

## **Judicial Accountability: An Australian Perspective**

This paper is a response to issues raised in the International Commission of Jurist's recent publication "Judicial Accountability: A Practitioner's Guide".<sup>1</sup> The Guide examines the mechanisms and procedures utilised in the international community to ensure accountability for serious judicial misconduct, such as corruption or complicity in human rights violations. The ICJ Guide aims to assist in the development of procedures that meet international law obligations to address such conduct whilst preserving the independence of the judiciary.

In Australia, recent years have seen the mechanisms by which judicial accountability is secured come under increased scrutiny by different State legislatures. There has been a substantial focus, in particular, on the ways in which misconduct by judges that is less serious than that warranting removal should be handled.<sup>2</sup> Nonetheless, the matters raised by the ICJ Guide in relation to very serious misconduct remain relevant to the Australian context both because no country should consider itself immune from such conduct taking place, even if historical instances are rare, and because frequently the principles discussed in the Guide have a broader application than just to very serious allegations. Of particular utility, is the Guide's discussion of the nature of accountability obligations under international law; its critique of different accountability bodies; and its articulation of procedural issues for fair handling of complaints.

Taking each of these matters in turn, this paper will describe the extent to which the principles outlined in the ICJ Guide are reflected in the discussion or practices of those responsible for judicial accountability in Australia.

### **Nature of Accountability Obligations**

The Hon John Doyle, who was Chief Justice of the Supreme Court of South Australia from 1995 to 2012, has made the point that a clear conceptualisation of judicial accountability is needed before an accurate assessment can be made of whether accountability obligations are being met. He argued, *extra curially*, that the suggestion "that the judiciary is unaccountable is misconceived. This misconception stems from the imprecision of the term accountability.

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<sup>1</sup> Published in June 2016 (hereafter, the "ICJ Guide" or simply "the Guide").

<sup>2</sup> H P Lee, "Appointment, Discipline & Removal of Judges in Australia" in H P Lee, *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 27 at 28.

In truth accountability is a concept the content of which varies according to the context in which it is being considered...”.<sup>3</sup> One aspect of context relevant to determining the manner in which accountability might be achieved is the relationship between the persons or institutions said to be accountable and the persons or institutions to whom they are accountable.

*Accountable to the rule of law*

The ICJ Guide notes that, at the broadest level, the judiciary as an institution should be accountable to the society it serves.<sup>4</sup> But as the judiciary is certainly not bound to base its decisions on how palatable they might be to the majority of society, it is clear that this accountability is made operative by adherence to the rule of law. That is, “societal opinions are relevant to the accountability of the judiciary only to the extent that such opinions are expressed through duly adopted laws that are compliant with the constitution of the State and international legal obligations.”<sup>5</sup>

The ICJ Guide views the nature of the judiciary’s accountability to the legislature and the executive in similar terms. Rather than judges being accountable to these other branches of government in the sense of being “responsible” or “subordinate” to them, the judiciary must instead “demonstrate that their decisions are based on legal rules and reasoning, and fact-finding based in evidence, in an independent and impartial way free from corruption and other improper influences.”<sup>6</sup>

The obligation of judges to decide cases in a manner that respects the rule of law, rather than public opinion or the dictates of government, invites attention to the more orthodox accountability mechanisms that have been recognised by courts in Australia for many years. For instance, judicial acknowledgement of the importance of the principle of open justice, the practice (and often obligation) to articulate reasons for judgment, and the openness of decisions to review by a court exercising appellate jurisdiction. Judicial acknowledgement of the

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<sup>3</sup> J Doyle, “Accountability: Parliament, the Executive and the Judiciary” (Paper presented at the AIAL Forum, 18-19 June 1998) 3, quoted in H P Lee and Enid Campbell (2013) “The Australian Judiciary” (2<sup>nd</sup> Ed.), Cambridge University Press at 150 (“The Australian Judiciary”).

<sup>4</sup> ICJ Guide at 15, citing Consultative Council of European Judges, Opinion No. 18, Position of the judiciary and its relation with the other powers of state in a modern democracy, CCJE (2015) 4 at [21]. Similarly, the Law Reform Commission of Western Australia has stated that judicial accountability “refers to judges being answerable for their actions and decisions to the community to whom they owe their allegiance”: “Complaints Against Judiciary”, Final Report published August 2013 at 1, 78-79 (“LRCWA Final Report”).

<sup>5</sup> ICJ Guide at 15.

<sup>6</sup> ICJ Guide at 16-17.

importance and value of these principles can be readily found in judgments and extra-curial commentary. Three examples follow.

First, with respect to the principle of open justice, in the 2011 case of *Hogan v Hinch*,<sup>7</sup> Chief Justice French of the High Court of Australia said:

“An essential characteristic of courts is that they sit in public. That principle is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny. It is also critical to the maintenance of public confidence in the courts. Under the *Constitution* courts capable of exercising the judicial power of the Commonwealth must at all times be and appear to be independent and impartial tribunals. The open-court principle serves to maintain that standard.”

Second, the obligation to provide reasons for decisions was referred to by Meagher JA in the New South Wales Court of Appeal decision of *Beale v GIO of NSW*:<sup>8</sup>

“The requirement to provide reasons can operate prophylactically on the judicial mind, guarding against the birth of an unconsidered or impulsive decision. It enhances judicial accountability. The provision of reasons has an educative effect: it exposes the trial judge or magistrate to review and criticism and it facilitates and encourages consistency in decisions. The educative effect does not stop with judges but extends to other lawyers, to government and to the public. ...”

And third, the importance of review of judgments has been commented on by Murray Gleeson QC, former Chief Justice of the High Court of Australia, writing extra-curially, and prior to his appointment to the bench. He observed that:<sup>9</sup>

“The most obvious means of review of judicial performance is to be found within the court structure itself, in the ordinary appellate process. ...The working of the appellate courts is the primary means by which the system provides for identifying and correcting judicial error.”

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<sup>7</sup> (2011) 243 CLR 506 at 530 (citations omitted).

<sup>8</sup> (1997) 48 NSWLR 430 at 442.

<sup>9</sup> “Judging the Judges” (1979) 53 *Australian Law Journal* 330 at 343.

Staying with the subject of Gleeson's observations, the ICJ Guide refers to the review of decisions through appeal or judicial review as being the primary accountability mechanism where a person has suffered harm as a result of a judicial decision that was wrong but made in good faith.<sup>10</sup> However, it should be noted that appeals can have a broader role to play in judicial accountability than might first be thought. The term "error", as identified by Gleeson, is used in the widest possible sense. Beyond simply correcting misapprehensions or misapplications of the law, appeals would, for example, go some way to redressing a litigant who is able to establish that the judge deciding their case had received a bribe to render a particular outcome. Thus, while appeals cannot go beyond reversing the decision made in a particular case, they can at the least provide this specific form of accountability to corrupt conduct.

*Accountable to those wronged by misconduct*

Of course, as was noted by Michael Kirby, a former Justice of the High Court of Australia, accountability of judges must extend beyond "mere answerability to the law".<sup>11</sup> "To say that a judge is answerable only to his or her conscience and the law may hide a multitude of sins..."<sup>12</sup> Indeed, the historic focus on traditional forms of accountability, such as appellate review and open justice, led John Basten, now a Justice of the New South Wales Court of Appeal, to observe ironically that "judges can be wrong but not bad".<sup>13</sup> The focus of the ICJ Guide, then, is the development of avenues for judicial accountability that can go further than those that traditionally form part of a court's ordinary functioning or hierarchical structure and can thus go further in providing redress for those who are victims of serious judicial misconduct. The Guide states that:<sup>14</sup>

"Individuals who are affected by particular judicial misconduct should also be able to expect that the judge will be held accountable for the wrongdoing and that... any damage will be remedied. Such persons should have access to complaints procedures capable of resulting in disciplinary proceedings for judicial misconduct."

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<sup>10</sup> ICJ Guide at 34.

<sup>11</sup> M Kirby, 'Judicial Accountability in Australia' (lecture presented at a function for the Commonwealth Legal Education Association in Brisbane on 6 February 2001) at 2.

<sup>12</sup> Ibid at 3.

<sup>13</sup> John Basten, "Judicial Accountability: A Proposal for a Judicial Commission", *Australian Quarterly*, 52 (1980) at 468, 477 quoted in R Ananian-Welsh, G Appleby and A Lynch, *The Tim Carmody Affair: Australia's Greatest Judicial Crisis* (NewSouth Publishing, 2016) at 199-200.

<sup>14</sup> ICJ Guide at 15-16.

The desirability of victims of serious judicial misconduct being able to seek remedy and reparation is a prominent theme in the second chapter of the ICJ Guide. The elements of adequate and effective reparation under international human rights law and standards are said to include, *inter alia*, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>15</sup> These elements, it is argued, should be available either from the individual judge or, if this would compromise judicial independence, from the State as a whole.<sup>16</sup> In Australia, the concern for achieving adequate reparation, in these terms, is not one that has received extensive discussion. Partly, this may be due to the absence of instances of corruption or complicity in human rights violations to which this conceptualisation of reparation may be more readily applied. However, aspects of the various elements of reparation discussed in the ICJ guide exist already in current complaint structures or have otherwise received judicial acknowledgment.

Restitution and compensation, in the sense used in the ICJ Guide, refer to the means by which a victim of serious misconduct or human rights violations is placed, so far as possible, in the position they would have been in had the wrong not occurred.<sup>17</sup> For instance, a person ordered to be detained on an arbitrary basis should have their liberty restored and receive damages for economic and non-economic losses (such as psychiatric harm). In Australia, were a judge to be responsible for an individual's arbitrary detention (for example, by ordering imprisonment for a person convicted of a minor offence where there is no basis for doing so in principle or precedent), a successful appeal against the order would have the effect of restoring the individual's liberty. It would not, however, provide a straightforward means of acquiring damages from the judge or the State for the harm suffered whilst detained.

One aspect of "satisfaction" referred to in the ICJ Guide is the need for acknowledgment of the facts and acceptance of responsibility for harm suffered by the victim of rights violations.<sup>18</sup> In so far as a violation of human rights is able to be corrected on appeal, the reasons for decision in that case would provide public acknowledgement of the wrong, albeit not from the judge who caused or was complicit in the harm. However, the idea of having a judicial conduct ombudsman, or similar office, who might direct a judge or judicial committee to issue an

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<sup>15</sup> ICJ Guide at 19.

<sup>16</sup> ICJ Guide at 16.

<sup>17</sup> ICJ Guide at 19.

<sup>18</sup> ICJ Guide at 19.

apology to a complainant (or even an *ex gratia* payment) has been given tentative support by some members of the Australian judiciary.<sup>19</sup>

### *Accountable to ethical and professional norms*

“Guarantees of non-repetition” refers to the obligation to ensure measures are in place to promote compliance with international standards.<sup>20</sup> Importantly, this includes the observance of codes of conduct and ethical norms. Australian courts all ensure new members of the judiciary undergo training, including a significant component on ethical conduct, and judges engage in ongoing training and education on these topics. In addition, the courts have fostered a culture of independence and integrity, violations of which are fiercely resisted. As has been observed by several jurists, “judges are accountable to peer opinion, which is a particularly powerful form of scrutiny.”<sup>21</sup> The ICJ Guide recognises the importance of informal methods for prevention and accountability such as “the professional culture within the national judiciary” as part of a holistic approach to responding to threats of corruption and human rights violations.<sup>22</sup> It is this wider suite of accountability mechanisms that provides the context for a discussion, in the next section of the paper, of accountability bodies set up to deal with misconduct that falls outside of traditional means for handling judicial error.

### **Accountability Bodies**

The ICJ Guide discusses several bodies that might have a role to play in promoting judicial accountability. These include judicial councils, Parliaments, ad hoc tribunals, anti-corruption bodies, national human rights institutions, professional associations, and more.<sup>23</sup> Each of these bodies plays some role in Australia, though a few have influence in only some State jurisdictions. This section of the paper will set out the means by which the various Australian jurisdictions deal with allegations of serious judicial misconduct, with a particular focus on how judges can be removed from office; the extent to which such means have been called upon

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<sup>19</sup> See, for example, Chief Justice Bryant’s evidence given to the Legal and Constitutional Affairs References Committee on Australia’s Judicial System and the Role of Judges, *Committee Hansard*, 12 June 2009 at 57.

<sup>20</sup> ICJ Guide at 19-20.

<sup>21</sup> J Doyle, “Judicial Independence” (1997-8) 16 *Australian Bar Review* 212 at 219. See also M Kirby, above n 11, at 14 and the comments attributed to judges in Sydney Morning Herald, “Who judges the judges?” 7 December 2009, <http://www.smh.com.au/national/who-judges-the-judges-20091206-kcrx.html> (accessed 24 September 2016).

<sup>22</sup> ICJ Guide at 3-4.

<sup>23</sup> ICJ Guide at 33-34.

historically; and the extent to which current processes reflect the principles articulated in the ICJ Guide.

### *Process for Removing Australian Judges from Office*

There is no uniform process in the Australian jurisdictions for dealing with complaints that would, if proven, justify removing a judge from office. Indeed, there is no uniform legislative basis for the removal of Federal, State or Territory judges. However, in general, removal is effected by declaration of the Head of State in the relevant jurisdiction<sup>24</sup> after Parliamentary request<sup>25</sup> on the grounds of proved misbehaviour or incapacity. A survey of the legal framework in each jurisdiction reveals the different ways this process might come about and the different degrees to which specified procedures for investigating allegations of serious misconduct have been established.

#### Federal Judges

For federal judges, s 72(ii) of the Australian Constitution provides the legal basis for removal. However, until relatively recently, there were no formal systems in place for the handling of complaints against federal judicial officers. Since 12 April 2013, legislation has provided for the establishment of a commission to assist the Parliament in discharging its responsibilities under s 72(ii) of the Constitution.<sup>26</sup> Where the Attorney-General or Chief Justice of a federal court, upon an initial assessment, considers that a complaint against a federal judicial officer is very serious, a commission may be set up by the Attorney-General to investigate further and provide an “opinion of whether or not there is evidence that would let the Houses of the Parliament conclude that the alleged misbehaviour... is proved.”<sup>27</sup> It is left to Parliament to ultimately determine whether such evidence in fact proves the misbehaviour complained of so as to justify the removal of the judicial officer. The commission must be constituted by three members nominated by the Prime Minister, with at least one of those members being a former Commonwealth judicial officer or a former judge of a State or Territory Supreme Court.<sup>28</sup>

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<sup>24</sup> Federally, the Governor-General; in the States, the relevant Governor.

<sup>25</sup> Where Parliament is bicameral, the request must come from both Houses; where the Parliament is unicameral, a request from the Legislative Assembly is sufficient.

<sup>26</sup> The *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) operates in conjunction with the *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth), though the former deals more with processes for handling complaints that might warrant removal while the latter deals with complaints of a less serious nature.

<sup>27</sup> *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 10(b).

<sup>28</sup> *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 13.

### New South Wales

New South Wales was the first Australian jurisdiction to implement an independent standing body to handle complaints made against judicial officers. The Judicial Commission of New South Wales was established in 1986 in the wake of scandalous behaviour alleged against a very small number of judges.<sup>29</sup> The Commission has ten members: six are the heads of the various courts and tribunals in the State and four are appointed on the nomination of a government Minister from among legal practitioners and members of the community.<sup>30</sup> Although its responsibilities are more wide-ranging than this, one of the Commission's roles is to receive complaints against judges, undertake a preliminary investigation of the complaint's significance and, where appropriate, refer serious complaints to its Conduct Division for further investigation. If the Conduct Division finds that a complaint could warrant removal of the judge, it must report its conclusions to the State Governor and the relevant Minister. Unlike the Commonwealth protocol, the New South Wales Governor is not permitted to receive a request from Parliament for removal of a judicial officer unless the Conduct Division of the Commission has reported that there are sufficient grounds to justify the removal.<sup>31</sup>

The legislature has also established a separate body, the Independent Commission Against Corruption (ICAC), which has concurrent jurisdiction with the Commission to investigate complaints of *criminal* misconduct by any public official, including judges.<sup>32</sup> ICAC has no enforcement powers against judges but it may refer its findings to the Judicial Commission or to Parliament.<sup>33</sup>

### Victoria

Very recently, Victoria enacted legislation to establish the Judicial Commission of Victoria, a body with broadly similar functions to the Judicial Commission of New South Wales.<sup>34</sup> Although it has received royal assent, the *Judicial Commission of Victoria Act 2016* (Vic) has

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<sup>29</sup> See "Current topics: New Formalised Judicial Accountability System Established in New South Wales" (1987) 61 *Australian Law Journal* 157 at 158.

<sup>30</sup> *Judicial Officers Act 1986* (NSW) s 5.

<sup>31</sup> *Judicial Officers Act 1986* (NSW) s 41.

<sup>32</sup> *Independent Commission Against Corruption Act 1988* (NSW) ss 3(1), 8-10.

<sup>33</sup> *Independent Commission Against Corruption Act 1988* (NSW) s 53.

<sup>34</sup> *Judicial Commission of Victoria Act 2016* (Vic) s 1.

yet to commence operation, presumably because administrative arrangements will need to be put in place to set up the Commission. However, by virtue of s 2(2), the majority of the substantive provisions of the Act will be operative no later than 1 July 2017. Once established, the Judicial Commission of Victoria will be able to refer serious complaints to an investigating panel, which may report to the Governor if the panel forms the opinion that facts exist that could warrant the removal of a judicial officer on the grounds of misbehaviour or incapacity.<sup>35</sup> A copy of the report must be provided to the Attorney-General who then must table it in Parliament for consideration.<sup>36</sup> As is the case in New South Wales, a report of this kind is a prerequisite for the removal of a judge from office but it is not determinative; the decision to request removal by the Governor will still rest with Parliament.<sup>37</sup> Any investigating panel to be referred a complaint by the Commission will have three members: a retired judicial officer, a current judicial officer, and a person of high standing in the community recommended by the Attorney-General.<sup>38</sup>

The Judicial Commission will operate alongside the existing Independent Broad-based Anti-corruption Commission (IBAC), which also has the power to conduct an investigation into the conduct of judicial officers.<sup>39</sup> IBAC may make requests of the Chief Commissioner of Police to take action in respect of allegations of corrupt conduct.<sup>40</sup> It must not, however, include any finding of corrupt conduct of a judicial officer or any other adverse finding in relation to a judicial officer arising from an investigation in its special or annual reports.<sup>41</sup>

### South Australia

South Australia is another State to recently adopt a standing, independent complaints-handling office – in this case, that of the Judicial Conduct Commissioner. The legislative framework was enacted late last year and the appointment of former judge Bruce Lander QC as inaugural Commissioner was announced in August 2016.<sup>42</sup> The Commissioner will undertake an initial assessment of complaints made or referred to him and may refer the complaint to the relevant

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<sup>35</sup> *Judicial Commission of Victoria Act 2016* (Vic) ss 33, 34.

<sup>36</sup> *Judicial Commission of Victoria Act 2016* (Vic) ss 34(4), 39.

<sup>37</sup> *Constitution Act 1975* (Vic) s 87AAB.

<sup>38</sup> *Judicial Commission of Victoria Act 2016* (Vic) ss 87AAS, 87AAW.

<sup>39</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 3.

<sup>40</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 160.

<sup>41</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 62.

<sup>42</sup> See <http://www.premier.sa.gov.au/index.php/john-rau-news-releases/995-watchdog-appointed-to-hear-complaints-against-judges-and-magistrates> (accessed 21 September 2016).

head of jurisdiction with recommendations for specific actions.<sup>43</sup> He may also refer the complaint immediately to Parliament for consideration of whether the judicial officer should be removed from office or, instead, may recommend to the Attorney-General that an independent judicial conduct panel be appointed to investigate the complaint further.<sup>44</sup> That panel would consist of two judges or former judges and one lay person.<sup>45</sup> A judge can only be removed by the Governor following an address by both Houses of Parliament.<sup>46</sup>

Where a complaint relates to conduct that the Commissioner reasonably suspects involves corruption in public administration, the complaint is to be referred to the Office for Public Integrity to be dealt with pursuant to the *Independent Commissioner Against Corruption Act 2012 (SA)*.<sup>47</sup> The matter may ultimately be referred to law enforcement agencies for potential criminal prosecution however the ICAC Commissioner may not issue directions to a judicial officer under investigation.<sup>48</sup>

### Queensland

In Queensland, a judge may be removed by the Governor in Council, on an address by the Legislative Assembly (Queensland's only House of Parliament), on the grounds of proved misbehaviour or incapacity justifying the removal. Proof of misbehaviour involves acceptance by the Legislative Assembly of a report of an investigatory tribunal, established on an ad hoc basis under special legislation.<sup>49</sup> The investigatory tribunal must consist of at least three members, appointed from among serving or retired judges, who must have concluded that the misbehaviour ground is established on the balance of probabilities before removal on this ground can take place.<sup>50</sup> This process is similar to the current Victorian position, prior to the commencement of its Judicial Commission legislation.

Any committee established pursuant to s 61 of the Queensland Constitution can be aided by investigations conducted by the State's Crime and Corruption Commission. At the tribunal's request, the commission must give the tribunal all material in the commission's possession

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<sup>43</sup> *Judicial Conduct Commissioner Act 2015 (SA)* ss 12, 13, 18.

<sup>44</sup> *Judicial Conduct Commissioner Act 2015 (SA)* ss 19, 20.

<sup>45</sup> *Judicial Conduct Commissioner Act 2015 (SA)* s 21.

<sup>46</sup> *Constitution Act 1934 (SA)* s 75.

<sup>47</sup> *Judicial Conduct Commissioner Act 2015 (SA)* s 15.

<sup>48</sup> *Independent Commissioner Against Corruption Act 2012 (SA)* s 36.

<sup>49</sup> *Constitution of Queensland 2001 (Qld)* s 61.

<sup>50</sup> *Constitution of Queensland 2001 (Qld)* s 61.

relevant to the subject of the tribunal's inquiry, including any relevant report of the commission.<sup>51</sup>

### Tasmania

In Tasmania there are no prescribed grounds for removal or formalised complaints processes. The only legal requirement for removal is an address requesting removal by both Houses of Parliament.<sup>52</sup>

### Australian Capital Territory

Complaints against Australian Capital Territory judges alleging unfitness for office are made to the Attorney-General who, if satisfied the complaint could warrant the removal of the officer, must request that the executive appoint a judicial commission.<sup>53</sup> Upon the judicial commission being established, the judge under investigation is automatically suspended, with pay, from office.<sup>54</sup> The commission comprises three members appointed from among serving and retired judges.<sup>55</sup> Like the ad hoc panels, commissions or tribunals in other jurisdictions, the commission must submit a copy of any findings it makes that the judge's behaviour might justify removal to the Attorney-General who may then table the report in Parliament.<sup>56</sup> The judicial officer whose behaviour has been impugned must be afforded the opportunity to address the Legislative Assembly prior to a decision by Parliament on whether to pass a motion calling for removal of the judge.<sup>57</sup>

### Northern Territory

As with most other Australian jurisdictions that lack a legislatively established complaints-handling body, the Northern Territory relies on a non-legislated Protocol to articulate how complaints are handled.<sup>58</sup> The Protocol provides that complaints are to be made to the relevant head of jurisdiction who must refer the complaint for consideration by Parliament if he or she concludes that the complaint has substance and it is serious enough to potentially warrant

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<sup>51</sup> *Crime and Corruption Act 2001* (Qld) s 70(2).

<sup>52</sup> *Supreme Court (Judges Independence) Act 1857* (Tas) s 1.

<sup>53</sup> *Judicial Commission Act 1994* (ACT) s 5.

<sup>54</sup> *Judicial Commission Act 1994* (ACT) s 19.

<sup>55</sup> *Judicial Commission Act 1994* (ACT) s 7.

<sup>56</sup> *Judicial Commission Act 1994* (ACT) s 5.

<sup>57</sup> *Judicial Commission Act 1994* (ACT) s 5.

<sup>58</sup> Supreme Court of the Northern Territory, *Protocol for Complaints against Judicial Officers of the Supreme Court of the Northern Territory* (2008) <<http://www.supremecourt.nt.gov.au/about/index.htm>> (accessed 19 September 2016).

removal. The *Supreme Court Act 1976* (NT) provides that a judge may be removed from office by the Administrator on an address from the Legislative Assembly only on the grounds of proved misbehaviour or incapacity.<sup>59</sup> The Act does not set out any additional procedures or requirements for the removal process.

### Western Australia

As with the Northern Territory, Western Australia currently handles the majority of its complaints against judicial officers in accordance with a non-legislated protocol.<sup>60</sup> The head of jurisdiction is generally responsible for investigating the complaints. If the complaints are considered sufficiently serious to warrant removal, then they are to be dealt with according to procedures established by law. However, also similar to the situation in the Northern Territory, there exists no law governing the removal of judges beyond the proposition that “all the judges of the Supreme Court shall hold their offices during good behaviour, subject to a power of removal by the Governor upon the address of both Houses of Parliament.”<sup>61</sup> Procedural protections in place in other States for investigations leading up to recommendations for removal from office – discussed further in the final section of this paper – are not presently available. Following a referral by the then Attorney-General for the State in May 2011, the Law Reform Commission of Western Australia has recommended the establishment of a Judicial Commission in a similar form to that operating in New South Wales.<sup>62</sup>

### *Two Case Studies of Serious Complaints against Australian Judges*

Fortunately, allegations of serious judicial misconduct in Australia are rare.<sup>63</sup> Moreover, the complaints that have been made are not indicative of misconduct of the nature focussed upon

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<sup>59</sup> s 40(1).

<sup>60</sup> Supreme Court of Western Australia, *Protocol for Complaints Against Judicial Officers in Western Australia* (2007) <[http://www.supremecourt.wa.gov.au/C/complaints\\_against\\_judicial\\_officers.aspx?uid=6960-4191-1980-2236](http://www.supremecourt.wa.gov.au/C/complaints_against_judicial_officers.aspx?uid=6960-4191-1980-2236)> (accessed 19 September 2016).

<sup>61</sup> *Supreme Court Act 1935* (WA) s 9(1). See also *District Court of Western Australia Act 1969* (WA) ss 11, 18, 18A; *Family Court Act 1977* (WA) s 18; *State Administrative Tribunal Act 2004* (WA) ss 110, 114.

<sup>62</sup> Law Reform Commission of Western Australia, “Complaints Against Judiciary”, Final Report published August 2013 at 1, 78-79 (“LRCWA Final Report”).

<sup>63</sup> In addition to the two case studies presented below, my researches have uncovered few other instances where commissions have been established to investigate whether a judge should be removed. Three examples may, however, be pointed to. The first, pertaining to the “incapacity” ground for removal, was in relation to Justice Vince Bruce of the New South Wales Supreme Court, who was found to have repeatedly delivered judgments after an unacceptably long delay: see *The Australian Judiciary*, above n 3, at 124–126. The second related to Chief Magistrate of the Australian Capital Territory Ron Cahill, alleged to have interfered with another Magistrate’s conduct of criminal proceedings relating to a figure known professionally and socially to the Chief Magistrate: see H P Lee, above n 2, at 41. The third arose out of allegations that Judge Robert Kent of the County Court of Victoria had failed to lodge income tax returns for several years prior to his appointment as a judge and

in the ICJ Guide. That is, they do not relate to complicity in human rights violations or corrupt behaviour in the exercise of judicial office. Nonetheless, a review of two occasions in which steps have been taken towards the removal of a judge, following serious complaints, is instructive in illustrating the way in which traditional parliamentary processes for removal have operated in practice. This will permit a better assessment of these processes in light of the ICJ Guide's critique.

#### Steps taken for the removal of Justice Murphy

Although no federal judge in Australia's history has been removed from office pursuant to the Commonwealth Constitutional provision outlined above, steps were taken in this direction against former Justice of the High Court of Australia, Lionel Murphy. Details of the circumstances prompting these steps have been described by me in detail elsewhere.<sup>64</sup> A highly abridged summary will suffice for present purposes.<sup>65</sup>

The principal allegation made was that Justice Murphy had engaged in activities amounting to an attempt to pervert the course of justice in order to assist his friend, a Sydney solicitor, whose association with leaders of organised crime groups had been under investigation by New South Wales police. Those investigations included illegal phone-tapping of the solicitor. It was the publication in newspapers of transcripts purporting to be of those tapes that received extensive media coverage, prompting public outcry and calls from the Federal Opposition for Justice Murphy's resignation. The ensuing process for investigating whether Justice Murphy should be removed from office was far from smooth.

In 1984, the Attorney-General asked the Australian Federal Police to report on whether there was evidence to support a prosecution for federal offences; the Attorney-General also sought advice from the Director of Public Prosecution's Office about whether the alleged conduct could amount to "misbehaviour" within the meaning of s 72(ii) of the *Commonwealth*

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still owed large sums in unpaid tax and penalties: see King "Removal of Judges" (2003) 6(2) *Flinders Journal of Law Reform* 169 at 177. In each of these examples, the judge in question resigned from office, thus obviating the need for removal by Parliament or, in the latter two cases, continued investigation into the allegations.

<sup>64</sup> R G Atkinson, "The Chief Justice and Mr Justice Murphy: Leadership in a Time of Crisis" (2008) 27(2) *University of Queensland Law Journal* 221-238.

<sup>65</sup> The following sources, in addition to those cited *ibid*, informed the ensuing summary: F Phillips, *The Modern Judiciary: Challenges, Stresses and Strains* (Wildy, Simmonds & Hill Publishing, 2010) at 29-30; The Australian Judiciary, above n 3, at 117-120; H P Lee, above n 2, at 36-38. These sources were also relied on in the summary of the Justice Vasta affair that follows.

*Constitution.* Later that year, two select Committees, in succession, were appointed by the Senate and reported on whether there was adequate evidence to justify the removal of the judge (the former was split on the issue along party lines; the second determined that there was adequate evidence to prove misbehaviour). Each committee was constituted principally by Senators, though the second was assisted by two former judges. In July 1985, Justice Murphy was convicted upon a criminal charge of attempting to pervert the course of justice but, following a successful appeal, this conviction was quashed and a retrial ordered. In April 1986, Justice Murphy was acquitted of criminal conduct at the retrial but, nevertheless, an investigatory body was established to examine all outstanding allegations against the judge – this time a Parliamentary Commission comprised of three retired judges. This Commission was terminated when it became public knowledge that Justice Murphy was dying of cancer. He died shortly afterwards, on 21 October 1986.

#### The Removal of Justice Vasta

In 1989, Justice Angelo Vasta of the Supreme Court of Queensland became the first and (so far) only judge to be removed from office since federation. The Commission precipitating his removal was prompted by an earlier wide-ranging inquiry into corruption, especially by State police, led by Tony Fitzgerald QC in 1987-1988. Justice Vasta was said to be a friend of Sir Terence Lewis, the Police Commissioner at that time, who came under close scrutiny in that inquiry and was ultimately sacked in 1989. Following media reports about their relationship, including allegations of disreputable conduct by Justice Vasta, and a preliminary investigation by Senior Counsel for the Government in the Fitzgerald Inquiry, a Parliamentary Judges Commission of Inquiry was appointed in November 1988. That Commission, composed of three retired judges, reported to the Legislative Assembly in 1989 that while there was no evidence to indicate that Justice Vasta failed to discharge his duties as a judge in accordance with the judicial oath, he had engaged in conduct outside the performance of those duties that indicated he was not “a fit and proper person to continue in office as a Judge”. Broadly speaking, this conduct included giving false evidence at a defamation hearing; making and maintaining allegations that the Chief Justice, the Attorney-General and Mr Fitzgerald QC had conspired to injure him; and making false statements, false claims and arranging “sham” transactions in order to obtain tax advantages. Justice Vasta appeared before the bar of Parliament to dispute the Commission’s findings but, following a seven-hour debate, a motion of the Legislative Assembly calling for his removal was carried on the voices.

### *Applicability of ICJ Guide Principles*

The preceding summaries of removal mechanisms and the case studies on their implementation are most notable for the extent to which they rely on actions by the executive and legislative branches of government for both the instigation of complaint investigations and for the final decision to remove the judicial officer. Even in those jurisdictions where the investigating body is comprised of retired judicial officers or is otherwise separate from the executive, it is generally the Attorney-General who makes the decision to commission the investigation – carrying with it the risk of a politically motivated decision. New South Wales is the only exception to this, where the decision to investigate complaints by the Conduct Division of the Judicial Commission is determined through the Commission’s own internal mechanisms for receiving and assessing complaints. The Judicial Commission of Victoria, once operational, will operate in a similar way. The Commissioner in Western Australia can only recommend a detailed investigation by an independent panel.

This state of affairs sits uncomfortably with the repeated reminders in the ICJ Guide that international standards suggest that the Executive should have “no substantive role in regard to judicial removals or other forms of judicial discipline.”<sup>66</sup> The ICJ Guide favours the use of judicial councils or commissions that are “composed entirely or with a majority of judges, with the possibility of additional minority representation of the legal profession or legal academics, but with the absolute exclusion of any representatives of the political branches of government...”<sup>67</sup> The Murphy affair is a powerful example of the problems that emerge when such guidelines are not followed. The use of two Senate Committees as part of the ongoing investigation resulted in any findings of those committees being coloured by the knowledge that its members could have been influenced by political interests. Moreover, it resulted in a lengthy process, with each new step prompted by the ongoing political pressure to take further steps. By the time a more obviously independent Committee was appointed, composed entirely of retired judges, it was rather too late.

The reason for excluding, as far as possible, the executive and legislature from the process of investigating a judge for removal is to maintain the independence of the judiciary. As has been noted by the Judicial Conference of Australia, “if an Attorney-General has the power to

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<sup>66</sup> ICJ Guide at 34.

<sup>67</sup> ICJ Guide at 35.

determine which matters should be investigated... it is accordingly possible that a politically-inspired reference will result in the suspension or perhaps resignation of a judicial officer whose conduct is in fact unimpeachable – even to the point of upholding the finest traditions of an independent judiciary.”<sup>68</sup>

There is, of course, a contrasting problem if it appears that the accountability body responsible for investigating complaints against judges is largely or exclusively composed of current or former judges. In the context of discussing the problem with complaints handling processes that rest with the relevant head of jurisdiction, the Judicial Conference of Australia noted that “the head must be acutely aware that the complainant is likely to view his or her decision as biased, or at least as perhaps being so. ... Such problems of perception are, in the Committee’s opinion, real.”<sup>69</sup> That problem may be seen to extend even to the work of judicial councils or commissions. However, it is more likely to be accepted where there is a standing commission or where the composition of an ad hoc investigating body is pre-determined or formed and guided by pre-established protocols. Moreover, as noted by the ICJ Guide, the inclusion of people without connection to any branch of government in a judicial council or commission may go some way to reassuring the public of the independence and impartiality of the accountability process.<sup>70</sup> Further, efforts to ensure that a judicial commission/council is as representative of the community as possible, for example by improving the proportion of women or persons from marginalised groups, whether as judge or lay members, may promote public confidence.<sup>71</sup> As noted in the first section of this paper, judges are accountable to the community they serve. And while this does not mean that judicial complaints should be determined by public opinion poll, it is important that the body investigating complaints on the public’s behalf is both relevantly experienced but also respected by them.

Focussing on the legal basis for removal, it is apparent that all jurisdictions in Australia leave to their parliaments the final decision about whether or not to remove a judge. In this regard, the ICJ Guide notes:<sup>72</sup>

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<sup>68</sup> Judicial Conference of Australia, “Second Report of the Complaints Against Judicial Officers Committee”, 1 December 2009 (revised 22 January 2010) at [4].

<sup>69</sup> *Ibid* at [60].

<sup>70</sup> ICJ Guide at 37.

<sup>71</sup> ICJ Guide at 39.

<sup>72</sup> ICJ Guide at 42-43.

“The requirement of Parliamentary approval for removal of judges has a long history in some countries, where it was originally adopted to limit an otherwise unchecked executive discretion to dismiss judges. However, many of these same standards also recognize that, today, the political character of Parliamentary bodies itself creates a risk of abuse.... There is a certain theoretical dissonance to the idea that elected political bodies could be capable of acting as an "independent and impartial tribunal" in judging judges, and the real-world track record of such proceedings bears out the concerns in practice. Further, even if in a particular country there is no recent history of abuse by Parliament of such powers, the political situation can change rapidly and future parliamentarians may be more willing to exercise the powers for ulterior motives or in an unfair fashion.”

The Guide observes that some international standards permit the use of parliamentary procedures in judicial removal but state that this should only be after full investigation, fair hearing and recommended removal conducted by an independent accountability body.<sup>73</sup> Moreover, based on the ICJ’s own experience, the Guide presents the view that Parliament’s only role should be establishing, in legislation, the procedures by which removal will take place and should play no substantive role in the removal itself.<sup>74</sup> It notes that the prospect of the executive not acting on a recommendation to remove a judge made by an independent accountability body is “not simply theoretical.”<sup>75</sup> In Australia, however, and especially at the federal level, the complete separation of parliamentary involvement from the removal process would be difficult to achieve. The federal constitution specifically provides for removal following Parliamentary address. Accordingly, to change this system would require a referendum. Constructive steps can be taken to improve current processes without the need for such a radical change, especially at the State level. Some of those steps would involve closer attention to ensuring procedural fairness in the process leading up to removal of a judge. These issues are discussed briefly in the final section of this paper.

### **Ensuring Procedural Fairness**

The ICJ Guide raises a number of considerations regarding procedural fairness that are reflected to a greater or lesser extent in the removal processes in the Australian jurisdictions.

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<sup>73</sup> ICJ Guide at 43-44.

<sup>74</sup> ICJ Guide at 45.

<sup>75</sup> ICJ Guide at 40.

The guide notes that an accountability body's power to collect evidence and manage proceedings should comply with the fundamental principles of the separation of powers and the special protections accorded to the work of the judiciary to preserve its independence, impartiality and dignity.<sup>76</sup> Moreover, as with any citizen against whom criminal, civil, or disciplinary proceedings are brought, basic requirements of natural justice should be observed. The ICJ Guide draws on the *Universal Declaration of Human Rights* in identifying the key elements of procedural fairness in all types of judicial accountability proceedings as including non-discrimination, equal procedural rights for both judge and complainant, the right to legal assistance and representation, expeditiousness, and the presumption of innocence.<sup>77</sup> A complainant should have access to relevant information about how they can seek redress and both sides should be able to review or appeal a decision of a disciplinary authority.<sup>78</sup>

It is apparent from a review of the practices in the various Australian jurisdictions that greater procedural protections are afforded to both judges and complainants in those jurisdictions which provide for the institution of an independent and standing accountability body. For instance, in New South Wales, the legislation establishing the Judicial Commission provides that complaints must be in writing, identifying the judge and complainant.<sup>79</sup> This ensures that receipt of the complaint can be acknowledged and the judicial officer concerned can be notified.<sup>80</sup> Moreover, frivolous or vexatious complaints are able to be summarily dismissed.<sup>81</sup> Under the Victorian scheme, judges and complainants are to be informed of the outcome of the complaint investigation (e.g., stating it was dismissed or referred), accompanied by written reasons.<sup>82</sup> In the majority of other jurisdictions these basic aspects of procedural fairness are either not acknowledged or depend on adherence to a non-legislated protocol.

In jurisdictions where investigations are instigated by the Executive there is particular scope for unsound processes where the Executive's action might be taken quickly and under strong public pressure. In the case of the removal of Justice Vasta, concerns have been raised about the manner in which the inquiry leading to his removal was conducted. It will be recalled that

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<sup>76</sup> ICJ Guide at 61.

<sup>77</sup> ICJ Guide 63-64.

<sup>78</sup> ICJ Guide at 67, 69.

<sup>79</sup> *Judicial Officers Act 1986* (NSW) s 17. Particulars must accompany the complaint and be verified by statutory declaration: *Judicial Officers Regulation 2012* (NSW) r 5.

<sup>80</sup> See <https://www.judcom.nsw.gov.au/complaints/guide-for-complainants/> (accessed 24 September 2016).

<sup>81</sup> *Judicial Officers Act 1986* (NSW) s 20.

<sup>82</sup> *Judicial Commission of Victoria Act 2016* (Vic) ss 43, 46.

the Legislative Assembly commissioned a report on his behaviour since the commencement of his appointment – the inquiry was not targeted to address any particular complaint. A second report by the Parliamentary Judges Commission of Inquiry itself noted that such a broadly-framed inquiry was “open to grave objection”. It said:<sup>83</sup>

“It is one thing to inquire into specific allegations of impropriety but it is quite another to conduct an inquisition into all aspects of a judge’s life. An inquiry of the latter kind exposes the judiciary to unacceptable risks that pressure will be applied to its members and becomes especially dangerous if instigated by pressure groups or as a result of media clamour.”

The presence of an established Judicial Commission or Commissioner, such as in New South Wales, South Australia and, within a year, Victoria, provides a clear, known avenue for raising complaints that invite a targeted response. Rather than weaken the perceived integrity of the Courts by inviting a deluge of unsubstantiated complaints, the willingness to receive and fairly deal with complaints by an independent body can enhance the public’s confidence in the judiciary.<sup>84</sup> It also enhances accountability of the Courts through providing a reliable means of recording the number of complaints received and the proportion that are found to be substantiated.

Pre-established, standing, accountability bodies have a further advantage. They can be set up to have built-in protections for judicial independence. In Australia, these protections are most apparent in the legislation governing the operation of what are colloquially referred to as “corruption watchdogs”. For example, in Queensland, the *Crime and Corruption Act 2001* (Qld) specifically provides that “the commission, when performing its functions or exercising its powers in relation to the procedures and operations of State courts or in relation to the conduct of a judicial officer, must proceed having proper regard for, and proper regard for the importance of preserving, the independence of judicial officers.”<sup>85</sup> Moreover, “to the extent a

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<sup>83</sup> Thomas, *Judicial Ethics in Australia*, 3<sup>rd</sup> ed. (LexisNexis Butterworths, Sydney, 2009) at 157.

<sup>84</sup> See similarly, V Morabito, “Judicial Officers Act 1986 (NSW): A dangerous precedent or a model to be followed?” (1993) 16 *University of New South Wales Law Journal* 481 at 490 quoted in J Basten, “Should Judges Have Performance Standards?” (1995) *Bar News* 9 at 9 and R Ananian-Welsh, G Appleby and A Lynch, above n 13, at 201, where it is argued that “[a]n appropriately crafted system that establishes an independent body to deal with complaints and that sets out – transparently – standards against which judicial conduct might be measured, a fair process by which such complaints are investigated, and empowers the body to deliver appropriate forms of discipline, would contribute to the public’s image of the propriety of the judicial system.”

<sup>85</sup> s 58(1).

commission investigation is, or would be, in relation to conduct of a judicial officer, the investigation must be conducted in accordance with appropriate conditions and procedures agreed by the chairperson and the Chief Justice from time to time.”<sup>86</sup> The required involvement of the head of jurisdiction of the courts fits with the significant role the State Supreme Courts play in supervising their own jurisdictions.<sup>87</sup> The courts’ supervisory function has been described by Chief Justice Marilyn Warren of the Supreme Court of Victoria as “the very foundation of judicial independence.”<sup>88</sup>

### **Conclusion**

Australia is in the fortunate position of having a judicial system of high competence, capacity and integrity. A leading academic on the Australian judiciary, H P Lee has observed:<sup>89</sup>

“The following assessment of the standing of the judiciary in Australia would be regarded as generally accurate: “Measured in historical and international terms the Australian judiciary is acknowledged to be of outstanding quality and has enjoyed the public’s confidence.””

However, as noted in the ICJ Guide, a lack of persistent problems in recent history should not encourage complacency. Recent controversy in Queensland surrounding the appointment and subsequent behaviour of the former Chief Justice of the Supreme Court only highlights this point. Academic commentators on those events have suggested that the “proposition – that some formal institution is needed to address allegations of poor judicial conduct that falls short of behaviour that would warrant removal – emerges as compelling.”<sup>90</sup> The review presented here of the protocols and accountability bodies in place in Australia to respond to complaints of judicial misconduct and corruption reveal that certain jurisdictions have taken more steps than others in ensuring a fair process that protects judicial independence. Nevertheless, the preceding discussion indicates that the principles raised by the ICJ Guide have been given due attention by Australian judges and legal academics. Indeed, the Complaints Committee of the Judicial Conference of Australia, which is the constituent member of the International

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<sup>86</sup> s 58(4).

<sup>87</sup> See *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

<sup>88</sup> M Warren, “Does Judicial Independence Matter?” (2011) 85 *Australian Law Journal* 481 at 485, quoted in LRCWA Final Report, above n 51, at 18.

<sup>89</sup> H P Lee, above n 2, at 27.

<sup>90</sup> R Ananian-Welsh, G Appleby and A Lynch, above n 13, at 198.

Association of Judges,<sup>91</sup> has recommended the support and promotion of “a structured system of dealing with complaints against judicial officers, such system being based on that of the NSW Judicial Commission.”<sup>92</sup> That Commission carries responsibilities that extend beyond the investigation of complaints, including, significantly, the role of organising and supervising an appropriate scheme of continuing education and training of judicial officers.<sup>93</sup> Support for such a holistic and transparent approach to dealing with judicial misconduct is encouraging, and indicates that, over time, processes in Australia have become more sophisticated and sensitive to the delicate balance that needs to be struck between independence and accountability.

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<sup>91</sup> See <http://www.jca.asn.au/iaj/> (accessed 27 September 2016).

<sup>92</sup> Judicial Conference of Australia, above n 68, at [63].

<sup>93</sup> See Judicial Commission of New South Wales, “Judicial Education”, <<https://www.judcom.nsw.gov.au/education/>> (accessed 27 September 2016).