

# JUDICIAL CONDUCT: CRAFTING A SYSTEM THAT ENHANCES INSTITUTIONAL INTEGRITY

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*Judges are human. It is their humanity that allows them to pass judgement on the complexities of fact and law in cases before them. However, their humanity also means they are subject to the usual gamut of human frailties. Problematic judicial conduct remains rare in Australia. However, failing to acknowledge and address it has the potential to damage the integrity of the courts and undermine the ability of individual judges to fulfil the judicial function. In this article we examine the requirements for a 'good' complaints system through a comparative analysis of systems operating in Australia and overseas. We proffer an alternative system for Australia, tailored to fit within our constitutional constraints whilst promoting the institutional integrity of the judiciary.*

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## I INTRODUCTION

As the 17<sup>th</sup> century dawned in England, the judiciary still cowered to the whims of the monarch, who expected judges to serve and protect the royal

interest.<sup>1</sup> Concern about the royal powers became the catalyst for the *Act of Settlement 1701*, 12 & 13 Wm 3, c 2 ('*Act of Settlement*'), which legislatively enshrined judicial tenure *quam diu se bene gesserint* (during good behaviour) and secured judicial salaries.<sup>2</sup> This legislation was the blueprint for protecting judicial independence that would eventually be adopted across the common law world.<sup>3</sup> Even today, the lessons of the 17<sup>th</sup> century loom large in discussions of judicial independence and accountability.<sup>4</sup> The fragility and importance of judicial independence is often used to elevate the status of the judiciary to a position beyond reproach. Yet judges are only human, and of course we would not want it any other way — their humanity allows them to determine credibility of witnesses and resolve difficult questions of fact and law. Their humanity also means, however, that they are subject to the usual gamut of human frailties.

While problematic judicial conduct is rare, failing to acknowledge and address it can damage the integrity of the courts and undermine their ability to fulfil the judicial function.<sup>5</sup> The words and actions of judges, both within the court process and outside it, contribute powerfully to the public experience and image of the justice system. The 'efficacy of judgment would seem to depend upon acceptance by the community of judicial authority which, in turn, would seem to depend upon the matter of public confidence'.<sup>6</sup>

A number of reasons explain recent interest in judicial accountability. Judicial power is a significant aspect of public power wielded on behalf of the

<sup>1</sup> John McLaren, *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial, 1800–1900* (University of Toronto Press, 2011) 11; Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (North-Holland Publishing, 1976) 3–5.

<sup>2</sup> *Act of Settlement* s III.

<sup>3</sup> See, eg, *Constitution* s 72.

<sup>4</sup> For a discussion of recent and serious incursions into judicial independence in a number of countries, see H P Lee, 'Judiciaries in Crisis — Some Comparative Perspectives' (2010) 38 *Federal Law Review* 371; Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 62, 63.

<sup>5</sup> William Thomas Braithwaite, *Who Judges the Judges? A Study of Procedures for Removal and Retirement* (American Bar Foundation, 1971) 8–9. *Contra* Australian Judicial System Advisory Committee, *Australian Judicial System: Report of the Advisory Committee to the Constitutional Commission* (1987) 88–9 [5.95]–[5.100].

<sup>6</sup> Justice Susan Kenny, 'Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium' (1999) 25 *Monash University Law Review* 209, 214.

community.<sup>7</sup> There has been an increasing acceptance that the judicial method requires judges to go beyond the law to resolve disputes, and they will often be forced to draw upon personal values.<sup>8</sup> This acceptance has, therefore, emphasised the conduct and integrity of the individual involved. Increasingly, judges are given responsibility and authority beyond the settlement of disputes and are expected to manage cases proactively.<sup>9</sup> There is also an increased focus on and normalisation of accountability in other government branches. Since the 1970s, community concerns about the integrity of those wielding executive and legislative power led to the establishment of transparent and formalised accountability mechanisms that have largely supplanted traditional mechanisms. The exercise of judicial power has traditionally been subject to scrutiny through a number of mechanisms, both ad hoc and informal, and formal. But the predominance of these assumes ‘judges can be wrong but not bad’.<sup>10</sup> The significance of, and changes in, the judicial role, and the potential for judges to be subject to the normal range of human frailties, suggest these traditional mechanisms are insufficient, and that there should be a transparent and rigorous way to address judicial misbehaviour and incapacity.

At the federal level in Australia the progress towards such a system has been glacial.<sup>11</sup> In 2012, the federal government passed the *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth) (*Judicial Complaints Act*) and in doing so it set in place a modest complaints-handling system for judges in the federal court system, excluding the High Court. This article examines the extent to which the 2012 legislative reforms address the problem of judicial misconduct and its potential to disturb public regard for the justice system. Part II draws on examples in order to enumerate the key categories of

<sup>7</sup> Mauro Cappelletti, “Who Watches the Watchmen?” A Comparative Study on Judicial Responsibility’ (1983) 31 *American Journal of Comparative Law* 1, 4–5, 7; Justice Kenny, above n 6, 210.

<sup>8</sup> See John H Farrar, *Legal Reasoning* (Lawbook, 2010) 101–2 [9.10]; Joe McIntyre, *The Nature and Implications of the Judicial Function* (PhD Thesis, University of Cambridge, 2012) 195.

<sup>9</sup> For an analysis of the various case management schemes in place in Australia, see B C Cairns, *Australian Civil Procedure* (Lawbook, 9<sup>th</sup> ed, 2011) ch 2. See also *Sali v SPC Ltd* (1993) 116 ALR 625, 629 (Brennan, Deane and McHugh JJ).

<sup>10</sup> John Basten, ‘Judicial Accountability: A Proposal for a Judicial Commission’ (1980) 52 *Australian Quarterly* 468, 477.

<sup>11</sup> This article will focus on the federal system, which raises unique constitutional challenges. In some states and territories, and particularly in New South Wales, more progress has been made towards standing, transparent processes for the resolution of complaints about judicial behaviour. The New South Wales system is considered in Part IV.

judicial incapacity and misconduct that have the potential to affect the delivery of justice. In Part III, we expound the history and features of the current Australian system. We also consider the constitutional framework in which judicial complaints and discipline rest at the Commonwealth level in Australia and how this has shaped the current complaints regime. In Part IV, the requirements for a 'good' complaints system are examined, and comparisons are made with judicial complaints systems in other similar jurisdictions. By reference to the categories established in Part II and the constitutional strictures explained in Part III, we will proffer an alternative system for Australia that is better tailored to the object of enhancing institutional integrity.

## II JUDICIAL MISCONDUCT AND INCAPACITY: SCOPE AND CATEGORIES

Problematic judicial behaviour is rare. As former Justice of the Victorian Court of Appeal, Geoffrey Eames, explained, for the most part

[d]edicated judges and magistrates daily grind out decisions in stressful and complex cases. They work long hours. They care very much about getting it right. Generally, and overwhelmingly, they do so.<sup>12</sup>

Yet the rarity of such behaviour does not undermine the need for an appropriate system to deal with complaints when they do arise. Such a system has the potential to address complaints, whether justified or vexatious, in a measured way to ensure that they do not undermine the integrity of the system as a whole, and the good work that most judges do. It can provide resolution for particular judges against whom false complaints are made and trial by media ensues,<sup>13</sup> particularly in a system that expects judges to remain silent in the face of complaints and criticism.<sup>14</sup> It can serve the interests of complainants who have been genuinely harmed by improper behaviour. It can signal to judicial officers the standards expected of them, and therefore discourage

<sup>12</sup> Justice Geoffrey Eames, 'The Media and the Judiciary' (2006) 2 *High Court Quarterly Review* 47, 58.

<sup>13</sup> Elizabeth Handsley, 'Issues Paper on Judicial Accountability' (2001) 10 *Journal of Judicial Administration* 180, 194.

<sup>14</sup> Basten, above n 10, 468–9.

problematic behaviour in advance.<sup>15</sup> Importantly, it can also demonstrate to the public that the judiciary is willing to meet proper standards and that action will be taken where poor behaviour occurs.<sup>16</sup>

By drawing on historical examples from Australia and elsewhere,<sup>17</sup> this Part chronicles behaviour by reference to the different categories of judicial misconduct and incapacity. William Braithwaite explained the importance of first understanding the scope and categories of concerning judicial behaviour as follows: ‘To be effective, a removal–discipline procedure should be able to deal with [the range of potential] problems; that is, it should be capable of a range of dispositions’.<sup>18</sup> Examples can assist in this process as they provide practical insight into the likely foibles of judicial character, although, of course, they will not be exhaustive. Tellingly, many examples have repeated themselves, giving rise to common patterns that can help shape the most appropriate disciplinary system.<sup>19</sup> Others are atypical and rare, but still meaningful in that they demonstrate the potential breadth of conduct to which a complaints system must be able to respond. Not all examples would necessarily lead to disciplinary consequences, but each might warrant scrutiny.

We analyse the relevance of each example of misconduct to the individual’s suitability to hold judicial office or maintain public confidence in the judicial institution.<sup>20</sup> It is these twin touchstones that will inform our analysis of what

<sup>15</sup> David Pimentel, ‘Reframing the Independence v Accountability Debate: Defining Judicial Structure in Light of Judges’ Courage and Integrity’ (2009) 57 *Cleveland State Law Review* 1, 26.

<sup>16</sup> *Ibid.*

<sup>17</sup> We have drawn on comparisons from Australia as well as a variety of foreign jurisdictions. While accepting that differences across these jurisdictions (such as in relation to appointment) may result in differences in culture (consistent with our thesis that institutional integrity is supported by a number of pillars, including judicial appointment), we believe there is still much to be gained from a comparison of judicial behaviour across these jurisdictions. Often, for example, the behaviour fits into a wider pattern of behaviour that Australian judges have also engaged in. In other cases, it demonstrates the breadth of potential fallibilities.

<sup>18</sup> Braithwaite, above n 5, 161.

<sup>19</sup> Shetreet, *Judges on Trial*, above n 1, 293.

<sup>20</sup> These twin touchstones largely mirror the test developed by the Australian High Court in *Grollo v Palmer* (1995) 184 CLR 348, 364–5 (Brennan CJ, Deane, Dawson and Toohey JJ), when answering the constitutional question of whether non-judicial functions conferred *persona designata* on federal judges are incompatible with their ‘judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power’.

behaviour must be addressed by a complaints system.<sup>21</sup> By employing confidence as a criterion we recognise that to function effectively, courts require the legitimacy and status that is gained from public trust.<sup>22</sup> In *Gallagher v Durack*, Gibbs CJ, Mason, Wilson and Brennan JJ explained that '[t]he authority of the law rests on public confidence'.<sup>23</sup> What is meant here is not that the courts must curry public favour or try to please the public over populist issues such as the exercise of judicial discretion in sentencing. Rather, the court must maintain the public's confidence in its institutional role and its ability to deliver justice in accordance with enduring judicial values, such as the right to a fair trial and the presumption of innocence.<sup>24</sup> A test of whether the particular conduct would lead to long-term diminished confidence in the institutional integrity of the judiciary and its ability to deliver on these values is employed.

Before continuing, two threshold issues must be addressed. First, there is an inevitable overlap that occurs where conduct provides a party with a reason to appeal against a judicial decision and also provides a reason for disciplining the judicial officer involved. Sometimes the ground of complaint against an individual judge is appropriately dealt with in its entirety as a ground of appeal because it involves honest error and no misconduct.<sup>25</sup> This would be the case, for example, where the complaint was from a defendant and related to a judge's misdirection to a jury caused by a misunderstanding or poor expression of the law, or where there was a complaint about judicial reasoning.

In other cases, an appeal is not the answer. Sometimes appeals are not available to the party who has been wronged by the judge's misconduct. Appealing against a decision is expensive and time-consuming. This may well

<sup>21</sup> There have been other attempts to classify and expound the various types of behaviour that affect judicial office: see, eg, David Wood, 'Judicial Ethics: A Discussion Paper' (Australian Institute of Judicial Administration, 1996); James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2009); McLaren, above n 1, 5; Handsley, 'Issues Paper', above n 13, 200–4; Charles Gardner Geyh, 'Rescuing Judicial Accountability from the Realm of Political Rhetoric' (2006) 56 *Case Western Reserve Law Review* 911; McIntyre, above n 8, 219–23.

<sup>22</sup> Handsley, 'Issues Paper', above n 13, 184; McIntyre, above n 8, 199–200, 203.

<sup>23</sup> (1983) 152 CLR 238, 243. See also *Metropolitan Properties Co (FCG) Ltd v Lannon* [1969] 1 QB 577, 599 (Lord Denning MR).

<sup>24</sup> For a similar distinction, see Handsley, 'Issues Paper', above n 13, 184; Elizabeth Handsley, 'Can Public Sector Approaches to Accountability Be Applied to the Judiciary?' (2001) 18(1) *Law in Context* 62, 93–4; Chief Justice Murray Gleeson, 'Public Confidence in the Judiciary' (Speech delivered at the Judicial Conference of Australia, Launceston, 27 April 2002).

<sup>25</sup> Geyh, 'Rescuing Judicial Accountability', above n 21, 925.

mean that even litigants with standing may opt against appealing. Additionally, as Geoffrey Miller explains:

The right of appeal is overinclusive; while it picks up some bad judges, it also captures many adequate judges who simply make errors (as all judges do), or even good judges who decide issues of first impression in a different way than the appellate court. Although reversal on appeal does provide some information about the capacities of the lower court judge, it is a noisy signal that cannot reliably separate good judges from bad.<sup>26</sup>

Where the ground of complaint involves misconduct, it will often be insufficiently dealt with by the appeal process.<sup>27</sup> Shetreet and Turenne have argued that appeals fail to provide ‘an official acknowledgement of the misconduct of an identified judge accompanied by a sanction’.<sup>28</sup> To return to the example of a judge’s misdirection to a jury, it may be that the misdirection is a result of an uncivil, or otherwise inappropriate, comment made by the judge against a party, a witness or a group within the community. While this may amount to a ground of appeal (although of course this would not be available for a witness or a member of the community), this remedy may still be insufficient. Appeals may correct legal errors and thus provide redress for the aggrieved litigant, but there is no additional consequence for the judicial officer, and no systemic solution that prevents ongoing misconduct. It provides no support for change, or even follow up as to whether such change has taken place. Further, the conduct’s impact on confidence in the judiciary is not addressed.<sup>29</sup>

Thus, while the availability of an appeal may appear to provide a solution, it is only a partial one that cannot address judicial misconduct satisfactorily either in respect of the individual judge involved or institutional confidence. Therefore, we have included a number of examples of misconduct or misbehaviour that may also be the basis of an appeal where we believe the appeal process offers insufficient redress.

<sup>26</sup> Geoffrey P Miller, ‘Bad Judges’ (2004) 83 *Texas Law Review* 431, 463.

<sup>27</sup> See Basten, above n 10, 479–80.

<sup>28</sup> Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (Cambridge University Press, 2<sup>nd</sup> ed, 2013) 13.

<sup>29</sup> The case of Federal Magistrate Joe Harman demonstrates our concerns. His conviction of a witness for contempt without following proper procedure in one case and failure to recuse himself in another led to successful appeals. Nonetheless, this was considered insufficient to address his conduct and he was also the subject of an informal disciplining procedure: Geesche Jacobsen, ‘Magistrate Suspended after Rulings Overturned’, *The Sydney Morning Herald* (Sydney), 26 August 2011, 3.

The second threshold issue is the question of judicial competence in the sense of whether a judge possesses the necessary intellect, knowledge and training to apply the judicial method well. Shetreet explains that the absence of power to remove on the basis of incompetence is

an inevitable price which society has to pay for maintaining the independence of judges. As it would be difficult to draw the line, if judges were to be removed for incompetence, this standard could be used as a pretext for removing from office judges who were perfectly competent but for some reason or another do not enjoy the support of those who control the machinery of removal ...<sup>30</sup>

Generally speaking, incompetence is not considered a ground for discipline or removal unless it manifests as incapacity or misbehaviour (as it may, for example, in relation to delays in delivering judgment or plagiarism).<sup>31</sup> It is fundamentally addressed by the selection of competent individuals to take judicial office, ongoing education regimes and the appeal process.

#### *A Incapacity*

Misconduct or misbehaviour relates to conduct that is improper or unprofessional. It imports an intentional element. Incapacity relates to a physical or mental inability to undertake the judicial task.<sup>32</sup> By its nature there is no intentional element associated with incapacity. However, the cleavage between the two may not be as clear as it initially appears. Incapacity can often manifest in misconduct. In 1998, Justice Vince Bruce of the New South Wales Supreme Court was the subject of complaint for delay in delivering a judgment. After a number of assurances that the situation would be remedied, Justice Bruce eventually claimed that his delay and breach of assurances were caused by depression suffered since appointment to the Bench.<sup>33</sup>

<sup>30</sup> Shetreet, *Judges on Trial*, above n 1, 284–5. See also Shimon Shetreet, ‘The Limits of Judicial Accountability: A Hard Look at the *Judicial Officers Act 1986*’ (1987) 10(1) *University of New South Wales Law Journal* 4, 15; Australian Judicial System Advisory Committee, above n 5, 77 [5.49] n 57.

<sup>31</sup> See Australian Judicial System Advisory Committee, above n 5, 77 [5.49] n 57. For examples of judicial misbehaviour warranting disciplinary intervention involving delay and plagiarism, see below nn 83–90 and accompanying text.

<sup>32</sup> For our purposes, whether the incapacity is caused by a mental or physical ailment is immaterial, although it may affect the most appropriate response to the issue.

<sup>33</sup> H P Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2<sup>nd</sup> ed, 2013) 124–5. See also the circumstances of Federal Magistrate Joe Harman: Jacobsen, above n 29.

While there can and should be sympathy for judges who are dealing with incapacity, at the same time their condition can have profound effects on those who engage with the justice system and therefore the judicial institution. As a consequence, responses need to balance the welfare of the particular judge and the wider public interest. Incapacity may be an ongoing problem, may have manifested during the judge's tenure and may be age-related. It may be permanent or passing, treatable or not.

Judges have suffered permanent or passing physical incapacity that affects their ability to work, but refused to resign — whether that be because of 'pride, self-interest, or lack of insight'.<sup>34</sup> In the late 1960s in Queensland, for example, Chief Justice Mack suffered a heart attack and became incapable of performing his judicial functions.<sup>35</sup> He nonetheless stayed in office for another two years.<sup>36</sup>

The most frequent cause of incapacity-based complaints against judges has been ongoing, but treatable, mental illness. Indeed, it would appear that physical or mental impairment is more common, at least in Australia, than misbehaviour.<sup>37</sup> Justice Bruce, for example, argued that he had been diagnosed and treated for his depression and that he would be able to perform his judicial functions, a position with which the Legislative Council ultimately agreed.<sup>38</sup>

Mental illness was again cited as a cause of conduct under examination in 2011, when two New South Wales Magistrates also found themselves in front of the Legislative Council defending their actions.<sup>39</sup> Magistrate Jennifer Betts was accused of bullying and treating defendants unfairly. The Legislative Council accepted her evidence that she had suffered from depression during the period in question and had subsequently sought treatment. Luke Foley said:

<sup>34</sup> Thomas, above n 21, 55 [4.52].

<sup>35</sup> Ibid.

<sup>36</sup> Ibid 55 [4.52] n 151.

<sup>37</sup> Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009) 65 [6.12], quoting Gilbert + Tobin Centre of Public Law, Submission No 1 to Senate Standing Committee on Legal and Constitutional Affairs, *Australia's Judicial System and the Role of Judges*, 27 March 2009, 4.

<sup>38</sup> Lee and Campbell, above n 33, 125–6.

<sup>39</sup> Ibid 126.

I believe it is possible for people who suffer from depression, when treated well and when found the right medication, to lead completely fulfilling and productive lives, including productive working lives.<sup>40</sup>

A similar process and result occurred in relation to the other Magistrate, Brian Maloney.<sup>41</sup>

While some incapacity-based complaints may be dealt with on appeal, it often provides an incomplete solution to the issue. In 2008, the High Court overturned two convictions on the ground that the trial judge, Judge Ian Dodd, had been asleep at times during the trial and this had led to a miscarriage of justice.<sup>42</sup> It was later revealed that the judge had severe obstructive sleep apnoea. While that condition was treated, he subsequently developed a variable anxiety state and retired on the grounds of permanent disability.<sup>43</sup>

Permanent physical or mental incapacity that is untreatable will not only reduce the individual judge's capacity to perform the judicial function, but may also undermine public confidence in the institution. Passing incapacity, both physical and mental, will also undermine the individual's capacity to fulfil the judicial function. However, provided judges do not sit during this period, passing incapacity should not have an ongoing effect on the public confidence in the system.

The exposure of litigants, witnesses, counsel and other members of the public to incapacitated judges who suffer from treatable illnesses that are not adequately treated while the judge is still performing duties on the Bench has the capacity to damage the reputation of the judiciary, and not just during the period they continue to serve. The social stigma that attaches to mental illness and the possibility of relapse may also affect public confidence in the judiciary. In such delicate cases, a judicial complaints system must be able to provide a proportional and tailored response for the judges concerned.

<sup>40</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 16 June 2011, 2482–3 (Luke Foley).

<sup>41</sup> Andrew Clennell and Kate Sikora, 'Magistrate Keeps Job: MPs' Vote Ends Nightmare', *The Daily Telegraph* (Sydney), 14 October 2011, 2.

<sup>42</sup> *Cesan v The Queen* (2008) 236 CLR 358.

<sup>43</sup> *Ibid* 373 [45] (French CJ).

## B *Misconduct and Misbehaviour*

Misconduct and misbehaviour can be classified in several ways. Temporally, it can be considered by reference to conduct that has occurred prior to the individual taking judicial office, during judicial office, and after retirement.

### 1 *Prior to Taking Judicial Office*

In Australia, a former High Court judge, the Hon Ian Callinan, was alleged to have been involved in misconduct prior to his appointment. Mr Callinan acted as counsel in proceedings that were an abuse of process, and had been used as ‘an instrument of oppression so as to frustrate the bringing, and expeditious disposition, of a legitimate claim’.<sup>44</sup> In a case in which costs were sought against the solicitors in the proceedings, Goldberg J noted that Callinan had ‘acquiesced’ and ‘approved’ of the tactics.<sup>45</sup> This judgment was handed down in July 1998, months after Justice Callinan’s appointment to the Bench. Despite the judgment, Justice Callinan remained on the Bench, and the Attorney-General defended Justice Callinan’s position:

no inquiry into the conduct of the judge is warranted ... An inquiry held inappropriately can endanger the independence of the judiciary, damage the standing of the courts and do harm to an individual judge.<sup>46</sup>

Just as the prior conduct of an individual seeking admission to the legal profession will demonstrate whether that person is of ‘good character’, it may be that the conduct of a judge prior to taking judicial office can demonstrate the judge is not fit to hold judicial office, or undermine public confidence in the institution itself. In our view, the type of conduct found to be engaged in by Mr Callinan would appear to raise significant concerns about his ethical judgment as a legal practitioner and, therefore, questions about his fitness for judicial office.

### 2 *During Judicial Office — On the Bench*

While a judge holds office, he or she may engage in misbehaviour in official duties or off the Bench. Both may demonstrate that the judge is not a fit and

<sup>44</sup> *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169, 250 (Goldberg J).

<sup>45</sup> *Ibid* 206–7. In the appeal to the Full Federal Court, the Court noted that it was unnecessary to make a finding about Mr Callinan’s involvement: *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134, 148 [50] (Lee, Hill and Sundberg JJ).

<sup>46</sup> Daryl Williams, ‘Justice Ian Callinan’ (News Release, 26 August 1998) 1, quoted in Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 2007) 85.

proper person to hold judicial office, or bring the reputation of the court into disrepute.

Judicial misconduct on the Bench often manifests as a failure of procedure. Tom Tyler's work on procedural justice suggests that litigants pay attention to a number of aspects of the judicial process:

the authorities' motivation, honesty, and ethicality; the opportunities for representation; the quality of the decisions; the opportunities for error correction; and the authorities' bias. It is noteworthy that the major criteria used to assess process fairness are those aspects of procedure least linked to outcomes — ethicality, honesty, and the effort to be fair ...<sup>47</sup>

Tyler finds that those who come into contact with the courts will be influenced not only by whether the outcome is just, but also by whether the process meets their notion of fairness. In fact, he argues, 'those affected by the decisions of third parties ... react to the procedural justice of the decision-making process at least as much, and often more, than they react to the decision itself'.<sup>48</sup>

Failures in process can occur throughout the interaction with the judge, from the moment of first contact through to the delivery of the outcome. The following areas emerge from our examination of reported instances of judicial misbehaviour as areas where the process of adjudication may have been less than ideal.

*(a) Failures of Interaction: Incivility, Rudeness, Bullying and Offence*

At times judges may be rude or uncivil to, or bully, their colleagues and staff, litigants, witnesses, jurors and counsel. As a result of his experiences, former High Court judge Michael Kirby recently called for more rigorous and formal responses to judicial bullying, including its recognition as an 'abuse of public office' warranting removal in serious or repeated cases.<sup>49</sup>

<sup>47</sup> Tom R Tyler, 'What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 *Law & Society Review* 103, 128.

<sup>48</sup> *Ibid* (citations omitted). See also Tom R Tyler, 'The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience' (1984) 18 *Law & Society Review* 51, 71. See also *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 693 [209] (Gageler J), quoting *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 97 [19] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

<sup>49</sup> Michael Kirby, 'Judicial Stress and Judicial Bullying' (2013) 87 *Australian Law Journal* 516, 525.

There are a number of examples of judges acting poorly towards individuals that appear before them or work with them. South Australia's infamous Justice Benjamin Boothby was renowned for his poor treatment of jurors.<sup>50</sup> He once had a jury locked away without food and water for 22 hours until they agreed to bring in a finding for the defendant as he had directed.<sup>51</sup> Similarly, in 1959, an English judge threatened to lock a jury up all night after they had been considering their verdict for over two hours, if no verdict was reached in the next 10 minutes.<sup>52</sup>

In 2010, the conduct of a Western Australian magistrate was questioned after a young lawyer took her own life in the weeks after she had allegedly been 'berated' by the magistrate in court.<sup>53</sup> In West Virginia an intemperate outburst, among other transgressions, by Judge Watkins towards a litigant that was made available via YouTube led to his suspension for the remainder of his term.<sup>54</sup>

Strained relationships between members of the judiciary can also emerge in a public forum. In 2005, the High Court overturned the conviction of former Chief Magistrate Di Fingleton for, without reasonable cause, threatening to remove a fellow magistrate as co-ordinating magistrate because he had supported another magistrate's claims against Ms Fingleton.<sup>55</sup> Fingleton's

<sup>50</sup> McLaren, above n 1, 194–5; John M Williams, 'Justice Boothby: A Disaster That Happened' in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 21, 26–8; Alex C Castles, 'Boothby, Benjamin (1803–1868)' in Douglas Pike (ed), *Australian Dictionary of Biography* (Melbourne University Press, 1969) vol 3, 194.

<sup>51</sup> John M Williams, above n 50, 28; Castles, above n 50, 194.

<sup>52</sup> *R v McKenna* [1960] 1 QB 411, 419–20 (Cassels J).

<sup>53</sup> Josh Jerga, 'Lawyer "Berated" in Court before Death', *The Sydney Morning Herald* (online), 20 August 2010 <<http://news.smh.com.au/breaking-news-national/lawyer-berated-in-court-before-death-20100820-138pm.html>>; Law Reform Commission of Western Australia, *Complaints Against Judiciary: Discussion Paper*, Project No 102 (2012) 94.

<sup>54</sup> *Re Judge Watkins III, Putnam County Family Court Judge*, 757 SE 2d 594, 603–4 (Ketchum J) (W Va, 2013); Leigh Jones, 'Legal Experts Say Judges Cracking from Pressure', *The Legal Intelligencer* (Philadelphia), 24 April 2013, 4. See also Martha Neil, 'Judge Whose Angry Rant Was Caught in YouTube Clip Is Suspended for Nearly Four Years', *ABA Journal* (online), 28 March 2013 <[http://www.abajournal.com/news/article/judge\\_who\\_shouted\\_shut\\_up\\_at\\_litigants\\_is\\_removed\\_top\\_state\\_court\\_cites\\_soc/](http://www.abajournal.com/news/article/judge_who_shouted_shut_up_at_litigants_is_removed_top_state_court_cites_soc/)>; David Lohr, 'Arthur Hage, Yelled at by Judge William Watkins, Says "It's Not Over"', *Huffington Post* (online), 8 October 2012 <[http://www.huffingtonpost.com/2012/08/10/arthur-hage-william-watkins\\_n\\_1764984.html](http://www.huffingtonpost.com/2012/08/10/arthur-hage-william-watkins_n_1764984.html)>.

<sup>55</sup> *Fingleton v The Queen* (2005) 227 CLR 166. Chief Magistrate Fingleton's conduct in so doing was found by a jury to have amounted to an offence against the *Criminal Code Act 1899* (Qld) sch 1 s 119B.

conviction was quashed as she enjoyed immunity in her judicial and administrative role, not because she was found not guilty of the conduct.<sup>56</sup>

In addition to incivility, rudeness or bullying behaviour towards particular persons, there have been occasions when judges have betrayed attitudes that cause offence. In colonial times, Justice Boothby made headlines in *The Adelaide Times* for stereotyping the Irish, the newspaper accusing Boothby of ‘shaking “his awful wig at the whole race”’.<sup>57</sup> In 2013, Magistrate Pat O’Shane resigned amidst controversy caused by a case in which she accused a paramedic of racism, asking him, ‘you don’t like blacks?’<sup>58</sup> In January 2012 this matter was referred to the Judicial Commission of New South Wales by the Premier.<sup>59</sup> Ms O’Shane has since sued a radio broadcaster, who criticised her decisions as ‘diabolical and wrong’, for defamation.<sup>60</sup> As part of this case the defendant sought access to the complaint records of the Commission.<sup>61</sup> Both Ms O’Shane and the Commission applied to the Supreme Court of New South Wales to have these subpoenas set aside and were successful in part.<sup>62</sup>

In 2002, a judge of the Cour Supérieure du Québec, Justice Barakett, was reprimanded for comments ‘derogatory to Aboriginal culture’.<sup>63</sup> The comments included describing the children in a child custody case as being ‘brainwashed away from the real world into a childlike myth of pow-wows and rituals’.<sup>64</sup> The award of custody to the non-Aboriginal father was seen as suspect.<sup>65</sup> In 1992, Justice Derek Bollen of the South Australian Supreme Court caused a media storm when, in the course of a rape in marriage case, he

<sup>56</sup> See, eg, *Fingleton v The Queen* (2005) 227 CLR 166, 192 [55]–[56] (Gleeson CJ). This immunity was derived from s 21A of the *Magistrates Act 1991* (Qld).

<sup>57</sup> McLaren, above n 1, 194, quoting Editorial, ‘Hasty Judgement’, *The Adelaide Times* (Adelaide), 26 September 1855, 2. See also John M Williams, above n 50, 26.

<sup>58</sup> Harriet Alexander, ‘Fearless O’Shane, Defender of Justice, Plans for Life after the Bench’, *The Sydney Morning Herald* (Sydney), 9 February 2013, 6.

<sup>59</sup> Andrew Clennell and Alicia Wood, ‘O’Shane to Retire from Life on Bench’, *Daily Telegraph* (Sydney), 25 January 2013, 3.

<sup>60</sup> Hannah Low, ‘Jones Seeks O’Shane Complaints’, *Australian Financial Review* (Sydney), 7 February 2014, 33.

<sup>61</sup> *Ibid.*

<sup>62</sup> *O’Shane v Harbour Radio Pty Ltd* [2014] NSWSC 93 (20 February 2014).

<sup>63</sup> Canadian Judicial Council, ‘Panel Disapproves of Conduct of Mr Justice Barakett’ (News Release, 26 July 2002).

<sup>64</sup> Graeme Hamilton, ‘Judge Calls Reserve Life a “Childlike Myth of Powwows”’: Native Leaders Outraged — Comments in Custody Case Show “Profound Ignorance” of Aboriginal People’, *National Post* (Toronto), 14 October 2000, quoting *L (D) v Listuguj Police Service* (Unreported, Cour Supérieure du Québec, Barakett J, 21 September 1999) [18].

<sup>65</sup> Hamilton, above n 64.

told an anecdote about a ‘mentally deranged’ woman whose false allegation of rape led a ‘respectable married businessman’ to commit suicide,<sup>66</sup> and advised a jury that:

There is, of course, nothing wrong with a husband, faced with his wife’s initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling.<sup>67</sup>

Bollen J’s jury directions led to the case going to the Court of Criminal Appeal,<sup>68</sup> reflection on whether rape victims were treated appropriately by the justice system,<sup>69</sup> and a parliamentary inquiry into gender bias in the judiciary.<sup>70</sup>

Conduct in this category may demonstrate that an individual concerned does not have the appropriate poise and character to engage in the judicial role. It is also likely to damage the confidence of litigants and other members of the public who witness the interactions. In addition to the likely impact on the audience, such comments raise the issue of the extent to which they betray bias that affects the outcome of the case.

<sup>66</sup> Transcript of Proceedings, *R v Johns* (Unreported, Supreme Court of South Australia, Bollen J, 26 August 1992) 5–6, quoted in *Question of Law Reserved on Acquittal Pursuant to Section 351(1a) Criminal Law Consolidation Act (No 1 of 1993)* (1993) 59 SASR 214, 216 (King CJ), 226 (Perry J) (*Question of Law (No 1 of 1993)*).

<sup>67</sup> Transcript of Proceedings, *R v Johns* (Unreported, Supreme Court of South Australia, Bollen J, 26 August 1992) 12–13, quoted in *Question of Law (No 1 of 1993)* (1993) 59 SASR 214, 219 (King CJ), 232–3 (Perry J), 237 (Duggan J). For an example of the media response, see Robert Milliken, ‘Judge’s Rape Tales Infuriate Australian Women’, *The Independent* (London), 14 January 1993, 12. For an academic critique, see Rae Kaspiew, ‘Rape Lore: Legal Narrative and Sexual Violence’ (1995) 20 *Melbourne University Law Review* 350.

<sup>68</sup> The Court of Criminal Appeal found that the direction ‘was apt to convey the impression that consent might be induced by force’: *Question of Law (No 1 of 1993)* (1993) 59 SASR 214, 234 (Perry J), 238 (Duggan J). King CJ dissented: at 222. While the matter proceeded to the Court of Criminal Appeal, it was as a ‘case stated’ pursuant to s 350(1a) of the *Criminal Law Consolidation Act 1935* (SA), a procedure in which the defendant’s ‘acquittal stands and is not open to question, irrespective of the manner in which the points of law falling for consideration are determined’ by the upper court: *Question of Law (No 1 of 1993)* (1993) 59 SASR 214, 222–3 (Perry J).

<sup>69</sup> Kaspiew, above n 67, 352.

<sup>70</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Gender Bias and the Judiciary* (1994) 1–6 [1.1]–[1.12].

(b) *Partial and Biased Conduct*

The judge must be impartial and unbiased. Of course, failure to be so will result in a breach of natural justice and jurisdictional error, and is therefore not generally considered to be misconduct so much as falling into legal error. But there is often significant overlap.<sup>71</sup> In New Zealand the friendship and financial ties between Justice Bill Wilson and counsel led to an appeal court reversing itself when it discovered a case of apparent bias, which it had previously rejected, was made out,<sup>72</sup> but also a complaint process that ultimately was brought to an end by the judge's resignation.<sup>73</sup>

Judges must recuse themselves where there is a 'reasonable apprehension' of bias.<sup>74</sup> A number of well-established grounds for disqualification have been developed in this area that provide guidance as to when a judicial officer's interests (pecuniary or otherwise), prior conduct (such as published statements), associations (such as personal relationships), or knowledge of extraneous information demonstrate an unacceptable level of prejudice (real or perceived).<sup>75</sup> Recusal, the appellate process, and availability of judicial review allow for some issues of partiality to be addressed, but, as we have explained above, these processes often leave unanswered larger questions about what the conduct demonstrates about the individual's judgement and capacity to perform the judicial role, and its impact on the institution itself. Further, these mechanisms cannot address repeated conduct.

Finally, judges can exhibit partial and biased behaviour that is not necessarily precluded by the rules of natural justice but may still amount to misconduct. This has commonly manifested itself when judges use the Bench as a 'pulpit' to chastise litigants and society more generally.<sup>76</sup> In the 1980s in the United States, Judge Lord was subject to disciplinary proceedings over

<sup>71</sup> Note that Thomas devotes a whole chapter to bias and prejudice: Thomas, above n 21, ch 5. See also Shetreet and Turenne, above n 28, 179–220.

<sup>72</sup> *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 35. The case concerned whether the friendship gave rise to an appearance of bias. See also Judicial Conduct Commissioner of New Zealand, 'Decision of the Judicial Conduct Commissioner as to Three Complaints concerning Justice Wilson' (7 May 2010) 2 [4].

<sup>73</sup> B V Harris, 'New Zealand: Supreme Court Judge Resigns — Saga Raises Questions about Recently Enacted Judicial Complaints Legislation' [2011] *Public Law* 436, 438.

<sup>74</sup> This test was enunciated by the Australian High Court in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

<sup>75</sup> *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J). For a general discussion of the jurisprudence, see Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5<sup>th</sup> ed, 2013) ch 9.

<sup>76</sup> Thomas, above n 21, 33 [4.21].

comments made when a settlement agreement was before the court. Judge Lord took the opportunity to morally 'reprimand' a number of officers of the company involved for refusing to recall their products and their conduct of the litigation.<sup>77</sup> The officers subsequently laid complaints against the Judge on the basis that their personal and professional reputations had been destroyed and they had not been accorded due process of law.<sup>78</sup> An appeal, which considered these reprimands, found that they had violated the officers' due process rights, and expunged them from the record.<sup>79</sup> The complaints to the Judicial Council were dismissed on the basis that they had been fully dealt with by the appeal court.<sup>80</sup>

This type of conduct is not always poorly received by the public and the media, but may still affect confidence in the judicial institution. In 2013 in South Australia, Youth Court Senior Judge Stephen McEwen delivered a stinging critique of some public servants after learning that his previous order regarding the housing of a juvenile offender had been disregarded. He referred to the department as being 'obstructive control freaks', 'refusing to just have a look at the blindingly obvious'.<sup>81</sup> Senior Judge McEwen's comments were well-received by the local news editor, who said: 'His remarks should be distributed and used as a check-list for any organisation that confuses holding meetings with actually doing things'.<sup>82</sup> However, it is unlikely that the public servants involved felt they had been afforded natural justice, or that future parties (particularly government parties) to proceedings before the judge would maintain confidence in his judgement.

### (c) *Delay in Delivering Judgments*

It has been said that justice delayed is justice denied. Concerns are often expressed about judges failing to dispose of court proceedings and deliver judgment expeditiously. While heavy workloads and the need for considered

<sup>77</sup> See Carol T Rieger, 'The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?' (1988) 37 *Emory Law Journal* 45, 66.

<sup>78</sup> *Ibid* 67.

<sup>79</sup> *Gardiner v A H Robins Co Inc*, 747 F 2d 1180, 1191 (Lay CJ, Bright and Arnold JJ) (8<sup>th</sup> Cir, 1984). The Court described Judge Lord's conduct as 'intimidation of private citizens who are not parties to proceedings before the district court [that] is antithetical to our notions of fundamental fairness and the proper functioning of our judicial system'.

<sup>80</sup> Rieger, above n 77, 69 n 117.

<sup>81</sup> David Penberthy, 'Here Comes da Judge', *Sunday Mail* (Adelaide), 10 February 2013, 46.

<sup>82</sup> *Ibid*.

judgments may well explain many occasions of delay, at times this may demonstrate a judge's inability to fulfil judicial functions.

Delay was the basis for the complaints initially made against Justice Bruce in New South Wales that have already been discussed.<sup>83</sup> In 2012 in the Australian Capital Territory, a complaint was made against a Supreme Court judge, Justice Richard Refshauge, by the Australian Capital Territory Bar Association for serious delays in delivering judgment. Some parties appearing before the judge had waited four and a half years for judgment to be delivered. The Attorney-General decided against establishing a commission to investigate whether Justice Refshauge's conduct warranted removal; instead, his 'punishment' was to be excused from hearing further cases for six months, during which an acting judge had to be appointed.<sup>84</sup> It was the second time in 12 months that the judge was excused from sitting to clear his backlog of cases.<sup>85</sup>

Delays in the resolution of cases have also been the subject of criticism at the appeal court level. For example, Heydon J described a primary judge's delay in giving judgment as 'deplorable',<sup>86</sup> and reflecting a process of litigation where the 'torpid languor of one hand washes the drowsy procrastination of another'.<sup>87</sup> While it is open to an appeal court to criticise delays, this is a very limited sanction as the delay alone is unlikely to give rise to an appeal, and, in any event, is unable to be remedied by the appeal process.

Excessive delays in justice lead to feelings of discontent with the judicial process, and a loss of confidence in its ability to resolve disputes expeditiously.

#### *(d) Professional Misconduct*

Judges may engage in conduct that would amount to professional misconduct if they were still in practice. Engagement in this type of conduct demonstrates an individual's failure to understand and meet ethical and professional obligations. It can also have a flow-on effect on public confidence in the judiciary for those who have witnessed the conduct, or who have appeared, or will appear, before the judge.

<sup>83</sup> See above n 33 and accompanying text.

<sup>84</sup> Jenna Clarke and Michael Inman, 'Refshauge Gets Break to Clear Case Backlog', *Canberra Times* (Canberra), 4 February 2013, 1; Michael Inman, 'Backlog of Cases Still Looms over Refshauge', *Canberra Times* (Canberra), 6 May 2013, 1.

<sup>85</sup> Clarke and Inman, above n 84.

<sup>86</sup> *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 228 [152].

<sup>87</sup> *Ibid* 229 [156].

Celebrated Australian jurist and former Chief Justice of the High Court Sir Owen Dixon engaged in such conduct. For many years before his brother Justice Rich's retirement, Sir Owen Dixon was writing Justice Rich's judgments.<sup>88</sup> A more contemporary example of such behaviour comes from Queensland. In 2006 Federal Magistrate Jennifer Rimmer was discovered to have lifted 2000 words from a Victorian judgment, and it was later found that similar conduct had occurred in a number of her other judgments.<sup>89</sup> She subsequently claimed that her conduct was caused by illness — hypothyroidism — and the stress of over-work. She took sick leave before ultimately resigning.<sup>90</sup>

(e) *Administrative Misconduct*

Shetreet describes administrative misconduct as including failing to follow regular procedures for taking vacation, coming to court late, rising from court too early, or failing to attend court at all.<sup>91</sup> To this list could be added sitting for overly long hours. The significance of administrative misconduct of this nature should not be underestimated. Of the 86 magistrates formally disciplined between March 2009 and December 2012 in England and Wales, 34 were brought before the authorities due to failures to sit for sufficient time and maintain appropriate contact with their Bench.<sup>92</sup> In serious cases such behaviour demonstrates a failure of the individual to meet their professional obligations as a judge, and can have profound effects on those who interact with the court.

<sup>88</sup> Sir Owen Dixon's biography is littered with examples of this: Philip Ayres, *Owen Dixon* (Miegunyah Press, 2003) 56, 57, 73, 93, 116, 119 (although this refers to an instance where Justice Dixon wrote a paper for Justice Rich rather than a judgment), 320 n 53 (which also refers to Justice Dixon helping Justice McTiernan), 326 n 93.

<sup>89</sup> Chris Merritt, 'Illness Affected My Judgment', *Weekend Australian* (Canberra), 1 April 2006, 3; Thomas, above n 21, 69–70 [4.71].

<sup>90</sup> Thomas, above n 21, 70 [4.71]. There are other cases where judges have copied the submissions of parties without attribution: see, eg, *Cojocar v Guardian ad Litem of British Columbia Women's Hospital & Health Center* (2011) 17 BCLR (5<sup>th</sup>) 253. While not judicial misconduct, similar conduct was revealed in *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166, 170 [5] (North, Logan and Robertson JJ), where a member of the Administrative Appeals Tribunal had lifted substantial parts of the Commissioner of Taxation's submissions into the Tribunal's reasons without attribution.

<sup>91</sup> Shetreet, *Judges on Trial*, above n 1, 301.

<sup>92</sup> Drawn from investigation statements of the Office for Judicial Complaints ('OJC'): Judicial Conduct Investigations Office, *Disciplinary Statements* <<http://judicialconduct.judiciary.gov.uk/816.htm>>. Thirty-two of these magistrates were removed from judicial office as a consequence of their failures.

(f) *Abuse of Judicial Power*

Judicial power can be wielded for private advantage. Abuse of judicial power is well illustrated by our colonial past. In the mid-19<sup>th</sup> century, Justice Barron Field raised eyebrows in the colony of New South Wales for manipulating his position for personal advantage on a number of occasions, including striking off an attorney who had been tardy handing money over to the judge in a private matter,<sup>93</sup> and finding that felony attain was not removed by pardons not issued under the Great Seal, a convenient decision in a case in which the judge was a defendant.<sup>94</sup> In the same era in Van Diemen's Land, Justice Algernon Sidney Montagu avoided paying a debt he owed on the basis that the Supreme Court 'could not be constituted without both judges' and therefore 'neither of them could sue or be sued in it'.<sup>95</sup>

There are a number of contemporary examples. One of the most notorious is the alleged use of judicial office by High Court Justice Lionel Murphy to try to secure an acquittal of a friend. As this amounted to a criminal offence and involved off-the-Bench behaviour, it will be dealt with below.<sup>96</sup> A more recent example is provided by Magistrate Kay Ryan who reportedly sent two workmen to the watchhouse for making too much noise during renovation work on the courthouse and interrupting her court proceedings.<sup>97</sup>

Abuse of the power entrusted to the judiciary demonstrates not only a failure of character in the individual judge, but has severe repercussions for the institution. Abuse of public power that becomes known by the public will lead to diminished confidence in public institutions.

### 3 *During Judicial Office — Off the Bench*

Considerable challenges can arise where concerns are raised about a judge's behaviour in their private capacity. This might involve criminal conduct and other reprehensible behaviour.

<sup>93</sup> C H Currey, 'Field, Barron (1786–1846)' in A G L Shaw and C M H Clark (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1966) vol 1, 373, 373; McLaren, above n 1, 145.

<sup>94</sup> McLaren, above n 1, 146.

<sup>95</sup> P A Howell, 'The Van Diemen's Land Judge Storm' (1966) 2 *University of Tasmania Law Review* 253, 255 (citations omitted). See also Alex C Castles, *Lawless Harvests or God Save the Judges: Van Diemen's Land 1803–55, a Legal History* (Australian Scholarly Publishing, 2007) 198.

<sup>96</sup> See below nn 103–7 and accompanying text.

<sup>97</sup> Roanne Johnson, 'Judge Dread on Way: Tough Magistrate to Take Bench Here in December', *Townsville Bulletin* (Townsville), 25 September 2010, 5.

(a) *Criminal Conduct*

Criminal conduct on the part of judges was a circumstance that was once rare in Australia, but, as Thomas observed in 2009, ‘this is no longer the case’.<sup>98</sup> Some criminal conduct would seem relatively innocuous — for example, a jaywalking fine — and there are doubts that this ought to lead to disciplinary action. Criminal conduct that involves moral turpitude is more problematic.<sup>99</sup> However, the line is not necessarily clear between conduct which involves moral turpitude and that which does not. Speeding, or driving under the influence, are in one sense ubiquitous and relatively minor offences, but the danger the conduct poses to other road users, and the perception that such conduct indicates a disregard for the law, underscore their seriousness and relevance to the judicial role. When a judge who has held office is found to have engaged in morally corrupt and illegal behaviour, this may still affect general perceptions of the Bench even though the conduct is not directly associated with the institution. An example came to public notice in South Australia when Judge Anne Bampton of the District Court was charged with driving with an excessive blood alcohol level and driving without due care, after a car accident with a cyclist.<sup>100</sup> The offence occurred on the eve of her elevation to the Supreme Court Bench. She pleaded guilty and the Chief Justice of South Australia issued a statement explaining his inability to ‘suspend the constitutional operation of a judicial appointment’.<sup>101</sup> During this period Justice Bampton was included in a local newspaper’s list of 20 ‘South Australians to watch in 2014’ on the basis that:

How she handles her impending court date — and the 80 per cent of South Australians calling for her to resign — will shape her time on the bench, and greatly influence the public’s attitude to the judiciary in 2014.<sup>102</sup>

It is criminal conduct, or allegations of it, that have resulted in the most controversial episodes in Australian judicial history.<sup>103</sup> The allegations,

<sup>98</sup> Thomas, above n 21, 177 [10.25].

<sup>99</sup> See Shetreet, *Judges on Trial*, above n 1, 367.

<sup>100</sup> Sean Fewster, ‘Drink-Driving Supreme Court Judge Anne Bampton Apologises, Fined \$1300 and Disqualified from Driving for Eight Months’, *The Advertiser* (online), 15 January 2014 <<http://www.adelaidenow.com.au/news/south-australia/drinkdriving-supreme-court-judge-anne-bampton-apologises-fined-1300-and-disqualified-from-driving-for-eight-months/story-fni6uo1m-1226801748176>>.

<sup>101</sup> Chief Justice Chris Kourakis, ‘Media Release’ (15 January 2014).

<sup>102</sup> ‘20 People to Watch’, *The Advertiser* (Adelaide), 4 January 2014, 36.

ultimately unproven, that Justice Lionel Murphy of the High Court of Australia had sought to interfere with the course of justice in proceedings being taken against Morgan Ryan, a Sydney solicitor and friend of Justice Murphy, continue to rock Australian legal and political circles.<sup>104</sup> Justice Murphy's alleged crime was to ask the Chief Stipendiary Magistrate of New South Wales, Clarrie Briese, to put pressure on the magistrate conducting the committal hearing against Ryan. Justice Murphy was investigated by two Senate Committee inquiries before being convicted of attempting to pervert the course of justice by the Supreme Court of New South Wales.<sup>105</sup> The conviction was quashed on appeal, and a retrial ordered.<sup>106</sup> He was acquitted at the retrial but was subject to a third investigation by a parliamentary commission of inquiry, which was brought to a close upon the news that Murphy was suffering from terminal cancer.<sup>107</sup>

Criminal conduct involving moral turpitude led to the removal of Justice Angelo Vasta of the Supreme Court of Queensland in 1989. This was on the basis, *inter alia*, that Justice Vasta had given false evidence about his relationship with corrupt Police Commissioner Sir Terence Lewis in a defamation hearing and that he had committed tax fraud.<sup>108</sup> There are a number of other examples of tax and expenses fraud committed by judges.<sup>109</sup>

Judges' convictions for lesser offences may still lead to questions about their character. Justice Jeff Shaw of the New South Wales Supreme Court was

<sup>103</sup> See Geoffrey Lindell, 'The Murphy Affair in Retrospect' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 280, 280–1.

<sup>104</sup> See, eg, *ibid* 280. Recently, allegations were made by two fellow magistrates that the Chief Magistrate of the Australian Capital Territory, Ron Cahill, had provided material to a magistrate in Victoria that might have had the effect of interfering with the criminal process. A judicial commission was established by the Attorney-General to investigate whether the conduct warranted removal: Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 10 November 2009, 4737–9 (Simon Corbell). However, it was ultimately abandoned when the Chief Magistrate resigned: Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 17 November 2009, 5099 (Simon Corbell).

<sup>105</sup> Lee and Campbell, above n 33, 118–19; A R Blackshield, 'The Appointment and Removal of Federal Judges' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 400, 410–12; Thomas, above n 21, 220–7 [12.15]–[12.20].

<sup>106</sup> *R v Murphy* (1985) 4 NSWLR 42. See also *R v Murphy* (1985) 158 CLR 596; *R v Murphy* (1986) 5 NSWLR 18.

<sup>107</sup> Lee and Campbell, above n 33, 119; Blackshield, above n 105, 412–13; Thomas, above n 21, 228–30 [12.20]–[12.22].

<sup>108</sup> Lee and Campbell, above n 33, 120–1.

<sup>109</sup> See, eg, the discussion in Thomas, above n 21, 176–7 [10.23]–[10.24].

caught drink driving in 2004, and after having given two samples of blood to police at the hospital, managed to take both home with him (intentionally or not). When the police admitted to having lost their sample, Justice Shaw's wife generously dropped his sample back. Justice Shaw's arrest was the very public manifestation of an underlying problem with alcohol. Highlighting again the close connection between misconduct and incapacity, he resigned from office and booked into a clinic for treatment of alcoholism.<sup>110</sup>

(b) *Reprehensible Behaviour*

Finally there is conduct that, while not criminal, is perceived as reprehensible — morally or politically. Whether reprehensible behaviour would be the basis for any form of discipline is a question not easily answered. There is a danger that if disciplinary consequences attach to this type of behaviour a chilling effect will be created within the judiciary. Judges may become reluctant to engage fully as members of the community, an effect that has its own dangers. On the other hand, some behaviour may be considered so serious that it casts doubt on the judge's ability to fill the public role of a judge, or impacts on the reputation of the court as an institution.

In 2012 in South Australia, Judge Mark Griffin of the District Court resigned after allegations were made that he had frequented a massage parlour that employed sex workers. He denied any criminal wrongdoing, but the Chief Judge of the District Court explained the resignation was on the basis of 'conduct that is inconsistent with his continuing to be a judge'.<sup>111</sup> Judge Griffin's resignation was controversial, with many in the Adelaide legal profession expressing regret at the loss of a very capable judge.<sup>112</sup>

In October 2012 in the United States, Judge Wade McCree of the Wayne County Circuit Court, Michigan, was reprimanded after texting a shirtless photo of himself to a female bailiff. When the photo found its way into the press, Judge McCree boasted to the reporter, saying: 'No shame in my game'.<sup>113</sup> He was reprimanded by the Michigan Supreme Court for conduct-

<sup>110</sup> Ibid 170–1 [10.11].

<sup>111</sup> Nigel Hunt, 'Judge Rudy: Sex Worker Allegations Lead to Shock Resignation', *Sunday Mail* (Adelaide), 16 May 2012, 1.

<sup>112</sup> Ibid.

<sup>113</sup> 'Wade McCree, Detroit Judge Reprimanded for Shirtless Cell Photo', *Huffington Post* (online), 24 October 2012 <[http://www.huffingtonpost.com/2012/10/25/shirtless-judge-detroit-wade-mccree\\_n\\_2016038.html](http://www.huffingtonpost.com/2012/10/25/shirtless-judge-detroit-wade-mccree_n_2016038.html)>.

ing himself in a ‘flippant manner’ and for not giving the interview ‘the seriousness he should have’.<sup>114</sup>

Conduct may also embroil a judge in political partisanship or other controversies that impact on the independence of the courts, or at least the perception of it. Judges may make controversial statements in their judgments, or speeches and extra-curial writings,<sup>115</sup> for example, criticising government policy and conduct, or a legislative regime. More often than not, such critique is legitimate — it may be, for example, a judge providing feedback to Parliament about the troublesome operation of a piece of legislation. However, such commentary can raise concerns. The Canadian Judicial Council has expressed disapproval of several public comments by judges. In one case, a judge publicly criticised the First Ministers for their approach to constitutional negotiations, and in another, a judge criticised the government’s approach to gun control in an open letter.<sup>116</sup>

In 2013, the Chief Justice of Queensland, Paul de Jersey, urged the government to allow criminal histories to be made available to juries, to allow judges to explain the concept of reasonable doubt to juries, and to require defence counsel to disclose their case prior to trial. The Attorney-General welcomed the comments on what he referred to as ‘controversial reforms’.<sup>117</sup> The President of the Australian Council for Civil Liberties, however, did not, claiming they were ‘the sorts of comments you’d expect to hear from a law-and-order politician. They are surprising coming from a chief judge’.<sup>118</sup>

In 2014, tensions between members of the Queensland judiciary and the government over the introduction of harsh new laws, penalties and bail processes targeting organised crime led to some public comment.<sup>119</sup> The

<sup>114</sup> Ibid.

<sup>115</sup> For a related critique, see Susan Bartie and John Gava, ‘Some Problems with Extrajudicial Writing’ (2012) 34 *Sydney Law Review* 637.

<sup>116</sup> See Justice John Sopinka, ‘Must a Judge Be a Monk — Revisited’ (1996) 45 *University of New Brunswick Law Journal* 167, 168.

<sup>117</sup> Renee Viellaris, ‘Queensland Chief Justice Paul de Jersey Wants Criminal Pasts Revealed’, *The Courier-Mail* (online), 15 March 2013 <<http://www.couriermail.com.au/news/queensland/queensland-chief-justice-paul-de-jersey-wants-criminal-pasts-revealed/story-e6freoof-1226597690808>>.

<sup>118</sup> Ibid. See also the strong criticism of Chief Justice de Jersey’s comments by Queensland lawyer Andrew Boe: Andrew Boe, ‘But Do We Need de Jersey Changes?’, *The Australian* (Canberra), 5 April 2013, 25.

<sup>119</sup> The tensions in Queensland can be well illustrated by reference to three events. The first was the staying of a bail order review by Fryberg J, on the basis of Premier Campbell Newman’s comments about the Court’s application of the new laws on bail applications, to the effect that the judges were not applying the laws as they had been intended: *R v Brown* [2013] QSC 299

President of the Judicial Conference of Australia, Justice Philip D McMurdo, indicated that while judges ‘should be conscious of the limits of judicial power, ensuring that it is exercised always according to law’, he noted that ‘where legislation goes to what Britain’s senior judge, Lord Neuberger, has described in this context as “the heart of the functioning of the judicial branch of the State”, some comment can be appropriate’.<sup>120</sup> The statement was made in response to a speech by Queensland Chief Magistrate, Judge Tim Carmody, a vocal supporter of the legislation. Judge Carmody had said:

The courts will be vulnerable to criticism, for example, if their members use the weight of their office to engage in the public debate or make comments about the comparative morality or fairness of regular laws regardless of which political party sponsored them or routinely adopted [sic] approaches to bail or sentencing practices clearly at odds with legislative or administrative policy intents or legitimate criminal justice objects such as deterrence or community protection via hard line incapacitation strategies.<sup>121</sup>

(31 October 2013). The second was the intervention by Judge Tim Carmody, the then Chief Magistrate, who indicated that he would deal with all contested bail hearings under the new laws: Marissa Calligeros, ‘Chief Magistrate Takes Charge of Biekie Bail Bids’, *Brisbane Times* (online), 5 November 2013 <<http://www.brisbanetimes.com.au/queensland/chief-magistrate-takes-charge-of-biekie-bail-bids-20131105-2wyfb.html>>. See also ‘Qld Chief Magistrate Tim Carmody’s Biekie Bail Directive an “Abuse of Power”’, *ABC News* (online), 6 November 2013 <<http://www.abc.net.au/news/2013-11-06/qld-chief-magistrates-biekie-bail-directive-an-abuse-of-power/5072272>>. Judge Carmody denied the directive had that effect: ‘Magistrate Hits Back at Bail Biekie Reports’, *news.com.au* (online), 6 November 2013 <<http://www.news.com.au/national/breaking-news/chief-to-hear-disputed-biekie-bail-cases/story-e6frku9-1226753184318>>. In February 2014, Applegarth J used an address to the jury to criticise the Premier’s characterisation of defence lawyers as ‘part of the criminal gang machine’. Applegarth J started his comments by saying: ‘Before we resume the trial I want to say something that isn’t particularly to do with this trial, but may help you with your jury service if any of you are on another jury in another case.’ He then explained the role of lawyers, and defence lawyers in particular, referring to the comments of ‘a prominent politician’ as ‘just nonsense’ and ‘ill-informed comments about hired guns, comments which smear hard-working professionals who are doing their duty’: Renee Viellaris, ‘Campbell Newman Blasted by Supreme Court Justice Peter Applegarth for Calling Biekie Lawyers “Hired Guns”’, *The Courier-Mail* (online), 11 February 2014 <<http://www.couriermail.com.au/news/queensland/campbell-newman-blasted-by-supreme-court-justice-peter-applegarth-for-calling-biekie-lawyers-hired-guns/story-fnihsrf2-1226822875483>>.

<sup>120</sup> Justice Philip McMurdo, ‘Comments by the Judicial Conference of Australia upon a Reported Speech by the Queensland Chief Magistrate Judge Carmody: 30 January 2014’ (Media Release, 30 January 2014).

<sup>121</sup> Judge Tim Carmody, ‘The Judiciary’s Job Is to Apply the Law Not to Meddle in It’, *The Courier-Mail* (Brisbane), 30 January 2014, 26.

Extrajudicial political commentary will be more controversial when it occurs during the course of a trial before the judge. Michael Kirby, when President of the New South Wales Court of Appeal in 1987, had sat on an application for leave to appeal against sentence by a prisoner suffering from AIDS.<sup>122</sup> At the time when the decision of the Court was reserved, President Kirby gave a speech at the Third International Conference on AIDS in Washington and referred to the case. While acknowledging that the judgment was reserved and that he could not disclose the outcome of the appeal, he explained the need for the legal system to give some recognition to the impact of AIDS on the prison term, although he acknowledged the difficulties of this at a time when community opinion would oppose such treatment.<sup>123</sup> In Australia, it was perceived as detracting from the Court's decisional independence at a time when judgment was still reserved.<sup>124</sup> Despite the controversy, President Kirby refused to recuse himself from the case.<sup>125</sup>

#### 4 *After Retirement from Judicial Office*

In many instances conduct that may be inappropriate while a judge is on the Bench is no longer, or less, controversial if it occurs after the judge has retired. In some circumstances, post-retirement misconduct may endanger public confidence in the character of those who hold judicial office and therefore might be the subject of proper complaint and investigation. With the individual a former judicial officer, there will necessarily be limits to the consequences that might attach to a finding of misconduct in these circumstances. We return to this in Part IV below.

In Australia one of the most controversial episodes of post-office conduct was that of former Federal Court judge, Marcus Einfeld. Einfeld was caught speeding. That, in and of itself, appears trivial and would be unlikely to affect

<sup>122</sup> See *Bailey v DPP (NSW)* (1988) 78 ALR 116, 118 (Wilson J), where the procedural history of the case is recorded.

<sup>123</sup> See the extract of the speech in Daryl Dellora, *Michael Kirby: Law, Love & Life* (Viking, 2012) 216–17.

<sup>124</sup> *Ibid* 217.

<sup>125</sup> Another example of problematic extrajudicial comment is provided by *Gaudie v Local Court of New South Wales* [2013] NSWSC 1425 (26 September 2013). There, a sitting magistrate declined to recuse himself from a matter involving an Indigenous defendant despite the newspaper reports of an interview with him in which he was critical of the rates of domestic violence in the Indigenous community and the approach of the Aboriginal Legal Service. On appeal Johnson J of the Supreme Court of New South Wales prohibited him from hearing the matter and stated that the events were illustrative of the dangers of ignoring the counsel provided by the *Guide to Judicial Conduct*: at [211], citing Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (2<sup>nd</sup> ed, 2007).

confidence in the judicial institution. However, in order to avoid paying the resultant \$77 fine, Einfeld filled in a statutory declaration claiming that a friend of his was driving the car. The friend had died several years before the incident.<sup>126</sup> Einfeld would eventually plead guilty to perjury and perverting the course of justice,<sup>127</sup> and voluntarily relinquish his practising certificate.<sup>128</sup>

Once a judge leaves the Bench, there are also questions about whether they ought to be restricted from returning to practice.<sup>129</sup> One difficulty here is that former judges could be given some unfair advantages, in particular if appearing before the courts, leading to complaints not only about the conduct of the retired judge but the sitting court.<sup>130</sup> If judges are seeking corporate appointments post-retirement, there is also the danger of the perception of corruption while on the Bench. Ronald Dworkin, in proposing limited terms for United States Supreme Court Justices, suggested that post-appointment

[t]hey could not be allowed to take up corporate appointments or law firm partnerships or to run for public office; the risk of an appearance of corruption while on the bench would be too great. But they could be appointed to lower courts, and they could, if the indignity were not too great, take up teaching in law schools, where the only possible corruption would be a benign penchant for praising their own opinions.<sup>131</sup>

In summary, there are myriad ways in which the conduct and capacity of judges can affect their ability to hold judicial office, or the public's confidence in the institution of the court. A judicial complaints system must be crafted in such a way that it can be employed against each of these types of conduct in order to foster public confidence and therefore increase the institutional integrity of the judiciary. Further, understanding the different transgressions

<sup>126</sup> Thomas, above n 21, 171 [10.14].

<sup>127</sup> *R v Einfeld* [2009] NSWSC 119 (20 March 2009).

<sup>128</sup> *Council of the New South Wales Bar Association v Einfeld* (2009) 258 ALR 768.

<sup>129</sup> In Australia barristers are restricted from appearing before Benches where they were formerly a member if the appearance is within five years of ceasing to be a member: see, eg, South Australian Bar Association, *Barristers' Conduct Rules* (at 14 November 2013) r 95(n). There are also restrictions in Ontario, New Brunswick and Saskatchewan in Canada: for details, see Justice Sopinka, above n 116, 173. Return to practice has attracted controversy in England and Wales: Mary L Clark, 'Judicial Retirement and Return to Practice' (2011) 60 *Catholic University Law Review* 841, 880–3.

<sup>130</sup> But see Justice Sopinka, above n 116, 173, who finds this argument 'less than convincing'.

<sup>131</sup> Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006) 158–9. See also Cristin Schmitz, 'Law Profs Call for Rules to "Guide" Ex-Judges' (2011) 30(44) *Lawyers Weekly* 3; Stephen G A Pitel and Will Bortolin, 'Revising Canada's Ethical Rules for Judges Returning to Practice' (2011) 34 *Dalhousie Law Journal* 483.

will help in the setting of standards against which judicial conduct can be scrutinised.

### III JUDICIAL INDEPENDENCE UNDER THE AUSTRALIAN CONSTITUTION

In this Part, we turn to the adequacy of the current system of judicial accountability in Australia, and the constitutional limits that constrain it, in light of this exposition of judicial fallibility.

#### *A The Constitution and the Current System: Constitutional Confusion over the Role of Accountability*

The independence of the federal judiciary in Australia largely rests on the provisions of the *Constitution* that protect judicial tenure and remuneration. Sections 72(ii)–(iii), with their provenance in the *Act of Settlement*, state that a judge of the High Court or other federal court ‘shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity’, and that their remuneration can be fixed by Parliament, but this shall not be diminished during their time in office.

The removal mechanism is blunt and the processes associated with it are left to the discretion of the Parliament. In 2012, for example, the Parliament passed legislation that created a standing process that may be used to investigate allegations against judicial officers when they emerge.<sup>132</sup> Section 72(ii) requires Parliament to be satisfied of behaviour *so serious* that the officer ought to be removed from office. But as our previous discussion demonstrates, it is more often the case that judges transgress the boundaries of what is proper in ways that do not justify the firing of the ‘nuclear option.’ Braithwaite explains that ‘considering the problem of judicial misconduct in its total dimensions, cases in which a judge’s removal from office is warranted are few ... Most actionable complaints call only for some form of discipline’.<sup>133</sup> This is consistent with the experience of complaints systems in other jurisdictions.<sup>134</sup> When misbehaviour that is borne of incapacity through

<sup>132</sup> *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth).

<sup>133</sup> Braithwaite, above n 5, 161.

<sup>134</sup> See Part IV(A) below.

treatable mental illness is in issue, the nuclear option appears even less suitable.

In recognition of these facts, the courts themselves have moved to address questions of accountability and public perceptions. The Australasian Institute of Judicial Administration and the Australian Judicial Conference support the judiciary, providing a forum for the discussion of matters including judicial accountability and a means by which the judges may respond to criticism. Courts have also started to engage media liaison officers.<sup>135</sup> Further, many of the federal courts in Australia, with the exception of the High Court, have established informal processes to deal with complaints about federal judges.<sup>136</sup> These systems establish procedures whereby complaints are made to the Chief Justice or Chief Judge. The head of jurisdiction can investigate and respond to the complaint, including speaking to the judge involved, and, if necessary, using their control over administrative matters within the court to try to resolve the issue (for example, by relieving the judge of his or her sitting duties to allow outstanding judgments to be written). These processes do not, however, lead to ‘disciplining’, as such, of federal officers. Further, judges only participate in the process voluntarily.<sup>137</sup> The processes are completely inadequate to deal, for example, with cases like that of Justice Murphy, who refused to stop sitting during the period of his investigation, despite the request of the Chief Justice of the High Court for him to do so.<sup>138</sup>

Chief Justice Wayne Martin of the Western Australian Supreme Court indicated that the informal system left heads of jurisdiction without ‘appropriate facilities or mechanisms’ to investigate complaints ‘and there may well be situations in which it may be alleged by either the complainant or the judicial officer that the Head of Jurisdiction has a conflict of interest in the conduct of such an investigation.’<sup>139</sup> Further, as Michael Kirby recently observed:

<sup>135</sup> See Handsley, ‘Public Sector Approaches’, above n 24, 95; H P Lee, ‘Challenges of Judicial Independence — An Australian Perspective’ in Shimon Shetreet and Christopher Forsyth (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012) 387, 398.

<sup>136</sup> These are the Federal Court, the Family Court and the Federal Circuit Court. These approaches are explained in Senate Legal and Constitutional Affairs References Committee, above n 37, 66–8 [6.14]–[6.29], 131–6.

<sup>137</sup> See *ibid* 132, 134; Kirby, above n 49, 524.

<sup>138</sup> See Andrew Lynch, ‘Judicial Complaints and Suspension’ (2012) 23 *Public Law Review* 81, 83; Lee and Campbell above n 33, 128–9.

<sup>139</sup> Senate Legal and Constitutional Affairs References Committee, above n 37, 69 [6.33], quoting Letter from Chief Justice Wayne Martin to Jim McGinty, Attorney-General (WA), 10 November 2006, 2.

Outsiders and even lawyers sometimes think that a chief justice or presiding judge, receiving a complaint, has power *ex officio* to decide the complaint and pull the alleged offender into line and even suspend them. Especially in the higher courts, the powers of discipline over judges are strictly limited and generally reposed elsewhere.<sup>140</sup>

The traditional conception of the head of jurisdiction as ‘first among equals’ tends to undermine their ability to act definitively, and any decisive actions, such as removal from the lists, could be subject to challenge by judges within the court.

The lack of a formal system to deal with complaints was often defended on the basis that any alternative would breach constitutional limits.<sup>141</sup> However, the articulation of this position has never been entirely clear. In the 1988 *Final Report of the Constitutional Commission*, no recommendation was made about introducing an independent organisation to deal with judicial complaints. In the Commission’s view, this was ‘a matter of policy for the Parliaments and Governments of Australia rather than an issue calling for constitutional amendment’.<sup>142</sup> Implicit in this is that the Parliaments of Australia had the constitutional capacity to create such an organisation. A 2000 report of the Australian Law Reform Commission (‘ALRC’), however, thought that such a position ‘would be problematic under chapter III of the *Constitution*’, at least at a federal level.<sup>143</sup> In 2009, the Senate Legal and Constitutional Affairs References Committee recommended that an independent judicial commission be created subject to constitutional limitations.<sup>144</sup>

In 2012, the Commonwealth Parliament passed the *Judicial Complaints Act*. It amends the *Family Law Act 1975* (Cth), the *Federal Court of Australia Act 1976* (Cth) and the *Federal Magistrates Act 1999* (Cth)<sup>145</sup> to provide a legislative basis for the informal system that was operating in those jurisdictions. It provides for assistance to the head of jurisdiction to handle complaints and provides legal protection to those involved in handling complaints. It provides a statutory power for the head of jurisdiction to ‘take any

<sup>140</sup> Kirby, above n 49, 524.

<sup>141</sup> See, eg, Australian Judicial System Advisory Committee, above n 5, 91 [5.112].

<sup>142</sup> Constitutional Commission, *Final Report of the Constitutional Commission* (Australian Government Publishing Service, 1988) vol 1, 413.

<sup>143</sup> ALRC, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 11.

<sup>144</sup> Senate Legal and Constitutional Affairs References Committee, above n 37, 93–5 [7.74]–[7.87].

<sup>145</sup> Now the *Federal Circuit Court of Australia Act 1999* (Cth).

measures that the [head of jurisdiction] believes are reasonably necessary to maintain public confidence in the Court, including, but not limited to, temporarily restricting another Judge to non-sitting duties'.<sup>146</sup> There is no other indication about the types of responses that may be made to a complaint — such as issuing a public admonishment or reprimand, or requiring mandatory judicial education. No guiding criteria are provided to assist the head of jurisdiction, or persons making a complaint, to determine what might fall across the line as inappropriate behaviour.

Despite the evidence discussed in Part II above to the effect that High Court Justices have engaged in conduct that requires investigation, the *Judicial Complaints Act* does not apply to the High Court of Australia. It is claimed by the Attorney-General's Department that this recognises the special position of the High Court, and that High Court Justices are subject to the spare and serious removal mechanism in s 72(ii) of the *Constitution* in the event of serious misconduct.<sup>147</sup> Andrew Lynch has argued that the small size of the High Court Bench (seven members), making the Chief Justice one of a bench of judges who often sit together, provides an additional reason for different treatment of the High Court.<sup>148</sup> The Attorney-General explained in her second reading speech that the High Court sits at the apex of the judicial system and 'could be called upon to determine the validity of any structure established to handle judicial complaints'.<sup>149</sup> However, the High Court may have to make determinations about the validity of any piece of legislation that applies to it (for example, the *High Court of Australia Act 1979* (Cth) or the *Judiciary Act 1903* (Cth)). The High Court has, in the past, had to consider legislation that directly touched upon the judiciary and it did so without fear or favour.<sup>150</sup>

Despite evidence that heads of jurisdiction have engaged in conduct that requires investigation, the *Judicial Complaints Act* does not provide for any mechanism to deal with complaints made against the head of jurisdiction. The

<sup>146</sup> *Judicial Complaints Act* sch 1 ss 5, 18; see also at sch 1 s 28.

<sup>147</sup> Senate Legal and Constitutional Affairs Legislation Committee, *Parliament of Australia, Courts Legislation Amendment (Judicial Complaints) Bill 2012 and Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012* (2012) 14 [2.15].

<sup>148</sup> *Ibid* 14–15 [2.16], quoting Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 25 May 2012, 5 (Andrew Lynch). See also Law Council of Australia, Submission No 375 to ALRC, *Review of the Adversarial System of Litigation*, cited in ALRC, above n 143, 231–2 [2.270].

<sup>149</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 14 March 2012, 2787 (Nicola Roxon).

<sup>150</sup> See, eg, *Austin v Commonwealth* (2003) 215 CLR 185.

Attorney-General's Department explained that it was inappropriate for a head of jurisdiction to be investigated by judicial officers 'who occupy positions lower in the judicial hierarchy', and that heads of jurisdiction are subject to the removal process in s 72(ii) of the *Constitution*.<sup>151</sup>

The overall intention of the scheme is undermined by its failure to apply to the highest court and heads of jurisdiction. After all, there are certainly sufficient historical examples of alleged judicial misconduct by these judges. Further, it is these matters that are likely to attract the most public attention, and deserve to be dealt with in a way no less transparent than matters arising in other federal courts.

### B *What Are the Constitutional Restrictions on Australian Complaints Systems?*

By formalising the previously established informal system, the *Judicial Complaints Act* is constitutionally cautious. We argue it is unnecessarily so. There are, undoubtedly, constitutional limits that restrict the design of a judicial complaints system for federal court judges. In Australia, the constitutional restrictions provide more stringent protection of the independence of the federal judiciary than those that protect the independence of state judges, both in terms of protection of tenure and remuneration but also the institutional protections afforded by the separation of powers.<sup>152</sup> However, we argue that these constitutional restrictions do not prevent the introduction of a commission composed of judicial officers (as opposed to officers of the executive, or even officers appointed by the executive) to receive, investigate, and act upon complaints, such as those in the other jurisdictions discussed in Part IV.

It is likely that the Commonwealth Parliament has the power to pass legislation on the subject of judicial complaints pursuant to its power to make laws that are incidental to the execution of any power vested by the *Constitution* in the Government of the Commonwealth or an officer of the Common-

<sup>151</sup> Access to Justice Division, Attorney-General's Department (Cth), Response to Questions on Notice to Senate Legal and Constitutional Affairs Legislation Committee, *Courts Legislation Amendment (Judicial Complaints) Bill 2012 and Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012*, 24 May 2012, 2, quoted in Senate Legal and Constitutional Affairs Legislation Committee, above n 37, 13 [2.12]. The system in England and Wales deals with this by requiring judges involved in the disciplinary process to be of the same or a higher rank: see discussion below n 251 and accompanying text.

<sup>152</sup> State judicial officers are given security of tenure in state legislation, and are institutionally protected through the principle in *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*').

wealth.<sup>153</sup> Judicial complaints legislation would be incidental to the removal power in s 72(ii) by providing a process for dealing with complaints against federal judicial officers that fall short of requiring removal.

An argument could be made that the grant of power to the Parliament to remove judges is inconsistent with any power to deal otherwise with complaints against judges and to discipline them short of removal.<sup>154</sup> Such an argument relies on an application of the maxim *expressio unius est exclusio alterius* — the maxim upon which the doctrine of separation of judicial power set out in *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers*') itself rests.<sup>155</sup> In that case, the High Court inferred that, by expressly granting federal judicial power to ch III courts and delineating the power and institution in that chapter, the *Constitution* precludes the grant of federal judicial power to other bodies (the first limb of the *Boilermakers'* doctrine).<sup>156</sup>

There are strong reasons to think that a similar implication would not be drawn from the removal power in s 72(ii).<sup>157</sup> Like all Latin maxims, *expressio unius est exclusio alterius* is only cautiously embraced by the courts, used predominantly to bolster a predetermined rule rather than as the primary reason underlying the result.<sup>158</sup> In terms of accountability, s 72(ii) deals only with removal. It does not establish a detailed complaints and discipline process for the judiciary, giving rise to the inference that no other body may perform such a role, in contrast with the particularity with which ch III of the *Constitution* as a whole defines the exercise of Commonwealth judicial power.<sup>159</sup> Further, the framers of the *Constitution* would have been aware of many of the issues that governors and legislatures had encountered with colonial judges and the need for a system short of removal to deal with these. While the framers did not expressly grant the Commonwealth Parliament power to make laws with respect to judicial conduct, as we develop below, it likely exists as part of the incidental legislative power to make laws with

<sup>153</sup> *Constitution* s 51(xxxix).

<sup>154</sup> For this argument, see Senate Legal and Constitutional Affairs References Committee, above n 37, 92 [7.69].

<sup>155</sup> (1956) 94 CLR 254.

<sup>156</sup> *Ibid* 268–70 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

<sup>157</sup> This argument accords with the position in Canada: see *MacKeigan v Hickman* [1989] 2 SCR 796, 812 (La Forest J); *Gratton v Canada (Judicial Council)* [1994] 2 FC 769, 797 (Strayer J); Justice T David Marshall, *Judicial Conduct and Accountability* (Carswell, 1995) 82.

<sup>158</sup> D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6<sup>th</sup> ed, 2006) 140 [4.28]. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 605 [200] (Kirby J); but see at 581 [124] (Gummow and Hayne JJ).

<sup>159</sup> See *Boilermakers'* (1956) 94 CLR 254, 268–9 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

respect to the Government of the Commonwealth or an officer of the Commonwealth.

The second limb of the *Boilermakers'* doctrine requires that federal ch III courts only exercise federal judicial power (or powers incidental or ancillary to it).<sup>160</sup> It is unlikely that the power to receive complaints and discipline judges is outside the judicial power of the Commonwealth, or outside of powers that are incidental to the exercise of the judicial power of the Commonwealth.<sup>161</sup> A system of internal discipline would seem entirely consistent with the acceptance that the courts may issue rules for their own procedure, despite this being accepted as a legislative function.

There are limits to the Parliament's power to create a complaints system. Any legislation could not create a body that has the capacity to interfere with the powers of the Parliament and the Governor-General in s 72(ii) (for example, by passing resolutions binding on the Parliament in the exercise of its power to request removal by the Governor-General). Further, it must not create a body with power to discipline judges in a way that breaches the independence guarantees in ch III. But what are these guarantees? Terms such as 'judicial independence' and 'institutional integrity' are often used judicially (although they do not appear in the *Constitution*), but their precise formulation and relationship to federal courts is not as frequently articulated.

The *Constitution* is said to protect the independence of federal courts through the two-limbed *Boilermakers'* doctrine. By preventing federal courts from exercising non-judicial powers (except incidental and ancillary powers), and by preventing other institutions from exercising federal judicial power, the *Boilermakers'* doctrine protects the integrity of judicial power, and those federal institutions that exercise it. The High Court has further explained that protecting the courts from exercising non-judicial powers also protects courts from legislation that may require the judges to exercise their powers in a manner that fails to accord with judicial process.<sup>162</sup>

<sup>160</sup> Ibid 271–2, 278.

<sup>161</sup> Similar arguments have been made to this effect in the United States: see, eg, *Re Certain Complaints under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*; *Williams v Mercer*, 783 F 2d 1488, 1502–4 (Campbell CJ for Campbell CJ, Kearse J and Pell SJ) (11<sup>th</sup> Cir, 1986) ('*Re Certain Complaints under Investigation*; *Williams v Mercer*'); *Hastings v Judicial Conference of the United States*, 593 F Supp 1371 (D DC, 1984). Both of these cases are discussed in Rieger, above n 77, 52–3.

<sup>162</sup> See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Nicholas v The Queen* (1998) 193 CLR 173, 208–9 [73]–[74] (Gaudron J); *Thomas v Mowbray* (2007) 233 CLR 307, 355 [111]

If these are the limits imposed by the *Boilermakers'* doctrine, on what basis is an argument framed that a judicial discipline body would undermine the integrity of federal courts? At the federal level, there has been little discussion of a constitutional protection of 'institutional integrity' of the courts. It has crept into the lexicon of Australian constitutional law through the *persona designata* doctrine and the principle in *Kable v Director of Public Prosecutions (NSW)* ('*Kable*').<sup>163</sup> The *persona designata* doctrine provides that non-judicial powers may be given to individual judges provided they are not incompatible with the judge's position as a ch III court judge, and specifically that it would not undermine public confidence in the institutional integrity of the judiciary.<sup>164</sup> The *Kable* principle protects the institutional integrity of State courts — which is required because the *Boilermakers'* principle does not apply to them.<sup>165</sup>

There is an identifiable trend in the High Court jurisprudence that recognises the basis for the *Kable* principle's requirement of institutional integrity is the idea that state courts must continue to answer their constitutional description as courts and must not therefore be stripped of any of their essential characteristics.<sup>166</sup> If this is correct, the reasoning would apply equally to federal courts. French CJ and Gageler J explained in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*, that the judicial power of the Commonwealth has three dimensions: 'the nature of the function conferred'; 'the process by which the function is exercised'; and the 'necessity for the function ... to be compatible with the essential character of a court as an [impartial and independent] institution'.<sup>167</sup>

On the basis that this limitation may exist, the following analysis will situate accountability as an important part of maintaining institutional integrity, rather than a principle at odds with it.

(Gummow and Crennan JJ); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354–5 [53]–[56] (French CJ).

<sup>163</sup> (1996) 189 CLR 51.

<sup>164</sup> See *Grollo v Palmer* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

<sup>165</sup> But see *Baker v Commonwealth* (2012) 206 FCR 229, 240–5 [47]–[63] (Keane CJ and Lander J), in which the Federal Court considered an argument that failing to provide a judicial pension to federal magistrates undermined the integrity of the Federal Magistrates' Court. Having no federal precedent to apply on this issue, the Court referred to *Kable* cases, and to the test for apprehended bias.

<sup>166</sup> See, eg, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ), 122 [195] (Kirby J).

<sup>167</sup> (2013) 295 ALR 596, 605–6 [27].

### C *Unpacking Independence and Accountability as Pillars of Integrity*

A major concern that emerges over judicial disciplinary systems is that such systems may undermine judicial independence.<sup>168</sup> The creation of a system that holds judges to account is seen as a grave threat to the judicial process:

Our judicial system can better survive the much discussed but rarely existent senile or inebriate judge than it can withstand the loss of judicial independence that would ensue if removal of judges could be effected by a procedure too facile or a standard too malleable.<sup>169</sup>

The general point that a system by which judicial misconduct is managed must be one that is carefully pitched is compelling. The key role played by the judiciary in protecting individual freedoms and shaping societal realities demands no less. It is possible that excessive accountability could undermine judicial independence.<sup>170</sup> Formal judicial accountability mechanisms may also encourage judges to act and decide cases in a ‘safe’ manner, a chilling effect that may have undesirable consequences,<sup>171</sup> or dissuade lawyers from accepting judicial appointment. There are also suggestions that accountability may undercut the authority of judicial decisions as ‘fair, final and authoritative’.<sup>172</sup> Suggestions that such a system may by its very existence, or because of its abuse, undermine the ability of the courts to perform the judicial function, and may outweigh the advantages of addressing individual cases of judicial misconduct, require further consideration.

Independence, judicial or otherwise, is not a good per se, it is a mediate virtue, an instrumental value.<sup>173</sup> We enshrine judicial independence because it is useful for ensuring that judges make fair and impartial decisions. It is also a way to support a high level of public regard for the judiciary. However,

<sup>168</sup> See, eg, Enid Campbell, ‘Suspension of Judges from Office’ (1999) 18 *Australian Bar Review* 63, 73–4.

<sup>169</sup> Chief Judge Irving R Kaufman, ‘Chilling Judicial Independence’ (1979) 88 *Yale Law Journal* 681, 715–16.

<sup>170</sup> Miller, above n 26, 458.

<sup>171</sup> Handsley, ‘Issues Paper’, above n 13, 182; McIntyre, above n 8, 205, 208.

<sup>172</sup> Justice R E McGarvie, ‘The Operation of the New Proposals in Australia’ in Australian Institute of Judicial Administration, *The Accountability of the Australian Judiciary: Procedures for Dealing with Complaints concerning Judicial Officers* (1989) 13, 37.

<sup>173</sup> Geyh, ‘Rescuing Judicial Accountability’, above n 21, 916.

independence is ‘not the only value at stake in the judicial discipline process’.<sup>174</sup>

Accountability also plays a role in shoring up the institutional integrity of the courts. ‘Like independence, accountability is partially justified as a performance-enhancing measure’.<sup>175</sup> Accountability can strengthen institutional integrity and even independence by ensuring judges act consistently with the institution’s underlying values.<sup>176</sup> This is acknowledged by existing processes that require courts to sit in public, and judges to announce their decisions and provide reasons for those decisions. The appeal process that may follow also acts to hold lower courts to account. None of these processes are seen as inconsistent with independence. The ultimate tool of judicial removal by parliament is another example of a mechanism that has been able to coexist with proper independence, despite the fact that it is potentially a threat to independence. Its drawback is that it has failed to deliver sufficient accountability.<sup>177</sup> It should be possible for a complaints system to be constructed in a manner that enhances institutional integrity without undermining independence. In the United States, the Court of Appeals for the 11<sup>th</sup> Circuit said:

a credible internal complaint procedure can be viewed as essential to maintaining the institutional independence of the courts. If judges cannot or will not keep their own house in order, pressures from the public and legislature might result in withdrawal of needed financial support or in the creation of investigatory mechanisms outside the judicial branch which, to a greater degree than the [Judicial Councils Reform and Judicial Conduct and Disability Act of 1980], would threaten judicial independence.<sup>178</sup>

Mauro Cappelletti emphasises that complaint systems perform a disciplinary function, as distinct from addressing civil claims against judges by wronged individuals.<sup>179</sup> In this way, a disciplinary system may receive and respond to

<sup>174</sup> John P Sahl, ‘Secret Discipline in the Federal Courts — Democratic Values and Judicial Integrity at Stake’ (1994) 70 *Notre Dame Law Review* 193, 246 (citations omitted).

<sup>175</sup> Miller, above n 26, 458.

<sup>176</sup> Francesco Contini and Richard Mohr, ‘Reconciling Independence and Accountability in Judicial Systems’ (2007) 3(2) *Utrecht Law Review* 26, 29–30.

<sup>177</sup> In the United States context, ‘Thomas Jefferson described impeachment as a “bungling way” for removing judges’: Sahl, above n 174, 204 n 44 (citations omitted).

<sup>178</sup> *Re Certain Complaints under Investigation; Williams v Mercer*, 783 F 2d 1488, 1507 (Campbell CJ for Campbell CJ, Kearse J and Pell SJ) (11<sup>th</sup> Cir, 1986), citing *Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 28 USCS §§ 331–2, 372.

<sup>179</sup> Cappelletti, above n 7, 46–7.

complaints, but its primary objective is to remedy damage to the judicial institution rather than to an individual (although the former may require the latter).

A transparent and rigorous accountability system is therefore an important pillar that supports public confidence in the judicial system and the integrity of the courts. Charles Gardner Geyh explained that an accountability system ‘reassures a sometimes-skeptical public that judges are doing their jobs properly’.<sup>180</sup> These ideals are also supported by a number of other pillars: most notably a judicial appointments framework that ensures candidates have the capacity and integrity to perform the judicial function, and that is sufficiently transparent to ensure public confidence in the process;<sup>181</sup> and a system of ongoing judicial education.<sup>182</sup> The ALRC found that ‘education, training, and accountability play a critical role in shaping the “legal culture” — and thus in determining how well the system operates in practice’.<sup>183</sup>

There is interaction between the pillars. For example, Christine Parker has found in her study of corporate compliance programs that training and education must be backed up by incentives, rewards and sanctions.<sup>184</sup> Thus, a system of enforcement and accountability of judicial standards supports the system of ongoing judicial education to achieve institutional integrity.

If accountability is intended to enhance public confidence and institutional integrity, the accountability mechanism must incorporate elements of openness. A lack of transparency in accountability mechanisms leads to a series of problems. First, those at the pointy end of such systems, the judges, are less likely to understand the standards they are being assessed against, and the probable consequences of falling below such standards. This means that the conduct mechanism will have a reduced opportunity to shape judicial behaviour in positive ways. Geyh found that informal methods of judicial

<sup>180</sup> Geyh, ‘Rescuing Judicial Accountability’, above n 21, 916.

<sup>181</sup> Handsley, ‘Issues Paper’, above n 13, 194–5. See also Simon Evans and John Williams, ‘Appointing Australian Judges: A New Model’ (2008) 30 *Sydney Law Review* 295; Sir Anthony Mason, ‘The Appointment and Removal of Judges’ in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997) 1; Australian Judicial System Advisory Committee, above n 5, 69–74 [5.11]–[5.33]; Braithwaite, above n 5, 10–11.

<sup>182</sup> On judicial education reforms in Australia, see, eg, President J Allsop, ‘Continuing Judicial Education: The Australian Experience’ (2012) 10 *Judicial Review* 439; James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4<sup>th</sup> ed, 2004) 75 [4.7].

<sup>183</sup> ALRC, above n 143, 114 [2.3] (citations omitted); see also at 219–20 [2.242].

<sup>184</sup> Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) 121–5.

discipline can thrive where there is a formal system in place in part because there is the potential that inaction could lead to a more formal process.<sup>185</sup> As one participant in his study stated, the *Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*<sup>186</sup> ‘serves as a “shotgun behind the door”’.<sup>187</sup> Second, the public is given the status of an uninformed bystander with a reduced ability to understand a critical element of their legal system.<sup>188</sup> Third, the complainant is less likely to be reassured as to the integrity of the system if large parts of it are conducted in secret. This means that the complaint system can fail to achieve its primary aim of responding meaningfully to the complaint in question.

With the importance of crafting a rigorous and transparent accountability system with institutional integrity in mind, the next Part will introduce a number of different types of complaints systems that have been implemented elsewhere, and analyse them by reference to the Australian constitutional limitations but also best practice for achieving a system that enhances institutional integrity.

#### IV CRAFTING A JUDICIAL COMPLAINTS SYSTEM

While formal judicial complaints systems are a rarity in Australia, they are an accepted part of the legal landscape in many jurisdictions. In fact, the presence of ‘proper procedures for the removal of judges on grounds of incapacity or misbehaviour’ that are ‘fairly and objectively’ administered is part of the suggested legal framework for Commonwealth countries.<sup>189</sup>

The following section will present a number of existing systems that offer a more comprehensive approach than that which currently operates at the federal level.<sup>190</sup> This survey is not intended to be exhaustive but rather to

<sup>185</sup> Charles Gardner Geyh, ‘Informal Methods of Judicial Discipline’ (1993) 142 *University of Pennsylvania Law Review* 243, 283 (presenting an empirical study of current and former Chief Circuit Court Judges in the United States federal system).

<sup>186</sup> 28 USC §§ 331–2, 372 (2012).

<sup>187</sup> Geyh, ‘Informal Methods of Judicial Discipline’, above n 185, 283.

<sup>188</sup> Sahl, above n 174, 246. See also Geyh, ‘Informal Methods of Judicial Discipline’, above n 185, 246.

<sup>189</sup> The Commonwealth, *Commonwealth (Latimer House) Principles on the Three Branches of Government* (February 2009) 12.

<sup>190</sup> We have considered the systems that operate in California (as one of the oldest judicial commissions and the model for many subsequent commissions); at the federal level in the United States (which offers an interesting comparator of a system with a constitutionally entrenched separation of powers); in England and Wales (a close historical comparator for

provide an overview of some of the key features of these systems that can inform our evaluation of the Australian arrangements. After initially outlining the general structure and process of these systems, this Part will analyse them by reference to their key features, explore notable points of difference and proffer our thoughts about how Australia should craft its own judicial complaints system.

*A Survey of Other Jurisdictions: United States, Canada,  
New Zealand, England and Wales, and New South Wales*

While there is a degree of variation between the judicial complaints systems, there is also a great deal of uniformity. To some extent the variation between systems can be explained by local factors, including constitutional stipulations (or the absence thereof), as well as the requirement for political compromise in the way the system was initially conceived.

In most states in the United States,<sup>191</sup> final responsibility for the regulation of judicial misconduct is given to the highest state court, which has power to order a range of sanctions from censure through to removal.<sup>192</sup> The state systems tend to adopt a two-step process whereby complaints are lodged, investigated and resolved by a judicial commission,<sup>193</sup> with an appeal avenue or a recommendation given to the highest state court.<sup>194</sup> As a consequence there is limited legislative or executive contribution. In the United States federal system, responsibility is given to circuit judicial councils, which are

Australia); in Canada and New Zealand (as two former colonies, again close historical comparators for Australia); and in New South Wales. Other scholarship has also considered the accountability mechanisms that exist in South Africa, Ireland, France, Germany and Spain: see, eg, Guy Canivet, Mads Andenas and Duncan Fairgrieve (eds), *Independence, Accountability, and the Judiciary* (British Institute of International and Comparative Law, 2006).

<sup>191</sup> This article will focus particularly on the Californian system because, as the earliest formal system, devised in 1960, it has been used as a model for many subsequent systems, including that in New South Wales: Kate Lumley, 'From Controversy to Credibility: 20 Years of the Judicial Commission of New South Wales' (Judicial Commission of New South Wales, 2008) 2.

<sup>192</sup> Carl E Stewart, 'Abuse of Power & Judicial Misconduct: A Reflection on Contemporary Ethical Issues Facing Judges' (2003) 1 *University of St Thomas Law Journal* 464, 466.

<sup>193</sup> In a majority of states (44 of 51) there is broad representation on the commissions with non-judge majorities: James J Alfini, Shailey Gupta-Brietzke and James F McMartin IV, 'Dealing with Judicial Misconduct in the States: Judicial Independence, Accountability and Reform' (2007) 48 *South Texas Law Review* 889, 907.

<sup>194</sup> *Ibid* 892. For a survey of the various state systems, see American Judicature Society, *Methods of Judicial Selection: Removal of Judges* (2014) <[http://www.judicialselection.com/judicial\\_selection/methods/removal\\_of\\_judges.cfm?state](http://www.judicialselection.com/judicial_selection/methods/removal_of_judges.cfm?state)>.

assisted by the head of jurisdiction and the investigations of a special committee.<sup>195</sup> The councils only have the ability to impose sanctions short of removal for art III judges.<sup>196</sup> Where removal is recommended, the matter is referred to the Judicial Conference.<sup>197</sup> These systems operate in addition to parliamentary processes of impeachment.<sup>198</sup>

Canada was an early adopter of a formal judicial complaints system. The Canadian Judicial Council, set up under legislation in 1971, is charged with promoting judicial efficiency, uniformity and accountability as well as improving the 'quality of judicial service' for the federal court system.<sup>199</sup> It operates in addition to complaints systems based in individual provinces.<sup>200</sup> The Council is given a non-exhaustive list of tasks and these extend beyond discipline to cover judicial education.<sup>201</sup> The Council is charged with receiving and investigating complaints.<sup>202</sup> The Council has the ability to convene an Inquiry Committee to hold hearings after which the matter is brought before the entire council for a recommendation.<sup>203</sup> However, its express powers only extend to making a recommendation to Parliament for removal.

New Zealand established a judicial complaints system in 2005.<sup>204</sup> The Judicial Conduct Commissioner is given primary responsibility for receiving and investigating complaints.<sup>205</sup> The Commissioner is appointed by the executive, but there is an obligation to consult with the Chief Justice as part of the appointment process.<sup>206</sup> Any complaint received by the Commissioner must be examined.<sup>207</sup> The Commissioner then has a number of options: he or she

<sup>195</sup> 28 USC §§ 351–64 (2012). See also Stewart, above n 192, 467.

<sup>196</sup> 28 USC § 354(a)(2)(B) (2012).

<sup>197</sup> 28 USC § 354(b)(2) (2012).

<sup>198</sup> See American Judicature Society, above n 194.

<sup>199</sup> *Judges Act*, RSC 1985, c J-1, s 60(1). See also Canadian Judicial Council, *About the Council: Mandate and Powers* (2014) <[http://www.cjc-ccm.gc.ca/english/about\\_en.asp?selMenu=about\\_mandate\\_en.asp](http://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_mandate_en.asp)>.

<sup>200</sup> See, eg, Ontario Judicial Council, *Judicial Conduct: Do You Have a Complaint?*, Ontario Courts <<http://www.ontariocourts.ca/ocj/conduct/do-you-have-a-complaint/>>.

<sup>201</sup> *Judges Act*, RSC 1985, c J-1, s 60(2).

<sup>202</sup> *Ibid* ss 60(2)(c), 63(2).

<sup>203</sup> *Ibid* ss 63–5.

<sup>204</sup> *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 4.

<sup>205</sup> *Ibid* s 8.

<sup>206</sup> *Ibid* s 7.

<sup>207</sup> *Ibid* s 15.

can take no further action,<sup>208</sup> dismiss the complaint,<sup>209</sup> refer the complaint to the relevant ‘Head of Bench’,<sup>210</sup> or recommend that a Judicial Conduct Panel be appointed.<sup>211</sup> The appointment of a Judicial Conduct Panel is appropriate when an inquiry is justified and the conduct might lead to removal.<sup>212</sup> In addition to the Judicial Conduct Commissioner, there is also a Judicial Complaints Lay Observer (‘Lay Observer’). This role predates the existence of Judicial Conduct Commissioner but has been retained.<sup>213</sup> The Lay Observer can review the response of the Head of Bench to the complaint and, where that was unsatisfactory, request the matter be reviewed.<sup>214</sup>

A system for responding to judicial misconduct in England and Wales commenced operation in 2006 as part of a raft of reforms contained in the *Constitutional Reform Act 2005* (UK) c 4 (‘*Constitutional Reform Act*’). This legislation also formalised the process for judicial appointments.<sup>215</sup> In 2012 the regulation of judicial discipline was reviewed and a number of changes recommended.<sup>216</sup> Following this review new regulations have come into force. The system for responding to complaints about judges is two-tiered, with a Judicial Conduct Investigations Office (‘JCIO’),<sup>217</sup> and a Judicial Appointments and Conduct Ombudsman (‘Conduct Ombudsman’). Ultimate power is held by the Lord Chancellor, a Cabinet Minister, who has power to remove all judicial officers from their office except senior judges, who must be removed by Parliament,<sup>218</sup> and the Lord Chief Justice — the Head of the Judiciary and President of the Courts of England and Wales — who may discipline judges short of removal.<sup>219</sup> As such,

<sup>208</sup> Ibid s 15A, as inserted by *Judicial Conduct Commissioner and Judicial Conduct Panel (Deputy Commissioner and Disposal of Complaints) Amendment Act 2010* (NZ) s 11.

<sup>209</sup> *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 16.

<sup>210</sup> Ibid s 17, as amended by *Judicial Conduct Commissioner and Judicial Conduct Panel (Deputy Commissioner and Disposal of Complaints) Amendment Act 2010* (NZ) s 13.

<sup>211</sup> *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 18.

<sup>212</sup> Ibid.

<sup>213</sup> See Margaret Wilson, ‘Judicial Complaints Lay Observer Appointed’ (Press Release, 7 March 2001).

<sup>214</sup> Office of the Judicial Conduct Commissioner, *Referring a Complaint* <[http://www.jcc.govt.nz/template.asp?folder=REFERRING\\_A\\_COMPLAINT&lev1=4&lev2=1&no=3](http://www.jcc.govt.nz/template.asp?folder=REFERRING_A_COMPLAINT&lev1=4&lev2=1&no=3)>.

<sup>215</sup> *Constitutional Reform Act* pt 4.

<sup>216</sup> OJC, *Annual Report 2012–13* (2013) 3.

<sup>217</sup> As of 1 October 2013 the OJC was renamed the Judicial Conduct Investigations Office: JCIO, *Judicial Conduct Investigations Office* <<http://judicialconduct.judiciary.gov.uk/index.htm>>.

<sup>218</sup> *Constitutional Reform Act* s 108, sch 14.

<sup>219</sup> Ibid s 108.

the procedures are the product of co-operation between the executive and judicial branches of government. This ensures that decisions over the content of the rules and procedures for the investigation of judicial conduct are not within the exclusive domain of the judiciary, thus promoting a degree of external scrutiny.<sup>220</sup>

The JCIO has the role of receiving, investigating, dismissing and providing advice on complaints,<sup>221</sup> either to a ‘nominated judge’ or, for more complex matters, to an ‘investigating judge’, who are appointed by the Lord Chief Justice.<sup>222</sup> The nominated judge can then dismiss the complaint, ‘refer matters to a leadership judge to be dealt with pastorally’,<sup>223</sup> or formulate advice for the Lord Chief Justice and Lord Chancellor.<sup>224</sup> There is the capacity to convene a disciplinary panel for particularly involved matters.<sup>225</sup> The Conduct Ombudsman can review the ‘exercise by any person of a regulated disciplinary function’.<sup>226</sup>

The one Australian State to have an independent standing body for managing judicial misconduct is New South Wales. The Judicial Commission of New South Wales was created by the *Judicial Officers Act 1986* (NSW). In addition to responsibility for investigating conduct complaints,<sup>227</sup> the Commission has responsibilities for monitoring and disseminating reports and information about sentencing as well as the continuing education of judges.<sup>228</sup> Initially these extra functions were described as ‘sugarcoating’,<sup>229</sup> but in more recent times it has been asserted that their presence assisted with the acceptance by

<sup>220</sup> James Harrison, ‘Judging the Judges: The New Scheme of Judicial Conduct and Discipline in Scotland’ (2009) 13 *Edinburgh Law Review* 427, 433.

<sup>221</sup> *Judicial Discipline (Prescribed Procedures) Regulations 2013* (UK) SI 2013/1674, rr 4, 6 (*JDPPR 2013*). In addition, complaints about justices of the peace must be made to the advisory committee in the relevant area, and those about tribunal members (other than Presidents) must be made to the President of the tribunal: at rr 6(2)–(3). This was also the case under the previous system: *Judicial Discipline (Prescribed Procedures) Regulations 2006* (UK) SI 2006/676, rr 9(1), 10(1) (*JDPPR 2006*).

<sup>222</sup> *JDPPR 2013* rr 9(1), 10(1). See also *JDPPR 2006* rr 17(1), 19(1).

<sup>223</sup> OJC, ‘A Review of the Rules and Regulations Governing Judicial Discipline’ (29 February 2012) 13.

<sup>224</sup> See *JDPPR 2013* r 13(3)(a); *JDPPR 2006* r 18.

<sup>225</sup> *JDPPR 2013* r 11. In pt 7 of the *JDPPR 2006*, this was termed a ‘review body’.

<sup>226</sup> *Constitutional Reform Act* s 110.

<sup>227</sup> *Judicial Officers Act 1986* (NSW) s 15.

<sup>228</sup> *Ibid* ss 8–9.

<sup>229</sup> Sir Laurence Street, ‘Memorandum on the History of the Judicial Commission’ (22 August 2007), quoted in Lumley, above n 191, 2.

the judiciary of the Commission's complaints-handling function.<sup>230</sup> It is also likely that the very limited powers of the complaints body, especially the absence of a power to sanction judges, has assisted in calming initial judicial hostility.

In essence, the Judicial Commission of New South Wales provides a public gateway and triage system for complaints,<sup>231</sup> and for matters referred by the Attorney-General.<sup>232</sup> On receipt of a complaint the Commission can, after preliminary examination, summarily dismiss the complaint.<sup>233</sup> Any surviving complaints are referred to the head of jurisdiction, or the Conduct Division of the Commission.<sup>234</sup> The Conduct Division is responsible for investigating the complaint with a view to providing a report to the Governor where a complaint is substantiated and sufficiently serious that it could warrant removal.<sup>235</sup> On completion, the report must be laid before Parliament for its consideration.<sup>236</sup> There is provision for the suspension of a judicial officer where the matter is seen as potentially leading to removal or where there is a charge or conviction for a serious criminal offence.<sup>237</sup> For matters that are substantiated but insufficiently serious to warrant removal, there is no provision for alternative consequences with the only option being referral to the head of jurisdiction to be dealt with by the traditional informal process, as outlined in Part III above.

### B *Commentary*

A number of key questions for crafting judicial complaints systems emerge from this short overview. As a preliminary matter, the extent to which the system is controlled by the judiciary or the executive tends to differ. The extent to which the executive may control the system will be informed by constitutional constraints in the particular jurisdiction. Part III explained that

<sup>230</sup> Chief Justice J J Spigelman, 'Dealing with Judicial Misconduct' (2003) 6 *Judicial Review* 241, 248–9.

<sup>231</sup> Forms can be downloaded from the Commission website: Judicial Commission of New South Wales, *Complaints: Complaints against Judicial Officers* (2014) <<http://www.judcom.nsw.gov.au/complaints/>>.

<sup>232</sup> *Judicial Officers Act 1986* (NSW) s 16.

<sup>233</sup> *Ibid* s 20.

<sup>234</sup> *Ibid* ss 21(1)–(2).

<sup>235</sup> *Ibid* pt 6 div 3.

<sup>236</sup> *Ibid* s 29(3).

<sup>237</sup> *Ibid* s 40.

in the Australian context at the federal level it is unlikely that a system that is not controlled by the judiciary would pass the constitutional test of maintaining the institutional integrity of the federal judicial system because of concerns about executive interference with the judicial arm.

However, constitutional issues are not the sole considerations when crafting an appropriate system. A system's design ought also to take into account the dangers associated with accountability systems and adopt features that address concerns that it may encroach on independence or lead to abuses that will do so. A complaints process should comply generally with the requirements for effective complaints management in other spheres, unless there is good reason for not doing so. The discussion above has also indicated that there is a risk that a judicial accountability system may be undermined by other proceedings, collateral challenge or precipitous resignations. A review of the England and Wales system stated the essential components of such a system are that it be independent, efficient and just, achieve a balance between transparency and confidentiality, and be proportionate.<sup>238</sup> In order to craft an appropriate complaints system, we argue that the following elements should be present:

- provision for a designated complaints-handling body separate from the court structure;
- the decision-making body has an appropriate composition;
- the system sorts complaints so that those involving substantive misconduct are considered;
- the standards against which judicial conduct is measured are apt to determine the types of incapacity and misbehaviour that must be addressed;
- an adequate opportunity to be heard is afforded to both the complainant and the judicial officer;
- the range of consequences provides options that suit varying types of relevant incapacity and misconduct;
- the system is sufficiently transparent to the public and judicial officers;
- mechanisms exist to protect the integrity of the complaints process; and
- the administration of the scheme is fair, accessible and timely.

<sup>238</sup> See Courts and Tribunals Judiciary, 'Consultation Launched on Judicial Discipline Regulations' (Media Release, OJC 06/12, 29 February 2012).

The following commentary considers best practice in relation to each of these dimensions, while also considering what is constitutionally possible in the Australian context.<sup>239</sup>

### 1 *A Separate, Designated Complaints-Handling Body*

In contrast to the current federal system in Australia, each of the jurisdictions surveyed has a designated complaints-handling body separate from the ordinary judicial hierarchy and process, although in Canada and New South Wales this body also operates to perform a number of other functions such as judicial education.

The creation of a separate complaints-handling body is an important normative statement. It indicates to the public that the system acknowledges the fallibility of the judiciary and provides a serious avenue of recourse and redress. Simply dealing with complaints in-house by the head of jurisdiction is insufficient to send this message. It also raises questions about how to deal with misconduct by heads of jurisdiction, a point insufficiently dealt with by the current federal arrangements. If part of the role of a complaints system is to enhance public confidence in the judiciary, the creation of a separate complaints-handling body must be the first step.

### 2 *Composition of the Decision-Making Body*

As we have already explained, any judicial complaints body in Australia must navigate the constitutional restrictions on executive involvement. In Australia, to ensure the institutional integrity of the judiciary under ch III, executive involvement in any judicial commission must be limited. It may be acceptable, for example, for public servants to serve on such a commission (just as public servants serve in the courts), but it would be inappropriate for a Minister to sit on a commission, or even appoint a senior public servant to such a commission.

This leaves the question as to whether there can be lay (in the sense of non-judicial and non-governmental) involvement in the process. Where a system consists only of judges there could be a perception of ‘Caesar judging Caesar’.<sup>240</sup> Shimon Shetreet has argued that a responsive or consumer-oriented model is a more appropriate model that ‘best balances the values of

<sup>239</sup> For other attempts to craft an ideal system, see, eg, Vince Morabito, ‘The *Judicial Officers Act 1986* (NSW): A Dangerous Precedent or a Model to Be Followed?’ (1993) 16 *University of New South Wales Law Journal* 481, 504–10.

<sup>240</sup> See also Cappelletti, above n 7, 50.

independence and accountability'.<sup>241</sup> This, we argue, is most appropriately (and transparently) achieved through lay involvement.

It is notable that most systems we have considered have been designed with, or have moved towards, including non-judicial and non-governmental members on their decision-making bodies. Commissions at the state level in the United States commonly include lay members.<sup>242</sup> For example, the Californian Commission on Judicial Performance is made up of 11 members, including 3 judges appointed by the Supreme Court of California, as well as 2 members of the State Bar and 2 citizens appointed by the Governor, 2 citizens appointed by the California State Senate Committee on Rules and 2 citizens appointed by the Speaker of the State Assembly.<sup>243</sup> In other states, too, a similar expanded process allows for appointment by other office holders, such as the Speaker of the State Assembly.<sup>244</sup> The New Zealand Judicial Conduct Panel includes a lay member,<sup>245</sup> and that system also incorporates a Lay Observer. The Judicial Commission of New South Wales is made up of six judicial members (chief judge or magistrate of a relevant court) and four non-judicial members.<sup>246</sup> The non-judicial members include one legal practitioner, and three persons of 'high standing in the community', appointed by the Attorney-General.<sup>247</sup>

The system in England and Wales also has some roles for non-judges as well as lay members. The JCIO is an associated office of the Ministry of Justice and is headed by a senior civil servant.<sup>248</sup> The Lord Chancellor<sup>249</sup> is the joint decision-maker together with the Lord Chief Justice. The Conduct Ombudsman has a review role.<sup>250</sup> If a disciplinary panel is appointed, it must include a

<sup>241</sup> Shetreet, 'The Limits of Judicial Accountability', above n 30, 13, citing Cappelletti, above n 7, 61.

<sup>242</sup> Alfani, Gupta-Brietzke and McMartin IV, above n 193, 907 (44 of the 51 systems).

<sup>243</sup> Ibid 893.

<sup>244</sup> New York is an example: *ibid* 904.

<sup>245</sup> *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 22 (one member of three).

<sup>246</sup> *Judicial Officers Act 1986* (NSW) s 5.

<sup>247</sup> *Ibid* s 5(5).

<sup>248</sup> Alexander Horne, 'Judicial Complaints' (Standard Note SN/HA/4912, House of Commons Library, 9 December 2008) 3.

<sup>249</sup> The Lord Chancellor is a Cabinet Minister and Secretary of State for Justice: see Parliament of the United Kingdom, *Glossary: Lord Chancellor* <<http://www.parliament.uk/site-information/glossary/lord-chancellor/>>.

<sup>250</sup> *Constitutional Reform Act* s 110.

current or former judicial office holder of higher rank than, and one of the same rank as, the judge complained of as well as two lay members.<sup>251</sup>

The Canadian Judicial Council currently has 39 members who are chief judges in their respective courts.<sup>252</sup> The chair of the Council is the Chief Justice of Canada. A 2002 review noted that there is no formal role for non-judges or puisne judges in the adjudication process, yet recommended against any changes.<sup>253</sup> Their reasoning was that the body was already cumbersome large and it was 'better to ... [involve] judges and non-judges in the activities of Council committees'.<sup>254</sup> This was the case despite the authors of the report 'acknowledging that it is certainly possible that, if Parliament were creating the Council today, it might include puisne judges and non-judges in its membership'.<sup>255</sup> As a consequence of this review, an advisory group was added to 'serve as a sounding board in respect of issues that the Chairperson might choose to raise with it'.<sup>256</sup> In our view this response is inadequate. The advisory group is only called in at the Chairperson's discretion and cannot contribute to the resolution of any specific complaint.

Any federal judicial commission in Australia must, of course, operate within the strictures of the *Constitution*. Thus, to the extent that government appointment of lay persons to such a commission would involve the executive in the investigation and disciplining of judges this may prove problematic. However, we strongly believe a commission that involves lay representatives will provide a more rigorous system both in fact and appearance. This could be achieved in Australia through the appointment of lay members by the relevant head of jurisdiction or a judicial panel, removing any possibility of executive interference in the institutional integrity of the judicial arm.

### 3 *The Sorting of Complaints*

A scheme should have an initial sorting process where frivolous, insufficiently specific matters and complaints relating solely to the outcome of a judicial decision are dismissed. Failure to include this would raise the possibility of

<sup>251</sup> *JDPPR 2013* r 11.

<sup>252</sup> See *Judges Act*, RSC 1985, c J-1, s 59.

<sup>253</sup> Chief Justice Richard Scott et al, 'The Way Forward: Final Report of the Special Committee on Future Directions to the Canadian Judicial Council' (Canadian Judicial Council, September 2002) 10.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

‘wide, wasting, and harassing persecution’.<sup>257</sup> For example, under the previous system in England and Wales, the JCIO’s predecessor, the Office for Judicial Complaints (‘OJC’), was obligated to dismiss complaints meeting a variety of criteria including that they were vexatious, or related to the private life or non-judicial professional conduct of the judicial office holder and ‘could not reasonably be considered to affect his suitability to hold judicial office’.<sup>258</sup> We argue that only those complaints that have the potential to engage one or more of the two touchstones — affecting the judge’s ability to hold judicial office, or the public confidence in the judicial institution — ought to be seriously considered. Most systems go to some length to set out those complaints that should be dismissed because they relate to the outcome of the judicial decision. For example, the Judicial Commission of New South Wales states, ‘[t]he Commission does not review a case for judicial error, mistake, or other legal ground. Reviews of those matters are the function of appellate courts’.<sup>259</sup> In New Zealand complaints about judicial decisions where there is a right of appeal or judicial review must be dismissed.<sup>260</sup> The Canadian approach appears to be to postpone these complaints until the appeal process has run its course.<sup>261</sup>

However, as we argued in Part II, not all complaints about the outcome of a judicial decision should be weeded out from the purview of a complaints system. In many cases misconduct can be intertwined with appealable legal error such that it is appropriate for a disciplinary body to consider them. As such, best practice would dictate that a complaints system is not required to dismiss these complaints. However, requiring the disciplinary system to wait until the appeal process has concluded seems logical as the determination of the appeal court may well be illuminating. This will also avoid any constitu-

<sup>257</sup> *Taaffe v Downes* (Unreported, Court of Common Pleas of Ireland, Lord Norbury CJ, Fox, Mayne and Fletcher JJ, 30 January 1813), reprinted in *Calder v Halket* (1839) 3 Moo PC 28, 40; 13 ER 12, 18 (Mayne J). See also *Floyd v Barker* (1608) 12 Co Rep 23, 23–4; 77 ER 1305, 1306 (Sir Edward Coke).

<sup>258</sup> *JDPPR 2006* r 14.

<sup>259</sup> Judicial Commission of New South Wales, *Complaints: Guide for Complainants* (2014) <<http://www.judcom.nsw.gov.au/complaints/complaints-more>>.

<sup>260</sup> *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 16(1)(f).

<sup>261</sup> See, eg, *Taylor v Canada (A-G)* (1997) 155 DLR (4<sup>th</sup>) 740, 742 [2] (Dubé J), where a complaint was made after a judge ordered that persons wearing kufis (which were described as a ‘Muslim religious head covering’) must remove them in the courtroom. The Canadian Judicial Council refused to consider the matter until the appeal was concluded: see at 743 [5]. After the appeal was concluded with adverse comment about the actions of the judge, the Council subsequently expressed disapproval of his Honour’s conduct. A judicial review of the process was dismissed: *Taylor v Canada (A-G)* [2002] 3 FC 91.

tional concerns that the complaints process is interfering with the substantive judicial proceedings.

#### 4 Standards

One of the key attributes of a judicial complaints system should be that the standards against which judicial behaviour is judged are clear and available.<sup>262</sup> These standards must be broad enough, or contain sufficient flexibility, so as to capture the range of behaviours that may affect a judge's capacity to fulfil the judicial role or undermine public confidence in the institution. However, they cannot be so broad as to provide insufficient guidance for judges and members of the public.

In all the jurisdictions considered, standards are not set out in the legislative instruments setting up the relevant complaints system. Rather, the standards expected of judicial officers are contained in documents developed or approved by judges that sit alongside the disciplinary regime.<sup>263</sup> While individual judges may well have set out and adhered to their own codes of conduct,<sup>264</sup> explicit standards for the judiciary were a rarity until the United States took the lead, with the American Bar Association publishing judicial standards in 1924.<sup>265</sup> While these represented an early attempt to set out what the judicial role entailed they were 'aspirational and unenforceable'.<sup>266</sup> Most states have since set out their own standards for judicial conduct based on the American Bar Association's *Model Code of Judicial Conduct*.<sup>267</sup> These codes

<sup>262</sup> See, eg, the *Bangalore Principles of Judicial Conduct*, which state as an aim that

[t]hey are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary.

*Strengthening Basic Principles of Judicial Conduct*, ESC Res 2006/23, UN ESCOR, 41<sup>st</sup> plen mtg, Agenda Item 14(c), UN Doc E/RES/2006/23 (27 July 2006) annex Preamble ('*Bangalore Principles of Judicial Conduct*').

<sup>263</sup> This is despite the fact that the first version of the *Judicial Officers Act 1986* (NSW) 'required the Commission to formulate a code of judicial conduct': Morabito, above n 239, 500.

<sup>264</sup> Lord Hale drafted an early version in 1660 that states, among other things, that judges should be 'short and sparing at meals': Richard Devlin, Justice C Adèle Kent and Susan Lightstone, 'The Past, Present ... and Future(?) of Judicial Ethics Education in Canada' (2013) 16 *Legal Ethics* 1, 22.

<sup>265</sup> Alfini, Gupta-Brietzke and McMartin IV, above n 193, 890–1.

<sup>266</sup> *Ibid* 891.

<sup>267</sup> Center for Professional Responsibility, American Bar Association, *Model Code of Judicial Conduct* (first published 1990, 2011 ed). For an example of a state code, see Supreme Court of California, *California Code of Judicial Ethics* (at 1 January 2013).

are drafted in a prescriptive manner.<sup>268</sup> For example, the *California Code of Judicial Ethics* states that '[a]ll members of the judiciary must comply with the code'.<sup>269</sup>

By contrast, the Commonwealth countries considered here have adopted exhortatory documents rather than prescriptive ones.<sup>270</sup> For example, the Canadian Judicial Council's booklet, the *Ethical Principles of Judges*, states that the principles it contains 'are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct'.<sup>271</sup> The judiciary of England and Wales has drafted a *Guide to Judicial Conduct*, which is intended to provide 'assistance to judges ... rather than to prescribe a detailed code'.<sup>272</sup> The *Guide to Judicial Conduct* is based on the *Bangalore Principles of Judicial Conduct*<sup>273</sup> and sets out guidance under five headings: judicial independence, impartiality, integrity, propriety, and competence and diligence. New Zealand also asserts that its judicial guidelines 'do not identify misconduct. They are not intended to bind or limit in any way the Commissioner's discretion in dealing with any such complaint as he or she thinks fit'.<sup>274</sup>

In Australia the primary resource is the *Guide to Judicial Conduct* published for the Council of Chief Justices of Australia.<sup>275</sup> This sets out three objectives:

- To uphold public confidence in the administration of justice;
- To enhance public respect for the institution of the judiciary; and
- To protect the reputation of individual judicial officers and of the judiciary.<sup>276</sup>

In order to deliver these it considers three 'basic' principles:

<sup>268</sup> Chief Justice Spigelman, above n 230, 246–7.

<sup>269</sup> Supreme Court of California, *California Code of Judicial Ethics* (at 1 January 2013), canon 6A. The Supreme Court is required by art VI § 18(m) of the *California Constitution* to 'make rules for the conduct of judges'.

<sup>270</sup> See Chief Justice Spigelman, above n 230, 246.

<sup>271</sup> Canadian Judicial Council, *Ethical Principles for Judges* (1998) 3.

<sup>272</sup> Judiciary of England and Wales, *Guide to Judicial Conduct* (revised ed, 2013) 3.

<sup>273</sup> *Ibid* 7 [1.3]–[1.4]. The *Bangalore Principles of Judicial Conduct* were developed under the auspices of the United Nations and intended to provide 'guidance to judges and to afford the judiciary a framework for regulating judicial conduct': *Bangalore Principles of Judicial Conduct*, UN Doc E/RES/2006/23, Preamble.

<sup>274</sup> Courts of New Zealand, *Guidelines for Judicial Conduct* (2013) 4 [6(a)].

<sup>275</sup> Australasian Institute of Judicial Administration, above n 125.

<sup>276</sup> *Ibid* 3 [2].

- Impartiality;
- Judicial independence; and
- Integrity and personal behaviour.<sup>277</sup>

Despite the degree of cross-fertilisation between judicial conduct guides,<sup>278</sup> the recognition of the role of perception and public confidence is more explicit in this document than in those in place in other jurisdictions, with the one exception of New Zealand.<sup>279</sup>

In determining whether any particular behaviour or incapacity is sufficient to justify some form of consequence, it is logical that the guides to judicial behaviour will be relevant, notwithstanding the disclaimers discussed above. There is also a good case for their use to inform the disciplinary process. Judges themselves have contributed to their drafting and so they are unlikely to contain precepts that are inappropriate or unrealistic, though they may be aspirational. The oddity is that such guides generally state categorically that they are not to be used for disciplinary purposes. This appears to be contrary to their existence, the expectations they create, and also practice. In Canada, for example, the most recent annual report of the Canadian Judicial Council provides vignettes from a number of different complaints dealt with by the Council. One states:

Judges must at all times preside with serenity. As noted in *Ethical Principles [for Judges]*, ‘Judges should avoid comments, expressions, gestures or behaviour which reasonably may be interpreted as showing insensitivity to or disrespect for anyone’ ... The judge apologized for his impatience and recognized that his manner and tone of us [sic] were inappropriate.<sup>280</sup>

<sup>277</sup> Ibid.

<sup>278</sup> This is acknowledged in *Judiciary of England and Wales*, above n 272, 7 [1.1], [1.3]. See also Chief Justice Spigelman, above n 230, 246–7 (stating that ‘the Australian approach was significantly influenced by the Canadian Judicial Council publication “Ethical Principles for Judges”’).

<sup>279</sup> While the Canadian *Ethical Principles for Judges* mentions the ‘right of every Canadian’ to have an independent judiciary, the public is otherwise notably absent: Canadian Judicial Council, *Ethical Principles for Judges*, above n 271, 4. In *Judiciary of England and Wales*, above n 272, 8 [1.4], ‘[p]ropriety, and the appearance of propriety’ is one of the principles but the connection to public confidence is not explicitly mentioned. The *New Zealand Guidelines for Judicial Conduct* states ‘the legitimacy of judicial function and the independence of the judiciary depend upon public confidence’: *Courts of New Zealand*, above n 274, 3 [4].

<sup>280</sup> Canadian Judicial Council, *Annual Report 2012–2013* (2013) 7 (citations omitted).

Similarly, reference is made to the Australian *Guide to Judicial Conduct* in a New South Wales inquiry report.<sup>281</sup>

A system of standards must also be clear about whether it extends to behaviour before, during (both on and off the Bench) and after judicial appointment. Changes in 2013 in England and Wales deal with the possibility that a judge subject to a complaint might resign or retire when advice that they be removed from office is proposed, or given, to the Lord Chancellor and Lord Chief Justice. In such a case a finding of misconduct can still be made notwithstanding the fact that they have ceased to hold office.<sup>282</sup> In contrast, the Judicial Commission of New South Wales must dismiss a complaint if it is about a person who is no longer a judicial officer.<sup>283</sup> An exclusion from the system is also made for retired or former judges in New Zealand.<sup>284</sup> This has been described as having ‘uncomfortable’ consequences in the Justice Wilson matter, introduced in Part II above, where a judge resigned prior to a panel being convened, as

[t]he judge has lost his job and his reputation has been severely damaged without the justifications for the complaints being tested by a full judicial conduct panel process. The complainants have not had their concerns considered by the panel. The wider community has been left without an authoritative pronouncement as to whether there was misbehaviour that warranted the judge’s removal.<sup>285</sup>

We argue that conduct occurring both before (even if the complaint is not yet made or unresolved at the point the judge retires) and after judicial appointment should be within the jurisdiction of a complaints body. Part II has already established why behaviour in these periods has the capacity to affect both an individual’s ability to fulfil the judicial function and public confidence in the institution. We accept that the consequences that can be imposed on a judicial officer who has left the Bench will be more limited. However, the

<sup>281</sup> Justice Simpson, D H Lloyd and K Moroney, ‘Report of an Inquiry by a Conduct Division of the Judicial Commission of NSW in Relation to Magistrate Jennifer Betts’ (21 April 2011, Judicial Commission of New South Wales Conduct Division) 50–1 [149]–[150].

<sup>282</sup> *JDPPR 2013* r 23.

<sup>283</sup> The Commission’s powers are limited to serving ‘judicial officers’: *Judicial Officers Act 1986* (NSW) s 20(1)(g).

<sup>284</sup> *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 5 (definitions of ‘complaint’, ‘complaint about a Judge’ and ‘Judge’).

<sup>285</sup> Harris, above n 73, 438.

issuing of public findings and perhaps reprimands remain relevant tools to ensure a public response is provided to inappropriate conduct.

In summary, best practice dictates that the standards by which judicial officers' conduct will be judged must be provided to those officers and the public. We believe that there are no constitutional impediments to the adoption of such standards in the Australian system provided that they have been developed within the judiciary and adopted by them. However, unlike many judicial standards documents to date, these standards should be more than just exhortatory and aspirational. They should provide guidance about the different categories of judicial incapacity and misconduct that would warrant disciplinary penalties (although, of course, different penalties may be appropriate). Ideally, they would also provide non-exhaustive examples of this behaviour (although, in time, these will be provided in practice if the complaints-handling process is made public, as we recommend below).<sup>286</sup>

We have developed a set of categories in Part II above by reference to the touchstones of the individual's ability to fill the judicial role and the maintenance of public confidence in the institution. However, we believe that simply having these generic touchstones does not offer sufficient transparency and certainty. More definite standards need to be set. While the classification of judicial conduct developed in this article is certainly not the only one, it is an example of a prescriptive but general set of standards that encompass a broad range of behaviours.

### 5 *Opportunity to Be Heard*

A right to be heard before an unbiased decision-maker is a key characteristic of fairness in the common law system. A judicial complaints body must give the judicial officer against whom a complaint has been made the complaint and supporting information presented against him or her together with an opportunity to respond to it.<sup>287</sup> In this way a complaints system has the capacity to protect, and provide resolution for, judges who may otherwise be subjected to trial by media with a limited right to respond. This raises the question of whether any costs incurred by the judge in the course of respond-

<sup>286</sup> The existing guides provide this level of detail to some extent: see, eg, Canadian Judicial Council, *Ethical Principles for Judges*, above n 271, in which broad guiding 'Statements' are given more content by 'Principles', which are then provided with greater context and examples of application in 'Commentary'; Australasian Institute of Judicial Administration, above n 125, which provides guiding principles which are then applied to a number of topics and situations for greater guidance: see above n 277 and accompanying text.

<sup>287</sup> See Handsley, 'Issues Paper', above n 13, 190; Morabito, above n 239, 492.

ing to complaints ought to be met by the government.<sup>288</sup> Rather than setting a norm that judges will always have their costs met by the taxpayer, we believe a more appropriate resolution of this issue would be that the Commission itself be given the discretionary power to award a judge's costs where it is appropriate in the circumstances.<sup>289</sup>

## 6 Consequences

In many systems the only disciplinary option has been removal. As this drastic approach is rarely appropriate, systems in England and Wales, and many of those in place in the United States, have adopted a range of graduated options from the pastoral (advice) through to the serious (public reprimand). There are arguments that the use of graduated consequences against sitting judges may compromise the public's and litigants' respect for judicial decisions.<sup>290</sup> To date, these concerns remain hypothetical, made without reference to substantiating evidence. Further, the use of graduated consequences in other jurisdictions with established judiciaries is now commonplace.

In England and Wales, the disciplinary options are set out in the *Constitutional Reform Act*. The Lord Chancellor has power to remove all judicial officers from their office except senior judges.<sup>291</sup> In addition,

[t]he Lord Chief Justice may give a judicial office holder formal advice, or a formal warning or reprimand, for disciplinary purposes (but this section does not restrict what he may do informally or for other purposes or where any advice or warning is not addressed to a particular office holder).<sup>292</sup>

<sup>288</sup> The Judicial Conference of Australia's submission to the Senate Standing Committee on Legal and Constitutional Affairs cited the 'absence of a provision ... for the payment of costs (if any) incurred by a judicial officer in responding to a complaint' as the 'one matter about which the [Judicial Conference of Australia] submits that an amendment is necessary': Judicial Conference of Australia, Submission No 4 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Courts Legislation Amendment (Judicial Complaints) Bill 2012 and the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012*, 2012, 1. The submission was unsuccessful: see Senate Legal and Constitutional Affairs Legislation Committee, above n 37, 20 [2.31].

<sup>289</sup> See the similar recommendation in Justice Mahoney, 'Procedures for Dealing with Complaints concerning Judges' in Australian Institution of Judicial Administration, *The Accountability of the Australian Judiciary: Procedures for Dealing with Complaints concerning Judicial Officers* (1989) 1, 8.

<sup>290</sup> Handsley, 'Issues Paper', above n 13, 186; McIntyre, above n 8, 219.

<sup>291</sup> *Constitutional Reform Act* s 108, sch 14.

<sup>292</sup> *Ibid* s 108(3).

While there are no definitions provided for the various disciplinary options, the legislation on its face seems to suggest an increase in severity from the formal advice to the formal warning to the reprimand. In addition to these options, the Lord Chief Justice can suspend a judicial office holder who is subject to criminal proceedings or convictions, or a senior judge where an address in Parliament for their removal is pending.<sup>293</sup> All actions must be agreed with the Lord Chancellor.<sup>294</sup>

In the United States, the state commissions and federal circuit councils have powers up to, and including, removal. In both cases, consequences can include public censure or reprimand.<sup>295</sup> In California, the Commission on Judicial Performance has a wide range of options in response to a complaint such as dismissal, advisory letter, private admonishment, public admonishment, public censure, and removal from office.<sup>296</sup> The most serious step is for the Commission to remove a judge, or, in cases of incapacity, involuntarily retire the judge. In such cases a public hearing will be held.<sup>297</sup>

Canada provides an example of a system that is not expressly given powers short of a recommendation for removal. The lack of a power to reprimand has been, to some extent, overcome by the ability to release information about complaints publicly.<sup>298</sup> For example, the offensive language used by Justice Leask in 2007 led his Chief Justice to formally express disapproval. This was publicised in a press release and the letter to the complainants explaining the actions taken was made available.<sup>299</sup>

An alternative can be seen in the New South Wales and New Zealand systems. There, the formal systems provide only for complaints to be pushed back to heads of jurisdiction or forward to a full removal hearing.<sup>300</sup> An early draft of the Judicial Officers Bill 1986 (NSW) provided for formal reprimands

<sup>293</sup> *Ibid* ss 108(4)–(7).

<sup>294</sup> *Ibid* s 108(2).

<sup>295</sup> Stewart, above n 192, 466–7. The federal circuit councils' power to remove judges cannot be exercised against art III judges: see above n 196 and accompanying text.

<sup>296</sup> *California Constitution* art VI §§ 18(d), 18.5(a).

<sup>297</sup> *Ibid* art VI § 18(i)(2); Commission on Judicial Performance (CA), *Rules of the Commission on Judicial Performance* (at 8 May 2013) r 102(b)(2).

<sup>298</sup> The Canadian Judicial Council has 'been guided by a legal opinion that it does have the power to "express disapproval"': Chief Justice Spigelman, above n 230, 252.

<sup>299</sup> Canadian Judicial Council, 'Canadian Judicial Council Completes Its Review of Complaints against Justice Peter Leask' (News Release, 20 September 2007).

<sup>300</sup> See above nn 210–12, 234–5 and accompanying text.

but this was removed before it was passed.<sup>301</sup> There is no guidance for the head of jurisdiction as to the steps that should be taken in response to this referral but presumably the intention is that there is some form of pastoral intervention.

The vast gulf between the two options leaves the relevant complaints bodies in an invidious position. Complaints of merit that are insufficiently serious to justify removal must be sent to the head of jurisdiction, whose powers are not legislatively determined. This removes them from public purview without necessarily leading to an adequate response. This approach means that the 'chief judge's unguided and unreviewable interpretation of the conduct in question will dictate if and how discipline is administered'.<sup>302</sup> It has been noted that this referral of meritorious but 'minor' matters 'can be hard to explain to complainants, especially if their complaints appear to have merit'.<sup>303</sup> Further, as noted earlier, the head of jurisdiction lacks power to investigate and enforce any sanctions against fellow judges.<sup>304</sup>

As a consequence, best practice will dictate having a range of possible consequences to respond to the diversity of potential conduct problems, as described in Part II above. This should include an ability to respond in a proportional way to serious complaints that do not justify removal. The consequences that may be useful include private advisory letter, referral to counselling, public admonishment or reprimand, requirement to apologise, ongoing monitoring (which will be particularly relevant where an individual is suffering from an ongoing but treatable illness), and requiring an individual to undertake further judicial education in a particular area. We have included public reprimands in this list because they provide a rigorous response with a high degree of visibility. While concerns may be raised that such approaches undermine the legitimacy of the judicial officer concerned, it is arguable that the judicial officer is already compromised due to their substantive misconduct. A failure to respond vigorously means that such conduct could be seen to be accepted by the judiciary, thus undermining the institution as a whole.

Further, just as there are guidelines to assist judges to achieve consistency and proportionality in sentencing, there ought to be guidelines as to when different remedies will be appropriately used. This may be by reference to the different standards of conduct, and the nature, cause and severity of transgres-

<sup>301</sup> Shetreet, 'The Limits of Judicial Accountability', above n 30, 9.

<sup>302</sup> Geyh, 'Informal Methods of Judicial Discipline', above n 185, 310.

<sup>303</sup> Chief Justice Gleeson, above n 24.

<sup>304</sup> See above nn 139–40 and accompanying text.

sions. For example, where judges exhibit uncivil or rude behaviour, this will justify different responses depending upon whether the conduct is the manifestation of mental illness, the conduct is isolated or part of a pattern of behaviour, or the conduct demonstrates inappropriate underlying attitudes. Where a complaints system provides a number of different remedies, the need to use the extreme penalty of removal is greatly reduced. This is because public confidence can be maintained by a public response that may consist of a single intervention or an ongoing one. This allows the individual member of the judiciary to continue to serve without undermining public confidence in the institution.

The *Constitution* provides in s 72(ii) that the power to remove judicial officers is exclusively that of the Governor-General and Parliament on the specified grounds of proved misbehaviour or incapacity. However, it is silent in relation to lesser penalties. As explained in Part III, we believe that, provided such reprimands are issued by a judicial body pursuant to judicially adopted standards, there is no constitutional impediment to empowering a judicial complaints body with disciplinary powers short of removal.

## 7 *Transparency*

In most jurisdictions, complaints processes are explained to the public via a website that, in many cases, provides links to the appropriate legislation that underpins the system.<sup>305</sup> Usually some form of annual report is also published that sets out basic statistics about the number and resolution of complaints.<sup>306</sup> Beyond these basic processes, the extent to which a judicial complaints system should be transparent in operation is contested. On the one hand, '[j]ustice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men'.<sup>307</sup> On the other hand, concerns about the privacy of complainants and judicial officers can be compelling. Those advocating confidentiality have asserted that '[p]rotecting the privacy and reputation of individual judges is considered a prerequisite to

<sup>305</sup> See, eg, Judicial Commission of New South Wales, *Welcome to the Judicial Commission of New South Wales* (2014) <<http://www.judcom.nsw.gov.au/>>; Commission on Judicial Performance (CA), *State of California Commission on Judicial Performance* (5 June 2014) <<http://cjp.ca.gov/>>; JCIO, *Judicial Conduct Investigations Office* <<http://judicialcomplaints.judiciary.gov.uk/>>.

<sup>306</sup> See, eg, the Judicial Commission of New South Wales's annual reports: Judicial Commission of New South Wales, *About the Commission: Annual Reports* (2014) <<http://www.judcom.nsw.gov.au/about-the-commission/annual-reports>>.

<sup>307</sup> *Amard v A-G (Trinidad and Tobago)* [1936] AC 322, 335 (Lord Atkin for Lords Atkin, Maugham and Sir Sidney Rowlatt).

preserving the independence and integrity of the entire judicial system'.<sup>308</sup> The balance between confidentiality and transparency can be a difficult one to achieve.

For most systems, the initial sorting of complaints is confidential.<sup>309</sup> Some systems explicitly provide that the complaint should be acknowledged and the complainant updated throughout the process.<sup>310</sup> However, where the consequence is that the complaint be sent to the head of jurisdiction or that private admonishment or the like be administered by the complaints authority, generally the matter remains confidential. In some systems, the 'person who lodged the complaint is advised that appropriate corrective action has been taken, but the nature of the action is not disclosed'.<sup>311</sup> This must appear very unsatisfactory for a complainant. In cases involving more serious misconduct or a repeated offence, a public admonishment or public censure may be issued.<sup>312</sup>

In most cases, once the matter has been identified by a preliminary investigation as meriting a review by a panel, there is scope for greater transparency. For example, New Zealand has adopted an approach with very limited transparency until the matter shifts to a panel process. Once the matter shifts to a panel the hearings must be in public, unless there are good reasons to do otherwise.<sup>313</sup> In Canada and New South Wales the authority is given discretion as to whether matters will be heard in public or private.<sup>314</sup> The Judicial Commission of New South Wales's discretion in this regard is now broader than it was initially. Originally, the *Judicial Officers Act 1986* (NSW) provided that less serious matters should be dealt with in private with more serious matters having a public hearing.<sup>315</sup>

<sup>308</sup> Sahl, above n 174, 224 (citations omitted).

<sup>309</sup> See, eg, Commission on Judicial Performance (CA), *Rules of the Commission on Judicial Performance* (at 8 May 2013) rr 102, 110. In New Zealand, the Judicial Conduct Commissioner must keep all matters that come to their attention in the context of their role confidential: *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 19.

<sup>310</sup> See, eg, *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) ss 14(1)(a), 8B(4)(c) 15A(5), 16(2), 17(2), 18(3).

<sup>311</sup> Commission on Judicial Performance (CA), *The Complaint Process* (2007) <[http://cjp.ca.gov/complaint\\_process.htm](http://cjp.ca.gov/complaint_process.htm)>.

<sup>312</sup> *Ibid.*

<sup>313</sup> *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 29.

<sup>314</sup> *Judges Act*, RSC 1985, c J-1, s 63(6); *Judicial Officers Act 1986* (NSW) s 24(2).

<sup>315</sup> Morabito, above n 239, 499, citing *Judicial Officers Act 1986* (NSW) ss 24(2)–(3) (as they read in 1993).

There is some evidence that a number of systems are shifting towards increased transparency.<sup>316</sup> The Canadian federal system was conceived with limited transparency. Section 63(5) of the *Judges Act*, RSC 1985, c J-1 provides that the Canadian Judicial Council can prohibit the publication of any information or documents if it is 'of the opinion that the publication is not in the public interest'. However, as noted earlier, the Council has asserted what is in effect a power to publicly reprimand by expressing disapproval of specific instances of judicial conduct.<sup>317</sup> Similarly, the Inquiry Committee can be held in public or private.<sup>318</sup> The tension between privacy and transparency is currently playing out in the Inquiry into the conduct of Associate Chief Justice Lori Douglas. Associate Chief Justice Douglas has been the subject of a complaint after her husband sent graphic photographs of her to a third party allegedly in order to persuade the party to engage in a sexual relationship with her Honour, in return for which he would receive legal services.<sup>319</sup> According to the Notice of Allegations, this conduct occurred prior to Associate Chief Justice Douglas's appointment and yet was not disclosed in her 'Personal History Form', and misleading statements were made to Independent Counsel investigating the matter.<sup>320</sup> Considerable materials are available on the Council's website but the photographs in question, and the full transcript of the hearing, have not been released as the Inquiry Committee attempts to balance the public interest in transparency with the privacy of the judge and the potential for further damage to the judiciary.<sup>321</sup>

The judicial complaints system for England and Wales has become more transparent and forthcoming since its inception in 2006. The Lord Chancellor and the Lord Chief Justice have the power to disclose 'information about disciplinary proceedings or the taking of disciplinary action' to the public or

<sup>316</sup> 'A First Amendment Right of Access to Judicial Disciplinary Proceedings' (1984) 132 *University of Pennsylvania Law Review* 1163, 1186 (citations omitted), stating that 'an increasing number of states [in the United States] have repealed their confidentiality provisions and have replaced them with ones requiring that these proceedings be open'.

<sup>317</sup> See above nn 298–9 and accompanying text.

<sup>318</sup> *Judges Act*, RSC 1985, c J-1, s 63(6).

<sup>319</sup> Canadian Judicial Council, 'In the Matter of an Investigation Pursuant to Section 63(2) of the *Judges Act* regarding the Honourable Associate Chief Justice Lori Douglas: Notice to Associate Chief Justice Lori Douglas' (Notice of Allegations, 29 May 2012) 2 [3]–[4].

<sup>320</sup> *Ibid* 2 [6], 3 [9].

<sup>321</sup> See Canadian Judicial Council, *Douglas Inquiry: Inquiry Committee regarding the Honourable Lori Douglas* (22 April 2014) <[http://www.cjc-ccm.gc.ca/english/conduct\\_en.asp?selMenu=conduct\\_inq\\_douglas\\_en.asp](http://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_inq_douglas_en.asp)>.

any individual.<sup>322</sup> An examination of the practice of the JCIO indicates that there has been increased disclosure over time.<sup>323</sup> For example, the decision to publish the names of judicial office holders subject to disciplinary sanctions was only taken in 2009, and even then, ‘only findings of a serious offence leading to suspension or removal of a judge were publicised’.<sup>324</sup> However it is clear that a number of disciplinary actions, including removal, were taken each year since the JCIO was formed in 2006.<sup>325</sup> Similarly, until 2012 the disclosure of particular disciplinary actions was limited to those cases where the consequence was removal from office.<sup>326</sup> The first statement indicating that a judicial officer received one of the lesser penalties was made public in January 2012, almost six years after the JCIO commenced operation.<sup>327</sup> As would be expected, once the decision was made to disclose disciplinary actions other than removals they were revealed as a significant part of the work of the JCIO. Of the statements disclosed between November 2008 and January 2013, 18 relate to disciplinary action short of removal and 20 involve either removal or resignation.<sup>328</sup>

This increased disclosure of the nature of the misconduct and the consequent penalty provides some guidance about the degree of seriousness with which certain behaviours are regarded. However, the information is still very limited in nature. For example, according to a recent statement,

<sup>322</sup> *JDPPR 2013* r 18. See also *JDPPR 2006* rr 40(3)–(4).

<sup>323</sup> Shetreet and Turenne, above n 28, 290–1.

<sup>324</sup> *Ibid* 290.

<sup>325</sup> See, eg, OJC, *Annual Report 2006–2007* (2007) 17 (Figure 10: Reasons for Taking Disciplinary Action).

<sup>326</sup> There is one statement about a suspension after a judicial officer’s association with a male prostitute was revealed in the tabloid press: OJC, ‘Statement from the Office for Judicial Complaints: Circuit Judge Gerald Price QC’ (Statement, OJC 11/09, June 2009). See also ‘Married Judge Forced to Resign after “Passionate Fling with Male Prostitute”’, *Daily Mail* (online), 13 July 2010 <<http://www.dailymail.co.uk/news/article-1294103/Judge-forced-resign-passionate-fling-male-prostitute.html>>.

<sup>327</sup> This dubious distinction belongs to Lord Justice Thorpe, who was reprimanded for ‘failing to adhere to the guidance regarding the reporting of traffic offences’ in January 2012: see OJC, ‘Statement from the Office for Judicial Complaints: Lord Justice Thorpe’ (Statement, OJC 01/12, 13 January 2012).

<sup>328</sup> Collated from data on the JCIO website: Judicial Conduct Investigations Office, *Disciplinary Statements* <<http://judicialconduct.judiciary.gov.uk/816.htm>>.

[t]he Lord Chancellor and Lord Chief Justice concluded that His Honour Judge Hopkins had made an inappropriate comment during a hearing at Cardiff Crown Court in 2012 and therefore issued him with formal advice.<sup>329</sup>

There is no statement of the standards against which the misconduct is measured. There is no explanation of the nature of the comment. There is also no guidance as to the circumstances that might cause this incidence of misconduct to attract a formal advice while another involving the same kind of behaviour leads to removal from office.<sup>330</sup>

This analysis reveals that as complaints systems are bedded down there is some increased impetus towards greater transparency. These changes should be welcomed. The assumption that ‘the secrecy of proceedings assures public ignorance ... and that such ignorance, in turn, preserves public confidence in the integrity of the judiciary’ is contrary to the general premise underlying open justice.<sup>331</sup> Such a Star Chamber approach creates an unfortunate impression of hypocrisy that could taint the system as a whole, and therefore undermine the aim of the process: to assure the institutional integrity of the judiciary and enhance public confidence. There is also a danger that if an opaque system of complaints was introduced, its capacity to reduce public confidence and institutional integrity would undermine its constitutionality. Finally, as Lawrence Solum observes, providing proper justifications for the law ‘involves more than simply a matter of instrumental efficacy. Respect for our fellow citizens requires that we make good and sufficient reasons available to them’.<sup>332</sup>

The default position should be in favour of transparency across the whole process — informing complainants of the progress of the matter, and reporting on the resolution of the matter and the reasoning behind it. There may well be individual cases where the need for confidentiality overrides the public interest in transparency, such as the complaint involving Associate Chief Justice Douglas described above, but even in such cases confidentiality should be as limited as possible.

<sup>329</sup> OJC, ‘Statement from the Office for Judicial Complaints: His Honour Judge Stephen Hopkins QC’ (Statement, OJC 35/13, 5 July 2013).

<sup>330</sup> See, eg, OJC, ‘Statement from the Office for Judicial Complaints: Mr Ian Lawless’ (Statement, OJC 17/10, 8 July 2010).

<sup>331</sup> ‘A First Amendment Right of Access to Judicial Disciplinary Proceedings’, above n 316, 1185.

<sup>332</sup> Lawrence B Solum, ‘Procedural Justice’ (2004) 78 *Southern California Law Review* 181, 230.

## 8 Protecting the Integrity of the Complaints Process

A number of events have illustrated that a judicial accountability system can be delayed, circumvented or undermined. The potential for judicial officers to resign prior to censure or removal has been seen in the New Zealand example provided by Justice Wilson,<sup>333</sup> as well as that provided by Magistrate Pat O'Shane in New South Wales.<sup>334</sup> We have already recommended that any accountability system must have the capacity to consider and respond to this conduct. It has been addressed in the England and Wales system by a regulation that provides that the 'Lord Chancellor and the Lord Chief Justice may continue to deal with the case and then make a finding of misconduct in relation to the office holder' where their removal has been recommended.<sup>335</sup>

The use of collateral challenge has been problematic in several Canadian cases. In the ongoing case of Associate Chief Justice Douglas described above, the entire Inquiry Committee resigned in the face of an application for judicial review that alleged they were biased against the judge in question.<sup>336</sup> In its reasons for resignation the Committee noted that

[j]udges are not entitled to a process that includes unlimited steps and interlocutory privileges for the judge at public expense and certainly not one that defeats the wider public interest that must be served by the judicial conduct process itself. Public confidence in the public complaints process that Parliament has established would be abandoned if anyone with standing could cripple its critical role simply by engaging in interlocutory judicial review.<sup>337</sup>

According to these reasons, their resignation was 'the course of action most likely to be effective in returning the focus of the inquiry to where it belongs'.<sup>338</sup> In *Cosgrove v Canadian Judicial Council*, a constitutional challenge to the power of the Canadian Judicial Council was successful in the Federal Court after the Inquiry Committee had rejected it.<sup>339</sup> The Federal Court

<sup>333</sup> See above n 285 and accompanying text.

<sup>334</sup> See above nn 58–62 and accompanying text.

<sup>335</sup> *JDPPR 2013* r 23.

<sup>336</sup> Dean Pritchard, 'Inquiry Interruptus: Committee Charged with Reviewing Sex Judge's Actions Up and Quits, Casting Future in Doubt', *Winnipeg Sun* (Winnipeg), 21 November 2013, 5.

<sup>337</sup> Inquiry Committee concerning the Honourable Lori Douglas, 'Reasons for Resignation of the Inquiry Committee' (Canadian Judicial Council, 20 November 2013) 4 [12].

<sup>338</sup> *Ibid* 11 [42].

<sup>339</sup> [2006] 1 FC 327.

decision led to a successful appeal to the Federal Court of Appeal,<sup>340</sup> and a refusal of leave to appeal by the Supreme Court of Canada.<sup>341</sup> While the challenge was ultimately unsuccessful, the process took from 2004 to 2009, and dealt with behaviour that occurred in 1999.<sup>342</sup>

Another cause for concern is the ability of the judicial accountability process to become enmeshed and potentially undermined in related proceedings. The Magistrate O'Shane defamation matter has the potential to open the Judicial Commission of New South Wales's documentation to scrutiny in a way not contemplated by the *Judicial Officers Act 1986* (NSW). In that case, the defendant subpoenaed the Commission's records on the basis that they could assist in showing the 'truth' of his criticism of Magistrate O'Shane.<sup>343</sup>

As these examples illustrate, the potential to frustrate or undermine a judicial accountability system by the use of collateral processes warrants close consideration when the legislation founding such a system is drafted. Efforts should be made to balance appropriate appeal processes with the need for timely and effective adjudication of conduct matters. The integrity of an accountability system must also be appropriately protected from collateral attack through other proceedings.

## 9 Administration of the System

The final element that should be considered when crafting a judicial complaints system is the fair, timely and accessible administration of the system. In all the jurisdictions considered, efforts are made to explain the processes and ensure they operate effectively and provide a prompt response to complainants.<sup>344</sup> For many jurisdictions a process of review of the handling of particular complaints is available. In the case of California, for example, judges and former judges can seek review from the Supreme Court.<sup>345</sup> In New Zealand,<sup>346</sup> and the United Kingdom,<sup>347</sup> the option of judicial review is

<sup>340</sup> *Cosgrove v Canadian Judicial Council* (2007) 279 DLR (4<sup>th</sup>) 352.

<sup>341</sup> *Cosgrove v Canadian Judicial Council* (2007) 383 NR 388. A further example is provided by *Taylor v Canada (A-G)* (1997) 155 DLR (4<sup>th</sup>) 740, described above: see above n 261.

<sup>342</sup> See Canadian Judicial Council, *Cosgrove Inquiry: Inquiry Committee regarding the Honourable Paul Cosgrove* (30 March 2009) <[http://www.cjc-ccm.gc.ca/english/conduct\\_en.asp?selMenu=conduct\\_inq\\_cosgrove\\_en.asp](http://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_inq_cosgrove_en.asp)>.

<sup>343</sup> Low, above n 60.

<sup>344</sup> See, eg, Canadian Judicial Council, *Expected Conduct of Judges: Making a Complaint* (2014) <[http://www.cjc-ccm.gc.ca/english/conduct\\_en.asp?selMenu=conduct\\_complaint\\_en.asp](http://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_complaint_en.asp)>.

<sup>345</sup> *California Constitution* art VI § 18(d). This review is only available to judicial officers.

<sup>346</sup> See, eg, *Re Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004; Wilson v A-G (NZ)* [2011] 1 NZLR 399.

available. For England and Wales as well as New Zealand, a formally designated review channel is provided, in England and Wales through the Conduct Ombudsman,<sup>348</sup> and in New Zealand, the Lay Observer.<sup>349</sup> This latter approach has some merit in that it provides the complainant with an accessible review avenue. Part of crafting a complaints system in which the public can have confidence is to ensure transparency about the timeframes involved in the process and the options for further review.

## V CONCLUSION

This article has set out guiding principles to craft judicial complaints systems that respond to problematic conduct in effective and fair ways that enhance institutional integrity. We have argued that the current system for Australia's federal judiciary, which empowers the head of jurisdiction to informally deal with minor complaints and leaves the removal of judicial officers to the Parliament and the Governor-General, is insufficiently rigorous and transparent. Its exemptions (relating to heads of jurisdiction and the High Court) further undermine its utility. In short, it fails to meet the requirements of accountability that support the institutional integrity of our judiciary.

The absence of judicial scandal and heightened political controversy over the proper role of judges means the time is opportune for Australia to turn its mind to crafting a judicial complaints system. A sober analysis of comparative systems against the objectives of an ideal system is required to ensure that the legislative or executive branches do not impose a complaints system on the judiciary as a form of punishment or censure.<sup>350</sup>

Many of the arguments for and against formal judicial complaints systems are made in the absence of empirical evidence and rely on suppositions about hypothetical consequences. In this article, our arguments are drawn from observations of the introduction and reform of systems in established and comparable judiciaries. There is certainly a need for greater understanding of the operation of these systems to bridge the continuing divide between the proponents and opponents of judicial complaints systems. Peter Russell observed in 1987 that the performance of judicial councils in Canada could

<sup>347</sup> See, eg, *Forrest v Lord Chancellor* [2011] EWHC (Admin) 142 (3 February 2011).

<sup>348</sup> *Constitutional Reform Act* s 110.

<sup>349</sup> Office of the Judicial Conduct Commissioner, *Referring a Complaint* <[http://www.jcc.govt.nz/template.asp?folder=REFERRING\\_A\\_COMPLAINT&lev1=4&lev2=1&no=3](http://www.jcc.govt.nz/template.asp?folder=REFERRING_A_COMPLAINT&lev1=4&lev2=1&no=3)>.

<sup>350</sup> Morabito, above n 239, 511–12; Shetreet, 'The Limits of Judicial Accountability', above n 30, 8, 16; Canivet, Andenas and Fairgrieve, above n 190, v.

only be said to have ‘probably succeeded in establishing a better reconciliation of security of tenure and accountability ... because the performance of these councils [had] not been systematically studied’.<sup>351</sup> Russell’s observations remain true today.

The framework we have set out provides a comprehensive analysis of the appropriate features of a judicial complaints system. The nine elements that we identify are mutually reinforcing and informed by broader, underlying accountability principles. As a threshold point, we have argued that any judicial complaints system must be administered by a body (be that a council or commission) removed from the ordinary judicial hierarchy and process. Constitutional restrictions in Australia dictate that this commission must still be made up of members of the judiciary, although it could also be constituted by lay members if those members are not appointed by the political branches of government.

Fundamental to a rigorous accountability system is transparency — transparency of standards, processes, timeframes and consequences. As such, we have argued that any system must have a transparent system of sorting complaints, indicating what complaints are within the jurisdiction of the body. The administration of the system, that is, the progress and resolution of the complaints, must also be transparent. Those subject to the process must be given a fair opportunity to be heard. A complaints system must also have tangible standards by which to measure the seriousness of judicial misbehaviour. Further, a wide range of consequences must be available and their use made public.

We have argued that concerns that public confidence in the judiciary may be undermined by a system such as we have proposed fundamentally misunderstand the necessity of accountability to ensure the institutional integrity of the judicial branch. It is our view that, crafted with care to ensure other pillars that support institutional integrity such as independence from the legislative and executive arm of government remain intact, a rigorous system of complaints handling is necessary to promote public confidence.

<sup>351</sup> Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (McGraw-Hill Ryerson, 1987) 185.