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Independence and External Review Performance

Introduction

In 2001 Chief Justice Spigelman AC, as he then was, made the following observation:

> Perhaps the foremost challenge for judicial administration today is to ensure that contemporary expectations of accountability and efficiency remain consistent with the imperatives of judicial independence and the maintenance of the quality of justice…
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> Accountability for adjudicative functions occurs in the form of open justice, the obligation to publish reasons and appellate review. Accountability for the administrative functions of courts is, in principle, distinct. Some activities fall clearly into

one or another category but there is a significant area of overlap between the two.[1]

Over a decade on and the challenge remains. There is perhaps greater pressure to ensure transparency in court administration, and in particular, accountability for money spent and actions taken. Statutory external review bodies have an important role to play in investigating the non-judicial administrative functions of courts and holding administrative officers accountable. The issues they highlight and the recommendations they make at a systemic level can contribute to improvements in public administration.

However, as court administration grows in complexity and size, the lines between judicial and administrative functions in courts are becoming increasingly blurred. It is at these junctures where the line between judicial and administrative functions is uncertain that tensions can arise between the functions of external review bodies and appropriate protections of judicial independence.

[1] Hon. J. Spigelman AC, Chief Justice of New South Wales, Judicial Accountability and Performance Indicators, 1701 Conference: The 300th Anniversary of the Act of Settlement, Vancouver, BC, Canada, 10

Today, I will discuss the interaction between external review bodies and the courts, with a particular focus on areas where external review bodies can go beyond their mandate to monitor court administration and begin to review judicial activities. I will also briefly discuss the issues raised by external review bodies that have explicit powers to investigate the conduct of judges.

External review bodies can encompass a range of government and non-government organisations. While this can extend to include research bodies such as law reform commissions, sentencing councils and academics, interactions with these bodies by the courts are generally on consensual terms. The focus of this paper will be on three standing bodies with statutory functions of review and investigatory powers- Auditors-General, the Ombudsman and Anti-Corruption Commissions.

Auditors General

I will begin with a discussion of the relationship between Auditors-General and the courts.

The functions of Auditors-General fall into two categories: auditing financial accounts and conducting performance or efficiency audits. The first function is largely uncontroversial in the context of courts and judicial independence. Financial authorities are usually conferred on administrative staff and accounting for expenditure does not impose on judicial functions. There is no question that financial accounts kept by courts should be subject to audit.

Performance and efficiency audits however have greater potential to stray into judicial functions and judicial involvement in court administration. The nature of the inquiry is also more problematic. Provisions for performance audits are often directed not only to measuring efficiency, but to evaluating compliance with relevant laws[2] or fulfilment of statutory functions.[3]

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[2] For example the *Public Finance and Audit Act 1983* (NSW) s38B(1) is in the following terms "The Auditor-General may, when the Auditor-General considers it appropriate to do so, conduct an audit of all or any particular activities of an authority to determine whether the authority is carrying out those activities effectively and doing so economically and efficiently and in compliance with all relevant laws".

[3] For example the *Audit Act 1994* (Vic) s 15 provides

> (1) The Auditor-General may conduct any audit he or she considers necessary to determine-
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> (a) whether an authority is achieving its objectives effectively and doing so economically and efficiently and in compliance with all relevant Acts; or…

The jurisdiction of the Auditor-General in most State and Territory Acts is determined by the definition of an 'agency' or 'authority'. Courts are rarely mentioned specifically in these definitions[4] and this can create uncertainty as to whether they fall within the ambit of the Auditor-General's functions. Most often the judiciary will fall outside the definition however, court administration undertaken by court staff, particularly those employed by a government Department, will fall within the definition.

Difficulties most commonly arise in relation to the inevitable areas of overlap between judicial functions and administrative functions, or in the misunderstanding of what is a judicial function and what is an administrative function.

Some audits of court administration pose no issue for judicial independence. An audit of whether the registry meets an objective of preparing files within a certain timeframe for example. An audit

[4] Federal courts are an exception as they are prescribed agencies under the *Financial Management and Accountability Regulations 1997* (Cth) but extending only to the CEO and the officers and staff of registries.

of associate's compliance with jury empanelment procedures would raise concerns. An audit of the procedures of a Judges' Council would clearly pose a problem.

Some courts have reported that there is often a lack of understanding about the involvement of judges in court administration and the functions which are judicial rather than administrative in nature. Listing of cases is a common example. There is often an assumption that the listing of cases is an administrative matter. In some jurisdictions it may be, but in others it is a task undertaken by a judicial officer and involves the exercise of the judicial functions resulting in a court order.

Unsurprisingly timeliness and backlogs are questions which Auditors-General frequently seek to consider. However a contributing factor to these figures will always be the performance of the judicial function. Chief Justice Doyle's memorandum of 14 March 2012 notes:

> It may be going too far to say that the principle of the separation of powers means that courts cannot be reviewed on the basis of efficiency. On the other hand, characterising a review as an "efficiency review" cannot be allowed to bypass the principle of separation of powers.
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> …
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> My own tentative opinion is that an external review of "case management, practices and processes"… would involve an infringement of the principle of separation of powers, but there is no reason the courts should fear an open dialogue on the manner in which case management operates.

Statements can be found in audit reports in numerous jurisdictions recognising the importance of judicial independence and the boundaries of the audit in that regard. Some reports have nonetheless considered issues of case management and administrative management by judges.

The 1999 NSW report contained the following statement:

> Recognising the importance of judicial independence, the audit has been concerned only with management processes. And in this regard, the Audit has benefited from the support and openness of the NSW judiciary – in particular that of the Chief Justice, the Chief Judge of the District Court and the Chief Magistrate. It seems evident that courts are becoming increasingly mindful that judicial independence does not remove the need to manage public resources appropriately and to account for their performance.

In addition to the question of judicial independence, an audit of a court can throw up a number of frustrations. In part that frustration can arise because under executive models of court governance the judiciary lacks authority or control over the allocation of critical resources and yet the court will still be perceived as responsible for the outcomes. In the case of timeliness and backlog indicators contributing factors will often be outside the scope of the auditor's consideration—the actions of

lawyers and parties, new legislation, or policy decisions by government in relation to resources.

The Auditor-General's report on Client Services in the Family Court of Australia and the Federal Magistrates Court noted that the question of judicial resources was a policy matter for government and therefore the report would not comment upon it, however the report went on to be critical of the courts' management of risk in relation to listings when a judicial officer was not replaced by government for a number of months.

The extent of frustration can depend on the understanding or attitude of individual auditors. A 2009 report by the Controller and Auditor-General of New Zealand into the Ministry of Justice entitled 'Supporting the management of court workloads' contained the following passage demonstrating a level of awareness of the issues involved:

> In practice, the management of court workloads requires a high level of partnership between the two branches of

> government. The executive cannot interfere in the progress of individual cases, but it is responsible for policy and legislative development that shapes the court process. The courts, as part of the judicial branch of government, can to some extent control the progress of individual cases or the allocated workloads. However, courts have no formal role in the policy and legislative processes that prescribe the court system. Also, courts cannot control what resources are allocated to them. In practice, if workload problems arise, solutions need to be devised collaboratively.

It is specifically noted in the same report that:

> We did not review the performance of the judiciary or any other participant in the justice sector other than the Ministry. We did not assess courts or tribunals other than the civil and criminal jurisdictions in the High Court and District Courts. We did not audit activities carried out by Ministry staff acting on the directions of the judiciary.

The 2008 Tasmanian report did not demonstrate the same level of understanding of the issues:

> Judicial independence is the centrepiece of any court system and the judiciary must, within the law, be individually independent in their decision-making. However, the efficient management of court resources is a distinct and separate issue from judicial independence. As in other areas of the public sector, accountability and transparency are important aspects that must be present in the non-judicial management of our courts.

The question of performance audits of non-judicial functions of courts was recently examined in Victoria by a Parliamentary Committee reviewing the *Audit Act 1994* (Vic).[5] The history behind the review includes a legal advice given in 1996 that courts did not fall within the definition of 'authority' under the *Audit Act 1994* (Vic) and therefore a report which had been prepared in relation to the Children's Court was not able to be tabled in Parliament. Following

[5] Public Accounts and Estimates Committee, *Report on the Inquiry into Victoria's Audit Act 1994*, October 2010.

the advice a protocol was developed. Under this protocol proposals by the Auditor-General to audit functions of a court are to be considered by the Head of Jurisdiction to ensure the audit is confined to non-judicial functions. The Victorian Auditor-General has stated that this protocol is unsatisfactory and that he should be given power under the Act to audit courts.

For the purpose of considering amendments to the Act an advice was obtained by the Parliamentary Committee from DF Jackson QC. The advice stated that it was unlikely there would be any constitutional impediment to conferral of statutory power on the Auditor-General to conduct audits of the non-judicial functions of the courts assuming it would not interfere with the exercise of the courts' jurisdiction or affect the exercise of the judicial function. Jackson QC noted however the difficulties in discerning the line between what is judicial and what is non-judicial or administrative. Hence the advice goes on to note that the possibility of contravention of constitutional limitations could be minimised by

conferring power on the head of jurisdiction to determine whether a function is non-judicial.

The Committee ultimately recommended that this course be adopted. The Government response to the report supported amendments to provide for audits of non-judicial functions of the courts subject to establishing a clear and workable distinction between judicial and non-judicial functions.

The varied experiences between jurisdictions in achieving and working towards a clearer distinction between judicial and administrative functions highlights the need for the judiciary to be vigilant in informing parliament of areas of encroachment on judicial independence and working with parliament to resolve issues.

Ombudsman

I now turn to the interaction between the function of the Ombudsman and the courts.

Ombudsman Acts across Australia confine the jurisdiction of the Ombudsman to investigating administrative actions, and are generally more explicit than Audit Acts in relation to the exclusion of judges.

Federal judges and courts are excluded but Court CEOs are specifically included in the jurisdiction of the Commonwealth Ombudsman.[6]

In NSW, conduct of a court or a person associated with a court is excluded from the Ombudsman's jurisdiction.[7] In Victoria, action by a court of law or a judge or magistrate is excluded.[8] In Queensland, courts and holders of judicial office are excluded when acting judicially or performing a function authorised under an Act to perform. Registry and court staff are also excluded to the extent their functions relate to the court's judicial functions.[9] In South Australia, acts done in the discharge of a judicial authority are

[6] *Ombudsman Act 1976* (Cth) s 3 (definition of prescribed authority).
[7] *Ombudsman Act 1974* (NSW) Schedule 1.
[8] *Ombudsman Act 1973* (Vic) s 13(3).
[9] *Ombudsman Act 2001* (Qld) s 9.

excluded.[10] In Tasmania, judges, associate judges, magistrates and courts are excluded from the definition of public authority.[11] In Western Australia, the Act does not apply to courts, judges or registrars.[12]

In the ACT, the Ombudsman is not authorised to investigate action taken by a judge or any action taken by a registrar when performing functions of a judicial nature.[13] In the Northern Territory, the Ombudsman must not investigate administrative action taken by a person while discharging or purporting to discharge a responsibility of a judicial nature.[14]

In addition to the limitations on jurisdiction the Acts generally set out circumstances in which the Ombudsman may decline to investigate including where there is a right of review to a court or tribunal or where the action is being or has been reviewed by a court or tribunal.

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[10] *Ombudsman Act 1972* (SA) s 3 (definition of administrative act).
[11] *Ombudsman Act 1978* (Tas) s 4(2).
[12] *Parliamentary Commissioner Act 1971* (WA) s 13.
[13] *Ombudsman Act 1989* (ACT) s 5(2).
[14] *Ombudsman Act 2009* (NT) s 16.

A provision which is common to all Acts is a right to apply to the Supreme Court (or Federal Court) to determine whether an investigation is within the jurisdiction of the Ombudsman.[15] So even in jurisdictions where judicial review of ombudsman's actions purport to be ousted, judicial independence issues remain.

Further areas of contention emerge in relation to actions by court staff which may be quasi-judicial or at judicial direction. In 2007 the Commonwealth Ombudsman published a report specifically addressing the jurisdiction in relation to courts and tribunals.[16] The report notes the difficulty in determining what is judicial and what is administrative. A submission by the High Court to that report noted that:

> …when Registry staff make decisions or take actions in relation to case management of matters filed in Court, they are exercising the power of the Court pursuant to both the

[15] *Ombudsman Act 1976* (Cth) s 11A; *Ombudsman Act 1974* (NSW) s 35B; *Ombudsman Act 1973* (Vic) s 27; *Ombudsman Act 1972* (SA) s 28; *Ombudsman Act 1978* (Tas) s 32; *Parliamentary Commissioner Act 1971* (WA) s 29; *Ombudsman Act 2001* (Qld) s 17; *Ombudsman Act 1989* (ACT) s 14; *Ombudsman Act 2009* (NT) s 20.

[16] Commonwealth Ombudsman, *Commonwealth courts and tribunals: Complaint handling processes and the Ombudsman's jurisdiction*, August 2007.

applicable legislation and the Rules of Court made pursuant to the *Judiciary Act 1903* (Cth).

The Family Court submitted a non-exhaustive list of non-administrative matters that could be used to promote greater certainty as to the distinction between judicial and non-judicial matters, including:

- the assignment of judges to cases
- arrangements for use of rooms
- the listing and management of cases
- action taken in relation to reports of the family consultants, prepared under the order and direction of the court.

Areas of uncertainty mentioned by the Federal Court were

- the registry acting pursuant to Rules of Court—such as refusing to accept a document for filing because it appears on its face to be an abuse of process
- the registry is acting in accordance with 'administrative' directions given by a Judge—such as a requirement that

documents from a certain litigant not be accepted for filing unless first inspected by the Judge, or that a litigant only communicate with a Judge through the registry (rather than by contacting the Judge's chambers)

- the registry is giving effect to administrative arrangements put in place by the Chief Justice for the 'orderly and expeditious discharge of the business of the Court'—such as the system for allocating matters to Judges.

These submissions to the Commonwealth Ombudsman's report highlight the significant overlap and confusion surrounding the distinction between judicial and administrative functions in courts; and the need for greater clarity in legislation as to when and how courts fall within the ambit of external review bodies, in order to avoid unnecessary interference with judicial independence.

Corruption Commissions

I turn lastly to the interaction between Corruption Commissions and the courts.

New South Wales, Queensland, Western Australia and Tasmania have established Corruption Commissions. Victoria has recently introduced legislation to establish an Anti-corruption Commission although the legislation is being introduced into Parliament in stages and is not yet complete.[17]

These forms of external review bodies often raise the same issues for judicial independence noted above, but have a different and potentially more serious context. The matters under investigation by Corruption Commissions may enter into grounds for removal from judicial office. At the same time these bodies are most likely to be the subject of litigation before the courts.

The Commissions vary in their application to courts and the judiciary. The NSW Independent Commission Against Corruption encompasses judges within its jurisdiction.[18] No specific provisions

[17] See the *Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Act 2012* (Vic) and the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).
[18] *Independent Commission Against Corruption Act 1988* (NSW) s 3 (definition of public official).

are made to preserve judicial independence. The Tasmanian Commission on the other hand does not encompass the judiciary.[19] In Western Australia the *Crime and Conduct Commission Act 2003* (WA) provides the Commission can investigate judges in relation to specific offences and recommend their removal from office but in doing so must have proper regard for preserving the independence of judicial officers and must adhere to procedures formulated in consultation with the Chief Justice. The protocol developed with the Chief Justice of Western Australia provides for notification of allegations and consultation in relation to the conduct of investigations.

The Victorian legislation which has yet to commence provides that an investigation of a Judge is to be conducted by an officer who is a former judge of a court of the same or higher level (although not of the same court as the judge under investigation).[20] The Act further provides that in investigating matters the Commission must have proper regard for the

[19] *Integrity Commission Act 2009* (Tas) s 5(2).

preservation of the independence of judicial officers; and must notify, and may consult, the relevant head of jurisdiction unless doing so would prejudice an IBAC investigation. The Commission is prevented from including in a report any finding of corrupt conduct of a judicial officer or any other adverse finding in relation to a judicial officer arising from an investigation.[21] Victoria has also an established process for investigation by a panel where an allegation is made that would ground removal of a judge if proved.[22] Findings by that panel are a prerequisite to a motion to remove in Parliament under the Constitution. It is assumed that the prohibition on IBAC publishing findings was included so as not to prejudice the subsequent process and that the Commission would, after making investigations, refer the matter.

Questions have been raised in Parliament and in the media in Victoria about the need for provisions which treat judges differently. The explanations given of the need to preserve judicial

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[20] *Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Act 2012* (Vic) s 9 inserting s 42 in the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).
[21] *Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Act 2012* (Vic) s 9 inserting s 43 in the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).
[22] *Constitution Act 1975* (Vic) Part IIIAA.

independence have often been received with cynicism. This points again to the ongoing need to educate parliament and the public of the reasons underlying the differential treatment of courts and judges under legislation and the importance of judicial independence. A better understanding of these issues may assist in the development of clear and appropriate protocols regulating interaction between Corruption Commissions and the courts, which ensure that parliaments do not unnecessarily influence removals from judicial office.

Investigative Powers

To conclude, I will expand on the issues for judicial independence raised by the extensive investigatory powers of each of the bodies discussed. These investigatory powers include the power to compel evidence and the power to enter government occupied premises either with or without a warrant. Anti-corruption Commissions are also provided with investigatory powers available to police including the ability to apply for covert surveillance and telephone intercept warrants.

Whether in the context of an investigation of courts or otherwise there is a question as to whether it is appropriate for such powers to extend to judges, judicial documents, court staff and court premises.

Because the powers are expressed in general terms these issues are often not considered, but some jurisdictions do have specific limitations. For example the Queensland Crime and Misconduct Commission has a right of entry power for official premises, but this does not extend to courts. [23]This issue was considered in the context of the Audit Act review in Victoria. DF Jackson QC advised that there was a significant likelihood that the compulsory powers in the *Audit Act 1994* (Vic) could not validly be conferred upon the Auditor-General in respect of a judicial officer or his or her personal staff or any documents in the possession of a judicial officer. Court administrative staff were considered a separate issue.

Conclusion

This paper has highlighted the need to remove the uncertainty surrounding how and when the courts fall within the ambit of the

functions of the Auditors-General, the Ombudsman or Corruption Commissions. Clear and workable distinctions in legislation between the judicial functions of courts, which external review bodies should not touch, and non-judicial administrative functions, which are the proper subject of external review bodies, are necessary to preserve judicial independence. Clear and effective protocols regarding the interaction between parliamentary officers involved in Corruption Commissions, and the courts are also required. Steps forward could include, for example, a clearer restriction of performance audits to non-judicial functions, non-exhaustive lists of judicial functions in Ombudsman Acts or Audit Acts and more clarity with regards to the limitations on the compulsory powers of these bodies in their application to judges and the courts. There will of course, as I have mentioned, be practical difficulties in clearly separating and defining the judicial and administrative functions of courts, and it is worth debating whether legislative definition is even possible, or if it is best to proceed on a case by case assessment of court functions and review. In attempting to resolve the tensions that arise between the functions and powers of external review bodies it

[23] *Crime and Misconduct Act 2001* (Qld) s 73.

will be necessary to continue an effective dialogue with and educate the parliament and the public about both the importance of judicial independence and the areas where external review bodies may threaten it.