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**Judicial Accountability**

by

**Gareth Griffith**

**Background Paper No 1/98**

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**NSW PARLIAMENTARY LIBRARY RESEARCH SERVICE**

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## EXECUTIVE SUMMARY

This paper presents a review of the present system of judicial accountability operating in NSW under the *Judicial Officers Act 1986* and offers some comparative information on the relevant models of accountability in other jurisdictions. It does so against a background of what Justice Ronald Sackville has described as a ‘sea change in public and political attitudes towards the legal profession’ (page 1).

**Accountable to the law and the community:** Chief Justice Brennan has said that judges cannot be accountable to the electorate as politicians are accountable: ‘The duties of the judiciary are not owed to the electorate; they are owed to the law, which is there for the peace, order and good government of all the community’. On the other hand, the point is made that accountability is required nowadays in most areas of public life and that the judiciary should be no exception to this rule. As Justice McGarvie has acknowledged, ‘Judges like all other officials in the community must be accountable to the community’ (pages 8-9).

**Judicial independence and accountability:** A prevailing theme in the contemporary debate is whether the values of judicial independence and accountability are compatible, or whether they must be in a state of tension. Should accountability be viewed as a correlative obligation of independence? (page 10)

**Judicial independence:** The principle of judicial independence is fundamental to the rule of law and, therefore, to the liberal democratic system of government. Chief Justice Brennan has also explained that ‘The principle of judicial independence is not proclaimed in order to benefit the Judges; it is proclaimed in order to guarantee a fair and impartial hearing and an unswerving obedience to the rule of law’. Judicial independence can be defined broadly to include the institutional independence of the courts, or more narrowly to refer to judicial security of tenure. In NSW security of tenure is entrenched under Part 9 of the *Constitution Act 1902* (pages 12-13).

**Judicial accountability:** Standard hierarchical models of accountability are often said to be inapplicable to the judiciary. Nonetheless, it is argued that, under the Anglo-Australian system of law, important informal mechanisms operate to make the judiciary accountable to the community, notably: judges are obliged to hear argument on both sides; judges are obliged to conduct hearings in public; judges must give reasons for their decisions; and their judgments are subject to appeal. Some jurisdictions also have formal accountability mechanisms, usually in the form of permanent judicial commissions. The NSW Judicial Commission was established under the *Judicial Officers Act 1986*. Opinion differs as to whether such commissions detract from judicial independence (pages 14-20).

**The NSW Judicial Officers Act 1986:** The Act has generated a range of comments, some critical of the whole attempt to establish a formal mechanism of accountability, others focusing on perceived limitations in the legislation. Some questions to be asked are: is there sufficient lay participation? are the investigative and adjudicative functions separated adequately? should there be a periodic external review of decisions? (pages 25 and 48).

**The ICAC Act 1988:** Formal judicial accountability in NSW also includes the ICAC Act, under which allegations of ‘corrupt conduct’ against a judge would be investigated (page 28).

**How well does the NSW system work?** Confidentiality requirements make it hard to arrive at any hard and fast conclusion. The fact that a Conduct Division is presently hearing a ‘serious’ complaint in public for the first time suggests that the system can be effective. However, a determined sceptic may still find much to question in the system (pages 29-32).

**Formal accountability mechanisms in the USA:** Federally, the impeachment mechanism for removal is supplemented by the disciplinary methods found under the Judicial Conduct and Disability Act 1980. At the State level, it has been said that the balance between independence and accountability has been struck differently, usually in favour of accountability. To an extent the Californian Commission on Judicial Performance served as a model for the NSW Judicial Commission. Since 1994 the Californian Commission has the following courses of action available to it: *dismissal* of complaint; the issuing of an *advisory letter* to the judge concerned; *private admonishment* of the judge with a view of bringing the problem to the judge’s attention; the issuing of a *public admonishment* or *public censure* for improper judicial conduct, typically in cases where the misconduct was serious but unlikely to be repeated; *removal* of a judge following a hearing, usually where there is persistent misconduct or, in cases where the judge is no longer capable of performing judicial duties, the Commission may determine to *involuntarily retire* the judge from office, again following a hearing (pages 33-37).

Performance evaluation programs and judicial codes of conduct are also common features of the US systems of judicial accountability (pages 37-40).

**Formal accountability mechanisms in Canada:** Federally, the system operates under a self-regulatory model, based on the Canadian Judicial Council. A judge can only be removed by a joint address of the Houses of Parliament upon a recommendation by the Council. All the provincial Judicial Councils have a wider range of disciplinary powers. Also, of the provincial Councils only Nova Scotia has no lay members. Ontario has six judges and six non-judges on its Judicial Council. Moreover in Ontario a Judicial Appointments Advisory Council is part of the judicial appointments process: seven of its thirteen members are lay persons (pages 40-43).

**The Swedish Justice Ombudsman:** One of the four Parliamentary Ombudsmen supervises the courts (pages 43-47).

**Judicial appointment:** A number of comparable jurisdictions have modified their procedures for judicial appointment. For example, in Ontario candidates for judicial office are interviewed by the Judicial Appointments Advisory Committee which submits its recommendations to the Attorney General. Seven of the thirteen members of the Committee are lay persons (pages 49-52).

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## 1. INTRODUCTION

Judges and the justice system generally have excited a considerable amount of critical interest over recent years. Viewed in this light, in the context of what Justice Ronald Sackville has described as a 'sea change in public and political attitudes towards the legal profession',<sup>1</sup> the issue of judicial accountability can be seen as offering a particular perspective on the wider subject of public confidence in the courts and the justice system, in which everything from access to justice to judicial activism is discussed. However, it should be emphasised at the outset that the accountability of the judiciary to the community is also a distinctive issue, concerned as it is with constitutional and ethical matters of a particular sort, in which a proper balance must be struck between judicial independence, on one side, and judicial accountability, on the other. Indeed, a prevailing theme in the debate is whether these values of independence and accountability are compatible, or whether they must always be in a state of tension.

The purpose of this paper is not to advocate reform but, instead, to present a review of the present system of judicial accountability operating in NSW under the *Judicial Officers Act 1986*, as well as to offer some comparative information on the relevant models of accountability in other jurisdictions. It starts, however, with a note on the current debate concerning judges and the judicial system, plus a comment on the concepts of independence and accountability in this context.

## 2. JUDGES AND THE JUDICIAL SYSTEM - A NOTE ON THE CONTEMPORARY DEBATE

Almost every day in recent months there has been some mention in the media of judges under threat, the courts usurping the role of Parliament, or the judicial system in crisis. As never before, in Australia the courts are now the subject of vigorous and persistent critical scrutiny, to the extent that members of the judiciary have themselves entered the public debate in their own defence. Certainly, 1997 was a tumultuous year for the Australian judiciary, as the following summary of the main incidents suggests:

- in January, in the aftermath of the controversial decision the month before in the *Wik* case, Justice Michael Kirby, in a speech delivered to the Bar Association of India, sparked off a heated debate about the scope, nature and legitimacy of what is called judicial activism or judicial creativity. While recognising important constraints on judges, Justice Kirby is reported to have said that 'judicial activism was an accepted legal tradition, and that courts might have to step in when Parliament failed to act on urgent issues because it was too electorally conscious',<sup>2</sup> remarks which did not endear him to either the Acting Prime Minister, Mr Fischer, or the Victorian

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<sup>1</sup> R Sackville, 'The access to justice report: change and accountability in the justice system' (1994) 4 *Journal of Judicial Administration* 65 at 68.

<sup>2</sup> 'Judicial activism counters political timidity', *The Australian Financial Review*, 8 January 1997.



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Premier, Mr Kennett.<sup>3</sup>

- in March, controversy focused on allegations made in relation to Justice Yeldham and the question as to whether these had been investigated in the early 1980s by the former Chief Justice of the NSW Supreme Court, Sir Laurence Street; and, if so, what had been the result of these investigations.<sup>4</sup>
- in April, Australia's eight Chief Justices of the States and Territories issued A Declaration of Principles of Judicial Independence.<sup>5</sup> Of this, the editorial in *The Australian* commented that the difficulty with the doctrine of judicial independence 'lies in the practice...In the sometimes uncertain demarcation between judicial territory and that of the government, there will be border skirmishes'.<sup>6</sup> *The Sydney Morning Herald* commented that much of the Declaration concerned the appointment of acting judges, said to be an increasingly common practice in NSW 'where there has long been concern about its implications, notably with regard to the question of security of tenure as a requirement of judicial independence'. The report added: 'Unfortunately the declaration does not deal with other matters of concern which arise with the appointment of acting judges. One is the question of whether it is constitutionally safe for judges to take early retirement and handsome pension rights knowing that they will be asked by willing governments to do highly-paid part-time judging after retirement'.<sup>7</sup> For Richard Ackland the Declaration was a 'delicate and limited document' which failed to mention that judges jeopardise their independence from the executive in a number of ways: 'In New South Wales, a Supreme Court judge is in the final throes of conducting a Royal Commission. A judge also heads the Independent Commission Against Corruption. Both are exercising executive functions, not judicial ones'.<sup>8</sup>
- on 24 April, the former Prime Minister, Malcolm Fraser, argued that in the *Mabo* and *Wik* judgments the High Court had made law in 'matters that should have been the prerogative of Parliament' and that it had done so 'without examination of the consequences'. He was also critical of the above Declaration of Principles of Judicial Independence, saying that it failed to address issues relating to judicial appointment

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<sup>3</sup> 'The law of Justice Kirby', *The Sydney Morning Herald*, 13 January 1997.

<sup>4</sup> 'State law chief wanted action on Yeldham', *The Sydney Morning Herald*, 13 March 1997.

<sup>5</sup> This is set out at Appendix D.

<sup>6</sup> PW Young, 'Judicial independence' (1997) 71 *The Australian Law Journal* 401-403; Editorial, 'Judicial debate is correct', *The Australian*, 15 April 1997.

<sup>7</sup> Editorial, 'The judges speak out', *The Sydney Morning Herald*, 15 April 1997.

<sup>8</sup> R Ackland, 'Judges protest their independence too much', *The Australian Financial Review*, 18 April 1997.

and promotion.<sup>9</sup>

- in May, the Federal Attorney General, Daryl Williams, spoke in defence of judicial independence generally and of the High Court in particular, criticising politically motivated or personal attacks against individual judges as ‘likely to undermine public confidence in the judiciary’.<sup>10</sup> Further, Mr Williams announced an improved process of consultation before High Court appointments are made.<sup>11</sup>
- an Australian Law Reform Commission Issues Paper released in April, reviewing the adversarial system in the context of federal civil litigation, generated a public debate concerning the efficiency of the justice system generally and the role played by the judiciary in this.<sup>12</sup> *The Australian Financial Review* used the debate as an opportunity to comment that the court system ‘is run by a professionally inbred labour cartel that has a deep historical sense of its own righteousness, a strong adherence to self-serving custom and a limited sense of public accountability’.<sup>13</sup>
- in May, the NSW Police Minister, Mr Whelan, reportedly attacked the judiciary for ‘letting down’ victims of domestic violence and failing to treat offenders with sufficient severity.<sup>14</sup>
- on 18 May, the former independent MP, Mr John Hatton, is reported to have said that the NSW justice system should be the next subject of investigation by a royal commission.<sup>15</sup>
- in June, the appropriateness of non-judicial statements made by judges was discussed, notably in relation to remarks made in a speech by the Chief Justice Nicholson of the Family Court on the question of the Federal Government’s response to the Aboriginal ‘stolen generation’ inquiry.<sup>16</sup>
- in July, the recent appointment of 32 acting judges to the District Court was

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<sup>9</sup> M Fraser, ‘Judges should not complain of rough justice’, *The Australian*, 24 April 1997.

<sup>10</sup> ‘Criticism of judges unfair: Williams’, *The Australian Financial Review*, 2 May 1997.

<sup>11</sup> Editorial, ‘Appointing judges no mean task’, *The Australian*, 6 May 1997.

<sup>12</sup> Editorial, ‘Career judges’, *The Sydney Morning Herald*, 9 May 1997; ALRC, *Review of the Adversarial System of Litigation*, Issues Paper 20, April 1997.

<sup>13</sup> Editorial, ‘Dilute the judges’ cartel’, *The Australian Financial Review*, 12 May 1997.

<sup>14</sup> ‘Whelan hits judges on domestic violence’, *The Australian*, 14 May 1997.

<sup>15</sup> ‘Investigate courts next says Hatton’, *The Sun Herald*, 18 May 1997.

<sup>16</sup> Editorial, ‘Injudicious public speaking’, *The Australian*, 14 June 1997; Editorial, ‘Keep judges to judging’, *The Australian Financial Review*, 17 June 1997; HP Lee, ‘Judicious to stay out of politics’, *The Sydney Morning Herald*, 19 June 1997.

criticised by the NSW Bar Association on the ground that it posed a threat to public confidence in the independence of the judiciary. On the other hand, editorial comment in *The Sydney Morning Herald* commended the move on the basis of cost and efficiency.<sup>17</sup>

- in August, the Australian Institute of Judicial Administration launched an inquiry to ascertain the public's view of the judicial system.<sup>18</sup>
- in August, in a speech at the Asia Pacific Courts Conference, the Federal Attorney General, reportedly said that judges should refrain from commenting on political issues and warned that 'if the courts did not develop mechanisms to ensure they were accountable, the community was likely to find it difficult to understand and appreciate the importance of judicial independence'.<sup>19</sup>
- on 24 August, it was reported that a magistrate was the first NSW judicial officer to be formally investigated by the Conduct Division of the NSW Judicial Commission.<sup>20</sup>
- on 3 September a study revealing that women received smaller payouts than men in accident compensation cases resulted in some judges being branded 'Neanderthals', with the NSW Minister for Women, Ms Lo Po, stating that the study showed that changes needed to be made within the legal profession.<sup>21</sup>
- on 10 September the NSW Minister for Police, Mr Whelan, reportedly stated that magistrates and judges were too 'lenient' on child abusers.<sup>22</sup>
- on 19 September the Chief Justice of the High Court delivered an address on the 'State of the Judicature' at the 30th Australian Legal Convention in which he defended the judiciary against political and personally directed attacks, and calling on the Attorneys-General of the nation to speak on behalf of the courts.<sup>23</sup>
- on 26 September, the Federal Attorney-General expressed his belief in the ability of

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<sup>17</sup> Editorial, 'Matters of judgment', *The Sydney Morning Herald*, 4 July 1997.

<sup>18</sup> 'Their honours ask us to be the judges', *The Australian*, 21 August 1997.

<sup>19</sup> 'Stay out of politics, A-G warns bench', *The Australian*, 23 August 1997.

<sup>20</sup> 'Judges to examine conduct of magistrate', *Sunday Telegraph*, 24 August 1997. As at 19 March 1998 this matter has yet to be determined. It is presently the subject of a public hearing of a Conduct Division of the Judicial Commission.

<sup>21</sup> 'Judges attacked over sex bias study', *The Sydney Morning Herald*, 3 September 1997.

<sup>22</sup> 'Courts too soft on child abuse', *Daily Telegraph*, 10 September 1997.

<sup>23</sup> Editorial, 'In defence of judges', *The Sydney Morning Herald* 1997.

judges to defend themselves ‘without sacrificing their independence and impartiality’.<sup>24</sup>

- in October, in the Earl Page Memorial Oration, Chief Justice Gleeson of the NSW Supreme Court, while speaking for a proper understanding of the tasks facing the judiciary viewed in relation to pressures from the media and the ‘highly politicised concern about certain law and order issues, acknowledged the need for the judiciary to explain itself better to the community, as well as to listen to ‘reasonable’ public demands.’<sup>25</sup>
- on 14 October, the Hon PA Rogan MP raised the Barry Hart case<sup>26</sup> in the NSW Parliament in which he accused ‘the judiciary and the legal profession of this State of corrupting due process, of incompetence, bias and a conspiracy to deny Barry Hart natural justice’.<sup>27</sup> Mr Rogan said that ‘the appalling saga’ suffered by Barry Hart was ‘one of the reasons for the strong community disillusionment, disenchantment and at times outright anger at the perceived arrogance and out-of-touch attitude that is increasingly being displayed by the State’s and nation’s judiciary’.<sup>28</sup>
- on 31 October, responding to comments by former Chief Justice Sir Anthony Mason, the Federal Attorney General re-iterated his view that the argument that an attorney-general has an obligation to defend the judiciary is an ‘outmoded notion’. Mr Williams observed: ‘it is my strong belief that the responsibility will always remain with the judiciary to foster a culture that facilitates communication and promotes an understanding of the justice system’.<sup>29</sup>

As the above summary shows, much of the focus of this recent debate has been on the High Court, with the comment being made that ‘Since the Wik decision was handed down just over a year ago, the court has been subject to the most intense criticism since its creation in 1903’.<sup>30</sup> Be that as it may, the contemporary High Court has certainly found itself at the centre of a heightened discussion concerning the role and appointment of members of the

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<sup>24</sup> D Williams, ‘Balancing the scales of justice’, *The Australian Financial Review*, 26 September 1997.

<sup>25</sup> ‘Judges must listen to the public’, *Daily Telegraph*, 23 October 1997; ‘MPs found guilty in crime debate’, *The Sydney Morning Herald*, 23 October 1997; Editorial, ‘Conflict and distrust’, *The Sydney Morning Herald*, 24 October 1997.

<sup>26</sup> Barry Hart is a victim of the Chelmsford deep sleep therapy. The details of the case are set out in Mr Rogan’s speech: *NSWPD*, 14 October 1997, pp 727-732.

<sup>27</sup> *Ibid* at 727.

<sup>28</sup> *Ibid*.

<sup>29</sup> D Williams, ‘Stand and be counted’, *The Australian*, 31 October 1997.

<sup>30</sup> G Williams, ‘Capital error of judgment’, *The Sydney Morning Herald*, 7 January 1998.

judiciary. In particular, the appointment of Justice Kenneth Hayne and Ian Callinan QC to the High Court raised again the issue of the political nature of High Court appointments, as did the statement of Deputy Prime Minister, Mr Fischer, that it was time for ‘capital C conservatives’ to be appointed to the High Court. In response to that statement, Justice Michael Kirby reportedly told the American Bar Association that the Australian Federal Government had made it clear that judges would be chosen to serve on the High Court on ‘ideological grounds rather than merit’.<sup>31</sup> The media reports failed to mention Justice Kirby’s further reflection that ‘The Federal Attorney-General, by an unprecedented procedure of consultation, has tried to repair the impression that the political inclinations of candidates rather than their ability and independence will be the chief criterion for appointment to the nation’s highest court’.<sup>32</sup>

In defence of the judiciary, the President of the Law Council of Australia, Brett Walker SC, said that media comments focused on Justice Kirby’s ‘denunciation of mere abuse of individual judges’, but ignored his defence of the legitimate need for ‘thoughtful, temperate criticism of reasons for judgement’.<sup>33</sup> These comments, in their turn, echoed the views expressed by the Chief Justice of the High Court, Sir Gerard Brennan, in the January 1998 issue of *The Australian Law Journal* on the state of the judicature. The judicature, he said, must be: impartial; competent; it must enjoy the confidence of the public; and it must be ‘reasonably accessible to those who have a genuine need for its remedies’.<sup>34</sup> On the vexed question of public confidence in the judiciary, the Chief Justice remarked, ‘Perhaps there is no more significant issue affecting the state of the modern judicature than the issue of public confidence in the judiciary’; he went on to say that ‘some ground rules should be spelt out’<sup>35</sup> where the criticism of judges is concerned. Judges, it was explained, cannot be accountable to the electorate as politicians are accountable: ‘The duties of the judiciary are not owed to the electorate; they are owed to the law, which is there for the peace, order and good government of all the community’.<sup>36</sup> The Chief Justice was particularly unhappy with recent criticisms of decisions of the courts in the areas of sentencing offenders, as well as in constitutional and native title cases:

Postures have been adopted and declarations have been made as to what the decisions ought to have been in order to satisfy some non-legal criterion which the critic embraces. Such criticism does not reveal a valid ground for

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<sup>31</sup> ‘Judges now picked for their political bias, says Kirby’, *The Sydney Morning Herald*, 6 January 1998.

<sup>32</sup> M Kirby, ‘Attacks on Judges - A Universal Phenomenon’, *speech given at the American Bar Association Winter Leadership Meeting*, Hawaii, 5 January 1998, p 9.

<sup>33</sup> Letters, ‘Justice Kirby and the High Court’, *The Sydney Morning Herald*, 9 January 1998.

<sup>34</sup> Sir G Brennan, ‘The state of the judicature’ (1998) 72 *The Australian Law Journal* 33 at 34. The article was based on a speech given at the 30th Australian Legal Convention, Melbourne, 19 September 1997.

<sup>35</sup> *Ibid* at 39.

<sup>36</sup> *Ibid* at 40.

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attack on a court or the judge or judges who constitute it. By all means let defects in applying the judicial method be criticised - trenchantly criticised if need be - but unless the rule of law has been misapplied, criticism of a decision is destructive of public confidence in the institution on which the rule of law depends.<sup>37</sup>

To an important extent this whole debate needs to be considered in the light of the impact made by the Mason High Court, with its abandonment of legal formalism and its advocacy of a form of judicial activism which acknowledges that, at the appellate level at least, judges do have a law-making function.<sup>38</sup> Reflecting on these developments, Geoffrey Lindell, Reader in Law at the University of Melbourne, has said 'Many leading members of the Australian judiciary have acknowledged that judges make law as a result of the inevitable choices which confront them in the decision-making process'.<sup>39</sup> As Justice Ronald Sackville has stated, the fiction that judges merely discover and apply the law as though it is a 'brooding omnipresence in the sky', cannot be sustained. He contends that, with the realisation that judges exercise 'conscious policy choices', the mystique surrounding judges and the legal system is diminished and that 'As mystique declines, so public scepticism about the institution increases. It is therefore not surprising that there is a greater willingness in the community to challenge the wisdom or even the propriety of judicial decisions'.<sup>40</sup> Chief Justice Doyle of the South Australian Supreme Court has argued in a similar vein, stating that a recognition of judicial activism brings with it a call for greater accountability, along with a concern that the judiciary should be more representative of the community at large.<sup>41</sup>

Judicial method also comes under the spotlight in these circumstances. For example, Chief Justice Doyle contends that in the *Mabo* case the High Court explained why the recognition of native title was just and desirable, but not why it was for the Court, rather than Parliament, to make a decision which had such significant social, political and economic

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<sup>37</sup> Ibid at 42.

<sup>38</sup> J Doyle, 'Implications of judicial law-making', from *Courts of Final Jurisdiction: The Mason Court in Australia* edited by C Saunders, The Federation Press 1996, pp 84-98.

<sup>39</sup> G Lindell, 'Judge & Co: judicial law-making and the Mason Court' (1998) 5 *Agenda* 83 at 91. For example, the Chief Justice of the Supreme Court of South Australia, John Doyle, reflecting on the developments associated with the Mason High Court, said in 1995: 'I proceed on the basis that judicial reasoning now involves the making of choices with significant policy elements, and that such choices are probably made more often than even now is realised or acknowledged' - J Doyle, 'Implications of judicial law-making', from *Courts of Final Jurisdiction: The Mason Court in Australia* edited by C Saunders, The Federation Press 1996, p 86.

<sup>40</sup> R Sackville, 'The access to justice report: change and accountability in the justice system' (1994) 4 *Journal of Judicial Administration* 65 at 72.

<sup>41</sup> J Doyle, 'Implications of judicial law-making', from *Courts of Final Jurisdiction: The Mason Court in Australia* edited by C Saunders, The Federation Press 1996, pp 86-87.

consequences.<sup>42</sup> Further, Justice Sackville has observed that ‘there is a discernable tendency for the High Court to take comfort from the “contemporary values” of Australian society to support its law-making functions’: for Justice Sackville, this method of reasoning is often no more than a formulation by the courts of ‘policy objectives that they consider the community should preserve or adopt’.<sup>43</sup> As Sir Anthony Mason remarked, replying in a rhetorical vein to suggestions made by Chief Justice Doyle, ‘if the principles of judge-made law are crafted to reflect contemporary values, what are those values, how do the judges identify them, are the judges giving effect to their own personal values and if so shouldn’t we ascertain what they are before they are appointed?’<sup>44</sup>

The recognition of judicial activism raises many questions.<sup>45</sup> Chief Justice Brennan has explained that the judiciary is not accountable to the electorate but to the law itself. But, then, is this not a circular argument if the judges themselves are part of the law-making process? Moreover, the Chief Justice chastised those who attack the courts for reaching decisions which do not conform with some non-legal criterion dear to the critics themselves, and insisted that criticisms should be restricted to the application of judicial method. However, if it is the case that judges exercise conscious policy choices, then the application of judicial method must itself involve the use of non-legal criteria. The general point to make is that the debate concerning judicial accountability stems in part from unresolved questions about how judges do, or should, ‘make’ laws.

The matters touched upon here - the independence and impartiality of the judiciary, appointment by the executive, the representativeness of the judiciary, the nature of judicial method, judicial activism and, with it, the balance that is to be struck between the functions of the courts and the parliaments of Australia - are the among the key issues in the contemporary debate about judges and the justice system, especially as this affects the superior courts in Australia. The question of access to justice is relevant to all courts, as are the problems related to legal aid funding and the opportunities for improved case management. That such matters are of keen contemporary interest is not in doubt. For example, in February 1998 the Law Society of NSW appointed an access to justice

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<sup>42</sup> Ibid, p 93. Chief Justice Doyle was also critical of a number of other High Court judgments, including *Dietrich v The Queen* (1992) 177 CLR 292.

<sup>43</sup> R Sackville, ‘Continuity and judicial creativity - some observations’ (1997) 20 *UNSW Law Journal* 145 at 162. Justice Sackville argues against the view that the High Court, in particular, has ‘adopted a new and qualitatively different approach to judicial law-making’.

<sup>44</sup> A Mason, ‘A reply’ from *Courts of Final Jurisdiction: The Mason Court in Australia* edited by C Saunders, The Federation Press 1996, p 114. Sir Anthony Mason rejected the suggestion that the Court should engage in value surveys. For a more detailed discussion see - S Brown, ‘The courts, legal and community standards’ from *Courts in a Representative Democracy*, AIJA 1995, pp 81-99.

<sup>45</sup> In the light of such contrasting decisions as those in *Kable* (1996) 70 ALJR 814 and *Lange* (1997) 71 ALJR 818, the extent to which the present High Court has followed its predecessor in this regard is open to debate. Lindell suggests that the present Court is more cautious, but warns that ‘generalisations can be hazardous’ - G Lindell, ‘Judge & Co: judicial law-making and the Mason Court’ (1998) 5 *Agenda* 83 at 91.

taskforce, based on feedback from its 13,700 solicitor members and information drawn from more than 80,000 calls from the public in 1997. According to Mr Ron Heinrich, the Law Society's President, the taskforce will 'explore how the legal profession and the judiciary can be more accountable to the community'.<sup>46</sup> It is due to report at the end of 1998.

### 3. JUDICIAL ACCOUNTABILITY AND JUDICIAL INDEPENDENCE

**Questions and observations:** The point is made that accountability is required nowadays in most areas of public life and that the judiciary should be no exception to this rule. It is said in this regard that the public criticism of the courts is part of 'the general trend of increased public pressure on all social and governmental institutions in an open society'.<sup>47</sup> The 'pedestal theory' of the judiciary cannot survive this trend.<sup>48</sup> As Justice McGarvie acknowledged, 'Judges like all other officials in the community must be accountable to the community'.<sup>49</sup>

On the other hand, as we have seen, the point is also made that the principle of judicial independence is fundamental to the rule of law and, therefore, to the liberal democratic system of government. Moreover, judicial independence is especially important in a federal system where there is a need for an impartial umpire to resolve disputes between the different levels of government, as well as between governments and private individuals who rely on the distribution of powers.<sup>50</sup>

For all that is said, however, about the constitutional importance of the judiciary, it would seem that 'the precise position which the judges occupy in the constitutional structure of the State may not be very easily defined'.<sup>51</sup> Judges are, after all, appointed by the executive and remunerated from the public purse. Yet, they are not public servants in any ordinary sense. As Professor Winterton has explained:

In view of the ambiguity in the role of the "Crown" as both the embodiment or personification of the state and the formal Head of the executive branch

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<sup>46</sup> The Law Society of NSW, 'Access to justice taskforce appointed', *Media Release*, 2 February 1998.

<sup>47</sup> S Shetreet, 'Judicial accountability: a comparative analysis of the models and recent trends' (1986) 2 *International Legal Practitioner* 38 at 39.

<sup>48</sup> V Morabito, 'The Judicial Officers Act 1986 (NSW): a dangerous precedent or a model to be followed' (1993) 16 *UNSW Law Journal* 481 at 491. This is described by Morabito as holding that 'it is the essence of the ritualistic aura of the judges that they must be placed in a position where they are apart from all mankind, and their behaviour outside the range of scrutiny or criticism'.

<sup>49</sup> *The Accountability of the Australian Judiciary: Procedures for Dealing With Complaints Concerning Judicial Officers*, The Australian Institute of Judicial Administration, 1989, p 15.

<sup>50</sup> *Beauregard v Canada* (1986) 30 DLR (4th) 481 at 493 (per Chief Justice Dickson).

<sup>51</sup> Z Cowen and DP Derham, 'The constitutional position of the judges' (1956) 29 *The Australian Law Journal* 705 at 712.



of government, it seems dangerously confusing to call judges “Crown servants”. They are undoubtedly servants of the public, but really *sui generis* from a legal point of view and, politically speaking, a separate, co-equal branch of government.<sup>52</sup>

A number of questions follow from these observations:

- what is the appropriate relationship between accountability and independence in this context?
- what is meant by judicial independence and what purpose does it serve?
- what is meant by judicial accountability and what form can and should judicial accountability take?
- what informal and formal mechanisms of judicial accountability operate at present?
- how effective are these informal and formal mechanisms of judicial accountability?
- what proposals for reform have been suggested?

**The relationship between judicial accountability and independence:** Are these mutually incompatible values, destined always to be in a state of tension? Alternatively, should accountability be viewed as a correlative obligation of independence, the one being the necessary complement of the other?

It may be that there is no one clear, categorical answer. For some commentators there must be a tension here; whereas for others this is not necessarily the case. For example, the 1995 Friedland Report on the Canadian judiciary acknowledged that tension must exist, in that accountability could have an ‘inhibiting’ or ‘chilling’ effect on the judges.<sup>53</sup> For Justice RD Nicholson of the Supreme Court of Western Australia, on the other hand, the two values of independence and accountability ‘should be perceived as complementary rather than antithetical,’<sup>54</sup> a view supported by Morabito who writes that an appropriate system of accountability will ‘enhance judicial independence’ by raising ‘general community satisfaction’ with the judiciary.<sup>55</sup>

In terms of what might constitute an appropriate system of accountability, writing on behalf

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<sup>52</sup> G Winterton, *Judicial Remuneration in Australia*, The Australian Institute of Judicial Administration 1995, p 10. Chief Justice Gleeson of the NSW Supreme Court has said in this regard: ‘All judges, it is hoped, regard themselves as servants of the public. They are , however, not public servants. They are part of an arm of government which is separate from the executive arm, to which public servants belong’ - ‘Who do judges think they are?’ (1998) 22 *Criminal Law Journal* 10 at 11.

<sup>53</sup> ML Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, *The Canadian Judicial Council*, May 1995, p 129. (Henceforth, the Friedland Report).

<sup>54</sup> RD Nicholson, ‘Judicial independence and accountability: can they co-exist?’ (1993) 67 *The Australian Law Journal* 404 at 414.

<sup>55</sup> V Morabito, ‘The Judicial Officers Act 1986 (NSW): a dangerous precedent or a model to be followed’ (1993) 16 *UNSW Law Journal* 481 at 490.

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of the judiciary Justice McGarvie has expressed the view that: ‘Because of the unique social function of judges the forms of accountability should be such as will in the long run tend to enhance rather than detract from their independence and impartiality and the trust and respect felt by the community for them’.<sup>56</sup> Writing from another perspective, David Pannick, a noted English commentator in this field, has stated:

The value of the principle of judicial independence is that it protects the judge from dismissal or other sanctions imposed by the Government or by others who disapprove of the contents of his decisions. But judicial independence was not designed as, and should not be allowed to become, a shield for judicial misbehaviour or incompetence or a barrier to examination of complaints about injudicious conduct on apolitical criteria...That a man who has an arguable case that a judge has acted corruptly or maliciously to his detriment should have no cause of action against the judge is quite indefensible.<sup>57</sup>

**Judicial independence - meaning and purpose:** A distinction is often made between the independence of the judiciary as an institution, on one side, and of individual judges, on the other.<sup>58</sup> Individual independence is said to have two elements: ‘substantive independence’, which means that in the exercise of their official duties judges are ‘subject to no authority but the law’, and ‘personal independence’, which refers to security of tenure.<sup>59</sup>

The doctrine of the independence of the judiciary can be traced back to the *Act of Settlement 1701* which established the rule that superior court judges should be appointed during good behaviour, but that they could be removed by the Crown on an address of both Houses of Parliament. Before then the judges held their commissions ‘during the King’s pleasure’ and, as Quick and Garran explain, ‘under the Stuart kings the Bench was systematically packed with partizans of the Crown’.<sup>60</sup> In effect, the Act of 1701 guaranteed security of tenure, dependent on good behaviour, for superior court judges and, with it, the independence of

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<sup>56</sup> *The Accountability of the Australian Judiciary: Procedures for Dealing With Complaints Concerning Judicial Officers*, The Australian Institute of Judicial Administration, 1989, p 15. For similar comments see - ML Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, *The Canadian Judicial Council*, May 1995, p 129. (Henceforth, the Friedland Report); S Shetreet, ‘Judicial accountability: a comparative analysis of the models and recent trends’ (1986) 2 *International Legal Practitioner* 38 at 39.

<sup>57</sup> D Pannick, *Judges*, Oxford University Press 1987, p 99.

<sup>58</sup> For a discussion of the inter-relationship between the two see - L King, ‘The separation of powers’ from *Courts in a Representative Democracy*, ALJA 1995, pp 12-13. Justice King writes that the ‘independence of the judge in his courtroom is dependent ultimately upon the collective independence of the judiciary as a whole’.

<sup>59</sup> S Shetreet and J Deschenes eds, *Judicial Independence: The Contemporary Debate*, Martinus Nijhoff Publishers 1985, p 598.

<sup>60</sup> J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, p 728.

the judiciary from executive interference. In this way, the Act established the foundations of a system of justice based on fair and impartial trials. Indeed, it is said that ‘Judicial independence is a means to an end rather than an end in itself’.<sup>61</sup> The end at issue is to ensure judicial impartiality and to prevent irrelevant considerations from contaminating the judicial process.<sup>62</sup> As Chief Justice Gleeson of the NSW Supreme Court has observed:

Judicial independence is an element of the constitutional system of checks and balances, and is the primary source of assurance of judicial impartiality.<sup>63</sup>

This re-enforces Chief Justice Brennan’s observation that ‘Impartiality is the supreme judicial virtue’.<sup>64</sup> Chief Justice Brennan has also explained that ‘The principle of judicial independence is not proclaimed in order to benefit the Judges; it is proclaimed in order to guarantee a fair and impartial hearing and an unswerving obedience to the rule of law’.<sup>65</sup> This, in turn, re-stated the view expressed by the former Chief Justice, Sir Anthony Mason, that ‘Judicial independence is a privilege of, and a protection for, the people. It is a fundamental element in our democracy, all the more so now that the citizen’s rights against the state are of greater value than his or her rights against another citizen’.<sup>66</sup>

Stephen Parker, Professor of Law at Griffith University, has said that societies such as ours have ‘a complex system of interlocking conventions, laws and administrative arrangements for protecting judicial independence’. He enumerated the system’s key elements as follows:

- appointment of judges on merit;
- appointment to a fixed retirement age so that there is no incentive to curry favour for renewal;
- protection from dismissal other than for good cause, so that the law, not popular or political sentiment, drives a court’s decisions;
- protection of terms and conditions while in office, so that judges and magistrates can do justice under the law without fear of personal retaliation by governments;
- immunity of decision-makers from civil actions for things said or done in a case, so that unsatisfied litigants are confined to the appeal process laid down by law;
- an ethic of independence among judges and magistrates so that old loyalties are cast

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<sup>61</sup> SB Burbank, ‘The past and present of judicial independence’ (November -December 1996) 80 *Judicature* 117.

<sup>62</sup> G Winterton, *Judicial Remuneration in Australia*, The Australian Institute of Judicial Administration 1995, p 14; V Morabito, ‘The Judicial Officers Act 1986 (NSW); a dangerous precedent or a model to be followed’ (1993) 16 *UNSW Law Journal* 481 at 490.

<sup>63</sup> M Gleeson, ‘Who do judges think they are?’ (1998) 22 *Criminal Law Journal* 10.

<sup>64</sup> Sir G Brennan, ‘The state of the judicature’ (1998) 72 *The Australian Law Journal* 33 at 34.

<sup>65</sup> ‘Independence of the judiciary’ (1997) 15 *Australian Bar Review* 175

<sup>66</sup> Sir A Mason, ‘The independence of the Bench; the independence of the Bar and the Bar’s role in the Judicial System’ (1993) 10 *Australian Bar Review* 1 at 3.

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- off on assuming office;
  - separation of the judicial power from other governmental powers so that legal cases are decided only by an independent judiciary;
  - separation of the courts as institutions so that decisions such as who should hear a case are made within the court.
  - institutionalised respect in the form of political conventions about the manner and tone of criticism of the judiciary.<sup>67</sup>

From the above, it is clear that the concept of judicial independence has a number of aspects and that it can be defined in variously broad or narrow terms. A broad definition would encompass the institutional autonomy of the courts,<sup>68</sup> which would include making the courts responsible for their own administration and the expenditure of funds appropriated to them by Parliament, as is the case in relation the Australian federal courts.<sup>69</sup> In the *Valente* case the Supreme Court of Canada found that, at the institutional level, the ‘essential conditions of judicial independence’ include financial security as well as ‘judicial control over the administrative decisions that *bear directly and immediately* on the exercise of the judicial function’ (emphasis added).<sup>70</sup> In other words, institutional independence means that judges have a right to control matters directly affecting adjudication, such as assignment of judges, sittings of the court and court lists.

From the standpoint of a narrower definition, the third essential condition of judicial independence identified in *Valente* was ‘security of tenure’. In fact, in NSW security of judicial tenure is now entrenched under Part 9 of the *Constitution Act 1902*. Under Part 9 no holder of a judicial office can be removed from office except ‘by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity’<sup>71</sup>. Also, section 53 (3) of Part 9 provides that ‘Legislation may lay down additional procedures and requirements to be complied with before a judicial officer may be removed from office’. Specifically, it was said by the Premier, Mr Fahey, in the Second Reading Speech, that it was intended that Part 9 would operate in conjunction with the provisions of the *Judicial Officers Act 1986*.<sup>72</sup> Under Part

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<sup>67</sup> S Parker, ‘The defence of the judiciary’, *The Australian*, 30 December 1997.

<sup>68</sup> Sir A Mason, ‘Judicial independence and the separation of powers’ (1990) 13 *UNSW Law Journal* 173 at 174.

<sup>69</sup> Sir A Mason, ‘The independence of the Bench; the independence of the Bar and the Bar’s role in the Judicial System’ (1993) 10 *Australian Bar Review* 1 at 2. Judicial independence is said to have been ‘reinforced’ in Australia by the granting of such autonomy to the federal courts. See also - Sir A Mason, ‘Judicial independence and the separation of powers’ (1990) 13 *UNSW Law Journal* 173 at 176, where is noted that, unlike the United States, the federal courts in Australia do not negotiate directly with the Legislature (in this country federal court budgets are determined by the Department of Finance).

<sup>70</sup> *Valente v R* [1985] 2 SCR 673 at 712; G Winterton, *Judicial Remuneration in Australia*, p 15

<sup>71</sup> Section 53(2).

<sup>72</sup> NSWPD, 17 November 1992, pp 9004-9005.

9 the term ‘judicial officer’ is defined widely to include magistrates, as well as judges of the State Supreme Court, the Industrial Court or a member of the Industrial Relations Commission in Court Session, the Land and Environment Court, the District Court and the Compensation Court.<sup>73</sup>

**Judicial accountability - meaning and purpose:** Accountability is a much-used but rarely defined word.<sup>74</sup> At its core, accountability means that a person or class of persons is answerable for his or her actions and decisions to some clearly identified individual or body. ‘To talk about accountability’, it is said, ‘is to define who can call for an account, and who owes a duty of explanation’.<sup>75</sup> Its bottom line is that someone in an organisation can accept the blame or praise for a decision or action.

To a large extent the call for greater judicial accountability can be seen in the context of a broader debate, in which those who exercise the enormous and increasing power of the State are called upon to be accountable to the community they serve.<sup>76</sup> With this goal in mind, the advancements in administrative law in recent years, including the creation of the office of the Ombudsman and the introduction of freedom of information legislation, were designed to ensure the accountability of the executive branch of government. Also, during the 1980s, in Australia as elsewhere, accountability became something of a vogue term in the managerial revolution which swept through the public sector. Codes of conduct, performance indicators, new reporting requirements and the like were introduced to supplement the traditional lines of accountability leading up through the public service to the Minister, Parliament and its committees and thence to the electorate.<sup>77</sup> In the United Kingdom the Citizen’s Charter program was launched in 1991, for the purpose of raising public service standards and making them more responsive to consumer needs, a development which influenced the Greiner Government’s customer Guarantee of Service initiative in the following year.<sup>78</sup> In this way a new pluralism has entered the field of public service accountability, which also includes accountability to such reviewing officers as the

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<sup>73</sup> Section 53(1). Note that until 1985 magistrates in NSW were officers in the public service. That situation changed with the *Local Courts Act 1982*, which became effective on 1 January 1985. The Act placed magistrates in a position similar to that of judges of the District Court who were subject to removal by the Governor. Thus, removal by Parliament applied only to judges of the State Supreme Court.

<sup>74</sup> For example, it is often used interchangeably with ‘responsibility’ - R Mulgan, ‘The processes of public accountability’ (1997) 56 *Australian Journal of Public Administration* 25 at 26.

<sup>75</sup> P Day and R Klein, *Accountabilities: Five Public Services*, Tavistock 1987, p 5.

<sup>76</sup> I Thynne and J Goldring, *Accountability and Control: Government Officials and the Exercise of Power*, Law Book Company 1987.

<sup>77</sup> J Wanna et al, *Public Sector Management in Australia*, Macmillan 1992, p 214. ‘The emphasis’, it is said, ‘is on greater discretion, greater devolution of authority, simplified budgetary processes, more autonomy and more distinct capacity to manage staff and resources’ (p 210).

<sup>78</sup> M Laffin and M Painter eds, *Reform and Reversal*, Macmillan 1995, p 15.

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Auditor-General and the Ombudsman, as well as the courts.<sup>79</sup>

The philosophical purpose of accountability, therefore, is to ensure that power must be responsive and responsible to the community, just as its pragmatic purpose is to ensure that institutional and individual functions are carried out in an efficient way.

The power of the courts in the modern State, particularly in a federal system operating under a written constitution, is very considerable. The same philosophical argument that relates to the executive government should apply, therefore, to the judiciary which, despite all that is said about independence, cannot be seen to operate free of any control. The question, obviously, is what form this control should take and what is it meant to achieve? Chief Justice Gleeson has said that, in pragmatic terms, ‘the ends to be served by accountability in judicial decision making concern the quality of individual decisions, and community acceptance of the outcome of the judicial process’.<sup>80</sup> But, again, how is this to be done?

What is called ‘line accountability’ represents the classical hierarchical model in which supervisors exercise the power to discipline those who report to them and to reward compliance.<sup>81</sup> Applied to the public service this would require officials ‘be accountable for the performance of their official tasks and, therefore, be subject to an institution’s or persons oversight, direction, or request that they provide information on their action to justify it before a review authority’.<sup>82</sup> However, it is generally agreed that such line accountability, along with the hierarchical relationships it implies, would not be appropriate in relation to the judiciary where it would make obvious inroads into judicial independence.<sup>83</sup> Indeed, the general difficulty with applying the concept of accountability in this context is that it usually involves a relationship of inequality between two parties: ‘Those who are accountable are in some sense subordinate to those who oversee their activities and to whom they must give account’.<sup>84</sup>

Thus, while accountability may in some sense be a correlative obligation of independence,

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<sup>79</sup> R Mulgan, ‘The processes of public accountability’ (1997) 56 *Australian Journal of Public Administration* 24.

<sup>80</sup> M Gleeson, ‘Judicial accountability’ (1995) 2 *The Judicial Review* 117 at 120.

<sup>81</sup> I Greene, ‘Judicial accountability in Canada’ from *Accountability for Criminal Justice: Selected Essays* edited by PC Stenning, University of Toronto Press 1995, p 361.

<sup>82</sup> I Thynne and J Goldring, *Accountability and Control*, p 8.

<sup>83</sup> I Greene, ‘Judicial accountability in Canada’ from *Accountability for Criminal Justice: Selected Essays* edited by PC Stenning, University of Toronto Press 1995, p 361. Greene notes that judicial independence would be violated if, for example, ‘certain judges were awarded salary increments for demonstrated ability, or were demoted for having too many decisions overturned on appeal, or were promoted or demoted as a result of their administrative record’.

<sup>84</sup> R Mulgan, ‘The processes of accountability’ (1997) 56 *Australian Journal of Public Administration* 25 at 27.

the form the one takes must be compatible with the requirements of the other. Where the accountability of the judiciary as an institution is concerned, for example, it may be relatively straightforward to assert that, bearing in mind budgetary constraints, if the judges are to be in charge of such things as court lists, then they should also be responsible and accountable for the efficient organisation of these administrative matters. More difficult, perhaps, is the relationship between independence and accountability where this affects the individual judge, that is, in terms of incapacity or misconduct in and out of court. How is accountability consistent with independence in this context, however these terms are defined? It may be that a more flexible view of accountability is needed here, one based perhaps on the observation made by Chief Justice Gleeson that 'Accountability...can range from a rigid subjection of one person to the control of another, to a degree of responsiveness on the part of one person to the interests or wishes of another'.<sup>85</sup>

Reference is often made to the models of judicial accountability formulated by Mauro Cappelletti, Professor of Law at the University of Florence, namely: the *repressive model* in which the judiciary is subservient to the political branches of the State; the *separateness model* in which the judiciary is completely autonomous from government and society; and the '*responsive or consumer-oriented model*', which combines a reasonable degree of accountability without subordinating the judiciary to outside forces. It is this third model that Cappelletti says reflects the democratic ideal 'that power should never go uncontrolled and that even the controlling power should not be irresponsible, that is, itself uncontrolled'.<sup>86</sup> It is this last model which Cappelletti favours, in the context of which different forms of judicial accountability can be discussed. One of these forms, for Cappelletti, is social accountability, by which he means those professional pressures exerted upon judges by their peers and others in the legal profession. He talks, too, of legal and political forms of accountability, with the latter referring to such things as the control the legislature, the executive and the press can have over the judiciary in different systems. The third form, legal accountability, can be divided into two categories, informal and formal.

**Judicial accountability - informal mechanisms:** Responding to claims that the judiciary should be accountable to the community, it is often said that judges are already accountable to the community in a number of formal and informal ways. One argument is that, under the Anglo-Australian system of law, the following informal mechanisms operate to make the judiciary accountable:

- judges are obliged to hear argument and evidence on both sides;
- judges are obliged to conduct hearings in public;
- judges must give reasons for their decisions; and

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<sup>85</sup> M Gleeson, 'Judicial accountability' (1995) 2 *The Judicial Review* 117 at 118.

<sup>86</sup> M Cappelletti. 'Who watches the watchmen? a comparative study of judicial responsibility' (1983) 31 *The American Journal of Comparative Law* 1 at 60.

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- their judgments are subject to appeal.<sup>87</sup>

These informal mechanisms alone, it could be argued, make the judiciary more accountable than many other areas of professional life where decisions are made behind closed doors, with all the opportunities this presents for concealment even in the freedom of information age. All the same, the informal mechanisms mentioned above have been the subject of critical examination. Some Canadian commentators, for example, have said that there are problems with seeing appellate review as a mechanism promoting accountability. One comment is that ‘appellate review divorces a judge’s performance from his or her person. It is exclusively a judge’s ruling that is under review. Whatever may be the result of this review, it will generally have no consequence for the judge himself or herself, with the possible exception of a slight hurt to his or her pride’.<sup>88</sup> More importantly, as Professor John Goldring has pointed out, ‘While the system of appeals provides, in theory, for the correction of wrong decisions by judicial officers, in practice it may not always provide a practical solution’.<sup>89</sup> Among other things, this is because appeals are limited to ‘questions of law’ and are based therefore on narrow legalistic grounds and not on grounds of fairness. Besides which, legal aid may not be available. Also, in many civil and criminal cases there is no trial as such and therefore the right to appeal is either heavily circumscribed or non-existent: Goldring notes that, where in a criminal case the accused pleads guilty, the role of the court is limited to the imposition of a sentence and often the accused person may not be aware that there is a right of appeal in these circumstances.<sup>90</sup>

That the work of the courts is usually done in public so that the quality of the justice administered on the community’s behalf may be fairly judged is true. On the other hand, the public’s actual understanding of what is said and done in the courts may be very limited and, it might be argued, without some kind of shared language and understanding the notion of accountability to the community may be little more than a shibboleth. ‘Truth in sentencing’ legislation and the like may assist in this respect, but it may be that the gap between legal discourse and its outcomes, on one side, and public comprehension of these, on the other, remains as wide as ever. The case for incomprehension has been put by Evan Whitton who

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<sup>87</sup> M Gleeson, ‘Judicial accountability’ (1995) 2 *The Judicial Review* 117 at 122-123. According to Chief Justice Gleeson, ‘Such requirements promote good decision making and the acceptability of the outcome of the judicial process, and they are consistent with the idea that democratic institutions should conduct their affairs in a responsible manner’.

<sup>88</sup> AD Doob and JP Brodner, ‘Achieving accountability in sentencing’ from *Accountability for Criminal Justice: Selected Essays* edited by PC Stenning, University of Toronto Press 1995, p 381.

<sup>89</sup> J Goldring, ‘The accountability of judges’ (1987) 59 *The Australian Quarterly* 145 at 153.

<sup>90</sup> *Ibid* at 152-153.



has described the adversarial system as 'trial by voodoo'.<sup>91</sup> It is argued that, by the esoteric complexity of its operation, the legal system has found a way of hiding in a public place, using a veil of jargon and procedure for concealment. In turn, this view of the law has led to calls for the overhauling of the adversarial system, which to some appears to have more to do with the manipulation of obscure rules of procedure and evidence than with any rational investigation into the truth of the matter at hand. 'All professions', said George Bernard Shaw, 'are conspiracies against the laity': none more formidably so, it is said in some quarters, than the legal profession.

Whether judicial accountability should be linked to a general overhaul of the legal system is too wide a question to be addressed in this paper. It is enough to say that in many jurisdictions, including NSW, legislators have identified a need to supplement the informal mechanisms of accountability with more formal systems to handle complaints against the judiciary.

**Judicial accountability - formal mechanisms:** The various systems of formal accountability which are in place in Canada and the United States are discussed in later sections of this paper, as is the Swedish Justice Ombudsman. For the moment it is enough to say that these systems offer interesting points of comparison with our own.

Traditionally, in those political systems based on the Westminster system the ultimate form of accountability is the removal of a judge by the Governor or Governor-General upon an address of both Houses of Parliament. Professor James Crawford has explained that 'Colonial judges were at first appointed at pleasure, and were liable to removal by the Crown, or to what was termed 'amoval' by the Governor in Council under the provisions of Burke's Act 1782'.<sup>92</sup> It was the establishment of responsible government in the second half of the nineteenth century which brought with it security of tenure, similar to that provided to English judges. In NSW the security of tenure of judges of the superior courts was consolidated in this form in 1900 under section 10 of the *Supreme Court and Circuit Courts Act*. Only in 1985 was this security of tenure and its attendant mechanism of accountability extended to magistrates and District Court judges in this State.

In the other Australian jurisdictions, removal upon an address of both Houses of Parliament still remains the key formal mechanism of accountability. In an important sense that is also true of NSW, although here the Judicial Commission also plays a significant role in the complaints system where judicial officers are concerned, combining this with its functions in the field of judicial education. The operation of the NSW Judicial Commission is

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<sup>91</sup> E Whitton, *Trial by Voodoo: Why the Law Defeats Justice and Democracy*, Random House 1994. The argument is developed in - E Whitton, *The Cartel: Lawyers and Their Nine Magic Tricks*, Herwick Pty Ltd 1998.

<sup>92</sup> J Crawford, *Australian Courts of Law*, 3rd ed, Oxford University Press 1993, p 63. Crawford adds that amoval under Burke's Act remained a possibility, at least until 1964. The Act gave statutory power to the "Governor and Council" of a colony to remove from office for misbehaviour a person holding office by Letters Patent, with the removed officer having the right to appeal to the Privy Council.

explained and evaluated in the next section of this paper. The main questions must be whether such formal mechanisms are required and, if so, are they effective or are they merely expensive forms of window dressing? It should be said at this stage that, in addition, allegations of ‘corrupt conduct’ on the part of NSW judicial officers would be brought to the attention of the Independent Commission Against Corruption, which operates as a further string to the bow of formal judicial accountability in this State.

**Accountability, independence and judicial commissions:** Opinion differs as to whether permanent judicial commissions detract from judicial independence. Most judges expressing a view on the issue tend to find against such permanent bodies,<sup>93</sup> on the basis that they compromise ‘important constitutional values’,<sup>94</sup> or because problems concerning judicial conduct in most jurisdictions have been overstated.<sup>95</sup> Some other commentators, however, argue that the dangers posed by properly constituted permanent commissions to the independence of the judiciary should not be exaggerated. ‘In any event’, writes David Pannick, ‘the dangers of judicial pusillanimity are outweighed by the potential advantages of subjecting judicial conduct to the assessment of the outside observer’. Pannick continues:

The layman’s willingness to accept the result of his trial, civil or criminal, is a pre-condition for the survival of the rule of law. Such acceptance depends as much on the diligence, politeness and fairness he believes he has received from the judge as it does on the legal quality of the decision made by the judge in his case. It therefore seems perverse to give one or more rights of appeal against the legal decision in the case, but no means by which the litigant’s dissatisfaction with judicial conduct can be publicly ventilated and considered. In an age when people are less willing than ever before to accept uncritically the exercise of public powers, the reputation of the judiciary can only benefit from the creation of a Judicial Performance Commission.<sup>96</sup>

**Judicial accountability - is there a problem?** In the NSW context the issue is not whether formal mechanisms should be introduced, but whether, in the light of such reforms, further

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<sup>93</sup> For example - JB Thomas, *Judicial Ethics in Australia*, Second Edition, LBC Information Services 1997, pp 258-259; MH McLelland, ‘Disciplining Australian Judges’ (1990) 64 *Australian Law Journal* 388, where it is noted that the judges of the Supreme Court of NSW publicly opposed both the *Judicial Officers Act 1986* (NSW) and relevant aspects of the *Independent Commission Against Corruption Act 1988* (NSW); RE McGarvie, ‘The operation of the new proposals in Australia’ from *The Accountability of the Australian Judiciary: Procedures for Dealing with Complaints Concerning Judicial Officers*, AIJA 1989, pp 13-38.

<sup>94</sup> MH McLelland, ‘Disciplining Australian Judges’ (1990) 64 *Australian Law Journal* 388 at 401.

<sup>95</sup> RE McGarvie, ‘The foundations of judicial independence in a modern democracy’ (1991) 1 *Journal of Judicial Administration* 3 at 37. Justice McGarvie notes that most District Court judges and magistrates in NSW supported the 1986 reforms which gave them security of tenure for the first time.

<sup>96</sup> D Pannick, *Judges*, Oxford University Press 1987, pp 99-100.

problems of judicial accountability can be identified. This leads to two avenues of inquiry: first, concerning the adequacy of the formal mechanisms that are already in place; secondly, concerning the more general question of public confidence in the judiciary.

This last question is notoriously hard to answer in any meaningful way. On one side, statements are often made about the decline in public confidence in the judiciary, especially in the immediate aftermath of a controversial decisions or, as in NSW in the 1980s, where a series of controversial incidents involving judicial officers raises doubts as to the personal integrity of some members of the judiciary. On the other side, judges sometimes fall back in their decisions on the requirement for public confidence in the courts. A good example is the *Kable* case where, as Elizabeth Handsley has explained, the decision to declare the *NSW Community Protection Act 1994* invalid was informed by four assumptions: (a) the judiciary needs public confidence in order to fulfil its functions effectively; (b) the judiciary currently enjoys public confidence; (c) the public perceives the judiciary as independent of the political branches of government; and (d) there is a causal connection between (b) and (c), that is, to the effect that ‘public confidence in the judiciary is caused by the perception of its judicial independence’.<sup>97</sup> All these assumptions, Handsley argues, are open to challenge, yet none of these were anticipated or addressed in the majority judgments. For example, with respect to the first assumption, Handsley suggests the alternative theory that:

the judiciary’s effectiveness might be grounded in the success of the legal profession in mystifying the law, so that lay-people believe they cannot possibly ever understand the law and so they do not have the tools or the raw materials to construct an informed critique of the work of the judiciary (and so they might as well not try). On such a theory, confidence in the judiciary does not derive from perceptions of its impartiality and integrity but rather (perceived) lack of capacity on the part of observers to reach an understanding of the nature of judicial work.<sup>98</sup>

In any event, the difficulties involved in producing sound empirical evidence on the question of public confidence in the judiciary must be formidable. The challenge is to ascertain the public’s view of a system which, in all probability, most people have no settled thoughts upon or dealings with, seeking only to avoid it. For many, the judiciary must be something like a barely visible arm of the State, glimpsed only very occasionally and then in fancy dress. As noted, in August 1997 the Australian Institute of Judicial Administration launched an inquiry to ascertain the public’s view of the judicial system and it will be interesting to see both the results that flow from this and the methodology upon which those results are based.

The first avenue of inquiry, concerning the adequacy of the formal mechanisms that are already in place, can be considered in relation to the NSW Judicial Commission.

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<sup>97</sup> E Handsley, ‘Do hard laws make bad cases? - the High Court’s decision in *Kable v Director of Public Prosecutions (NSW)*’ (1997) 25 *Federal Law Review* 171 at 175.

<sup>98</sup> *Ibid* at 175-176.

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#### 4. JUDICIAL ACCOUNTABILITY IN NSW - *THE JUDICIAL OFFICERS ACT 1986*

**Background:** The NSW Judicial Commission was established under the *Judicial Officers Act 1986*. The Act was introduced amidst considerable controversy and it has since been described as a ‘revolutionary’ piece of legislation, in that it established a formalised system of judicial accountability, the first of its kind in Australia.<sup>99</sup> The direct model for the system adopted here was the Californian Commission on Judicial Performance, although at the same time it needs to be recognised that important differences exist between the two

The background to the *Judicial Officers Act 1986* was one of public controversy based on a number of inquiries into the conduct of judges.<sup>100</sup> Responding to these, the then Attorney-General, Hon. TW Sheahan MP, said ‘it is the soundness and integrity of the judicial system itself that the community is uneasy about. Whether the community concern is blameless or not is now immaterial. Reassurance must be provided and justice

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<sup>99</sup> V Morabito, ‘The Judicial Officers Act 1986 (NSW): a dangerous precedent or a model to be followed’ (1993) 16 *UNSW Law Journal* 481 at 482.

<sup>100</sup> Briefly, during 1985 and 1986 Justice Murphy of the High Court was acquitted on two charges of attempting to pervert the course of justice. Similarly, Justice Foord of the NSW District Court was acquitted on two charges of attempting to pervert the course of justice in October 1985. On the other hand, in March 1985, a former NSW Chief Stipendiary Magistrate, Murray Farquhar, was convicted of attempting to pervert the course of justice and served a prison sentence. There was, in addition, the controversy in NSW surrounding the decision not to ‘reappoint’ five magistrates, based apparently on allegations of ‘unfitness’, when the Court of Petty Sessions was abolished and the magistrates’ courts were reconstituted as the Local Court. In 1987 the NSW Court of Appeal held that the decision was voided by procedural unfairness. Fuelling the debate on judicial accountability still further, in September 1986 Professor Vinson released his report dealing with the sentencing of drug cases in the District Court between 1980 and 1982, which purported to find that a particular judge had exercised leniency in dealing with clients of a particular solicitor. It was revealed later that Justice Foord was the judge in question. More generally, the Vinson report concluded that the system of justice in NSW is ‘neither systematic nor just’.- V Mullen and G Griffith, *The Independence of the Judiciary: commentary on the proposal to amend the NSW Constitution*, NSW Parliamentary Library, Briefing Paper No 9/1995 .

must not only be done but be seen to be done.<sup>101</sup> In fact, the proposal to establish a Judicial Commission added to the controversy. The judges of the Supreme Court were unanimous in their opposition to it in its original form, under which a ‘Conduct Division’ of the proposed Judicial Commission would have had the power to recommend to the Governor that judicial officers be dismissed without recourse to Parliament.<sup>102</sup> Following unprecedented protests from members of the judiciary, including the Chief Justice of the day, Sir Laurence Street, Parliament’s role in the dismissal process was re-instated before the Bill itself was introduced. Thus, section 41 of the *Judicial Officers Act 1986*, as originally enacted, provided:

If a report of the Conduct Division presented to the Governor sets out the Division’s opinion that a matter could justify parliamentary consideration of the removal of a judicial officer from public office, the Governor may remove the officer from office on the address of both Houses of Parliament.<sup>103</sup>

As noted, judicial tenure is now entrenched under Part 9 of the *NSW Constitution Act 1902*, notably section 53(2) of that Act which provides that a holder of judicial office can only be removed ‘by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity’. However, that section operates in conjunction with the relevant provisions of the *Judicial Officers Act 1986*, so that section 41 of the *Judicial Officers Act* now reads:

- (1) A judicial officer may not be removed from office in the absence of a report of the Conduct Division to the Governor under this Act that sets out the Division's opinion that the matters referred to in the report could justify parliamentary consideration of the removal of the judicial officer on the ground of proved misbehaviour or incapacity.
- (2) The provisions of this section are additional to those of section 53 of the Constitution Act 1902.

**An overview of the *Judicial Officers Act 1986*:** The key features of the Act, as this relates to the Judicial Commission’s complaints jurisdiction, are as follows:

- The Judicial Commission has 8 members, 6 official members drawn from the judiciary and 2 appointed members, nominated by the Attorney General. One appointed member is to be a legal practitioner, the other a person of ‘high standing

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<sup>101</sup> NSWPD, 24 September 1986, p 3874.

<sup>102</sup> For a blow by blow account of the controversy see - P Clark, ‘How government and judiciary came into conflict’, *The Sydney Morning Herald*, 19 September 1986.

<sup>103</sup> Section 41 was amended in 1992 when Part 9 was inserted into the *NSW Constitution Act 1902*. In particular, section 41 is now expressed to be in addition to section 53 of the Constitution Act. Section 53(2) of that Act provides: ‘The holder of a judicial office can be removed from the office by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity’.

in the community’.<sup>104</sup>

- ‘Any person’ has the right to complain to the Commission ‘about a matter that concerns or may concern the ability or behaviour of a judicial officer’.<sup>105</sup>
- The Attorney General may also refer complaints to the Commission.<sup>106</sup>
- Following a preliminary examination, which is to be conducted in private, the Judicial Commission may: (a) summarily dismiss a complaint; (b) classify the complaint as minor; (c) classify the complaint as serious.<sup>107</sup>
- *Serious complaints* are those which could justify parliamentary consideration of the removal from office of a judicial officer.<sup>108</sup> *Minor complaints* refer to all those other complaints which have not been summarily dismissed.<sup>109</sup> Summary dismissal can occur where, for instance, a complaint is deemed ‘trivial’ or ‘vexatious’, or where ‘the person complained about is no longer a judicial officer’.<sup>110</sup>
- A minor complaint can be referred to either the Conduct Division or, if it found that the complaint does not warrant such attention, to the appropriate head of jurisdiction.<sup>111</sup>
- All serious complaints must be referred to the Conduct Division.
- The Conduct Division comprises a panel of three judicial officers, or two judicial officers and a retired judicial officer. It is not necessary to be a member of the Judicial Commission in order to sit on the Conduct Division panel. Conversely, Commission members are not precluded from sitting on the Conduct Division.<sup>112</sup>
- As far as practicable, *investigation* of a complaint is to be conducted in private.<sup>113</sup> Likewise, when the Conduct Division decides to hold a *hearing* of a minor

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<sup>104</sup> Section 5. The official members are : the Chief Justice of the Supreme Court; the President of the Industrial Relations Commission; the Chief Judge of the Land and Environment Court; the Chief Judge of the District Court; the Chief Judge of the Compensation Court; and the Chief Magistrate.

<sup>105</sup> Section 15 (1).

<sup>106</sup> Section 16.

<sup>107</sup> Section 19.

<sup>108</sup> Section 30 (1).

<sup>109</sup> Section 30 (2).

<sup>110</sup> Section 20.

<sup>111</sup> Section 21.

<sup>112</sup> Section 22 (1) and (4).

<sup>113</sup> Section 23(3).

complaint, it is to be conducted privately.<sup>114</sup> Serious complaints, on the other hand, are heard in public (unless considerations of confidentiality require otherwise).<sup>115</sup> A public hearing is currently underway, the first time such a hearing has been conducted under the legislation.

- The Conduct Division may reclassify a complaint.<sup>116</sup>
- The Conduct Division must not pursue a complaint if the judicial officer ‘ceases to hold office for any reason’.<sup>117</sup>
- Where it is of the opinion that a judge may be physically or mentally unfit to hold office, the Conduct Division can request a judicial officer who is the subject of a serious complaint to undergo a medical examination.<sup>118</sup>
- If the Conduct Division finds that a minor complaint is substantiated, it can ‘either so inform the judicial officer complained about or decide that no action need be taken’.<sup>119</sup> Either way, it must report to the Judicial Commission setting out the action it has taken.<sup>120</sup>
- If the Conduct Division decides that a serious complaint is substantiated, it may recommend parliamentary consideration of the removal of the judicial officer.<sup>121</sup> It must in any event report its conclusions to the Governor.<sup>122</sup>

**Comments on the Judicial Officers Act 1986:** The Act has generated a range of comments, some critical of the whole attempt to establish such a formal mechanism of accountability. For example, Mr Justice McLelland of the NSW Supreme Court has said that ‘the mere establishment of an official body with the express function of receiving complaints against judges as a first step in an official investigation renders judges vulnerable to a form of harassment and pressure of an unacceptable and dangerous kind, from which their constitutional position and the public interest require that they should be protected’. He also commented on other matters, including the issues of the waste of judicial time involved and the anomalous position that is created where a complaint against a judge of the Supreme Court is dealt with by a ‘Judicial Commission consisting predominantly of judicial officers

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<sup>114</sup> Section 24(3).

<sup>115</sup> Section 24 (2).

<sup>116</sup> Section 30 (3).

<sup>117</sup> Section 32 (1).

<sup>118</sup> Section 34.

<sup>119</sup> Section 27.

<sup>120</sup> Section 29 (7).

<sup>121</sup> Section 28.

<sup>122</sup> Section 29 (1).

of lower rank than himself'. His general argument, expressed first at the Australian Legal Convention in 1989, was that establishing legislative procedures for receiving, investigating and adjudicating complaints against judges presented the greatest threat to the independence of the judiciary since colonial times.<sup>123</sup>

Others have been less categorical in their criticisms but have still maintained that the Act has gone too far in certain directions. Professor James Crawford has said, for instance, that, while the Act does strengthen the independence of judges of inferior courts and magistrates, it goes 'too far' in allowing a Conduct Division to investigate minor complaints.<sup>124</sup> Likewise, Justice JB Thomas of the Supreme Court of Queensland has remarked that 'judges should not be rendered liable to a disciplinary system for other than serious matters of misconduct which could arguably justify their removal'.<sup>125</sup> Professor Shetreet has argued that a major problem with the Act concerns the granting of disciplinary powers to the administrative heads of the judiciary collectively and individually: 'The result is the introduction of hierarchical patterns into the judiciary, which in turn have the result of chilling judicial independence'.<sup>126</sup>

Others have been critical of certain perceived limitations in the legislation. Comments of this nature can be confined to the following areas:

- ***a self-regulatory model:*** to a very large extent the Act establishes a self-regulatory model of accountability, with only marginal involvement by lay persons. Of the 8 members of the Judicial Commission, 2 are not judges and one does not have to be a lawyer, although there is no reason why the person appointed as having 'high standing in the community' should not be legally qualified. The three-member Conduct Division, on the other hand, has no lay participation. This is despite the fact that the Attorney General would have preferred to have included two 'consumer representatives' on the Conduct Division, following the Californian example: the proposal failed, however, because the Chief Justice did not 'like' it.<sup>127</sup> Morabito has said on this issue that 'including lay people on the Conduct Division would enhance the credibility of the mechanism and would inject a different perspective and outlook into the proceedings'.<sup>128</sup> The point has been made about self-regulatory models in general that, as with police internal review mechanisms, they rarely produce

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<sup>123</sup> MH McLelland, "Disciplining Australian Judges" (1990) 64 *ALJ* 388.

<sup>124</sup> J Crawford, *Australian Courts of Law*, 3rd ed, Oxford University Press 1993, p 67.

<sup>125</sup> JB Thomas, *Judicial Ethics in Australia*, Second Edition, LBC Information Services 1997, p 259. Justice Thomas favours a case by case approach to accountability and not a permanent bureaucracy such as the Judicial Commission (pp 269-270).

<sup>126</sup> S Shetreet (1987), *op cit*, p 11.

<sup>127</sup> *NSWPD*, 2 October 1986, pp 4477-4478.

<sup>128</sup> V Morabito, 'The Judicial Officers Act 1986 (NSW): a dangerous precedent or a model to be followed' (1993) 16 *UNSW Law Journal* 481 at 501.



sanctions against misconduct by an official and, in the words of two Canadian commentators, can act ‘as a shield against external criticism rather than as a defender of public interest’.<sup>129</sup>

- ***membership of the Conduct Division:*** The Act does not define the members of the Conduct Division in any clear way. Are we to assume that, *prima facie*, they will usually be members of the Commission itself? If so, what are the implications for the same persons being involved at every stage of examination and recommendation? To put it another way, does the Act contemplate the possibility that the same persons might be involved at both the initial investigation stage as well as in the later adjudication of a complaint? The 1997 Annual Report of the Judicial Commission states that a serious complaint was referred to the Conduct Division in July 1997, but it says nothing about the membership of the Conduct Division.<sup>130</sup> Alternatively, if the Conduct Division is to be comprised, in part or in full, of people from outside the Commission, as contemplated under section 22 (4), then who are they to be and by what criteria are they chosen? Must they, for example, be or have been higher up in the judicial hierarchy than the person against whom the complaint is made? Morabito comments, ‘it may be difficult to find serving judges, of at least the same “rank” as the judge against whom the complaint was lodged, who would be willing to sit on the Conduct Division. Recruiting judges of lower rank than the judge complained about is not an entirely satisfactory alternative while utilising judges from other States may not be feasible’.<sup>131</sup>
- ***what is judicial misconduct?*** The Act refers to ‘the ability or behaviour of a judicial officer’, whereas the Constitution Act refers to ‘proved misbehaviour or incapacity’. Professor Goldring comments in this regard that, ‘While the full Judicial Commission is given the power to provide guidelines to the Conduct Division, Parliament itself has not spelt out any criteria for what might constitute incapacity or proven misbehaviour such as would justify the removal of a judicial officer from office’.<sup>132</sup> One question posed by Professor Goldring is whether the Act should not have specified the grounds for the removal of a judge, this being the ‘area of greatest possible controversy’: further, it leaves ‘it open to the Commission to make, between complaints about judicial officers, a division between complaints which are “serious” and those which are not, without any specificity’.<sup>133</sup> The other side of the coin is that any attempt to be specific about such matters may be problematic in

<sup>129</sup> AN Doob and JP Brodeur, ‘Achieving accountability in sentencing’ from *Accountability for Criminal Justice* edited by PC Stenning, University of Toronto Press 1995, p 381.

<sup>130</sup> Judicial Commission of NSW, *Annual Report 1997*, p 22.

<sup>131</sup> V Morabito, ‘The Judicial Officers Act 1986 (NSW): a dangerous precedent or a model to be followed’ (1993) 16 *UNSW Law Journal* 481 at 501.

<sup>132</sup> J Goldring, ‘The accountability of judges’ (1987) 59 *The Australian Quarterly* 145 at 160. Note that Goldring’s comments refer to the Bill and not the Act itself.

<sup>133</sup> *Ibid.*

itself.

- ***a code of conduct for judges:*** following on from this, as the Attorney General informed the NSW Parliament in 1986, the government's original intention was to give the Judicial Commission the power to 'establish a code of conduct for judges', a proposal which was dropped in the face of judicial opposition.<sup>134</sup> Taking up this issue, Morabito has claimed that this is an unsatisfactory situation where a formal system for the removal of judges is in operation.<sup>135</sup> John Basten QC agrees, stating that the Commission should, subject to appropriate parliamentary consent, 'establish a code of conduct which should specify the standards expected of judicial officers and also the consequences which might obtain in the case of contravention'.<sup>136</sup>
- ***minor complaints:*** Section 22(2) of the Act seems to assume that minor complaints, if not sufficiently serious to warrant the attention of the Conduct Division, are best dealt with by the chief judicial officer of the court in which the offender sits. However, the Act does not specify what, if anything, is to be done by the relevant head of jurisdiction. As John Basten QC has said, the Act is 'curiously unhelpful' in this regard, doing 'little in principle to assist with complaints of consistent rudeness in court, consistent lateness on the bench or other similar misconduct, minor in terms of each infraction, but rising, possibly, to a level of moderate severity when part of a pattern of dereliction'.<sup>137</sup> Morabito has also commented at length on the deficiencies of the Act where minor complaints are concerned. He notes, for example, that the rationale behind the provision referring minor complaints to the Conduct Division is hard to detect, noting: 'The Conduct Division is asked to consider a minor complaint and, if it reaches the conclusion that the complaint has been substantiated, the only action which it can take is to inform the judge concerned. What is the point of requiring the Commission and the Conduct Division to each carry out an examination of a minor complaint, if at the end of the process, no corrective action can be taken in relation to substantiated instances of inappropriate conduct'.<sup>138</sup>
- ***resignation or retirement from the Bench:*** the Conduct Division must not pursue a complaint if the judicial officer 'ceases to hold office for any reason'. Justice Thomas has confirmed that, of the 4 complaints which had been classified as 'serious' between 1986 and 1996, 'in each case the judicial officer in question resigned after the conduct division had commenced its inquiry but before finality had

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<sup>134</sup> NSWPD, 2 October 1986, p 4478.

<sup>135</sup> V Morabito, 'The Judicial Officers Act 1986 (NSW): a dangerous precedent or a model to be followed' (1993) 16 *UNSW Law Journal* 481 at 500.

<sup>136</sup> J Basten. 'Should judges have performance standards?' (1995) *Bar News* 9 at 10.

<sup>137</sup> *Ibid* at 10.

<sup>138</sup> V Morabito, 'The Judicial Officers Act 1986 (NSW): a dangerous precedent or a model to be followed' (1993) 16 *UNSW Law Journal* 481 at 495.

been reached'.<sup>139</sup> The question that arises is whether this arrangement is always in the public interest, especially where the issue may involve actual misconduct and not some of kind of mental or physical incapacity. Where misconduct is at issue could this provision be seen as something of a 'get out of gaol free card' both for the individual judge concerned and the judicial system itself, with the former retaining his or her reputation and superannuation benefits and the latter avoiding bad publicity? Another viewpoint may be that the public interest is indeed served under an arrangement of this kind, where the dignity of any judge suffering some form of incapacity, for example illness or infirmity, is effectively removed from office. Note, too, that the present public hearings into a 'serious' complaint involving a magistrate show that resignation or retirement are not always the preferred option.

- **rights of judges:** conversely, the biggest deficiency of the Act, according to Morabito, is its failure to set out more fully the rights of judges against whom complaints are lodged and the restrictions on the powers of the Judicial Commission and the Conduct Division. The fact that the Commission and the Conduct Division operate largely out of public scrutiny require that all 'necessary safeguards be expressly and clearly set out in the Act'.<sup>140</sup>

**The Independent Commission Against Corruption Act 1988 (NSW):** It needs to be emphasised that the system of formal judicial accountability in NSW also includes the ICAC Act, under which allegations of 'corrupt conduct' against a judge would be investigated. The definition of the term 'public officials' is expressed to include any judicial officer.<sup>141</sup> Chief Justice Gleeson has said that, in practice, there are arrangements under which the ICAC is kept 'regularly informed' of complaints to the Judicial Commission 'which are of such a nature that they ought to be brought to its attention'.<sup>142</sup>

Chief Justice Gleeson also made the point that the Judicial Commission is not a forum for the administration of criminal justice and that allegations of criminal conduct would be dealt with in the normal way by the prosecuting authorities.<sup>143</sup>

**How well does the NSW system work?** It's hard to say, mainly because, as Justice Thomas has remarked, the Judicial Commission system has a protection 'that preserves the

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<sup>139</sup> JB Thomas, *Judicial Ethics in Australia*, Second Edition, LBC Information Services 1997, p 211.

<sup>140</sup> V Morabito, 'The Judicial Officers Act 1986 (NSW): a dangerous precedent or a model to be followed' (1993) 16 *UNSW Law Journal* 481 at 504.

<sup>141</sup> *ICAC Act 1988 (NSW)*, section 3 - reference is to any judicial officer 'whether exercising judicial, ministerial or other functions'.

<sup>142</sup> M Gleeson, 'Judicial Accountability' (1995) 2 *The Judicial Review* 117 at 129.

<sup>143</sup> *Ibid.*

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confidentiality of complaints'.<sup>144</sup> A limited picture, however, emerges from the Annual Reports which show that, between 1986 and June 1997 the Commission had received 494 complaints. Of these, 19 were classified as minor and 4 were classified as serious. In total, 7 complaints were referred to the Conduct Division, of which 4 were classified as serious, and 3 as minor. In July 1997 another 'serious' complaint was referred to the Conduct Division, making a total of 8 since 1986. As noted, of the 4 complaints which had been classified as 'serious' between 1986 and 1996, 'in each case the judicial officer in question resigned after the conduct division had commenced its inquiry but before finality had been reached'.<sup>145</sup> Most complaints, however, were summarily dismissed.

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<sup>144</sup> JB Thomas, *Judicial Ethics in Australia*, Second Edition, p 209.

<sup>145</sup> *Ibid*, p 211.

**Table 1 - LEVEL OF COMPLAINTS, 1986/87 to 1996/97** <sup>146</sup>

Year	Number of Complaints	Withdrawn	Summarily Dismissed	Classified Minor	Classified Serious	Conduct Division References
1986/87	26	0	2	0	0	Nil
1987/88	29	4	46	0	0	Nil
1988/89	34	0	27	2	0	2
1989/90	23	2	19	0	1	1
1990/91	24	0	18	3	1	1
1991/92	24	1	24	4	0	Nil
1992/93	20	0	18	1	1	1
1993/94	31	0	23	1	1	1
1994/95	45	0	43	3	0	Nil
1995/96	100	2	73	3	0	1
1996/97	138	5	116	2	0	0

Perhaps the most interesting feature of the system is the recent rise in the number of complaints. Thus, between 1986 and 1994/1995 the number of complaints grew from a modest 26 in the first year to 45 in the last. However, in 1995/1996 the number suddenly escalated to 100; then in 1996/1997 there was a total of 138 complaints. One view of this is that the level of complaints is still very modest, bearing in mind the volume of cases dealt with by the many judicial officers in this State.<sup>147</sup> On the other hand, the Judicial Commission itself acknowledged the increase was 'very significant', although it also noted that most complaints were still summarily dismissed.<sup>148</sup> Seeking some sort of explanation, Justice Thomas has observed:

It is curious that the number of complaints, which remained fairly steady between 1987 and 1995, substantially increased in 1996. The only reason I have heard suggested for this is that members of the profession have now become more familiar with the system and are more frequently taking pressure off themselves by advising disgruntled litigants of their right to

<sup>146</sup> This is an updated version of a Table presented by Justice Thomas (Ibid) at page 211.

<sup>147</sup> In 1994, for example, Chief Justice Gleeson, reported that there were 273 judicial officers in NSW and that they dealt with around 300,000 cases - M Gleeson, 'Judicial Accountability' from *Courts in a Representative Democracy*, AIJA 1995, p 173.

<sup>148</sup> NSW Judicial Commission, *Annual Report 1995-1996*, p 32.

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bring a complaint against the judge.<sup>149</sup>

Whether that is the only available explanation is a moot point. It may be that, as public scrutiny of the courts increases, disgruntled consumers are less intimidated by the legal system and therefore more inclined to use the formal complaints mechanism. Is the increase in complaints a sign of the system's success, or is it evidence of a potentially alarming new trend? In any event, it is interesting to note the Judicial Commission's latest commentary on the pattern in the nature and scope of complaints:

As in previous years, allegations of bias, failure to give a fair hearing, discourtesy, and allegations that an unsuccessful party to litigation was not given a proper opportunity to put his or her case, constituted the most common cause of complaint. When such complaints are made, the record of the proceedings, which often includes a tape recording, is examined, and where appropriate the judicial officer concerned is asked for a comment or an explanation.

Many complaints amount, in essence, to a complaint that a judicial officer has made a wrong decision. Frequently, complaints of this kind are made in apparent substitution for appeals to a higher court. Where a party to litigation is aggrieved by an unfavourable decision, but for one reason or another does not wish to appeal, a personal complaint against the decision-maker, alleging bias or incompetence is sometimes made. Such complaints are dealt with on their merits, but the Commission is not an appellate tribunal with a function of correcting allegedly erroneous decisions, and there is an important difference between making a wrong or supposedly wrong decision and engaging in judicial misconduct.

There were seven complaints alleging discrimination of some kind such as sexual or racial discrimination.

The great majority of complaints related to conduct on the bench, but there were a small number of complaints concerning extra-judicial conduct, or conduct in an office other than that of judge or magistrate. There was one complaint alleging that a judge had improperly used his office for personal advantage.

There were several complaints of delay in the delivery of reserved judgments.

The most striking feature of the complaints this year was the high proportion arising out of applications for apprehended violence orders. Proceedings of that kind usually involve emotional stress. Frequently, one party is not

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<sup>149</sup>

JB Thomas, *Judicial Ethics in Australia*, Second Edition, LBC Information Services 1997, p 213.

legally represented. Sometimes both parties are unrepresented. Magistrates who deal with such applications are obliged to behave in an impartial manner. This, it appears, is sometimes construed as a failure to show appropriate concern for the plight of one of the parties. For whatever reason, this particular form of litigation is by far the most productive of complaints to the Commission. To put the matter into perspective, however, it should be observed that there were about 50,000 such applications made, and they gave rise to 38 complaints.<sup>150</sup>

**General comments:** It is probably fair to say that the available evidence does not point to a hard and fast conclusion as to how well the NSW system of judicial accountability works in practice. A sceptic could perhaps find much to question in it and several possible criticisms of the *Judicial Officers Act 1986* have been noted. Alternatively, the fact that a Conduct Division is presently hearing a 'serious' complaint in public for the first time may be looked upon as one measure of the system's effectiveness. Indeed, a champion of the judiciary would point out that higher levels of accountability already exist in NSW than in any other Australian jurisdiction and may suggest that, with the sudden increase in complaints in mind, a self-perpetuating system which encourages complaints will be 'destructive of the self-confidence of judges and of their ability to act fearlessly'.<sup>151</sup> It is certainly the case that those commentators who are themselves judges place the NSW system of accountability in the 'enough is enough' or even 'more than enough' categories; whereas commentators from outside the judiciary sometimes come down on the side of constructive reform.

Either way, it will be instructive to compare the formal accountability mechanism which operates in NSW with those found in other selected jurisdictions.

## 5. FORMAL SYSTEMS OF JUDICIAL ACCOUNTABILITY: A COMPARATIVE PERSPECTIVE

**A sign of the times:** In 1980 Professor Anderson wrote of 'a worldwide trend toward subjecting judges to scrutiny to improve judicial conduct and performance'.<sup>152</sup> If anything that trend has intensified since that time and the following discussion presents a comparative analysis of the developments in the United States, Canada and Sweden.

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<sup>150</sup> NSW Judicial Commission, *Annual Report 1996-1997*, p 20. The criteria adopted by the Commission to summarily dismiss complaints are set out at Appendix A.

<sup>151</sup> JB Thomas, *Judicial Ethics in Australia*, Second Edition, LBC information Services 1997, p 258.

<sup>152</sup> S Anderson, 'Judicial accountability: Scandinavia, California and the USA' (1980) 28 *The American Journal of Comparative Law* 393.

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**The United States - the federal system:**<sup>153</sup> A distinction needs to be made between the State and Federal levels in the US context. First, similar to the Australian system, US federal judges enjoy tenure subject only to impeachment and removal, with Article II of the US Constitution providing the same process for the removal of judges as for the removal of the President. Under Article I, the House of Representatives determines that impeachment is appropriate and then acts as prosecutor, while it is the Senate that tries the impeachment.

However, this impeachment mechanism for removal is supplemented by the disciplinary mechanisms found under the Judicial Conduct and Disability Act of 1980. This established a self-regulatory model for the US federal judiciary (other than the Supreme Court) to control judicial misconduct.<sup>154</sup> The Act permits any person to file a complaint alleging that a federal judge 'has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts...or is unable to discharge all the duties of office by reason of mental or physical disability'.<sup>155</sup> Further, in 1990 the Act was amended to allow the chief judge of one of the 13 circuits to 'identify a complaint' on his or her own initiative, without requiring the formal filing of a complaint.

The screening of complaints is undertaken by the Chief Judge of the circuit, at which stage around 95% of cases are dismissed, mainly because the complaint is frivolous and/or related to the merits of the case (apparently a common factor in all formal accountability systems).<sup>156</sup> If the Chief Judge finds that there is a case to answer, which cannot be dealt with by informal means, then a special committee must be appointed to investigate the complaint and a file a written report with the circuit judicial council containing its finding and recommendations. It seems these special committees are *ad hoc* in nature and comprise the Chief Judge and an equal number of circuit and district court judges. A review mechanism is also available, that is, where a judge is unhappy with the corrective action taken by the special committee, or where a complaint is not referred to such a committee. In either case a petition can be made to the Circuit Judicial Council for review.<sup>157</sup>

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<sup>153</sup> This account is based largely on the Friedland Report, pp 116-123.

<sup>154</sup> Note that the US Supreme Court is not subject to the 1980 Act or to the Code of Conduct for US judges.

<sup>155</sup> This has been interpreted widely to include forms of non-official misconduct, such as the use of office to obtain special treatment for friends - JB Thomas, *Judicial Ethics in Australia*, Second Edition, p 246.

<sup>156</sup> JN Barr and TE Willing, 'Decentralized self-regulation, accountability, and judicial independence under the Federal Judicial Conduct and Disability Act 1980' (1993) 142 *University of Pennsylvania Law Review* 25 at 34. In a major empirical review of the legislation it is said that the majority of complaints are 'frivolous' and 'often directly related to the merits of underlying litigation that may itself be frivolous'. It is added, 'Attorneys' complaints resulted in corrective actions four and one-half times more frequently than would be expected based on their proportion of filings. Attorneys were also more likely than non-attorneys to succeed in having a special committee appointed to investigate a complaint' (at 45).

<sup>157</sup> *Ibid* at 88-92. The study found only two petitions for review which were granted by the Judicial Council.



In keeping with the view that the 1980 Act is ‘remedial legislation, designed primarily to correct aberrant behaviour, not to punish judges’, it gives the Chief Judge the authority to deal with problems informally.<sup>158</sup> Formal sanctions, however, can only be ordered by the Judicial Council following the report of the relevant special committee. The powers of the Circuit Judicial Council do not extend to the removal of a judge from office. Instead:

It may ‘request’ that a judge retire, and may order that the judge be assigned no further cases for a time. It may order a private or public censure or reprimand, and it may take ‘other appropriate action not including removal’. Really serious cases are reported to Congress, and the ultimate remedy of removal remains in the form of impeachment.<sup>159</sup>

One comment made in the Canadian Friedland Report concerning the US federal system was that there was an inadequate separation of ‘the investigation of the complaint from the adjudication of the complaint’. Under US federal procedures the Chief Judge vets the complaints and selects and chairs any special hearing committee that is set up. Petitions for review are heard by the circuit council, a body which the Chief Judge chairs in all but these cases. For Friedland, ‘this gives the chief judge too much power or at least the appearance of too much power, over the proceedings’.<sup>160</sup>

The National Commission on the discipline and removal of federal judges, established in 1990 due to concerns that the impeachment process was taking up too much of Congress’ time, concluded in its 1993 report that the system was working well and should, with some reform, be continued. For example, the National Commission recommended that the orders of a Chief Judge dismissing a complaint, plus any accompanying memorandum, should be made available to public scrutiny. Adoption of any of the State models of judicial accountability was considered but rejected as ‘neither necessary nor desirable’ by the National Commission.<sup>161</sup>

**The United States - the State models of judicial accountability:** At the State level it must be emphasised at the outset that significant differences exist between these systems and our own, thus making comparison difficult. One obvious difference is that in many US States judges are appointed by popular election,<sup>162</sup> a factor which alters the whole context of the

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<sup>158</sup> The Friedland Report commended this informal aspect of the US federal system (p 122).

<sup>159</sup> JB Thomas, *Judicial Ethics in Australia*, Second Edition, p 246.

<sup>160</sup> The Friedland Report, May 1995, p 1313.

<sup>161</sup> *Ibid*, pp 122-123.

<sup>162</sup> For example see Article VI, Section 16 of the Californian State Constitution under which judges are elected usually for defined terms, six years in the case of judges of superior courts. However, the Governor has the power to fill certain vacancies by appointment, subject to confirmation by the Commission on Judicial Appointments. For a general account of the different methods used to appoint or elect judges in the US and the historical background to these see - M Cominsky and PC Patterson, *The Judiciary Selection, Compensation, Ethics and Discipline*, Quorum Books 1987, Chapter 2.

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debate concerning accountability. Indeed, it can be said that the whole balance between independence and accountability has been struck differently in the State systems, usually in favour of accountability at the expense of independence. Justice Thomas has remarked in this regard that ‘the American problems arise from a different system of judicature, appointment, tradition and practice’.<sup>163</sup>

Nevertheless, it is the case that the Californian model of judicial accountability was influential in the establishment of the NSW Judicial Commission and that, whatever the points of contrast and dissimilarity, handled carefully the experience of the US State systems may still be instructive, acting either as a warning or a guide.

California was the first State to introduce a formal accountability mechanism in 1960 and, while this model has undergone significant changes since that time, it has served as the basis for the introduction of similar Commissions of Judicial Performance in all the other States. A major difference between the State and Federal systems in the US is that in all the State systems there is significant lawyer and lay participation in the process. Before 1994 the Californian model had five judges on a nine member commission, plus two lawyers appointed by the State Bar and two lay members appointed by the Governor. Similar arrangements were in place in Michigan and Pennsylvania. However, as the Friedland Report explains, in many other States judges were in a minority on such commissions, including Washington (three out of eleven members), Illinois (two out of nine), New York (four out of eleven), and Ohio (seven out of twenty eight).<sup>164</sup> Since 1994 this is also the case in California where of the eleven members, only three are judges: these are appointed by the Supreme Court; a further two members are from the State Bar and are appointed by the Governor; but now there are six lay members, with the Governor, the Senate Rules Committee and the Speaker of the Assembly appointing two of these lay members each. The lay participants are described as ‘6 citizens who are not judges, retired judges, or members of the State Bar of California’.<sup>165</sup>

This reform was introduced by Proposition 190 in 1994. In addition, the Proposition:

- transferred authority to remove or discipline judges from the Californian Supreme Court to the Commission on Judicial Performance;
- provided for public disciplinary proceedings against judges and former judges and specified the circumstances warranting their removal, retirement, suspension, admonishment, or censure;
- specified the authority of the Commission on Judicial Performance to discipline former judges;

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<sup>163</sup> JB Thomas, *Judicial Ethics in Australia*, Second Edition, p 252.

<sup>164</sup> The Friedland Report, May 1995, p 126. Note that seventeen of the Ohio Commissioners were lawyers.

<sup>165</sup> Article VI, Section 8 of the Californian State Constitution.

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- provided immunities to persons employed by or making statements to the Commission; and
  - specified review processes for Commission determinations and required the State Supreme Court to issue a Code of Judicial Ethics.

Proponents of these reforms claimed that the Californian system had fallen behind those in other States, especially as regards lay participation and the transparency of the discipline procedures. It was said, for instance, that the Commission for Judicial Performance had only held one public hearing in the last six years. It was said, too, that the changes would stop ‘judges from escaping discipline by retiring or resigning with charges of misconduct pending against them’.<sup>166</sup>

Opponents of the reforms, on the other hand, pointed out that the ‘public member majority’ would in reality be a majority of people with close ties to the Governor, the Assembly Speaker and the State Senate leadership, thus resulting in a more politicised Commission. The point was also made that, by adopting Proposition 190 the people of California had rejected the recommendation of the American Bar Association, based on a five-year study, for model Commissions consisting of equal numbers of citizens, judges and lawyers appointed by the Governor, the State Supreme Court and the State Bar respectively.<sup>167</sup>

According to the Californian Commission on Judicial Performance 1996 Annual Report, a complaint about a judge is first analysed by the Commission’s staff, after which the Commission itself meets to decide what action is to be taken. In increasing order of severity, the courses of action available to the Commission are: *dismissal* of complaint; the issuing of an *advisory letter* to the judge concerned; *private admonishment* of the judge with a view of bringing the problem to the judge’s attention; the issuing of a *public admonishment* or *public censure* for improper judicial conduct, typically in cases where the misconduct was serious but unlikely to be repeated; *removal* of a judge following a hearing, usually where there is persistent misconduct or, in cases where the judge is no longer capable of performing judicial duties, the Commission may determine to *involuntarily retire* the judge from office, again following a hearing. A summary of action taken by the Commission in 1996 is set out at Appendix B.

The Californian Commission and its equivalents tend to receive a large number of complaints, which has led one Australian commentator to suggest that such bodies have turned into expensive and self-perpetuating bureaucracies which ‘do not seem capable of clearing up the problems with which they were created to deal’.<sup>168</sup> As always, however, alternative explanations and perspectives are also available. Justice Thomas presents the following statistical breakdown of complaints for selected States:

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<sup>166</sup> [Http://ca94.election.digital.com/e/prop/190/for.htm](http://ca94.election.digital.com/e/prop/190/for.htm)

<sup>167</sup> [Http://ca94.election.digital.com/e/prop/190/against.htm](http://ca94.election.digital.com/e/prop/190/against.htm)

<sup>168</sup> JB Thomas, *Judicial Ethics in Australia*, Second Edition, p 252.

**Table 2 DATA FOR SELECTED STATES, 1994/95**

	Complaints Received	Complaints Dismissed without Investigation	Complaints Dismissed after Investigation but without Formal Adjudication	Informal Action before Formal Charge	Judge Vacated Office before Formal Adjudication	Case Dismissed after the Formal Hearing	Private Censure	Public Censure	Judge Removed
California	1,320	622	265	41	3	0	6	3	0
Illinois*	166	51	115	22	n/av	2	n/appl	0	0
Michigan	624	10	469	12	1	1	7	0	0
New York	1,438	1,230	98	32	19	0	n/appl	14	1
Ohio	687	n/av	n/av	0	0	1	0	0	0
Pennsylvania	328	0	383	0	0	0	n/a	0	1
Washington	262	n/appl	n/av	n/appl	0	0	n/appl	10	1
	4,825			107	23	4	13	27	3

\* 1992 figures for Illinois (1995 figures unavailable)

**The United States and Canada - performance evaluation programs:** Another feature of the accountability process found in several of the US States is the use of performance evaluations for the judiciary. These were discussed at some length in the 1995 Canadian Friedland Report which explained that they were first introduced in Alaska in the mid-1970s. In the US performance evaluation is designed to serve one of two purposes, that is, either to assist in the judicial re-election process or to improve judicial performance. The Alaskan model is linked to the election process, but the Friedland Report presents the New Jersey and Connecticut programs as models which are designed to improve judicial performance and may therefore 'offer guidance to Canadian jurisdictions'.<sup>169</sup> Of the New Jersey program, which started on a pilot basis in 1979, the Friedland Report states that it:

relies primarily on questionnaires filled in by lawyers who have had full trials or have had a high volume of other proceedings before the judge. A Judicial Performance Commission, consisting of six retired judges, guides judges in assimilating the results of their evaluations. Since 1990, videotaping court proceedings has been part of the process. A communications expert analyses the judges' verbal and nonverbal behaviour, including the judge's control in interactions with people in court and the judge's style in posing questions, gathering facts, and considering information.<sup>170</sup>

<sup>169</sup> The Friedland Report, May 1995, p 159.

<sup>170</sup> Ibid, pp 159-160.

The Friedland Report adds that in Connecticut jurors are surveyed in addition and that both the process and its outcomes seem to be viewed by the judiciary in a favourable light.<sup>171</sup>

The introduction of such a performance evaluation program had been contemplated in various Canadian Provinces, including Ontario, Manitoba and Nova Scotia.<sup>172</sup> To date, it seems that only Nova Scotia has introduced a Judicial Development Pilot Project,<sup>173</sup> where it was designed to promote the quality of justice in that Province. The pilot project had the following features:

- judicial performance was evaluated through a lawyers' questionnaire and an individual judge's parallel self-assessment;
- the assessment was based on general experience with the judge and was not designed to be case specific;
- the lawyers' questionnaire requested assessments of legal ability, impartiality, judicial management skills, disposition practices and comportment;
- the participation of judges in the pilot project was on a voluntary basis;
- the information process assured the confidentiality of both judges and lawyers; and
- senior or recently retired judges would served as a 'mentor' to the participating judges.<sup>174</sup>

The final report on the pilot project found that 'Both participating judges and lawyers strongly suggest that some form of judicial performance appraisal become a regular feature of the Nova Scotia judicial system'.<sup>175</sup> For example, 31 of the 34 participating judges favoured some ongoing program within a three to five year cycle.<sup>176</sup>

**The United States and Canada - Codes of Judicial Conduct:** Justice Thomas commented in 1997: 'All US jurisdictions, state and federal, now have codes of judicial conduct. In Canada, only British Columbia and Quebec have them. In Australia there is none, though the Queensland magistrates have an unofficial short code which they adopted at a meeting'.<sup>177</sup>

In the US the first such code, called 'Canons of Judicial Ethics', was produced by the American Bar Association in 1924. The latest ABA Model Code of Judicial Conduct was

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<sup>171</sup> Ibid.

<sup>172</sup> Ibid, pp 161-163.

<sup>173</sup> Letter to the author from G Salsbury, Executive Assistant to the Chief Justice of Nova Scotia, 23 February 1998.

<sup>174</sup> DH Poel, *The Nova Scotia Judicial Development Project: A Final Report and Evaluation*, August 1997, p v.

<sup>175</sup> Ibid, p 26.

<sup>176</sup> Ibid, p 23.

<sup>177</sup> JB Thomas, *Judicial Ethics in Australia*, Second Edition, p 238 and pp 4-6 for a discussion on the desirability of such codes.

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passed in 1990 and it has been adopted federally and by most States, sometimes with modification. Some of these codes place greater emphasis on ‘providing guidance’ to judges and nominees for judicial office, whereas others stress that they offer ‘a structure for regulating conduct through disciplinary agencies’. The codes deal with both judicial and extra-judicial conduct and activities. Canon 4, for example, of the 1990 ABA Code is headed: ‘A judge shall so conduct the judge’s extra-judicial activities as to minimize the risk of conflict with judicial obligations’ and contains a commentary on appropriate ‘financial activities’; Canon 5 is headed, ‘A judge or judicial candidate shall refrain from inappropriate political activity’.<sup>178</sup>

The Friedland Report explains that the Canadian Judicial Council examined at different times whether such a code should be introduced federally, only to reject the idea in favour of publishing in 1991 a book, *Commentaries on Judicial Conduct*. Of the two Canadian Provinces which have adopted formal codes, British Columbia’s Code of Judicial Ethics, produced in 1976, is the most detailed.

For its part, the Friedland Report favoured the introduction of a formal code of this kind federally in Canada, noting among other things that, as judges deal with issues that can affect stock prices, land values and other investments, they should disclose relevant holdings and transactions privately to a person such as their chief justice: ‘someone other than the judge involved should know of the judge’s major commercial and financial transactions. The existence of such disclosure would be one more step in the accountability that the public expects from its public officers’.<sup>179</sup> In fact, in response to this and other developments, it was reported in 1996 that Canadian Judicial Council was in the process of drafting a code of judicial conduct.<sup>180</sup>

**Canada - the federal system:** As with the United States, a distinction must be made, only this time between the federal and the various Provincial systems of formal judicial accountability. Federally, the system operates essentially under a self-regulatory model based on the Canadian Judicial Council, which was established in 1971 under the *Judges Act*. The Council consists entirely of chief justices and associate chief justices; it is chaired by the Chief Justice of Canada.<sup>181</sup>

Chief Justice Scott of Manitoba writes that much of the Council’s work is undertaken through committees, notably the Judicial Conduct Committee which consists of members of the Executive Committee. There are no formal procedures for the investigation of a complaint but the usual process is that the Executive Director passes the complaint on to the Chief Justice of Canada. The Chief Justice then decides whether to dismiss the matter

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<sup>178</sup> The full text of the Code is set out in Appendix 3 of Justice Thomas work on *Judicial Ethics in Australia*.

<sup>179</sup> The Friedland Report, May 1995, p 156.

<sup>180</sup> RJ Scott, ‘Accountability and independence’ (1996) 45 *University of New Brunswick Law Journal* 27 at 32-36.

<sup>181</sup> *Ibid* at 29.

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or to establish a panel of a committee which will then decide upon further action. This panel of three then considers whether a formal investigation by an inquiry committee may be warranted. If so, then the full Council (minus the members of the committee and up to five other members of Council ‘set aside’ should an inquiry be established) decides whether a formal hearing will take place.

Where an inquiry committee is established, three members of the Council are designated to ‘investigate’ the complaint, in addition to which the Minister of Justice may make appointments to the committee. The investigation committee has a discretion whether its proceedings should be held in public or in private, although the Minister can require a public hearing. On completion, the investigation committee reports to the Council which has the power to recommend that the judge in question be removed. As Chief Justice Scott explains, this is the Council’s only formal power under the legislation; panels have, however, exercised a power of reprimand in the past by communicating an ‘informal expression of disapproval’ to the judge.<sup>182</sup> Chief Justice Scott continued:

In the fiscal year 1994-95, 9 of the 174 complaints were referred to a panel. During the past few years there have been two inquiries, both of which have been held in public, namely, the Marshall and Gratton inquiries. The Bienvenue inquiry is also to be held in public...In the Marshall, Gratton and Bienvenue inquiries the federal Minister of Justice...designated two lawyers as members of the inquiry committee.<sup>183</sup>

The 1995 Friedland Report was generally supportive of this system,<sup>184</sup> noting with approval the qualified separation of the investigation of a complaint from its adjudication.<sup>185</sup> Nonetheless, it did recommend reforms in certain areas. The US federal system arrangements whereby the judge’s own chief justice is involved at the initial stages of a complaint were commended, with the recommendation being made that this decentralised aspect of the US system might be grafted on to the centralised Canadian model. On the question of the visibility or transparency of the complaints process, the Friedland Report stated:

there should be a modest amount of lay and lawyer participation in the

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<sup>182</sup> Ibid at 30.

<sup>183</sup> Ibid at 31.

<sup>184</sup> The Friedland Report, May 1995, pp 87-105. Friedland stated: ‘I never sensed that any matter was being “covered up” by the Council after a complaint was made to it’ (p 94).

<sup>185</sup> Ibid, pp 131-132. Friedland did not advocate that these functions be undertaken by completely separate bodies, as this might result in the investigation being too aggressive and therefore potentially harmful to the judiciary. He accepted the federal system where the chair of the Judicial Conduct Committee is not on panels, and members of panels are not on an Inquiry Committee if one is established for that case. Also, those who are on a panel do not participate in the Council decision to send a matter to a formal investigation by an Inquiry Committee and those who are to be on such a Committee are removed from deliberations of the Council on the case.

panels and formal Inquiries, full disclosure in a sanitized form of all complaints, plus a periodic external review of the decisions made in the complaint process. I suggest that each non-public pre-Inquiry panel include a lawyer or lay person...<sup>186</sup>

Concerning lay participation in formal Inquiries, Friedland recommended that such participants should not be chosen by the government, for the reason that 'it is undesirable for the government to have control of the composition of an Inquiry Committee'.<sup>187</sup>

**Canada - the Provincial models of judicial accountability:** The first Provincial system was established in Ontario in 1968, followed by British Columbia a year later. By 1995 all provinces and territories, except Prince Edward Island, had adopted the concept of a Judicial Council.

A key difference between the provincial and federal councils is that, whereas the only statutory power available federally is removal by a joint address of the Houses of Parliament upon a recommendation by the Judicial Council, all the provincial Judicial Councils are given a wide range of disciplinary options, extending from a simple warning, through to reprimand, suspension and, ultimately, removal.<sup>188</sup> However, as at 1995 British Columbia is the only jurisdiction where removal is by the Judicial Council itself (or a Supreme Court judge) rather than the legislature, Cabinet or the Court of Appeal.<sup>189</sup>

A key difference between the various provincial Judicial Councils lies in the make-up of their membership, notably their lay membership. Thus, the Friedland Report states that Nova Scotia is the only provincial council with no lay representation, whereas in Manitoba four out of the nine members are judges. The Ontario Council, on the other hand, has a 12-person Council comprised of six judges and six non-judges. The non-lawyers consist of 2 lawyers appointed by the Law Society and 4 remunerated lay persons appointed by the government, with the legislation directing those making the appointments to take account of 'the importance of reflecting, in the composition of the Judicial Council as a whole, Ontario's linguistic duality and the diversity of its population and ensuring overall gender balance'.<sup>190</sup>

The Friedland Report explains that the separation of the screening, investigation and hearing of complaints in Ontario is achieved in the following way:

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<sup>186</sup> Ibid, p 137.

<sup>187</sup> Ibid, pp 137-138.

<sup>188</sup> RJ Scott, 'Accountability and independence' (1996) 45 *University of New Brunswick Law Journal* 27 at 32.

<sup>189</sup> The Friedland Report, May 1995, p 107. Note that the judge in question may appeal to the Court of Appeal from the finding of the tribunal.

<sup>190</sup> Ibid, p 110.



There are three stages in the process, all conducted by members of the Judicial Council: a two person subcommittee that screens all the complaints; a four person review panel; and a hearing panel of a size determined by the Council. Persons on the screening subcommittee cannot be on the review panel or the hearing panel, and persons on the review panel cannot be on the hearing panel.<sup>191</sup>

A major concern of the Friedland Report was that, in a country with an integrated hierarchical legal system such as Canada's, there should be more consistency between the disciplinary standards and procedures: 'we have one legal system. There should, to the extent possible, be one set of standards of judicial conduct'.<sup>192</sup> Also, the Report was critical of those provincial systems which permit the removal of a judge by the Cabinet or, as in British Columbia, by the Judicial Council itself. It argued that judicial independence requires that removal be made either by the legislature, as in Ontario, or by the court of appeal, as in Quebec.<sup>193</sup>

**Sweden - the Justice Ombudsman:**<sup>194</sup> A very different model of judicial accountability is found in Sweden, based on the office of the Parliamentary Ombudsman. At present there are four such Ombudsmen, so called because they are appointed by the Swedish Parliament, the Riksdag.<sup>195</sup> Indeed, the fundamental concept behind the Swedish Ombudsman is that he or she is an officer of Parliament whose function is to ensure that public servants carry out their duties competently and according to law.<sup>196</sup> At present under the Swedish system, the Chief Parliamentary Ombudsman is responsible for the supervision of the courts (plus the police and public prosecutors), as well as for administration of the office and for determining the main focus of its activities. The other three Ombudsmen have separate spheres of supervision, which range across many areas of responsibility, including the armed forces, the Church of Sweden and legal aid.<sup>197</sup> Each Ombudsman, it appears, exercises his constitutional

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<sup>191</sup> Ibid.

<sup>192</sup> Ibid, p 130.

<sup>193</sup> Ibid.

<sup>194</sup> The Swedish title for the office is *Riksdagens Justitieombudsman*, commonly abbreviated to 'JO' and translated as the Parliamentary Ombudsman for Justice.

<sup>195</sup> In addition to these Parliament appointed Ombudsmen, there are a number of government appointed Ombudsmen, notably: the Consumer Ombudsman; the Equal Opportunities Ombudsman; the Ombudsman Against Ethnic Discrimination; the Children's Ombudsman; and the Office of the Disability Ombudsman.

<sup>196</sup> The Parliamentary Ombudsman's office enjoys full autonomy from the Riksdag, which has no power to issue directives to the office. There is, however, a requirement for the Ombudsman to report to the Riksdag and that report is examined by a standing committee.

<sup>197</sup> B Wieslander, *The Parliamentary Ombudsman in Sweden*, The Bank of Sweden Tercentenary Foundation and Gidlunds Bokforlag 1994, p 109. The four areas of responsibility are set out in the 'Administrative Directives for the Secretariat of the Parliamentary Ombudsman, issued in March 1993.

power independently and free from intervention by the others.<sup>198</sup> Somewhat confusingly, although only one of the four Parliamentary Ombudsmen supervises the courts, all four are referred to as Justice Ombudsmen (JO).

The office of Parliamentary Ombudsman dates back to 1809 when, to ensure the maintenance of the rule of law, he monitored the work of public officials, including judges. For example, according to Professor Stanley Anderson, in 1816 the first Ombudsman brought charges against a local judge for permitting a son to testify against his father and for delay in the proceedings against several defendants, as well charges against the entire chamber of a Stockholm court for faulty procedure in a criminal case. Anderson adds that both instances the judges concerned were fined.<sup>199</sup> Writing in 1966 Walter Gellhorn commented that the Ombudsman could only prosecute public officials for having violated the law but that, in Sweden with its distinctive approach to administrative law, traditionally this had broader implications than one might expect, for:

an official commits the crime of ‘breach of duty’ if through ‘negligence, imprudence, or unskillfulness’ he fails to act in the manner required by a statute, a valid regulation or direction, or ‘the nature of his office’...<sup>200</sup>

Indeed, the authority of the Parliamentary Ombudsman to prosecute is based on the fact that Swedish public servants and judges are subject to criminal liability for the performance of their official responsibilities: ‘Anyone who, intentionally or owing to negligence, fails to carry out the obligations of his office, may be sentenced to a fine or imprisonment for up to two years for a breach of official duty’.<sup>201</sup>

From the earliest days, when around 50% of the Ombudsman’s activity was devoted to the courts,<sup>202</sup> he had the power to instigate prosecutions and, at least until the beginning of the twentieth century, there were many prosecutions of public officials in Sweden. With respect to judges, this meant that the Ombudsman had the power to bring an indictment against the judicial officer in a court of superior standing to the judge’s own. By the 1960s this course of action was far less frequent and amendments to the Penal Code in the 1970s reduced this prosecution aspect of the Ombudsman’s role still further. Now the Ombudsman’s main role is to admonish where abuses or breaches of duties on the part of public officials are identified. In terms of the jurisdiction of the Ombudsman over the courts, it has been said:

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<sup>198</sup> F Nozari, ‘The Swedish institution of Justice Ombudsman’ (1990) 18 *International Journal of Legal Information* 1 at 5.

<sup>199</sup> S Anderson, ‘Judicial accountability: Scandinavia, California and the USA’ (1980) 28 *The American Journal of Comparative Law* 393.

<sup>200</sup> W Gellhorn, *Ombudsmen and Others*, Harvard University Press 1966, p 201.

<sup>201</sup> K Boutz, *The Supervisory Function of the Parliamentary Ombudsman in relation to the Swedish Courts*, Swedish Parliamentary Ombudsman’s Office 1992, p 2.

<sup>202</sup> I al-Wahab, *The Swedish Institution of Ombudsman*, Liber Forlag 1979, p 70.

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The Ombudsman is empowered to intervene if it appears there were faults or malpractices during the proceedings of the trial such as if the parties or witnesses were mistreated in the court. Moreover the decisions of the courts may also fall within the purview of the Ombudsman's supervision even though he normally does not intervene except when an obvious error has been committed...Judges can be held responsible if they are found at fault as a result of neglect, error or any act or omission to act which is contrary to their official duties as set by law, statutes, instructions and regulations.<sup>203</sup>

An instance of the Ombudsman intervening in court decisions was where the courts had overlooked an amendment to sentencing laws requiring them to deduct the time an offender spent in custody from his or her term of imprisonment. The Ombudsman intervened in this instance, either to order a new trial or to set an earlier day for release, or else, where release had already occurred, to grant compensation.<sup>204</sup> Examples of more recent critical pronouncements made by the Parliamentary Ombudsman are set out at Appendix C.

It seems that for the most part the Ombudsman's supervision generally takes place over judges of lower courts and that only in serious cases is he required to exercise control over members of the Supreme Court and the Supreme Administrative Court. In particular, under Article 8, Chapter 12 of the Swedish Constitution, if a criminal act has been committed in the course of official functions by a member of either of these superior courts, proceedings under the Penal Code against the judge shall be brought before the Supreme Court by the Parliamentary Ombudsman or by the Attorney-General.

Perhaps the best recent account in English of the Ombudsman's jurisdiction over the courts is the commentary on 'The Ombudsman and the Judiciary' in John Hatton's Churchill Fellowship Report, *Accountability - Decentralisation of Power and Government- Sweden and Canada*. This commentary was written by Anders Wigelius, at the time the Parliamentary Ombudsman with responsibility for the courts. He notes:

- any person can lodge a complaint with the Ombudsman, although as a rule the Ombudsman will not intervene while a matter is still pending in court;
- the Ombudsman can also start an investigation on his own initiative, usually based on observations made during an inspection, or where a problem is uncovered in the course of an investigation of a complaint: 'The number of initiative cases concerning the courts is rather small, perhaps ten a year, but they are often more important than the complaints cases';
- many complaints are dismissed summarily, but those that are taken up are normally sent to the court complained against with a request for 'information or an explanation or, sometimes, an investigation of facts plus the court's opinion';

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<sup>203</sup> Ibid, pp 70-73.

<sup>204</sup> Ibid, p 71.

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- following changes to the Penal Code in 1975, the Ombudsman's original role as prosecutor has been reduced, so that now his main function is to admonish or criticise officials;
  - the Ombudsman's main concern in the law courts is to ensure that cases are dealt with according to the procedural regulations and that they are decided within a reasonable period of time,<sup>205</sup> without abuses or breach of duties on the part of judicial and other court officials;
  - court judgments are not exempt from supervision, but the Ombudsman will normally only intervene if a manifest error has been committed. Several examples are presented, including where 'A judge received an admonition for having sentenced a person to prison for a shorter period than the law allowed';
  - in more serious cases, where for example it is suspected that a judge has committed a criminal act, the Ombudsman, acting as a prosecution officer, will hold oral hearings with the judge;
  - in less serious cases, involving incongruities or minor errors, the Ombudsman will settle these by 'recommendation or mild criticism recorded in the minutes kept by the Ombudsman's assistant';
  - the Ombudsman may be present at the sessions or meetings of a court or administrative authority, but cannot express his opinion at those sessions or meetings;<sup>206</sup>
  - all officials are obliged by law to give the Ombudsman any information he may ask for and assist him with investigations;<sup>207</sup>
  - the Ombudsman must state his reasons for a decision in writing;
  - these decisions are made available immediately to the public; and
  - the independence of the courts in Sweden is established under Article 2, Chapter 11 of the Swedish Constitution which provides: 'No public authority, nor Parliament may determine how a court shall adjudicate a particular case or how a court shall in other respects apply a rule of law in a particular case'.<sup>208</sup> Moreover, no permanent

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<sup>205</sup> B Wieslander, *The Parliamentary Ombudsman in Sweden*, The Bank of Sweden Tercentenary Foundation and Gidlunds Bokforlag 1994, p 35.

<sup>206</sup> Article 6, Chapter 12 of the Swedish Constitution.

<sup>207</sup> Article 6, Chapter 12 of the Swedish Constitution.

<sup>208</sup> J Hatton, *Accountability - Decentralisation of Power and Government - Sweden and Canada*, Churchill Report [1994], Annexure B. The Churchill Fellowship was itself undertaken in 1989.

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judicial officer may be removed from office except where that person has committed a crime or has reached retirement age.

The Parliamentary Ombudsman's Annual Report, covering the period 1 July 1996 to 30 June 1997, shows that the total number of cases concerning the courts was 390 (326 of these had reference to courts of law and 64 to administrative courts).<sup>209</sup> In six of these cases the Ombudsman decided to start a preliminary criminal investigation, and 39 of the cases were finished by a decision including admonitions or other criticism.

Having set out the key features of the Swedish model of judicial accountability, it must be emphasised that the problems of comparison with any Australia jurisdiction are especially acute in this context. This is because Sweden operates with a civil law system, certain features of which are particular to Sweden itself.<sup>210</sup> As noted, the notion of independence is still relevant to the Swedish judiciary, yet it must be interpreted in relation to a career judiciary in which, in contrast to the Anglo-Australian common law system, judges are viewed as public servants.<sup>211</sup> However, even among civil law jurisdictions, the supervision of the courts by the Ombudsman is very unusual. Indeed, only in Finland does the office of Ombudsman have a jurisdiction over the courts similar to that found in Sweden. None of the offices of Ombudsman which have been created in Australia, Canada, Denmark, New Zealand, Norway, the United Kingdom and the United States have adopted this aspect of the Swedish model.

That is not to say that that model may not prove to be instructive. After all, it is the case that, despite concerns about the uniqueness of the Westminster model of government,<sup>212</sup> with some modification the distinctly Swedish office of the ombudsman has been transplanted into many foreign systems of public administration, our own included, as part

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<sup>209</sup> The Swedish Parliamentary Ombudsman, *Annual Report 1996-1997 - Summary in English*, pp 570-571; letter to author from Kjell Swanstrom, Head of Staff, Parliamentary Ombudsman's Office, 13 March 1998. Mr Swanstrom adds, 'Very recently the Chief Parliamentary Ombudsman, Mr Eklundh, decided to prosecute a judge for unlawful trial in a great number of cases'.

<sup>210</sup> For example, in the District Courts in Sweden a panel of Lay Assessors take part in the main hearing in specified classes of cases. They do not behave as a jury but, rather, assist and have a role in the judgment of mainly criminal cases of a more serious nature and in family law cases - J Hatton, *Accountability - Decentralisation of Power and Government - Sweden and Canada*, Churchill Report 1994, p 38.

<sup>211</sup> The Swedish judge is a member of a career service and will normally have been recruited to the service from university - F Stacey, *Ombudsmen Compared*, Clarendon Press 1978, p 11.

<sup>212</sup> One concern was that an Ombudsman would lessen the responsibilities of MPs under the Westminster system. In Britain, the Whyatt Committee in 1961 recommended that, to safeguard the position of Parliament, MPs and Ministers, complaints should only be sent on to the Ombudsman by an MP - Sir J Whyatt, *The Citizen and the Administration*, Stevens and Sons 1961, p 80. Concerns were also expressed about the compatibility of the Ombudsman with the principle of ministerial responsibility - JA Cross, *British Public Administration*, University Tutorial Press Ltd 1970, p 175.

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of the modern movement towards greater public sector accountability. It may be that a case can be made for transplanting the Swedish Ombudsman's supervision of the courts to other political cultures.

## 6. JUDICIAL ACCOUNTABILITY IN NSW - COMMENTS AND SUGGESTIONS

The issue in NSW is not whether a permanent judicial commission should or should not be established. That hurdle has already been jumped here. Rather, the questions to ask must concern the effectiveness of the formal mechanism which is in place. The fact is that the *Judicial Officers Act 1986* was passed in some haste, amidst considerable controversy and one question must be whether it is now time to review its operation. It is also the case that the Act does not encompass the entire range of issues at stake in the contemporary debate concerning judicial accountability. For this reason, the following overview of comments and suggestions on judicial accountability is in two parts. The first is specific to the *Judicial Officers Act 1986*, the second deals with those issues which lie outside the immediate scope of the legislation.

Again, it should be emphasised that this paper seeks only to present an overview of the contemporary debate; it does not advocate reform in any general or particular sense.

**The Judicial Officers Act 1986 - critical overview:** Building on the earlier review of the critical comments made about the Act, as well as the comparative overview in the previous section, the following points can be noted in brief:

- ***Lay participation:*** is a more meaningful level of lay participation needed, in line with the original intention of the Government in 1986 to include 'consumer representatives' on the Conduct Division? The trend in the USA, as well as in the Canadian Provinces, would seem to be in this direction. The danger otherwise is that any disciplinary system which offers only a token participation by lay members may be viewed with scepticism. Countervailing concerns regarding judicial independence have been noted.
- ***The separation of investigative and adjudicative functions:*** the Canadian Friedland Report was very much in favour of the separation of the investigation of the complaint from the adjudication of the complaint, stating 'As a matter of natural justice, the person who decides an issue should not have been involved in the earlier stage as an investigator'.<sup>213</sup> The question here is whether the *Judicial Officers Act* is clear enough in its separation of these functions, or should it state in express terms that members of the Judicial Commission involved in the initial investigation of a complaint cannot also be a member of a Conduct Division dealing with complaints classified as 'serious'?
- ***Resignation, retirement and the complaints system:*** part of the motivation behind

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<sup>213</sup> The Friedland Report, May 1995, p 131.

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Proposition 190 in California in 1994 was to prevent judges from using resignation and retirement as a safe harbour when serious complaints are made against them. The question this raises for NSW is whether the legislation should permit disciplinary proceedings against former judges, at least in some cases.

- ***Defining courses of action:*** the suggestion is that the precise action to be taken, in particular in relation to ‘minor complaints’, should be spelt out more clearly in the Act.
- ***Code of Judicial Conduct:*** the introduction of such a code has been suggested in NSW and, again, this would seem to be consistent with the original proposal as well as with the trend in both the USA and Canada. Certainly, the Friedland Report recommended that a code be introduced at the federal level in Canada. Justice Thomas has noted that, in Australia, different views are held by judges on the question of the desirability of such codes. He adds: ‘I would like to see the formulation at least of precepts that would declare the high standards that judges have traditionally set and which helps the community to appreciate this fact’.<sup>214</sup>
- ***Annual reports:*** the legislation requires the Annual Report of the Judicial Commission to deal with certain specified subjects and the issue is whether these reports should be more detailed still in some key areas; for example, concerning the membership of any Conduct Divisions established under the Act, or detailing the background and eligibility of the lay member of the Commission.
- ***Periodic external review of decisions:*** bearing in mind the shield of confidentiality behind which much of the disciplinary function of the Judicial Commission is conducted, it may be that some form of independent, external review of its disciplinary decisions should be conducted at regular intervals, to be defined under the legislation. Again, the Friedland Report recommended periodic external review of this sort in the Canadian context.

**Judicial appointment:** The paradox in the whole debate about judicial independence, a value which is often defined and defended in more or less absolute terms, is that judges are appointed by the executive government. Inevitably, the propriety of this method of appointment has been questioned over the years, for the obvious reason that it is open to political manipulation. Indeed, to pretend that political considerations never play any part in judicial appointment, in NSW as elsewhere, would be disingenuous.<sup>215</sup> Consider, for example, the appointment of HV Evatt to the office of Chief Justice of the Supreme Court of NSW in 1960, for the well-reported purpose of ‘easing Evatt out of politics with

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<sup>214</sup> JB Thomas, *Judicial Ethics in Australia*, Second Edition, p 4.

<sup>215</sup> For a discussion on ‘Politics and the Bench’ see - R Thomson, *The Judges*, Allen and Unwin 1986, Chapter 3.

dignity'.<sup>216</sup> Another insight into the past politics of judicial appointment in this State is gained from the arrangement reportedly operating in the 1940s under the McKell Government where appointments to the Bench were made alternately to Catholics and Protestants.<sup>217</sup> Not that concerns about the politicisation of judicial appointment are in any way unique to NSW. Reviewing the history of judicial appointments in Britain in 1932, Harold Laski concluded that uncontrolled appointment by the executive leaves 'too great play to political influence' and suggested that the executive should be required to consult an advisory committee of judges.<sup>218</sup>

As noted in the first section of this paper, much of the contemporary debate in this field has revolved around the question of appointment. Discussion of the issue has been dominated in the past by considerations of judicial independence, whereas more recently it has also focused on the composition of the judiciary (the question of its 'representativeness'), as well as on the procedures for the appointment of judges. Moreover, it may be that judicial appointment should be viewed as a 'front-end' mechanism of judicial accountability.<sup>219</sup> As the Friedland Report commented, there is an 'obvious connection between the selection process and the subsequent necessity for disciplining judges'.<sup>220</sup> Sir Anthony Mason has said, 'Absence of mechanisms for accountability and lack of judicial performance standards lend greater weight to claims for more open procedures and public participation in the judicial appointment process'.<sup>221</sup>

Three observations can be noted. First, having accepted that 'political considerations do intrude into the practice of selecting judicial appointments' in contemporary Australia, Livingstone Armytage argued for the formulation of explicit criteria which can be debated and agreed at a level of principle, such as is found federally in the USA. Armytage commented: 'The United States approach aims to provide transparency through the formulation of process and the identification of explicit, ranked criteria. This approach appears more credible than the less formalized approaches operating in Britain and Australia which acknowledge merit as the only basis for appointment but which embody extraneous

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<sup>216</sup> P Crockett, *Evatt: A Life*, Oxford University Press 1993, p 300; D Clune, *The Labor Government in NSW, 1941-1965*, unpublished PhD thesis, University of Sydney 1990, p 144.

<sup>217</sup> B d'Alpuget, *Mediator: A Biography of Sir Richard Kirby*, Melbourne University Press 1977, p 35. Presumably, however, as with Evatt, all these appointees were well qualified legally to hold judicial office.

<sup>218</sup> HJ Laski, *Studies in Law and Politics*, George Allen and Unwin Ltd 1932, p 173.

<sup>219</sup> I Greene, 'Judicial Accountability in Canada' from *Accountability for Criminal Justice* edited by PC Stenning, University of Toronto Press 1995, p 362.

<sup>220</sup> The Friedland Report, May 1995, p 128.

<sup>221</sup> Sir A Mason, 'The appointment and removal of judges' from *Fragile Bastion: Judicial Independence in the Nineties and Beyond* edited by H Cunningham, Judicial Commission of New South Wales 1997, p 2.



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and covert considerations'.<sup>222</sup>

Secondly, the various options for a more transparent appointment process were canvassed by Sir Anthony Mason in 1997. Again, his view was that the current ill-defined process of private consultation is 'inadequate' and he went on to write in positive terms about advice by a judicial commission (of 'not more than nine members of whom at least five should be judges and practising lawyers'),<sup>223</sup> as well as about the need to advertise for and interview candidates for judicial appointment (although he would exclude the higher courts).<sup>224</sup> Sir Anthony also endorsed the idea that 'The States could be given a more formal role in the appointment procedures of High Court Justices'.<sup>225</sup>

Thirdly, in his Churchill Fellowship Report John Hatton commended the Ontario system of judicial appointment. This, too, involves the advertising of vacancies, followed by the interview of candidates based on detailed criteria. It seems candidates are interviewed by a Judicial Appointments Advisory Committee which then submits its recommendations to the Attorney General. The interesting aspect of the procedure, however, is that, according to

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<sup>222</sup> L Armytage, *Educating Judges*, Kluwer Law International 1996, pp 57-58. He states in addition, 'In New South Wales, there is an informal tradition for the attorney-general to consult with the chief justice, the relevant head of jurisdiction and the leader of the bar before submitting names to Cabinet' (page 63). See also the recent comments of Colin Howard QC, general counsel for the Victorian Government, suggesting that High Court appointments be modelled on US Supreme Court procedures - C Howard, 'Secrecy shadows justice', *The Australian*, 16 March 1998.

<sup>223</sup> Note that in 1977 Sir Garfield Barwick had called for the establishment of a similar body, stating that 'Such a body should have amongst its personnel judges, practising lawyers, academic lawyers and, indeed, laymen likely to be knowledgeable in the achievements of possible appointees' - Sir G Barwick, 'The State of the Australian Judicature' (1977) 51 *The Australian Law Journal* 480 at 494. Note, also, the less specific suggestions in - Sir H Gibbs, 'The appointment of judges' (1987) 61 *The Australian Law Journal* 7 at 11. On the other hand, in defence of the present system it has been said, 'In practice, party-political appointments have been rare, and those which may have originated in party manoeuvres have usually been defensible on other grounds. The danger of an independent commission is that it would produce safe, uncontroversial appointments and that it would tend to limit the range of candidates' - J. Crawford *Australian Courts of Law*, 3rd edition, Oxford University Press 1993, p 62.

<sup>224</sup> At the time of writing Sir Anthony noted that in Britain judicial appointment were to be advertised for positions below the High Court. However, it is now reported that advertisements are to be placed for High Court judges 'in a move aimed at boosting applications from women and ethnic minority candidates' - 'Advertisements for judges in the High Court', *The Times*, 12 February 1998. The Lord Chancellor also intends to present an annual report to Parliament on the operation of the judicial appointment system, which is to involve both judges and lay members in the process of shortlisting judicial candidates for interview - 'Judicial appointments' [Spring 1998] *Public Law* 138; G. Drewry, 'Judicial appointments' [Spring 1998] *Public Law* 1.

<sup>225</sup> Sir A Mason, 'The appointment and removal of judges' from *Fragile Bastion: Judicial Independence in the Nineties and Beyond* edited by H Cunningham, Judicial Commission of New South Wales 1997, p 16.

Mr Hatton, ‘The majority of Members of the Committee to appoint judges are lay people’.<sup>226</sup> In fact, since the scheme was adopted on a statutory basis in 1994 seven of the thirteen members of the Committee are lay persons. The Attorney General may appoint ‘only a candidate who has been recommended’, although the Attorney General ‘may reject the Committee’s recommendations and require it to provide a fresh list’.<sup>227</sup> The Friedland Report commented on the Ontario model: ‘This writer’s impression is that the Committee has improved the overall quality of the provincial court judges. Certainly it has made the bench more representative of the make-up of the citizenry’.<sup>228</sup> On the other hand, the Report thought the Ontario model, by recommending a large number of names, still gives the government too much discretion in the appointment process and expressed a preference for the system in Manitoba where ‘three to six names are put forward for a specific opening’.<sup>229</sup>

The general point to make is that a number of comparable jurisdictions have modified their procedures for judicial appointment.

**Performance assessment:** The subject of performance assessment has been discussed in detail in recent years.<sup>230</sup> For example, at the institutional level the Sackville Report on *Access to Justice* recommended that court charters be introduced for this purpose, an important element of which would be the development of a mechanism for accountability for service delivery, including complaints/suggestion mechanisms, and review of performance standards.<sup>231</sup> The Report acknowledged that developments were already under way in many courts in this regard, including the introduction of a set of standards for evaluating the performance of the Local Courts of NSW.<sup>232</sup>

As noted, in the USA performance evaluation for individual judges is common and it has been introduced recently, on a pilot basis, in the Canadian province of Nova Scotia.

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<sup>226</sup> J Hatton, *Accountability - Decentralisation of Power and Government - Sweden and Canada*, Churchill Report [1994], p 298.

<sup>227</sup> The Friedland Report, May 1995, p 245. The report offers a detailed account of the appointment procedures in Canada. It recommended that provinces that have not changed their appointment policy should ‘look carefully at the nominating systems in Ontario, British Columbia, Quebec, and Manitoba, all of which appear to be working well. At the federal level, it is suggested that special nominating committees be established for each appointment to the Supreme Court of Canada’ (page 267).

<sup>228</sup> Ibid, p 246.

<sup>229</sup> Ibid, p 268.

<sup>230</sup> For an Australian discussion of peer review for the judiciary see - PH Molony, ‘Peer review for the judiciary’ (1993) 2 *Journal of Judicial Administration* 222. Molony recommends such methods of review, but only as a means of ‘avoiding the perils of an imposed public system of misconduct review’ (at 237).

<sup>231</sup> Access to Justice Advisory Committee, *Access to Justice: an action plan*, 1994, chapter 15.

<sup>232</sup> R Mohr et al, ‘Performance measurement for Australian courts’ (1996) 6 *Journal of Judicial Administration* 156.

**National standards of judicial accountability:** The Canadian Friedland Report, having regard to the country's integrated legal system, was concerned to ensure consistency in accountability standards on a national basis. The reasoning behind the argument would also apply in Australia.

**The Swedish model of judicial accountability:** This model has found at least one advocate in NSW,<sup>233</sup> namely, John Hatton who commented:

External scrutiny of the performance of the court system by the Justice Ombudsman to expose questionable practices, even by Judges are methods we should adopt. Swedish experience for me provided an answer to a key question. How can there be a mechanism of external scrutiny and accountability which applies to judges and yet does not interfere with judicial independence and its separation from the political process. The role of the Justice Ombudsman's Office ensured external scrutiny without compromising independence.<sup>234</sup>

Many would disagree. But, then, these comments do highlight the extent to which any system of accountability must have an 'external' element if it is to be credible in the long term. The danger otherwise is that the accountability mechanism itself will be seen to act 'as a shield against external criticism rather than as a defender of public interest'.<sup>235</sup>

For its part the Friedland Report rejected a similar Canadian proposal for extending the jurisdiction of the Ombudsman to include supervision of the courts, on the basis that it would be injurious to judicial independence for judges to be scrutinised by a government-appointed ombudsman.<sup>236</sup> What if a 'Justice Ombudsman' was appointed by Parliament, as in the case of the United Kingdom's Parliamentary Ombudsman, or if a parliamentary committee had an advisory role in the appointment process? Would an arrangement of this sort solve the conundrums associated with balancing judicial independence with some form of external accountability?

## 7. CONCLUSIONS

None of the ground covered in this paper is free from conceptual and practical controversy and complication. Having set out various comments and suggestions for change in the last

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<sup>233</sup> In fact, according to the Friedland Report (pages 138 and 338) an Ombudsman model has also been advocated in Canada - D Rowat, 'The Ombudsman should supervise the courts' (July/August 1992) *Options Politiques*.

<sup>234</sup> J Hatton, *Accountability - Decentralisation of Power and Government - Sweden and Canada*, Churchill Report 1994, p 343. At present, under Schedule 1 of the *NSW Ombudsman Act 1974*, the courts are excluded from the Ombudsman's jurisdiction.

<sup>235</sup> AN Doob and JP Brodeur, 'Achieving accountability in sentencing' from *Accountability for Criminal Justice* edited by PC Stenning, University of Toronto Press 1995, p 381.

<sup>236</sup> The Friedland Report, May 1995, p 138.

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section, the point should be made again that the informal mechanisms of accountability which operate in relation to judges are significant. Particularly important in this respect is the requirement to give reasons for their decisions. That is not to say that more formal mechanisms should not be in place and, once established as in NSW, that these should not be the subject of ongoing scrutiny and review.

## **APPENDIX A**

### **Criteria Adopted for Classifying Complaints**

**NSW Judicial Commission, *Annual  
Report 1996-1997***

## CRITERIA ADOPTED FOR CLASSIFYING COMPLAINTS

Complaints examined and dismissed under section 20 are set out below.

### Table three: Complaints dismissed

Complaints dismissed during the year were dismissed on the basis of the following criteria, which are expressed in terms of the Act -

CRITERIA ADOPTED	NUMBER
<p><b>sections 20(1)(b), 20(1)(d) and 20(1)(h)</b>                      The complaint was frivolous, vexatious and not in good faith and occurred at too remote a time. Further consideration of the complaint by the Commission was unnecessary or unjustifiable</p>	2
<p><b>sections 20(1)(d) and 20(1)(h)</b>                      The matter complained about occurred at too remote a time and further consideration of the complaint by the Commission was unnecessary or unjustifiable</p>	1
<p><b>sections 20(1)(d), 20(1)(f) and 20(1)(h)</b>                      The matter complained about occurred at too remote a time to justify further consideration and related to the exercise of a judicial or other function and was subject to adequate appeal or review rights. Further consideration by the Commission was unnecessary or unjustifiable</p>	1
<p><b>sections 20(1)(e) and 20(1)(h)</b>                      There was a satisfactory means of redress or of dealing with the complaint or the subject matter of the complaint and further consideration by the Commission was unnecessary or unjustifiable</p>	1
<p><b>sections (20)(1)(e), 20(1)(f) and 20(1)(h)</b>                      There was a satisfactory means of redress or of dealing with the complaint or the subject matter of the complaint and the complaint related to the exercise of a judicial or other function and was subject to adequate appeal or review rights. Further consideration by the Commission was unnecessary or unjustifiable</p>	2
<p><b>sections 20(1)(f) and 20(1)(h)</b>                      The complaint related to the exercise of a judicial or other function that was subject to adequate appeal or review rights and further consideration of the complaint by the Commission was unnecessary or unjustifiable</p>	28
<p><b>section 20(1)(g)</b>                      The person complained about was no longer a judicial officer</p>	1
<p><b>section 20(1)(h)</b>                      Further consideration of the complaint by the Commission was unnecessary or unjustifiable</p>	80

The statutory criterion for classifying a complaint as “serious” is that the grounds of complaint, if substantiated, could justify parliamentary consideration of the removal from office of the judicial officer complained about. That decision is based on a view of the seriousness of the matter, which is formed following the Commission’s preliminary examination. Any other undismitted complaint is defined by the Act as minor: section 30(2).

## **APPENDIX C**

**The Supervisory Function of the Parliamentary  
Ombudsman in relation to the Swedish Courts  
- Kristina Boutz, Head of Department,  
Office of the Swedish Parliamentary Ombudsman  
1992**

## **The Supervisory Function of the Parliamentary Ombudsman in relation to the Swedish Courts**

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### **1. Background**

Since the founding of the institution in 1810, the work of the Parliamentary Ombudsmen has included supervision of the courts. According to the current instructions, the Parliamentary Ombudsmen are to supervise the observance by the officials working in the public administration of laws and other statutes, and see to it that they otherwise fulfill their obligations. It is the special duty of the Parliament Ombudsmen to ensure that courts and administrative authorities observe the stipulations of the Instrument of Government with regard to objectivity and impartiality, and that the fundamental rights and freedoms of the citizens are not encroached upon in the public administration.

In their decisions, the Ombudsmen may state whether a measure implemented by a public agency or official violates the law or any other statute or is otherwise erroneous or unsuitable.

In their capacity as special prosecutors, the Ombudsmen may proceed against any official who, by neglecting the obligations of his office, has committed any criminal act other than an offence involving an abuse of the freedom of the press. If the official has committed an error which is subject to disciplinary action, the Ombudsmen may notify the body having the authority to issue a disciplinary sanction. If an Ombudsman comes to the conclusion that an official should be dismissed from office owing to a criminal act or gross or repeated offences when performing his duties, he may report this to the body having the authority to implement such a measure.

The authority of the Parliamentary Ombudsmen to prosecute is based on the fact that Swedish civil servants and judges are subject to criminal liability as regards the performance of their official responsibilities. Anyone who, intentionally or owing to negligence, fails to carry out the obligations of his office, may be sentenced to a fine or imprisonment for up to two years for a breach of official duty. If the error is considered minor, however, he will not be subject to criminal liability. Public prosecutors are also authorized to prosecute in cases of breaches of official duty; among them only the Chief Public Prosecutor, however, is entitled to prosecute a judge.

The Swedish constitution stipulates that no public authority, including the Riksdag (the Swedish Parliament), may determine what the judgement of a court is to be in any individual case, or otherwise determine how a court of law is to apply a rule of law in any particular case. It also contains regulations stating that a holder of the office of a permanent judge may not be removed from office except if he has committed a crime or reached retirement age. These regulations contribute to guarantee the independence of the courts.

The task of supervising the courts is carried out through examination of complaints lodged by individuals, at the initiative of the Parliamentary Ombudsman, and through inspections.



Most of the inquiries carried out by the Ombudsmen are related to the formal regulations concerning the activities of the courts. The Ombudsmen seldom make statements as to the judgement pronounced by a court.

A very common type of complaint is that an individual feels that his case has been wrongly adjudicated due to too little consideration having been given to a certain circumstance, or that a person who has been convicted of a crime is in fact innocent. In such cases the Ombudsman usually examines the judgement of the court but then dismisses the applications, with the motivation that he may only under special circumstances open an inquiry into a matter that is subject to the jurisdiction of the courts. Pursuant to a tradition developed over a long period of time, the Parliamentary Ombudsmen thus are particularly cautious about expressing assessments of the judgement of a court or any other decision made by a court. Further details on this view may be found in the English Summary of the annual report of the Swedish Parliamentary Ombudsmen for 1987/88, where a relevant decision is summarized.

In order to illustrate what the Parliamentary Ombudsmen consider themselves able to criticize without encroaching upon the independence of the courts, a number of examples of critical pronouncements are given below. These examples are grouped under headings indicating common types of complaints.

## **2. Examples of Criticism of the Courts**

### ***2.1 Slow Processing***

A young judge in a district court was criticized because, upon discovering that a dispute had not been sufficiently prepared for the main hearing, he postponed the case rather than taking any measures to remedy the deficiencies. This was considered to be particularly remarkable as the case had already been pending for more than three years.

In a case regarding dismissal of the executor of an estate, the court concentrated on making the executor complete his assignment, instead of deciding the issue of his dismissal. This made the procedure very time-consuming. The district court is also the supervisory authority for estate executors, with the task of ensuring that they submit an annual account of their administration. Because of this the court was also criticized for not having taken action against the executor at an earlier stage, since he had neglected his duties on several other occasions.

There used to be a summary proceeding at district court level to demand payment for small claims, the purpose of which was to quickly provide a creditor with an enforceable court decision. A complaint concerned a district court which had not acted on an application after six months. The Ombudsman stated that although processing times had tended to increase in recent years, this was the most alarming delay he had encountered. It was, however, clear that the court in question had attempted to reduce the number of cases pending in various ways, and so the Ombudsman found that the long processing time was not attributable to an error or to neglect on the part of the court, but most probably to a lack of resources.

According to the Code of Judicial Procedure, a judgement is to be issued, as a rule, shortly after the conclusion of the main hearing. Only if there is a serious obstacle in the way may a judgement be issued more than two weeks after the hearing. One district court was criticized for not having issued a judgement until eight weeks had passed.

A court of appeal was criticized for taking nine months to decide on an application for the reopening of a case after the non-observance of a time-limit. The judge responsible for preparing the case received particular criticism because he had not availed himself of the opportunity to decide on his own in the matter of asking for the opinion of the other party in the case. It was considered to be an aggravating circumstance that it had been highly probable from the outset that the application would be granted.

An administrative court of appeal was criticized because two cases, in which it was obvious that there were no prerequisites for allowing the complaint, had not been decided after three and a half years.

The Supreme Administrative Court is the highest instance of appeal in matters concerning the right of access to official documents. In a report one of the Parliamentary Ombudsmen discussed the procedure used by the Court when handling requests concerning access to the Court's own documents. The issue at hand was whether this procedure was in accordance with the strict demands for promptness laid down in the Freedom of the Press Act and the Secrecy Act. In light of the Court's role as the final instance of appeal in such matters the Ombudsman found that the procedure used could be accepted.

## **2.2 *Erroneous Processing***

A young boy was the injured party in a case of assault. When subpoenas were issued, the district court confused the injured party with his father, and also neglected to subpoena a witness. Because the subpoenas had been handled by a relatively inexperienced clerk, the Parliamentary Ombudsman emphasized the importance of the judge responsible for a case making his instructions clear as to which individuals are to be subpoenaed. The district court was also criticized for having ignored a document submitted by the injured party claiming compensation for damages instead of including it in the case file for the criminal action. This resulted in the claim not being tried in the case.

A person complained that he had been allowed too short a time to respond to an injunction in a case of attachment of goods. The court of appeal admitted that a mistake had been made. Since the man had been given a respite for his response, the Parliamentary Ombudsman stated that no miscarriage of justice had occurred.

In cases regarding ownership of real estate, it is the obligation of the district court, as soon as an action has been instituted, to report this for inclusion in the property register. In one case, the summons application submitted was incomplete, and the application fee had not been paid. The Parliamentary Ombudsman issued a statement as to how the rule was to be applied under the circumstances, and stated that the district court should have sent a report to the register as soon as the summons application was filed.

A district court was criticized for having a decision delivered by a process server instead of sending it through the ordinary postal system. As a result of this it was not possible for the concerned party to appeal against the decision within the prescribed time.

On the basis of observations made on an inspection visit, the Parliamentary Ombudsman requested a county administrative court to submit a statement as to why the court had failed to appoint public counsel and to hold an oral hearing in a case of compulsory custody of an addict. The Parliamentary Ombudsman found the explanation offered by the county administrative court to be acceptable, but criticized the court for not having documented the information on which its stand was based - information provided by the individual to whom the case applied.

A county administrative court scheduled an oral hearing in a custody dispute at very short notice. The counsel of one of the parties was unable to attend the hearing, and submitted an application to have it suspended, but the hearing was held in spite of this. The Parliamentary Ombudsman found the refusal of the county administrative court to postpone the hearing for a few days remarkable, and even more dubious as it meant that one of the parties was, in practice, denied representation by counsel at the hearing.

### ***2.3 The Conduct of the Court and its Treatment of the Parties***

In a decision one of the Parliamentary Ombudsmen dealt with complaints about a judge from two different persons with regard to statements made by the judge during oral hearings in custody cases. The judge was said to have been sarcastic, and to have commented on things which were said during the hearing, etc. The inquiry did not clarify exactly what had been said, but the Parliamentary Ombudsman found that the judge had been “joking” with the parties in a manner inappropriate in a court of law, and that her statements were injurious to the confidence of the parties in the objectivity of the court.

In another case the applicant questioned the appropriateness of a judge’s having asked him, during a preparatory hearing, how he intended to manage the custody of his child if he was sent to prison. At the time of the hearing the applicant was holding the child in his home against the will of the child’s mother. In light of the circumstances, the Parliamentary Ombudsman did not find reason to criticize the statement of the judge, although he admitted that it might have been somewhat drastic.

During a hearing in a case concerning real estate, the judge was seized with a suspicion that a map submitted as evidence was a forgery. On behalf of the court the judge reported the matter to the public prosecutor in order to have an inquiry made as to whether the crime of falsification had been committed. In his decision, the Parliamentary Ombudsman stated that in order to protect the integrity of the courts a court should report a suspicion of a crime that has arisen in a case before it only in instances of an exceptional nature and upon serious consideration. A report of this kind will obviously be looked upon as a sign of the court having taken the side of the opposite party in the case. The Parliamentary Ombudsman stated that the action of the judge was clearly improper.

## **2.4 *Formulation of Judgements and Decisions***

In one case the Parliamentary Ombudsman criticized both the district court and the court of appeal for their respective ways of accounting for their reasoning in a case of sexual abuse of a child. The Parliamentary Ombudsman found that the way in which the courts had worded the reasons for their judgements had created uncertainty about which criminal acts the accused had been convicted of and about what was meant when the length of the sexual relationship was referred to as a reason for judging the crime to be gross. The Parliamentary Ombudsman also questioned whether the judgement of the court of appeal satisfied the requirements of the Code of Judicial Procedure, in light of the very brief account of how the accused pleaded and of the circumstances he referred to as counter-evidence to the allegations of the prosecution. The court of appeal was also criticized for not having stated its reasons when deciding to reject the application of the accused for a supplementary inquiry.

With regard to the decision of a county administrative court, the Parliamentary Ombudsman stated, i.a., that the decision did not, strictly speaking, contain anything worthy of being referred to as a statement of reasons, and that the demand for efficiency must not be carried to such an extreme that the court neglects one of the main guarantees of legal security provided in the Administrative Courts Procedure Act (the obligation to provide reasons).

## **2.5 *The Legality of Decisions***

The Parliamentary Ombudsman reported a judge for disciplinary action because he had approved the tapping of a telephone, although the circumstances were such that this was not legally possible. The Central Disciplinary Board, however, found that the error was not grave enough to merit a disciplinary sanction.

In a decision the Parliamentary Ombudsman expressed his opinion on the decisions of the district court and the court of appeal concerning the right to make tape recordings and live radio broadcasts from the trial in the case of the murder of Mr. Olof Palme. The question was whether the right of the court to prohibit audio recordings of the interrogations of witnesses and others included the right to decide that the interrogations should not be broadcast live on radio. The Parliamentary Ombudsman found the content of the provision to be vague, and therefore decided not to criticize the courts' interpretation of it. The court of appeal was, however, criticized for having made its decision to prohibit all audio recording in advance and as generally applicable, without having inquired as to opinion of the individuals being interrogated.

An administrative court of appeal was criticized for referring, in its explanation of the reasons for a refusal to consider an application, to the stipulations on municipal appeals instead of administrative appeals.

A county administrative court refused to consider an application for intervention with regard to a driving licence because the public counsel had limited his claim to requesting a warning. As there is a precedent stating that, when there is a choice between suspension and a warning, the county administrative court is not bound by the way in which the public counsel formulates his application, the Parliamentary

Ombudsman found that it was wrong to refuse to consider the application.

## **2.6 *Inspection Records***

Inspections of courts cover i.a. the following factors

- the processing times of court cases and other legal matters
- the measures taken for dealing efficiently with the different kinds of legal matters (estate inventories, bankruptcies etc.)
- cases that have been pending for a long time with regard to the obligation of the court to see to it that processing does not stagnate
- judgements with regard to e.g. whether they are worded in such a way that they can be enforced, whether the grounds for the plaintiff's case are properly stated etc.
- some cases that have been recently decided in order to see whether the provisions in the Code of Judicial Procedure have been properly applied.

## **APPENDIX D**

**Declaration of Principles on Judicial  
Independence Issued by the Chief  
Justices of the Australian States and Territories  
10 April 1997**

The eight Chief Justices of Australia's States and Territories have released a Declaration of Principles on judicial independence.

The Chief Justices believe it is appropriate, in the interest of safeguarding independence, to state certain principles relating to judicial appointments. The Declaration deals with security of tenure of judges, the appropriateness of the use of retired and acting judges, and the importance of the principle that judges should not be dependent upon the executive government for the continuance of the right to exercise judicial office.

The Chief Justices regard the independence of the judiciary as existing to serve the public.

The Declaration of Principles takes into account what is known as the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (The Beijing Principles).

The Beijing Principles were adopted at the 6th Conference of Chief Justices of Asia and the Pacific held in Beijing, People's Republic of China in August, 1995. Chief Justices from 20 Asian and the Pacific countries including Australia, attended the conference.

The Chief Justices wish to emphasise that neither the timing of the Declaration, nor its contents, related to any particular event within their jurisdictions.

The importance to the public of judicial independence has been underlined in major speeches by the present Chief Justice of Australia, Sir Gerard Brennan, and by his predecessor, Sir Anthony Mason.

Those speeches have stressed that one of the fundamentals of a free society is government by the rules of law, administered without fear or favour by an independent judiciary.

The Chief Justices of the Australian States and Territories recognise that in any state or country, the key to public confidence in the judiciary is its manifest impartiality.

There is a crucial link between judicial impartiality and the principles of judicial independence, understood as a set of protective safeguards. This Declaration of Principles, like the Beijing Principles, has as its aim the articulation and promotion of the principles of judicial independence.

A further aim of the Declaration of Principles is to set at regional level, certain minimum standards necessarily involved in safeguarding judicial independence and judicial impartiality.

Whereas the *Universal Declaration of Human Rights* enshrines in particular the principle of the right to a fair and public hearing by a competent, independent and impartial tribunal established by the law.

Whereas the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* both guarantee the exercise of that right.

Whereas the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* prescribes minimum standards for judicial independence making due allowance for national differences in the LAWASIA Region.

Whereas the Chief Justices of the States and Territories of Australia consider it desirable to state in more detail in terms applicable to the circumstances of the States and Territories of Australia certain of those principles relating to judicial appointments and to the exercise of judicial office.

Now they adopt the following principles relating to the appointment of judges of the Courts of the States and Territories:

- (1) Persons appointed as Judges of those Courts should be duly appointed to judicial office with security of tenure until the statutory age of retirement. However, there is no objection in principle to:
  - (a) the allocation of judicial duties to a retired judge if made by the judicial head of the relevant court in exercise of a statutory power; or
  - (b) the appointment of an acting judge, whether a retired judge or not, provided that the appointment of an acting judge is made with the approval of the judicial head of the court to which the judge is appointed and provided that the appointment is made only in special circumstances which render it necessary.
- (2) The appointment of an acting judge to avoid meeting a need for a permanent appointment is objectionable in principle.
- (3) The holder of a judicial office should not, during the term of that office, be dependent upon the Executive Government for the continuance of the right to exercise that judicial office or any particular jurisdiction or power associated with that office.
- (4) There is no objection in principle to the Executive Government appointing a judge, who holds a judicial office on terms consistent with principle (1), to exercise a particular jurisdiction associated with the judge's office, or to an additional judicial office, in either case for a limited term provided that:
  - (a) the judge consents;
  - (b) the appointment is made with the consent of the judicial head of the Court from which the judge is chosen;
  - (c) the appointment is for a substantial term, and is not renewable;
  - (d) the appointment is not terminable or revocable during its term by the Executive Government unless:



- (I) the judge is removed from the first mentioned judicial office; or
  - (ii) the particular jurisdiction or additional judicial office is abolished.
- (5) It should not be within the power of Executive Government to appoint a holder of judicial office to any position of seniority or administrative responsibility or of increased status or emoluments within the judiciary for a limited renewable term or on the basis that the appointment is revocable by Executive Government, subject only to the need, if provided for by statute, to appoint acting judicial heads of Courts during the absence of a judicial head or during the inability of a judicial head for the time being to perform the duties of the office.
- (6) There is no objection in principle to the appointment of judges to positions of administrative responsibility within Courts for limited terms provided that such appointments are made by the Court concerned or by the judicial head of the court concerned.

The declaration was signed by:

The Hon J Miles, AO, Chief Justice of the ACT

The Hon Justice D Malcolm, AC, Chief Justice of Western Australia

The Hon AM Gleeson, AC, Chief Justice of New South Wales

The Hon J Macrossa, AC, Chief Justice of Queensland

The Hon J Phillips, Chief Justice of Victoria

The Hon Justice Martin, AO, MBE, Chief Justice of the Northern Territory

The Hon J Doyle, Chief Justice of South Australia

The Hon JE Cox, RFD, ED, Chief Justice of Tasmania