Judicial Conference of Australia

2005 Colloquium Papers

Judicial Conduct: Still a Live Issue?

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Introduction

1. This paper is intended as a broad overview of some recent trends and developments in the area of judicial conduct and arrangements for dealing with complaints. While concentrating on the Australian scene, it also notes some structural and operational changes in a number of international jurisdictions, as well as some of the rich, modern literature on the topic. Some of the key issues of principle and structure are highlighted while others mentioned simply in passing.

2. The general observation is made that judicial conduct is a live issue in the current Australian and international environment and that we in Australia have not yet developed proper modern systems for dealing with some of the problems that arise. It is suggested that to a significant extent judicial conduct issues should be dealt with by the judiciary itself, the obvious exception being potential removal cases, which will usually require the involvement of the Executive and, ultimately, in very rare cases, the Parliament. The particular judicial conduct arrangements vary from jurisdiction to jurisdiction in Australia but some general suggestions are made as to possible future directions.

3. Finally, there are some observations about the wider judicial system context within which the contemporary judicial conduct discussion is taking place. An interesting point of reference in this regard is New South Wales, which has a Judicial Commission providing education, information and conduct services, while most other jurisdictions have no formal machinery for dealing with any of these areas. Victoria is in the in-between position of having a discrete Judicial College (JCV) as well as new statutory machinery for dealing with key aspects of the conduct issue. It will be interesting to see what future developments occur and, in particular, whether they occur in the different Australian jurisdictions in a principled, thematic, co-ordinated way or in the usual, haphazard *ad hoc* fashion.

4. As mentioned at the end of the paper, a variety of Commissions, Councils, Committees and so on have emerged across the common law world in the last twenty years or so. Some of these are statutory bodies established at the initiative of the executive branch of government; others are more judicially inspired and oriented. Some perform single functions; others combine a number of judicial system activities. The idea of some kind of Commission arrangement especially a judicially controlled one, could be a fertile area for inquiry in Australia, both as a general initiative but also as a possible structure for handling judicial conduct matters.

Background and Recent Developments

5. In preparation for this Colloquium I somewhat apprehensively asked the Internet search engine, Google, if it could find some material for me on the topic of judicial conduct. It was remarkably obliging and produced some 57 pages of entries, 564 individual items in all. It is probably more by now. My reaction to this was mixed. At one level, it was pleasing to have some recent material to look at but at another level the sheer volume and complexity of what was on the computer screen was somewhat daunting and a little bewildering as well.

6. On balance I was relieved because the search revealed that the topic of judicial conduct is, to use a sporting phrase of the times, "on a roll". While some distinguished commentators have observed of late that the subject has, putting it a little crudely, been done to death and asked, only half rhetorically, if there could possibly be anything new or worthwhile said about it, Google revealed that it has a momentum and life of its own. My relief lay in the fact that I was at least going to be able to put some of these developments before you for discussion and thus perhaps justify your very kind invitation for me to appear here.

7. I have not researched this subject extensively, let alone exhaustively, but among other things, the following particularly caught my eye, and not in any particular order of priority:

- In the United States a very high level Committee, chaired by Supreme Court Justice Stephen Breyer, has been established by Chief Justice William Rehnquist to inquire into how the federal judicial system has implemented the *Judicial Conduct and Disability Act* of 1980.[1] In announcing the Committee the Chief Justice acknowledged criticism by the Congress of judicial handling of conduct issues.

  Part of the background to the commissioning of this inquiry was the uproar caused by the fact that another Supreme Court Justice, Antonin Scalia, accepted a flight on Air Force Two and went hunting with Vice President Cheney in Louisiana, some three weeks after the Court had agreed to hear a challenge to the secrecy maintained by a White House energy policy task force chaired by the Vice-President. In a 21 page memo Justice Scalia said he had done nothing wrong and would not disqualify himself from the case. "If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the nation is in deeper trouble than I had imagined," he wrote. This Committee is expected to take two years to complete its task.

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[1] See *Washington Post* May 26, 2004.

- In the United Kingdom some rather extraordinary things are happening on the judicial scene.[2] While the picture is a somewhat confusing one my understanding is that as part of the major constitutional reforms which are occurring there is to be a new judicial appointments system, involving a Judicial Appointments Commission, which will handle the whole process, including advertising and interviewing, and make recommendations for appointment to the Secretary of State for Constitutional Affairs. There is also to be a new arrangement between the Lord Chief Justice and the Secretary of State regarding complaint handling. Complaints about judicial conduct will be handled in the first instance by a complaints secretariat working to support the Lord Chief Justice and the Secretary.

  Not content with those far-reaching changes there is also to be a Judicial Appointments and Conduct Ombudsman appointed. This also follows the passing of the *Constitution Reform Act* 2005. Applications for this position close in August 2005 and the successful applicant is expected to commence operations in April 2006, when the Judicial Appointments Commission (JAC) and the Office of Judicial Complaints (OJC) commence operations. The role of the Ombudsman will be not only to review the handling of judicial conduct complaints but also to investigate complaints regarding judicial appointments and the appointments process generally. (This will include considering complaints from candidates for judicial office about the way in which their applications were handled.) These are indeed startling times for the UK judicial system! The phrase "shake-up" is one that comes to mind.

- In New Zealand there has also been a rash of judicial conduct activity of late. In 2001 a new complaints scheme was introduced and a booklet was published jointly by the Chief Justice and the Attorney-General outlining the court system, judicial accountability and how the complaints system operates.[3] A novel feature of the scheme was the introduction of the position of Judicial Complaints Lay Observer. The Observer has power to review complaints and may request the relevant Head of Court to reconsider a complaint. It appears that this role was introduced to bolster the transparency and accountability of the traditional system for dealing with non-removal type complaints.

  As in the UK, however, there is obviously a degree of restlessness within the relevant political and bureaucratic circles on these matters because it has very recently been announced that in New

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[2] See Department for Constitutional Affairs Website (www.dca.gov.uk/dept/report 2004/04.htm)

[3] The broad details of this scheme were outlined in the 2003 Victorian report on judicial conduct. (See *Report on the Judicial Conduct and Complaints System in Victoria*, Department of Justice, Victoria, 2003).

Zealand, from August 2005, a brand new disciplinary arrangement will come into force pursuant to the *Judicial Conduct Commissioner and Judicial Conduct Panel Act* 2004.[4] As I understand it, the new Commissioner, Ian Haynes, an Auckland solicitor, will receive and screen all complaints about judicial officers. He will identify those serious enough to justify inquiry by a Judicial Conduct Panel, which would be established on his recommendation by the Attorney-General. Such a Panel will have three members – a judge, a second judge, retired judge or barrister and solicitor, and a lay member. It will have the powers of a Commission of Inquiry. Following an adverse report by the Panel the Attorney has the discretion to decide whether to initiate removal proceedings.

This new scheme is the result of a report commissioned by the Attorney-General, The Hon Margaret Wilson, from Chen Palmer and Partners, Barristers and Solicitors, a firm headed by The Hon Geoffrey Palmer, former New Zealand Prime Minister and Attorney-General.[5] The consultants were requested to provide a report on judicial administration issues concerning "the lack of a co-ordinated approach to the appointment, administration, security and termination of judicial and quasi-judicial appointments ….".

- Meanwhile, back in the Northern Hemisphere, The Republic of Ireland has been very active over a number of years in areas of judicial administration change. In December 2000, a Committee on Judicial Conduct and Ethics, chaired by the Chief Justice, produced a report on what it called judicial accountability.[6] This Committee proposed the establishment of a Judicial Council whose role would be very similar to that of the Judicial Commission of New South Wales. The Council would have a Conduct and Ethics Committee responsible for dealing with complaints. In turn, the Committee would be able to establish a Panel of Inquiry to deal with any particular cases that might arise. In cases where misconduct was established such a Panel would be able to make a variety of recommendations, including for private reprimands, public reprimands and the tabling of a resolution for removal in the Parliament. Coupled with reprimands, there could be an additional recommendation that the judge in question be requested to attend courses of counselling or treatment; also, that the judge not be assigned to court duties for a specified time.
- The Internet has also told me that, closer to home again, South Africa has recently introduced a judicial commission type structure for dealing with conduct complaints and that the Philippines and Hong Kong have both introduced judicial conduct codes. It seems

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[4] See Auckland District Law Society, Issue No. 22, *Judicial Conduct "Filter"*, www.adls.org.nz/profession/lawnews/2005/issueno22

[5] *Memorandum : Judicial Administration Issues*, Chen Palmer & Partners, Barristers and Solicitors, Public Law Specialists, November 2002.

[6] *Report of Committee on Judicial Conduct and Ethics*, Dublin, Ireland, December 2000.

that these kinds of developments, which originated many years ago in the United States, and later spread to Canada, are now beginning to envelop the common law world at a rather rapid rate.

Australian Commentary

8. I mentioned earlier that some eminent Australian commentators had recently suggested that the subject of judicial conduct had been dealt with extensively both here and elsewhere, to the point that it was a little difficult to know what, if anything, remained to be said about it. One of those distinguished commentators was Justice JJ Spigelman, Chief Justice of New South Wales, who, in an Address to the 5th World Wide Common Law Judicial Conference in Sydney in 2003, said:

"*It is as difficult to find anything new or different to say about judicial misconduct as it is to do so about judicial independence. I am reminded of Lord Bingham's expressed hope that his lecture on 'The Future of the Common Law' could be included in any future list of the one hundred best lectures entitled, 'The Future of the Common Law.' I have no such lofty ambition. The top thousand speeches on judicial misconduct will do me.*"[7]

9. Whether there are new or different things to be said is perhaps a matter of opinion but even the somewhat spotty research I have been able to do for this paper certainly provides *prima facie* support for the sentiments expressed by the Chief Justice i.e. that there has been a great deal written on this topic in recent times. While these matters are usually reduced to the relative indignity of footnotes, in order to provide a glimpse of what His Honour was driving at I have jotted down below on a purely arbitrary and selective basis some pieces of published writing which appeared in the years immediately preceding 2003:

- A chapter on the appointment and removal of federal judges by Professor Tony Blackshield in the book, *The Australian Federal Judicial System,* edited by Opeskin and Wheeler and published in 2000.[8]
- A number of relevant chapters in the book, *The Australian Judiciary*, written by Campbell and Lee and published in 2001.[9]
- Two papers by Sir Anthony Mason, one on appointment and removal, published in *Fragile Bastion: Judicial Independence in the*

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[7] Spigelman JJ, *Dealing with Judicial Misconduct*, Paper for the 5th World Wide Common Law Judicial Conference, Sydney, Australia, April 2003.

[8] Blackshield AR, *The Appointment and Removal of Federal Judges*, in Opeskin, B and Wheeler, F (eds.) The Australian Federal Judicial System, Melbourne University Press, 2000, pp.400-441 at 422.

[9] See, for example, Chapter 5 (*Removal, Suspension and Discipline of Judges*) and Chapter 6 (*Judicial Conduct*) in Campbell, E and Lee, HP, The Australian Judiciary, Cambridge University Press, 2001.

Nineties and Beyond, 1999 and one on judicial accountability for a Judicial Conduct and Ethics Conference in Dublin in 2000.[10]

- An article by Justice Drummond of the Federal Court in the *Australian Bar Review* in 2001.[11]
- A paper by Justice Denham of the Supreme Court of Ireland at an AIJA Conference in Darwin in 2000, containing much Australian material.[12]
- Numerous articles on the Judicial Commission of New South Wales, including those by Ivan Potas in *Reshaping the Judiciary* (ed. Corns) published in 2001 and the CEO, Ernie Schmatt, at the 2000 Dublin Conference.[13]
- Paper by Justice Branson of the Federal Court on judicial ethics and standards of conduct, presented to a conference in Beijing in 2001.[14]
- "Who Judges the Judges?", a paper by Justice Chernov of the Victorian Court of Appeal presented to a lawyers' conference in Malaysia in 2002.[15]
- An article by Handsley on judicial accountability published in the *Journal of Judicial Administration* in 2001.[16]
- Report No. 89 of the ALRC, *Managing Justice*, published in 2000, which dealt quite extensively with judicial accountability issues.[17]
- The Australian Council of Chief Justices, *Guide to Judicial Conduct*, published by the AIJA in 2002.[18]

10. As I have indicated, this is an arbitrary selection and almost certainly incomplete at that but one can readily see the basis for Chief Justice

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[10] Mason, A, *The Appointment and Removal of Judges*, in Fragile Bastion: Judicial Independence in the Nineties and Beyond, Judicial Commission of New South Wales and *Judicial Accountability*, Paper for a Judicial Conduct and Ethics Conference, Dublin, Ireland May 2000.

[11] Drummond, D, *Do Courts Need a Complaints Department*? 21 Australian Bar Review, 2001, pp.11-49.

[12] Denham, S, *The Diamond in a Democracy: An Independent, Accountable Judiciary*, Keynote Address to the Annual AIJA Conference, Darwin, July 2000.

[13] Potas, I, *The Judicial Commission of NSW: Treading a Fine Line between Judicial Independence and Judicial Accountability*, in Reshaping the Judiciary, (ed. Corns, C), Federation Press, 2001 and Schmatt, E, *The Role and Functions of the Judicial Commission of New South Wales*, Paper for a Judicial Conduct and Ethics Conference, Dublin, Ireland, May 2000. (See also Schmatt, E, *Complaints Against Judicial Officers*, Paper presented to the Industrial Relations Commission of NSW Annual Conference, April 2005).

[14] Branson, CM, *Judicial Ethics and the Standards of Conduct*, Paper presented at the China-Australia Human Rights Judicial Co-operation Conference Beijing, China, 2001.

[15] Chernov, A, *Who Judges the Judges*?, Paper to a Malaysian Bar Association Conference, September 2002.

[16] Handsley, E, *Issues Paper on Judicial Accountability*, Journal of Judicial Administration, 10 (2001), pp.180-226.

[17] *Managing Justice : A Review of the Federal Civil Justice System*, ALRC Report No.89 (See, in particular, paras. 2-241-2.297).

[18] *Guide to Judicial Conduct*, published for The Council of Chief Justices of Australia by the AIJA, 2002.

Spigelman's opening remarks in April 2003. However, for good or for bad, he was not able to stem the tide and material continues to appear on this topic. For example, the following items may be of interest:

- A paper on removal of judges by former Chief Justice of South Australia, The Hon L J King, published in the *Flinders Journal of Law Reform* in 2003.[19]
- An article in the *Monash University Law Review* of 2003 by the current South Australian Chief Justice, Justice Doyle.[20]
- A Victorian report on the judicial conduct and complaints system by the present author, published in 2003.[21]
- The AIJA report, *Governance of Australia's Courts*, published in 2004, which contains sections on judicial conduct issues.[22]
- A paper on removal of Federal judicial officers by Duncan Kerr SC MP, former Federal Minister for Justice, presented to an Administrative Law Forum in June this year. [23]

11. Again, I would be confident that this is a far from complete list. I have listed these items simply to provide a snapshot of the intellectual and other activity going on in relation to this topic. I suppose the important Spigelman question remains whether there are still genuine problems and issues to address in the Australian context or whether so much of the printed debate, and presumably the underlying chatter, is really a good deal of repetitive blathering, albeit with the best and most honourable of intentions on the part of the protagonists.

Stock-Taking Interlude

12. Before turning to some of the actual issues it is worth reflecting on what we know and don't know about the nature and scope of the conduct problem. It has long been assumed, and indeed said from time to time, that the Australian judiciary is a well-behaved judiciary, both on and off the bench and for that reason conduct issues have not loomed large as an issue of public policy discussion. Perhaps typical of statements on the matter is something I wrote in a recent report for the Victorian Government on the judicial conduct and complaints system:

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[19] King LJ, *Removal of Judges*, Flinders Journal of Law Reform, 6 (2003), pp. 169-183.

[20] Doyle, J, *The Australian Judicature : Some Challenges*, Monash University Law Review, 29(2) 2003, pp.201-212.

[21] See Note 3 above.

[22] Alford, J, Gustavson, R, and Williams, P, *The Governance of Australia's Courts : A Managerial Perspective*, AIJA, 2004, (See especially Chapter 3, *Appointing, Paying and Removing Judges*).

[23] Kerr, D, *The Removal of Federal Justices : Qui Custodio Custodis*?, Paper presented to the Administrative Law Forum, Canberra, Australia, June 2005.

"*For the purposes of perspective it should be mentioned at the outset that, despite a small number of high profile cases in recent times, the overall history of the Australian judiciary, including of course Victoria, has been a largely tranquil and satisfactory one, with remarkably few complaints made, especially serious ones. This is important to note, particularly having regard to the large number of cases heard in the courts each year and also the difficult and volatile nature of the environment in which judicial officers operate. The few prominent cases, therefore, need to be seen in their appropriate context and perspective*."[24]

13. I went on to observe that even in relation to major cases of recent times in only one instance, post-federation, has a judge (Mr Justice Angelo Vasta of the Queensland Supreme Court) actually been removed from office by the Head of State after a parliamentary address. I also pointed out, however, that a number of judicial officers have resigned after a variety of conduct investigations in different jurisdictions.

14. I might say that I was politely rebuked in a couple of the submissions received during the Victorian review for expressing far too sanguine a position on the state of the nation in relation to judicial conduct issues. Of course as a matter of empirical knowledge we can never have a clear, authoritative picture of judicial conduct, especially "off-bench" conduct. Also, because of the informal arrangements used in most jurisdictions to deal with non-removal type complaints one has no way of knowing, as I discovered in the Victorian review, how many complaints there are or what they are about. It is even possible that removable conduct occurs which for one reason or another is never discovered or revealed.

15. I must say, upon reflection, and also as a result of seeing Duncan Kerr's very recent contribution to the conduct debate, that I may well wish to revisit the general statement I made in the Victorian report. Simply confining oneself to the modern era and looking at the following instances cited by Kerr[25] does provide some food for thought as to whether there is a problem and what machinery is available for dealing with it:

- The Justice Murphy case of the 1980s.
- The Queensland case of Justice Vasta in the 1980s and an investigation involving a Judge of the District Court during the same period.
- In the 1990s there was the case of Justice Bruce in New South Wales and earlier there had been a case involving a District Court Judge, which led indirectly to the establishment of the New South Wales Judicial Commission.
- In 2000 there was the case of the then Chief Magistrate of Victoria, Michael Adams QC and the following year two Victorian County Court Judges were convicted of failing to lodge tax returns. One of those Judges later resigned after being the subject of an inquiry commissioned by the Attorney-General.

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[24] See Note 3 above at p.12.

[25] See Note 23 above.

- In 2002 there was the case of Queensland Chief Magistrate, Diane Fingleton only very recently resolved by the High Court.
- In that same year, under Parliamentary privilege, a Senator made extraordinary allegations concerning Justice Kirby of the High Court.
- Back in New South Wales a Magistrate was issued with an AVO after an application by her husband; a Supreme Court Judge was charged with drink driving offences; and, more recently, a number of unnamed judicial officers were apparently issued with notices by the ATO in relation to allegedly failing to lodge tax returns; and a District Court Judge received publicity as a result of complaints made to the Judicial Commission that he had appeared to be asleep at some point in a trial.
- Also, very recently, there has been adverse media coverage in relation to Justice Hannon of the Family Court (now retired) and Chief Justice Malcolm of Western Australia.

16. One could also add to Duncan Kerr's list the fact that in recent years two South Australian Magistrates were sentenced to terms of imprisonment after convictions for sex offences and in the Northern Territory a Magistrate has this year resigned after an apparently long-running controversy about aspects of his behaviour in Court.

17. Many of the cases mentioned here do raise serious issues of judicial behaviour regardless of whether any actual complaints have been made and whether they have been substantiated. Also, to the extent that the instances listed here may be the mere tip of an iceberg, the bulk of which comprises an unknown number of lower level type matters, there is more than a hint of a suggestion that, collectively, we do have some issues to think about, simply in terms of the nature and volume of instances arising and the machinery that exists for dealing with them.

18. Further, while leaving aside for the moment the special cases of the New South Wales[26] and ACT[27] Commission structures little has been done of any real substance in the majority of other jurisdictions, including the Federal sphere, to alleviate, for example, the manifest difficulties which occurred in dealing with the Murphy and Vasta cases.[28] And while quite a bit of work has been done by individual courts in relation to improving the transparency and accessibility of the arrangements for coping with lower

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[26] *Judicial Officers Act (NSW)* 1986.

[27] *Judicial Commissions Act (ACT)* 1994.

[28] Speaking of the Murphy case, Sir Anthony Mason, who was a member of the High Court of Australia at that time said this:

"….. the experience illustrated the serious deficiencies in the existing system which allows allegations against a judge to become a political football and a media spectacular. … it was a disconcerting experience for all concerned, leaving me with the impression that there was a systemic risk that the determination of allegations of judicial misconduct under the then existing procedures would become mired in political expediency and controversy."

(See Note 10 above, the Irish Conference Paper at P.4).

level complaints, there is, according to some views, a series of problems that beset that area of activity as well. It is probably also worth making the standard remark that even if particular cases were not arising it behoves a modern, progressive judicial system to have appropriate machinery and procedures to deal with matters when, and if, they do arise. It seems to me hard to argue with the wisdom of that proposition. Otherwise, one is really saying that there is not a problem worth worrying too much about or, even if there are difficulties, that the present machinery is able to deal with them satisfactorily. I suspect that not too many people would agree with either of those propositions.

Particulars

19. Because this paper is a general overview of aspects of the conduct debate I have not allowed myself much scope for detail on particular features but I will at least suggest those issues which, it seems to me, create special interest. These suggestions are based very much on the experience with the recent Victorian review. On that basis, of course, the issues in point may not be relevant in other, let alone all, Australian jurisdictions.

Nature of Behaviour

20. I should at once indicate that regardless of the jurisdiction I would not be in favour of any statutory effort to define what should be removable misbehaviour or incapacity or what divides removable misbehaviour from non-removable misbehaviour. However worthy such an endeavour might be in principle, it seems to me a near impossible and impractical exercise. However, it must be admitted that there is a series of difficulties in this area. These should be recognised as part of any discussion of conduct issues.

21. For example, while one might readily agree with the retired judges who formed the Commission of Inquiry in the Justice Murphy case that the word "misbehaviour" should be used in an ordinary way and is not to be restricted to misconduct in office or to conduct of a criminal nature, a considerable amount of leeway is thereby created for debate and interpretation as to what is misconduct and as to whether, in any particular case, it is a "hanging offence". It will be recalled that the Commissioners, (Lush, Blackburn and Wells) spoke more or less in unison about notions such as conduct judged by contemporary standards which throws doubt on a judge's suitability to continue in office; conduct which, being morally wrong, demonstrates the unfitness of the judge to continue; and behaviour which represents so serious a departure from the standards of proper behaviour by the judge that it must be found to have destroyed public confidence.[29]

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[29] *Special Report of the Parliamentary Commission of Inquiry*, August 1986.

22. In commenting on this it should be noted that while these suggestions are obviously very useful it will be the relevant Parliament, as we saw in the Vasta and Bruce cases, which is the ultimate judge of whether behaviour justifies removal. This means, as Professor Tony Blackshield has noted in the Federal context, that "misbehaviour" is essentially a political rather than a legal notion, which is not to deny of course that a decision by Parliament may well be justiciable before the High Court.[30] Frankly, one of the difficulties, which is at once of course a blessing, is that we have very little jurisprudence to draw upon in relation to the idea of judicial misbehaviour.

23. The following points may also be of some interest:

- As the Commissioners in the Murphy matter pointed out, the distinction between criminal and non-criminal behaviour is not necessarily going to be very helpful. For example, while a conviction for a lower or medium level drink driving offence or a minor assault may not be regarded as sufficient for the removal of a judicial officer, non-criminal behaviour such as persistent failure to produce timely judgments or repeated serious rudeness to litigants and/or lawyers could be.
- A second point in relation to misbehaviour is the one recently made by The Hon Len King AC, QC, former South Australian Chief Justice, in observing that the lack of definition, let alone a jurisprudence, of "misbehaviour" may well involve *ex post facto* judgements being made about the behaviour in question, including of course, off-bench behaviour that may have occurred years earlier, and before the person became a judge.[31] In other words, it is conceivable that the behaviour in question may not have been regarded as seriously wrong by the judge or by the community at the relevant time. And the judge might legitimately be able to say that at the relevant time there was nothing definitive or authoritative to indicate what was and what was not regarded as acceptable. In this regard Mr King notes the positive development in Australia of a *Judicial Conduct Guide*.[32] This, he suggests, may go some way to resolving the difficulty he highlighted because it does at least provide some guidance as to acceptable and unacceptable behaviour.
- A third, and also related, aspect of this matter is that in an increasingly populist-oriented community the vagaries of the current approach to the notion of judicial misbehaviour, and the general references to so-called community standards, may raise the spectre of an executive government attempting to hound an unpopular judge from office. This may be seen as somewhat

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[30] See Note 8 above at p.422.

[31] See Note 19 above.

[32] See Note 18 above.

fanciful and far-fetched but cannot, I would suggest, be wholly disregarded as a possibility at some stage in the future.

Finding and Analysing the Facts

24. Under the Judicial Commission system that operates in New South Wales there is an independent, statutory scheme for dealing with complaints, a major element of which is a formal investigative mechanism. There is also a Commission arrangement in the ACT but it only becomes operational at the behest of the Attorney-General, who has first made the threshold decision that the complaint, if substantiated, is a potential removal matter. Most other jurisdictions do not have formal, structured machinery for dealing with serious complaints, let alone lower level ones.

25. Many commentators took the view that the absence of standing investigative machinery at the Federal and State levels exposed glaring weaknesses of procedure in the Murphy and Vasta cases respectively in the 1980s.[33] These cases were investigated by *ad hoc* Parliamentary and other commissions of inquiry. The investigations were lengthy, at times uncertain, and were accompanied by a great deal of political rancour and unpleasantness, during which a fair amount of unedifying judicial dirty washing was exposed before a somewhat bemused and concerned community.

26. The problems of the Murphy and Vasta cases were echoed to some degree in Victoria in 2000 and 2001 by the Adams and Kent cases respectively.[34] In the Adams case, the Attorney-General had sought informal advice from a leading member of the Victorian Bar and for the Kent matter an investigation was conducted by Mr Len King AC, QC, former Chief Justice of South Australia, but was discontinued when the Judge under investigation resigned. For the purposes of the review following those cases, I was persuaded by the thinking of the Constitutional Commission of the late 1980s,[35] and largely echoed twelve years later by the ALRC as part of its *Managing Justice* Reference, that some sort of formal, standing investigative apparatus was required.[36] As the ALRC put it, adopting very much the position of the Constitutional Commission:

"*The Commission believes it is important for the Federal Parliament to establish a general standing procedure in advance of any controversy or "crisis atmosphere" surrounding a particular allegation. The danger in the present position is that when a particular case arises, the process itself becomes a major issue, with the potential of the merit or otherwise of the substantive allegations to become lost in*

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[33] See, for example, Sir Anthony Mason (Note 28 above).

[34] On the Adams matter See Corns, C, *The Judiciary in Victoria : Balancing Independence with Accountability*, Law Institute Journal, April 2001, pp.46-49.

[35] Constitutional Commission Advisory Committee on the Judicial System and *Final Report of the Constitutional Commission*, Commonwealth of Australia, 1988.

[36] See Note 17 above.

the skirmishing. Every interim decision in these circumstances has the potential for added controversy - such as whether to establish an advisory committee to investigate and report, whether to use sitting or retired judges (or others) for this purpose, the particular identity of the persons appointed (e.g. with respect to any prior political affiliations they may have had, or any political or social views expressed, including any views about the "proper" role of judges), the powers of such a committee to compel evidence, whether it operates in the open or is closed to the public, and so on."[37]

27. This approach was endorsed by the late Richard E McGarvie AC, QC, who explained his thinking on the matter as follows:

"*If the obvious gap in the existing system for the removal of judges is filled by a judicial tribunal available to find the facts, the system will supply all that is needed by way of a formal disciplinary sanction against judges. An impartial judicial tribunal to find what is proved by evidence to have occurred in respect of an allegation and to express an opinion whether that could constitute a ground warranting removal would usually override partisanship in Parliament. The finding and opinion would carry a great deal of weight with Members of Parliament. Voting under the observant eyes of the electorate, members would be conscious of the electoral impact if they voted to keep in office a judge they knew the electorate regarded as unfit to hold office because of the facts found. Making it a prerequisite to removal that a judicial tribunal form the opinion that removal could be warranted on the facts found would avoid the risk of the Houses of Parliament for political reasons treating a ground as proved when it was not or treating it as justifying removal when it could not.*"[38]

28. While the ALRC floated such an approach in its *Discussion Paper* for the *Managing Justice* project it changed its position by the time of the final report. This was apparently due to a submission from the Federal Court suggesting that there could be constitutional problems with such an approach.[39] The Commission recommended instead that the Parliament should develop a protocol for dealing with serious matters and that the protocol might well involve some kind of independent investigative mechanism.

29. One cannot be sure what developments might occur in constitutional law in the future but it seems that in the non-Chapter III environments of the States and Territories, a variety of approaches could be possible and permissible. I am not aware, for example, of any constitutional challenges to the operation of the New South Wales Judicial Commission. And in Victoria, as a result of the recent review, a standing, investigative panel and committee arrangement has now been introduced as part of the *Courts Legislation (Judicial Conduct) Act* 2005, although not, it seems, without constitutional issues having had some bearing on the result.

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[37] *Managing Justice Report*, at p.201.

[38] McGarvie, RE, *The Operation of the New Proposals in Australia*, in The Accountability of the Australian Judiciary : Procedures for Dealing with Complaints Concerning Judicial Officers, AIJA, 1989, pp.13-42 at p.22.

[39] This is discussed in the *ALRC Report* at paras. 2.260-2.297.

30. I am not a constitutional law scholar or practitioner but, as I understand it, the argument in the Federal sphere is, in essence, that s 72(ii) of the Constitution is the only authorised mode of disciplining judges. On that basis, any attempted insertion at Federal level of a New South Wales type Commission could be unconstitutional because it would be an attempt to establish a regime outside s 72(ii) and, therefore, Chapter III. The basis of course for Chapter III is the protection of judicial independence within Federal governmental arrangements.

31. If one were to accept this argument, and wanted to be just a little bit mischievous, one could suggest that the result might be that Federal judicial officers were more independent than those in New South Wales and the ACT and that people who propose similar schemes for other States and Territories are embarked upon the fettering of judicial independence. Perhaps both propositions are correct. It may simply be a matter of opinion.

32. Also, while there might be degrees of constitutional infringement, something will presumably either be ruled by the High Court as unconstitutional or not. Thus, an attempted establishment of a Federal Judicial Commission of the New South Wales type might be held to be unconstitutional but so might any Parliamentary or Executive Government initiative in the judicial conduct area i.e. because it would be outside the parameters of Chapter III of the Constitution. So, if this particular constitutional argument is taken seriously, there are important implications for what can and cannot be attempted on the Federal judicial conduct scene. Interestingly, Sir Anthony Mason has expressed the following view:

"*There are some criticisms that can be made of this argument. It certainly seems to read a lot into the Australian Constitution. It also places very considerable emphasis on judicial independence despite the fact that neither the NSW model nor the Canadian model appears to have constituted a threat to judicial independence. The argument is consistent with the tendency of judges to treat judicial independence as a shield for themselves rather than as a protection for the people. Indeed, there is a lot to be said for the view that judges have devalued judicial independence in the public estimation by relying upon it in order to protect their own position and privileges.*"[40]

33. My understanding is that following the ALRC's *Managing Justice* report and Senator Heffernan's outburst concerning Justice Michael Kirby, the Federal Government was developing a scheme for dealing with some aspects of complaints about Federal judicial officers. In fact, I understand that there was a particular proposal developed, which was circulated to the Federal Courts for comment, but it has not been made public and cannot, therefore, be openly discussed even in a forum such as the JCA.

[40] See Irish Conference Paper (Note 10 above) at p.12. It may also be that the Commonwealth Parliament would have power under S.51 (xxxix) of the Constitution to establish a body to assist it in exercising its power under S.72(ii). Also, under S.50 each House may have such a power. These powers would be subject to Chapter III but would Chapter III be interpreted to exclude such measures? (I am grateful to Professor George Winterton of The University of Sydney for these suggestions).

While still on the subject of constitutional aspects of fact finding and analysis it should be mentioned that anyone attempting to establish modern judicial conduct machinery at State level may need to have regard to the possible implications of pronouncements of the High Court, especially in the two 1996 decisions of *Kable*[41] and *Wilson*.[42] This is because some constitutional experts have expressed the view that the combined impact of these two decisions casts considerable doubt on the permissible extent of the involvement of both Federal and State judicial officers in a range of administrative activities, including, quite possibly, serving as members of a committee investigating the conduct of a fellow judicial officer.[43]

34. The problem supposedly lies in the fact that such a committee would be exercising an advisory function to the Executive or the Parliament and reporting in a way that may not be public. As I understand the argument, the problem of the involvement of State judges at a State level could be that because State courts exercise Federal jurisdiction their judicial officers are not supposed to act in a way contrary to what would be required under the Constitution of Federal judicial officers. (The so-called "incompatibility" doctrine).

35. I am not really in a position to assess the strength of this argument or what, in fact, the High Court might decide in any particular case but it does seem to me in general terms to be "drawing a rather long bow". Even if that is not the case I would be most interested in seeing, for example, a list of the administrative involvements of judges that would run foul of such a ruling, e.g. being members of parole boards and the like. And lest it be assumed that this kind of discussion is a bit rarefied and academic in nature I should mention that, consistent with the 1988 proposal of the Australian Constitutional Commission, I recommended in the Victorian report an investigative panel of sitting judges from the different senior courts around the country. The Government accepted this proposal for the purposes of its legislation but after the initial introduction of the Bill there were amendments to provide that the members would be retired judges.[44] I was not party to the relevant discussions but I would be very surprised if constitutional factors were not considered in determining the ultimate content of the legislation in relation to the composition of the judicial panel.

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[41] *Kable v DPP (NSW)* (1996) 189 CLR 51.

[42] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

[43] See, for example, Campbell, E, *Constitutional Protection of State Courts and Judges*, Monash University Law Review, p.397. At p.415 of that article Professor Campbell says:

> "The majority opinions in *Kable's* case should prompt State Governments to reassess current arrangements under which non-judicial functions have been assigned to State courts and judges and also those under which State judges are appointed as designated persons to undertake non-judicial tasks."

[44] See generally the passage of the *Courts Legislation (Judicial Conduct) Act (Vic)* 2005.

Lower Level Complaints

36. The *Terms of Reference* for the Victorian review included the arrangements for dealing with non-removal, lower level complaints. This is another area of significant interest. In Victoria, as in most other jurisdictions, these matters are dealt with on an informal basis by the head of jurisdiction, often having been referred by the Attorney-General through the Department of Justice. This is in contrast to a system such as that of New South Wales (and now New Zealand) where the Judicial Commission (Commissioner) deals with all complaints, i.e. receives *and* investigates them.

37. In looking at the Victorian system it struck me that in general there were two main difficulties:

- No formal records were kept of complaints so that it was not possible to get any real sense of their nature and extent.
- The complaints system itself, if you could call it that, was not clear and accessible. Not only was this so of the procedures themselves but there was a problem of communicating to the general public the message that because of judicial independence it was not appropriate for there to be any sanctions in cases where complaints were substantiated. This last aspect is also the case in a Commission system such as New South Wales. It is different in Canada under the Judicial Council arrangements.[45]

38. The Victorian report did not recommend the adoption of a Commission type arrangement for Victoria. Generally speaking, it didn't seem to me that Victorian circumstances of the time called for it. I proposed a new standing statutory investigative arrangement for removal type cases and, frankly, it struck me as appropriate as a matter of principle for lower order complaints to be dealt with internally by the judiciary itself.

39. All Victorian Courts, and also VCAT, have now produced complaint handling protocols which they have published on their websites.[46] This has gone a considerable way towards solving the problem of lack of clarity and accessibility of the arrangements. My report also suggested that a booklet along the New Zealand lines be published, setting out basic information about the court system, judicial independence and the complaints procedure. I still think that this would be helpful but so far the suggestion has not been adopted.

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[45] See *The Conduct of Judges and the Role of the Canadian Judicial Council*, CJC, 2000. For matters short of removal the CJC may express disapproval of a judge's conduct.

[46] The Supreme Court Protocol is attached to this paper as an Appendix. And for an interesting recent article on dealing with complaints in an informal manner see Fitzpatrick, CT, *Building a Better Bench : Informally Addressing Instances of Judicial Misconduct*, The Judges' Journal, Winter 2005, pp.16-20.

40. It was put to me, incidentally, during the review that there is a risk that in up-grading and raising the profile of the informal complaints system a community perception may develop that the system actually has teeth and that there is machinery for pulling errant judicial officers into line, and perhaps even punishing them for their unacceptable behaviour. This is a risk but I think the answer is for the judiciary to communicate as clearly as it can why an arrangement of formal findings and sanctions would be inappropriate. I believe that in the past the judiciary has not been particularly effective in communicating with the public and court users about matters of that kind. I suspect that there is still room for improvement in that regard.

Other Aspects

41. While it is not central to the actual complaint handling process one of the revelations to me in conducting the Victorian review was the antiquated and messy state of the various misbehaviour and removal provisions. I proposed changes in this regard and these have been included in the *Courts Legislation (Judicial Conduct) Act* 2005.

42. The Supreme and County Court provisions were very much eighteenth century in their substance and terminology.[47] In substance, the predominant legal view appeared to be that Victorian judges were more exposed and in a weaker position generally than their Federal counterparts. I proposed that the removal grounds should be the same for all three Courts and should be consistent with the Australian Constitution. The Victorian *Constitution Act* 1975 has now been amended to that effect.

43. It also seemed significant to me that the Parliament could vote to remove judges on the basis of a simple majority vote. It was also of interest that the relevant Supreme Court provision could only be repealed, altered or varied by an absolute majority vote while the County Court one could be changed by a simple majority. In relation to this latter aspect I was intrigued to see that the *Constitution Act* specified that the relevant removal provisions for office holders such as the Auditor-General, the Ombudsman and the Electoral Commissioner could only be changed by referendum. Given the importance of judicial independence it struck me as rather odd that judges had so little constitutional protection by comparison with other independent officeholders. I proposed that a special majority (3/5ths) vote be required both for removal of judges and any alteration to the relevant provisions. The first of these proposals was implemented but the second was not.

44. The reason I mention these matters here is that they may also be relevant in a number of other Australian jurisdictions. For fairly obvious reasons there is a dearth of authority on the technical and procedural aspects of the removal of judges from office but if my Victorian experience

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[47] Section 77(1) of the *Constitution Act* 1975 and Section 9(1) of the *County Court Act* 1958, respectively.

was anything to go by an examination and some tidying up may be well required in a number of jurisdictions.[48]

45. A second matter I raise very briefly under this "Other Aspects" heading is how the informal, lower level complaints system in use in the vast majority of Australian jurisdictions is to cope with a complaint made about a chief judicial officer. Is a chief judicial officer to investigate a complaint made about him or her? I discussed this aspect in my report following some interesting submissions on the point from the Courts themselves.[49] I suspect that this is an issue worthy of further attention.

46. Another miscellaneous aspect worthy of discussion is the question whether it should be possible to suspend a judicial officer against whom a serious complaint is made. This can be done in New South Wales under Section 40 of the *Judicial Officers Act* 1986. The basis for the exercise of the power is the existence of a complaint or Commission report which could justify parliamentary consideration of removal or being charged with, or convicted of, an offence punishable by 12 months imprisonment or more. The suspending authority is the relevant chief judicial officer.

47. I did not explore this matter in my report but presumably the interest lies in attempting to balance countervailing arguments. On the one hand, there may well be circumstances in which the suspension of a judicial officer could be desirable. On the other hand there is the issue of judicial independence to consider. And if there is to be a suspension power there may be an issue as to who should exercise it and in what circumstances. The New South Wales provision is a useful point of reference in this regard.

Future Directions

48. Dealing with matters of alleged judicial misbehaviour, whether of the "on-bench" or "off-bench" variety, and whether serious or less serious, can be very difficult. I suspect that there is no perfect or fool-proof arrangement for doing it, whether based within the judicial branch of government or within an external Commission type or other structure. It is interesting to note that while there has been a good deal of attention devoted to this topic in Australia in recent times, there has not been a high

[48] In an article some years ago on removal from office in Western Australia Christine Wheeler concluded:

> "Questions relating to procedures to be used for effecting the removal of a judge are surrounded by doubt, even in the United Kingdom, largely because of a dearth of authority or precedent of any kind. When complications stemming from Western Australia's previous – and, to an extent, continuing – colonial status are taken into account, the questions which could be raised in this area in Western Australia are not only legally complex, but could also be potentially embarrassing both to the judges and to those who might, if an appropriate situation ever arose, seek to remove them."

(University of Western Australia Law Review, 14, 3 (1980), pp.305-323.

[49] See Victorian Report, p.50.

level, detailed national assessment of it, something which looks at all key aspects in an Australia-wide context. It is probably time that there was such an examination. With the agreement and co-operation of the States and Territories, including of course their judiciaries, it could perhaps be done by the ALRC. For reasons mentioned in due course it might be preferable for the JCA to do it or at the very least to be heavily involved in any law reform project.

49. Failing some sort of national, co-ordinated approach, it is a matter of resorting to the usual, often unsatisfactory, *ad hoc*, jurisdiction by jurisdiction series of developments. Whatever the approach, the obvious starting point is that each jurisdiction, and especially each judiciary (perhaps even each court) needs to make an assessment of how it sees its own situation and requirements. Some may well take the "if it ain't broke don't fix it" approach, or a variation on that theme which could be that it is a little "broke" but that the various solutions could be more trouble than they are worth.

50. Certainly, however, in terms of "modelling" we are fortunate in Australia to have the New South Wales Judicial Commission. Even if different jurisdictions see problems with a Commission type structure it is certainly a living, breathing, and now well-tested example of a particular approach to dealing with matters of judicial discipline. Any other interested jurisdictions can usefully ask themselves what they like about the New South Wales model and what they do not like. It is, in other words, an excellent and immediate point of ready, practical reference for those wishing to develop a scheme.

51. The Commission model has some obvious advantages, the most salient of which is that it is a separate, independent, and largely judicially led piece of machinery for dealing with complaints. Apart from anything else, one might think that it would be attractive to other jurisdictions because it largely relieves the Attorney-General of the burden of being too heavily involved in the complaints area and also the heads of jurisdiction who, under the systems in most jurisdictions around Australia, have the job of dealing with the vast majority of complaints. Interestingly, during the Victorian review the idea of a New South Wales type structure was floated but vigorously opposed by all three Courts, by VCAT, and by the Bar and the Law Institute as well. So far, the Victorian Government has given no indication of wishing to move in the Commission direction. I don't know whether the key institutions in other Australian jurisdictions would take the same view about a Commission model. It would be interesting also to explore whether any objections are those of principle or are more practical in nature e.g. that a Commission structure is not suitable for smaller jurisdictions.

52. I have a view about all this which many may regard as a bit quaint and somewhat "olde worlde". It stems from my sense of the basic principles and importance of judicial independence. It has for long struck me that while the general notion of judicial independence, particularly in relation to decision-making, is alive and well in Australia, the idea of a vibrant, strong independent branch of government is not. I am thinking particularly of the inability of the judicial branch of government in many parts of Australia properly to govern its own affairs and, apart from

perhaps financing aspects, to be truly and operationally in charge of its own destiny.[50]

53. This is basically a philosophical position but it does seem to me a problem that only at the Federal level and in South Australia does the judicial branch of government have a significant say and autonomy in the conduct of its judicial administration affairs. Those involvements, it seems to me, strengthen the judicial branch of government within those jurisdictions by comparison with their counterparts in other jurisdictions. The relevance of this to arrangements for dealing with judicial conduct issues is that it seems to me that to a very large degree the judicial branch of government should be responsible for dealing with conduct complaints. As Wheeler has said in the United States context:

"*Judicial-branch control of judicial discipline and removal - never an exclusive control, to be sure - cannot assure judges' protection from improper efforts to remove them and should not limit their independent decision making. Indeed, some judges may regard discussion of judicial disciplinary measures as out of place in any list of judicial independence protection. Nonetheless, to the degree the judiciary and its administrative agents can promote effective treatment of problem judges, it stands likely to mitigate the demand for improper treatment of judges who deserve no rebukes*."[51]

54. Potential removal cases are a different matter, where Executive Government and Parliamentary interventions may be called for, but my general view is that the vast majority of complaints should be dealt with by the judiciary itself having regard of course to the importance of individual judicial independence, the independence of the judiciary as a separate branch of government and the need for its accountability to the public it serves. How each judiciary or court organises itself to do this is a somewhat separate issue and needs proper discussion at individual and probably court system level as well.

55. On that basis, I have serious reservations about any attempts by executive branches of government to involve themselves in judicial complaint handling issues. For similar reasons, while I understand that a Commission system, such as that in New South Wales, can be effective and efficient in its judicial conduct operations, I think I would still prefer a bifurcated arrangement of a committee of serving or retired judges investigating the very occasional possible removal level matters and the judiciary itself dealing with non-removal complaints. This would mean, in effect, the judiciary itself dealing with judicial conduct issues because the number of potential removal matters is negligible. The external, investigative machinery would only very rarely be wheeled into action. For all intents and purposes the judiciary would deal with its own conduct

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[50] In relation to this see generally the important recent AIJA report on courts' governance. (See Note 22 above).

[51] Wheeler, R, *Judicial Administration : Its Relation to Judicial Independence*, The National Center for State Courts, 1988 at p.42.

issues. To me, this should be part and parcel of the functions of a separate, independent, well-organised judicial branch of government.[52]

56. No doubt these views could be regarded in many quarters as rather "politically incorrect" because of the failure to provide an "independent" system for dealing with judicial conduct. In most walks of life these days it seems to be virtually taken for granted that "complaint" arrangements need to be managed by some agency or institution independent of, and separate from, the body concerned. This is too big a debate to get into at this stage but my basic position is that I agree with Wheeler that in philosophical, constitutional and governmental terms the judiciary is a unique and special institution and that there are strong grounds for suggesting that it should deal with its own discipline.

57. Aside from whether an approach of this kind is appropriate in principle, my sense is that a number of cultural and attitudinal changes may need to occur to make it work. One would be an acceptance that judicial conduct is a live issue and that better arrangements are needed for dealing with it than we have at present. I may be quite wrong about this but my instinct is that the general judicial attitude to these matters is one of saying that we prefer not to think too much about it at all. Perhaps the attitude is that if the occasional serious incident occurs the Executive will somehow deal with it. It may also be thought that even lower level type complaints are so relatively uncommon that when they do arise they can appropriately be dealt with privately, quietly and informally by the relevant chief judicial officer in a conciliatory, pastoral care kind of way.

58. If that is the position it is at one level perfectly understandable but my sense is that it probably needs to change. These days our politics, community attitudes and expectations, media behaviour and so on are such that issues of this kind do need to be recognised, discussed and dealt with in a reasonably open and systematic way.[53] The core issues will often be difficult but it is probably better to get them out into the open, at least within judicial circles, and to work on ideas and structures for the modern judicial environment.

59. There is a "chicken and egg" dimension to this discussion. For the judiciary to take stronger responsibility for dealing with the conduct issue, because in principle it is the best thing to do, would also assist in developing the judicial branch of government as an institution. Equally, for the judicial branch of government to develop, it should take, and be seen to take, greater responsibility for its own affairs. It has already developed significantly in this regard, as the noted Canadian judicial administration expert, Carl Baar, noted in the late 1990s.[54] Baar traced the

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[52] Interestingly, although I did not see it until after I had written the actual text of this paper, a very similar view was expressed in 2003 by Chief Justice Doyle of South Australia. (See *Future Shock*, an Address to the County Court of Victoria Annual Seminar, Marysville, Victoria, 2003).

[53] As to the media aspect witness the coverage of judicial affairs, including conduct issues, by *The Australian* newspaper in recent times.

[54] Baar, C, *The Emergence of the Judiciary as an Institution*, Journal of Judicial Administration, 8 (1999), pp.216-232.

growth of courts from what he called "state actors" i.e. because of their roles under the constitutions and laws of their particular jurisdictions to their modern position as "state institutions". He particularly emphasised the growth of independence and impartiality, and has noted the more recent emphasis on overall institutional effectiveness, including things like court governance, improved staffing, caseflow management and managerial judging.

Institutional Frameworks

60. Finally, there is the question of the institutional frameworks and structures within which judicial institutions generally, including systems for dealing with conduct issues, might develop. In this regard there are the respective roles of the judicial, legislative and executive arms of government to consider. By definition the judiciary does not legislate. If, in a particular jurisdiction, there are executive and legislative branches of government which are intent on activism in relation to the judicial sector there may well be developments of a dubious or unprincipled nature which the judicial branch can be hard-pressed to resist.[55]

61. Notwithstanding the validity of the Carl Baar thesis about judicial institutional development, the judiciary is relatively powerless to develop its own institutional approaches to things. It will usually require the active support of the executive and sometimes the legislature. Almost invariably it needs funding from beyond its recurrent budget. Perhaps the best course in this respect is for the judiciary to develop the ideas and then to influence and persuade the executive of their merits so that implementation can proceed. This may particularly be the case with judicial conduct arrangements because the executive is clearly interested in this area and it may have different ideas from the judiciary as to how best to proceed.

62. More broadly, we have seen a number of examples in recent Australian history of the power of the executive and the legislature to affect judicial institutions and their operations. For instance, in one fell legislative swoop in New South Wales, the judicial conduct arrangements were dramatically altered and a formal judicial education system was introduced. At the Federal level, the courts' governance changes of 1989, another legislative initiative, introduced substantially different principles

[55] Even if the executive branch is not active in relation to judicial system matters if, and when, particular issues arise the executive and judicial branches in any particular jurisdiction may have very different views about how things should be handled and by whom. These kinds of debates have raged for many years in the United States, especially within State Jurisdictions. As a recent example, in the State of New Hampshire its Supreme Court (The High Court) has been working on a proposal for a new Judicial Conduct Commission but according to the Chairman of the upper house Judiciary Committee, the Court's proposal is an attempt to control something which rightly resides with the State lawmakers. And the Chairman of the equivalent lower house committee has questioned how a commission of the Court's devising could qualify as independent. (See www.nhpr.org/view_content/590).

and practices for judicial administration. In Victoria, a Judicial College (JCV) was established, certainly in consultation with the Judiciary, but very largely as an initiative of the Attorney-General and on a statutory basis. There was no obvious pressure from the Judiciary for its establishment. In Victoria, the recent judicial conduct system changes were the result of Executive Government action leading to legislation, with the only judicial involvement being consultation during the review process.[56]

63. It seems to me that a case can well be made for a much more extensive involvement of the judiciary in decision-making processes of these kinds. The argument is essentially based on the core principles of judicial independence and the need for our society to have a strong, effective, independent judicial branch of government. Complaint handling arrangements would be very much part of any such agenda.

64. Whether initiatives of this kind should be pursued in an *ad hoc*, unsystematic manner or through some kind of judicially controlled Judicial Commission is an interesting question. As to the latter, there are many models, both theoretical and actual, but it is worth recalling that in 1992 Justice published a report on the *Judiciary in England and Wales*, in which it proposed the establishment of a broad-based Judicial Commission for the United Kingdom.[57] Such a Commission would have responsibility for:

- Advising on judicial appointments
- Judicial education
- Career development
- Performance, including standards and complaints.

65. Some judicial officers may see this idea as rather unusual and perhaps out of kilter with the needs and interests of the judicial system in this country but a form of it may well be worth considering. Provided appropriate funds were allocated it would certainly enhance and strengthen the judicial branch of government and provide an umbrella structure within which judicial conduct matters could be dealt with. Perhaps this is something the JCA could consider placing on its list of future projects.

Conclusion

66. Traditionally, the issue of misconduct has not loomed large on the agenda of judicial system discussions. A number of prominent cases in recent history seem to have changed that. There is now a debate about such matters and, in particular, about the appropriateness and efficacy of existing arrangements for dealing with conduct issues. There seems to be

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[56] And also in Victoria see the recent move by the Attorney-General to legislate for acting judges.

[57] *The Judiciary in England and Wales*, a report by Justice, London, 1992.

a concern in government, judicial and some community circles about these matters. There is a question who should be involved in the debate and who should lead it. It has been suggested in this paper that judicial conduct is a live issue; that there is some work to be done; and that the judiciary as a separate, independent component of government should play a key, if not leading, role in that process.

APPENDIX

Supreme Court of Victoria

Complaints

Judicial Complaints Process

Judges and Masters are not subject to direct discipline by other persons, apart from extreme cases where they may be removed by the Governor on an address from both Houses of Parliament for serious misconduct or unfitness. This degree of immunity from direct discipline except in extreme cases is necessary to maintain the independence of the Judges and Masters so that they can, and can be seen to, administer justice impartially. At the same time they are made accountable generally through the public nature of their work, the requirement that they give adequate reasons for their decisions and the right given to litigants to challenge decisions on appeal.

There may be occasions, however, where a person is concerned not with the decision made but with the conduct of a Judge or Master. Such concerns can be raised in writing with the Chief Justice. The Chief Justice will determine how the concerns raised should be addressed consistently with the need to preserve the independence of the Judge or Master and will, where appropriate, communicate with the person who has lodged the complaint.

In considering the conduct of Judges and Masters it should be borne in mind that they are expected to manage proceedings efficiently and effectively. At times they have to be brief and assertive. If you consider that you have been dealt with too briefly or firmly, this may be the reason. "Guide to Judicial Conduct" published by the Australian Institute of Judicial Administration Incorporated is published on its web site – **http://www.aija.org.au**.

Complaints Against Associates And Tipstaves

Concerns about the conduct of an Associate or Tipstaff should be addressed to the Judge or Master employing them. The Judge or Master will consider how the concerns should be addressed and will communicate with the person lodging the complaint. The Judge or Master in his or her discretion may refer the matter to the Chief Justice.

Complaints Against Other Staff

Concerns about other staff should be raised with the Chief Executive Officer. The Chief Executive Officer may, in his or her discretion, refer the matter to the Chief Justice.