question the genuineness of the decision not to award the petitioner the degree of Doctor of Philosophy nor the propriety of the procedures leading to that decision.[42]

5. Formal visitations — assessor appointed

There have been three matters in which an assessor was appointed and a hearing ensued, namely Cases B,[43] E[44] and O.[45] The first of these, Case B, attracted extensive publicity[46] and is probably the best known example of visitorial intervention in Western Australia. The petitioner was an academic staff member who submitted to his Vice-Chancellor in June 1979

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40. Decision of the Visitor, 12 Sept 1988, 2.
41. File ref 11.1.17.10.
42. Decision of the Visitor, 30 Sept 1988, 15.
43. File ref 1.48 (parts 1 & 3).
44. File ref 11.1.17.6.
45. File ref 11.1.17. 14.
46. Eg 'Governor to Rule in Leave Row' *The West Australian* 17 Apr 1980, 11; 'Governor Hears Leave Case' *The West Australian* 6 May 1980, 22.

an application for 12 months' study leave. The Vice-Chancellor approved the application, but only for a period of six months. The petitioner claimed that the Vice-Chancellor's decision to limit his study leave was harsh and unjust, and contrary to the spirit and intention of the petitioner's contract of service and specific resolutions of the University Senate. He also sought, in effect, a declaration that he was entitled to a period of 12 months' study leave.

At a preliminary hearing in early December 1979, the University argued that the Visitor had no jurisdiction to entertain either of these claims, but the Visitor ruled that he did have jurisdiction. Later that month, the University instituted proceedings in the Supreme Court seeking a declaration on these matters. The Full Court by a majority[47] held that the Visitor did not have jurisdiction to hear or determine the claim relating to the declaration of entitlement to 12 months' leave. The issue of the declaration arose out of a contract, and the rights created by it were personal to the parties to it. That aspect of the dispute, therefore, could not be categorised as an internal or domestic matter. The other issue concerned the manner in which the Vice-Chancellor had exercised his discretion. This was unanimously held to be an internal or domestic matter and within the Visitor's jurisdiction. Accordingly, the Court held unanimously that the Visitor did have jurisdiction to review the Vice-Chancellor's decision.

The Petition was subsequently heard at Government House in May 1980 by the Governor assisted by an assessor. The Visitor was not persuaded that the decision was harsh and unjust, and accepted the Vice-Chancellor's response that his decision was made in the bona fide and honest exercise of a discretion vested in him by the Senate. The Visitor also considered that he had no authority to interfere with the exercise of discretionary power provided that the discretion had been exercised honestly.

In Case E (1982), the petitioner sought the exercise of the visitorial jurisdiction to enable him to be re-admitted as a medical student. After completion of the clinical requirements of the sixth and final year of his medical degree course in 1977, but before the final examination, he was apprehended and charged with the theft of drugs from a pharmacy. It was alleged that, at that time, and for some time previously, he had been a user of addictive drugs. In late December 1977, the petitioner was advised that the Executive Committee of the Faculty had suspended him from the Faculty until his readmission was approved. The petitioner claimed that he was denied any opportunity to be heard in relation to the suspension and that the decision, if within power, was made in denial of natural justice and was of no effect.

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47. *Murdoch University v Bloom and Kyle* supra n 10; Burt CJ and Smith J; Wallace J dissenting.

Further, or alternatively, the petitioner claimed that the Faculty by its Executive Council or otherwise had no power to suspend him.

In March 1978, the petitioner pleaded guilty to the charge of theft and was imprisoned for a period of four years with a minimum of 11 months before being eligible for parole. He was granted work release in October 1978 and enrolled as a student in a different faculty in 1979. Permission to re-enrol in the final year of the medicine course was nevertheless refused on several occasions although he claimed that he had not used addictive drugs since his arrest and that he was a fit and proper person to complete the course.

In his submission to the Visitor he argued further, or alternatively, that he ought to be permitted to re-enrol and so complete the examinations. After a three day hearing at Government House in August 1983, the Visitor concluded that the petitioner had been given inadequate opportunity to be heard in his own defence. He was, therefore, justified in exercising his jurisdiction as Visitor, and in reviewing the Committee's conclusions and recommendations, and the decision of the Senate to adopt them. In all the circumstances, however, he did not consider any substantial miscarriage of justice had occurred. He concluded that he should not disturb the decision of the Senate. Both the Faculty and the Senate were entitled to refuse to re-admit the Petitioner in the honest exercise of discretion. He also added that, if he had an open discretion in the matter, then he would also have refused re-admission. The university again agreed to pay the assessor's fees.

In Case O (1993), the petitioner had been enrolled as a third year Bachelor of Arts student. He was charged with misconduct in 1991 on grounds of plagiarism in an essay assignment. The Vice-Chancellor subsequently notified him that he was satisfied the charge had been established and that he had decided, subject to the ratification of the Senate, to expel the student. The student appealed to a Board of Discipline which conducted a hearing and found the charge proved. The Visitor appointed an assessor who subsequently conducted a hearing at the university and concluded that nothing had emerged which indicated that the exercise of a properly conferred discretion had been based on any material fact which should not have been considered. The Visitor adopted his assessor's report. In dismissing the petition, he approved *Re University of Melbourne, ex parte de Simone*[48] and *Murdoch University v Bloom and Kyle* and proceeded on the undisputed basis:

> That the Visitor does not sit on appeal from the exercise of a discretion by a body of the University having authority to exercise that discretion merely on the grounds that a different person with equal honesty might have reached a different conclusion For the Visitor's powers to be invoked it needs to be shown that the exercise of

48. [1981] VR 378.

power by such a body was from wrong motives or was illegal or corrupt.[49]

IMPLICATIONS FOR PRACTICE

Visitors' decisions are rarely published in any jurisdiction[50] and have never been published in Western Australia.[51] Hearings have not been open to the public and there is no current, authoritative or comprehensive published description of the exercise of this jurisdiction. It is, therefore, difficult, if not impossible, to ascertain from published sources alone how the visitorial jurisdiction operates in practice. This situation may well justify Sir Francis Burt's reference to 'justice administered in secret'.[52] Similarly, the fact that no petition to the Visitor in Western Australia has ever been upheld or successful may support Howell's observation[53] that the jurisdiction unduly favours universities as 'repeat players', able to accumulate knowledge and experience of the jurisdiction in a manner not available to ordinary petitioners.

The preceding review, therefore, may help to clarify certain aspects of this jurisdiction to the extent that precedent may indicate future practice. It may also dispel certain misconceptions that have evolved about the visitorial jurisdiction and generally stimulate discussion about the continued utility of this concept.

The visitorial jurisdiction is invoked by a petition addressed and delivered to the Governor as Visitor. No particular formality is required as to the form of the petition, and failure to observe the customary formalities of a petition may be overlooked provided that it is sufficiently clear and precise to establish the petitioner's locus standi, and discloses the nature of the grievance and relief sought.[54]

Upon receipt of a petition, the Visitor will decide initially whether it discloses an issue prima facie within the visitorial jurisdiction and whether the petitioner appears to have standing. The Visitor will then forward a copy to the respondent institution for comment and specific confirmation that all internal avenues of appeal have been exhausted. If the Visitor accepts jurisdiction, and there are no issues of fact or other matters warranting a

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49 Decision of the Visitor, 1993, 3.

50. See eg *Re University of Melbourne, ex parte De Simone* [1981] VR 378, *Re La Trobe University, ex parte Wild* [1987] VR 447; *University of Melbourne, ex parte McGurk* [1987] VR 586, *Re La Trobe University, ex parte Hazan* [1993] 1 VR 7, *Re Petition to Dame Roma Mitchell* (1992) 57 SASR 573; *Re Macquarie University, ex parte Ong* (1989) 17 NSWLR 113

51. It was the appeal from the Visitor's decision which was reported in *Murdoch University v Bloom and Kyle* supra n 10; see also RJ Sadler 'The University Visitor in Australia: Murdoch University v Bloom' (1980) 7 Mon L Rev 59.

52 Supra n 2, 10

53 GG Howells 'Employment Disputes within Universities' (1989) 8 Civil Just Quart 152.

54 Eg Case I

hearing, the Visitor may reach a decision without a hearing. If the petition reveals issues of fact which will necessitate a hearing, and which might otherwise also involve the Governor undesirably in controversy, an assessor will be appointed who will determine interlocutory matters and procedures. Past assessors have been experienced counsel, senior counsel and a former judge. Final hearings may be conducted either at Government House before both the Visitor and assessor (as with Cases B and E), or by the assessor alone at the institution, as in Case O where the assessor's report and recommendations were subsequently adopted by the Visitor. Since 1979, successive Visitors have also been comprehensively advised at all stages by the Solicitor-General, notwithstanding any assistance provided by an assessor. In Cases B, E and O, the respective respondents agreed to pay the assessor's fees, reflecting, it is suggested, the Visitor's status as one of the principal officers of the Institutions in question. In Case B, the university also paid for the transcript proceedings.

The Western Australian experience also discloses a substantial difference between popular perceptions of the role and function of the Visitor and the way in which it has operated in practice. Commentators have tended to focus on the unique features of the office almost as a matter of curiosity and imprecisely on the idea of the Visitor's *very wide* powers of intervention.[55] However, it is evident that in Western Australia, at least, successive Visitors have interpreted their role and jurisdiction narrowly, cautiously and almost reluctantly. It is also clear that in practice the Visitor will only consider the merits of a particular exercise of discretion challenged by a petitioner in the most exceptional circumstances.

Thus, Robinson focuses in a recent article[56] on the following dictum of Simon Brown J in *R v Judicial Committee of the Privy Council acting for the University of London, ex parte Vijayatunga*:

> The Visitor has untrammelled power to investigate and right wrongs arising from the application of the domestic laws of a charitable foundation; untrammelled, that is, save only and always that the Visitor must recognise the full width of his jurisdiction and yet approach its exercise in any given case reasonably.[57]

Similarly, Forbes, summarising the powers and functions of the Visitor, suggests that the Visitor 'may reconsider internal decisions on their merits'.[58] Such statements may be correct as a matter of strict law, but they fail to acknowledge with adequate emphasis that the Visitor is concerned more with the integrity of the decision-making process than with the merits of

55. WA Higher Education Review Committee *Report on Higher Education in WA* (Perth, 1989) 79.
56. Supra n 7, 109.
57 [1988] 1 QB 322, 344.
58. JRS Forbes *Disciplinary Tribunals* (Sydney Law Book Co, 1990) 11

particular decisions, even where there is a procedural irregularity. In this regard, the potential for such statements to generate unrealistic expectations, particularly in the minds of potential petitioners, is illustrated by, for example, Case J where the petitioner wrote to the Governor as Visitor and appealed 'for final arbitration in this matter, trusting to your enlightened judgement'.

By contrast, the decisions in Cases H and I clearly illustrate how such popular perceptions of the Visitor's role may differ from the reality of practice. In Case H, the Visitor noted that while his jurisdiction:

> Extended to decisions regarding the appointment and promotion of academic staff, the function of Visitor is different in character and purpose from the jurisdiction of an industrial appeal body. The Visitor's responsibility... is to ensure that the established procedures relating to staff appointments have been observed and that those people charged with responsibility for the decision approach their selection task with honesty and integrity. The selection task itself is one of judgment and it would be wrong of the Visitor to seek to impose his personal judgement rather than accept the genuine judgement of those within [the institution] charged with the responsibility of making an appointment That course would be warranted only when it appeared that the judgement in the selection had been exercised from improper motives.[59]

In Case I,[60] the Visitor reiterated that his primary function was to interpret university statutes and regulations. He added:

> It is not, however, a proper function of the Visitor to substitute his own assessment of a thesis submitted for examination for the genuine view of those regularly appointed to examine the thesis and decide upon its fate, nor, in the absence of reason to believe that those persons have acted from improper motives, to interfere in that process of decision-making. I have not read the thesis of the petitioner and I do not believe I would be assisted by such a reading.... In so far as the petition seeks to have the degree awarded to the petitioner forthwith, it should be clear that even if fault was to be found in the process of examination which warranted setting aside the decision not to award the degree, the most it would be proper for the Visitor to require is that the thesis be re-examined.

This cautious approach is also reflected in the requirement to exhaust all internal avenues of review. The logic of this approach cannot be denied. As Case K neatly illustrates, until this process has occurred, it cannot be certain that there is in fact a dispute for the Visitor to consider. Nevertheless, this practice clearly disappointed the petitioner in Case F where time was at a premium and his prediction concerning the futility of a formal and final appeal to the Senate was fulfilled. In that case, it might have been thought that the particular circumstances could have justified a departure from the usual practice thus allowing the Visitor to accept jurisdiction. Although the

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59. Cf *Re UWA Academic Staff Assoc* (1979) 59 WAIG 445; appeal 909, discussed in 'University Staff Loses Court Appeal' *The West Australian* 6 Jun 1979, 12.

60. Decision of the Visitor, 30 Sept 1988, 2.

final outcome may have been no different, the petitioner might have derived some greater satisfaction from knowing that he had at least been able to have his grievance considered.

EVOLUTIONARY IMPERATIVES

It is now appropriate to return to the remarks of Sir Francis Burt and to their context. While it would be an exaggeration to suggest the Visitor has been a matter of controversy since The University of Western Australia was first established in 1911, it has nevertheless been the subject of on-going consideration and review, particularly since the revival of this jurisdiction in 1979.

In 1923, when Case A arose, there would have been little Australian precedent to suggest how the obligations of this office should be discharged.[61] Although the student appears eventually to have accepted the decision in 1928,[62] Alexander also records that this incident prompted former Acting Vice-Chancellor Somerville, in what has been described as his unpublished 'homespun history'[63] of The University of Western Australia, to refer to the Visitor as 'a mere relic of antiquity, a legendary figure of very doubtful use, in fact a mere excrescence on our WA University Act'.[64]

He notes that statutes which would have defined the visitor's role with greater precision were drafted in 1912 by the Acting Registrar of the university and suggests that the later confusion about the Visitor's role might have been avoided if they had been implemented.[65]

Vice-regal concerns with the role of the Visitor arose in response to Cases B and C which commenced in 1979. A briefing paper[66] prepared for the Governor in 1980 identified the essence of the concerns:

> From experience of [Case C] and of the *Bloom v Murdoch University* case, it is apparent that there are a number of adverse possibilities residing in the present legal status of the Governor's role and function as Visitor to the Universities. Particular aspects which need consideration with a view to having the Governor's Visitor status rationalised and clarified by legislation are:
>
> (1) The fact that in the present situation, matters which are
> • of their nature controversial;

61. At that time there were only 3 reported cases in Australia: *Visitation at the University of Melbourne* (1871) 2 Aust Jurists Rep 87; *University of Melbourne* (1883) 5 Aust Law Times 145; E Scott *A History of the University of Melbourne* (Melbourne: Melb UP, 1936) 91-94.
62. Supra n 24, 478.
63. Id, 253.
64. Id, 279.
65. Id, 278. Subsequent legislative enactments concerning the Visitor in 1966, 1973 and 1984 have been noted above.
66. File ref 11 1.17.3A (Folio 2).

- arise regularly from day to day at the University;
- are in many cases of a minor nature

could be referred to the Governor as Visitor when properly they should remain within the province of the University Administration to decide — with recourse to the Courts if a difference of sufficient importance arose.

(2) having regard to (1) above, the possibility of the practice of petitioning the Visitor escalating when *Bloom v Murdoch University* receives publicity in the media.

(3) With respect to the Governor's office, the propriety of there being too ready legal access to the Governor as Visitor; and in that context, the possibility of developments with petitions of this nature which could involve the office of the Governor in situations which would have adverse, inappropriate and/or political connotations.

(4) The disproportionate amount of time and the high costs involved in cases where the Governor can be called upon to exercise his jurisdiction as Visitor.

The matter was subsequently referred to the State Attorney-General in mid-1980 and considered in Cabinet in August 1980, where discussion was deferred for one year. Vice-regal concern was also expressed concerning the extent to which, and the circumstances in which, the functions of the Visitor could be delegated and an assessor used. Conflicting legal advice had been received concerning these matters, and the extent to which, at least in relation to The University of Western Australia, the Governor could act without the advice of the Executive Council.

In 1982, Cabinet approved in principle legislative changes to clarify these issues and action was taken for appropriate legislation to be drafted. Following the change of government in February 1983, the new Attorney-General wrote in August to all affected institutions, academic staff associations and student guilds seeking their views.[67] The letters explained that 'the Governor has indicated that he does not personally wish to continue this dispute-resolving role and that he recommends its discontinuance'.

Subsequently, further letters explained that:

> His Excellency is concerned that the Office of Governor should not be drawn directly into areas of sensitivity arising from contentious matters between the various parties engaged in the affairs of your institution.

A further alternative was also posited that the Governor might retain his dispute-resolving powers, but be authorised to delegate them in appropriate cases.

In 1984, various drafts of proposed legislation were circulated for discussion. This process was stimulated in late 1984 and early 1985 by Case F. The dispute involved a senior member of staff at a time when the Visitor was a former professor of the same university. Although there was no suggestion of any actual conflict of interest, the circumstances of this

67. File ref 11.1.17.3A.

appeal to the Visitor were perceived to jeopardise the integrity of the office of Governor. Case F, therefore, exemplified the urgent need to clarify and formalise the powers of the Visitor to delegate his or her functions.

The impetus for legislative reform subsequently faded with the resolution of Case F, and the issue has remained dormant for several years. In 1985, the Hetherington Committee[68] recorded that it had received some submissions on the role of the Visitor but offered no comment on the issue 'since it is currently under review by the Attorney-General'. In 1989, the Report of the Committee of Review[69] noted that this review had not been undertaken and doubted the continued utility of the visitorial jurisdiction. The Committee saw no need for the Visitor's role to be continued and recommended that it 'be considered by the Western Australian Higher Education Council for advice to the Minister'. In June 1994, in response partly to Sir Francis Burt's address and the New South Wales reform, the Western Australian Higher Education Council resolved to support the abolition of the role of the Visitor in a judicial but not a ceremonial capacity. The Western Australian Education Policy and Coordination Bureau subsequently endorsed this recommendation.[70]

Sir Francis Burt's statements, therefore, are consistent with long-standing expressions of vice-regal concern with aspects of the role and function of the Visitor. Far from representing an isolated attack on the concept, they are consistent with the legislative changes in Victoria and New South Wales. They also reflect reforms abolishing the Visitor in the Canadian Province of Alberta in 1976,[71] in New Zealand in 1990,[72] and in South Africa in 1993.[73] His views, therefore, may well indicate the direction of future reform in Western Australia.

CONCLUSION

It is tempting to suggest that abolition of the Visitor would have little impact. Without intending to canvass the merits of the office,[74] it is clearly little used and other administrative law processes exist to cover most situations in which the Visitor can act. In this regard, the Industrial Relations

68. Tertiary Institutions Committee *Senates and Councils of Tertiary Institutions in WA: Review of Structures and Functions* (Perth, 1985) 72, ¶ 7.34.
69. Supra n 55, 79-81, ¶ 6.3.4 (Recommendation 28).
70. WA Education Policy and Coordination Bureau *Role of the University Visitor* (Perth, July 1994).
71. The Universities Amendment Act 1976 (Alberta).
72. Education Amendment Act 1990 (NZ).
73. University of Cape Town (Private) Amendment Act 1993 (SA).
74. The principal issues are summarised in PWF Whalley & DM Price 'The University Visitor' (1994) 114 Cth Uni Bull of Current Documentation 7.

Commission offers an expert forum for the resolution of industrial matters. Similarly, some universities come within the jurisdiction of the Parliamentary Commissioner.[75]

However, perhaps the most fundamental question to arise from this review is whether the Visitor's role is limited to ceremonial and appellate functions or whether the original interventionist, supervisory jurisdiction still exists. In light of section 9(3) of the Murdoch University Act 1973 (WA) it is appropriate to consider whether this aspect of visitorial jurisdiction is obsolete or merely dormant, available for use should an appropriate case arise.

On the one hand, Sir Robert Megarry has described this latter aspect of the jurisdiction as being 'at least obsolescent'.[76] Similarly, Sir Henry Winneke, formerly Governor of Victoria and ex officio Visitor of Melbourne University has described it as 'dead and probably beyond redemption'.[77] By contrast, other commentators see the scope for intervention as being much wider than suggested by the Western Australian experience. Thus, Farrington suggests that 'it is often forgotten that the Visitor also has a general power of inspection of the university, its academic and non-academic functions'.[78]

Similarly, Ikhariale refers to the recent crisis in the Nigerian university system and describes how the myth of the ceremonial role of the Visitor's office:

> Was shattered when as the result of the squabbles that became the pastime of Nigerian university campuses in the 1980s, the Visitor, purporting to exercise his 'powers of a Visitor' instituted a series of 'visitations' into the management of the universities, with frightening consequences to the hitherto cherished concept of academic freedom and the related issue of professorial tenure.[79]

Perhaps of more immediate and persuasive precedent value for Western Australia, however, is the South Australian example of Sir Mark Oliphant. As Governor of South Australia and ex officio Visitor of Flinders University, he exercised his original jurisdiction when he attended a student meeting at

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75. For the interrelationship of the Visitor's and Parliamentary Commissioner's jurisdictions see: WA Parl Commissioner *The University Visitor* (presented to Aust Ombudsmen, Canberra, 26 Apr 1995); see also WA Parl Commissioner *Annual Report* (Perth, 1994) 55-56. Edith Cowan University is not within the jurisdiction of the Parliamentary Commissioner. In this regard, recommendation no 3 of the Hetherington Report (1985) has yet to be implemented.
76. *Patel v Bradford University Senate* [1978] 1 WLR 1488, 1493.
77. H Winneke *Jurisdiction of The University Visitor* (Monash Uni, 28 Mar 1980) Sir Henry Winneke was Visitor in *Ex parte De Simone* supra n 50, the first visitation in Victoria since 1884.
78. DJ Farrington *The Law of Higher Education* (London: Butterworths, 1994) 51.
79. MA Ikhariale 'The Institution of the Visitor in English and Overseas Universities: Problems of Its Use in Nigeria' (1991) 40 Int'l & Comp L Quart 699

the university in 1974 in an attempt to resolve student unrest.[80] More recently, in 1992, Debelle J reviewed the nature of the visitorial jurisdiction and stated that '[t]he original jurisdiction is to supervise the foundation. In exercise of that jurisdiction the Visitor may on his own initiative visit the foundation'.[81]

If the jurisdiction of the Visitor is limited to an appellate function and the extent of that function is illustrated and defined by past practice, then there is little to be lost by abandoning the Visitor as a mechanism for dispute resolution. Such action would also have the additional merit of allaying long standing vice-regal concerns. However, it is submitted that the Visitor's role and function is wider than suggested by the Western Australian experience to date, and that there is substantial value in preserving the office.

80. *Re Petition to Dame Roma Mitchell* (1992) 57 SASR 573, 574.
81. Ibid.