"Judicial Accountability – New Developments and Threats"
A Paper delivered at the
Commonwealth Lawyers' Conference
Goa, India
Wednesday, 8 March 2023

The Honourable John Logan RFD [1]

The judges were then summoned before the King who ripped up their letter in front of them, stating that "I well know the true and ancient common law to be the most favourable to Kings of any law in the world, to which law I do advise you my Judges to apply your studies".[2] *While all the other judges were repentant, Coke maintained the position stated in the letter, informing the King "When the case happens I shall do that which shall be fit for a judge to do". For this defiance of Royal authority, Coke was dismissed from his office as Chief Justice of the Court of King's Bench.*

Contents

---

[1] A Judge of the Federal Court of Australia and of the Supreme and National Courts of Papua New Guinea; President, Australian Defence Force Discipline Appeal Tribunal.
Caveat - The views expressed in this paper are personal and, as to any controversial issues of law, necessarily provisional. They are not to be regarded as those of either the Australian or Papua New Guinea governments or of any court or tribunal of which the author is a member. I gratefully acknowledge helpful critiques of an early draft of this paper respectively offered by my current Associate, Mr Evan Donaldson and by my wife, Mrs Jan Logan, each of whom has been a solicitor in active practice. Such errors as remain are mine alone.

[2] Hostettler, p. 91.

Introduction

There is no denying that the subject of "judicial accountability" is topical and widely abroad in modern times.[3]

However, there is, I suggest, a question-begging quality in the term, "Judicial Accountability". Absent answering, "To whom is a judiciary as an institutional arm of government accountable or an individual judge accountable?" and "In respect of what?" consideration of whether there are any new developments or threats to "judicial accountability" and, if so, what is apt to be unfocussed, if not misleading or erroneous.

Because I hold judicial appointments in both Australia and in Papua New Guinea, I propose to offer answers to these questions with examples from each of those jurisdictions.

At the most general level of abstraction, a starting point for answering each of the unstated questions mentioned is supplied by Australia's and Papua New Guinea's respective national constitutions. Each provides for a separation of legislative, executive and judicial powers.[4] In keeping with this separation of powers, each national constitution vests national judicial power in a judiciary institutionally independent from the legislative and executive.[5]

---

3 Google scholar returns 375 results for articles with "Judicial Accountability" in the title between the years 2000 and 2022, compared with just 77 articles for the years 1950 to 1999.

4 This separation of powers is implicit in the Australian Constitution by separate chapters, Chapters I, II and III, respectively directed to The Parliament, The Executive Government and The Judicature see *R v Kirby; Ex parte Boilermakers' Society of Australia (the Boilermakers' Case)* HCA 10, (1956) 94 CLR 254. Papua New Guinea's Constitution makes separate provision within Part VI for these three branches of government but goes further by explicitly providing in s 99(3) that, "(3) In principle, the respective powers and functions of the three arms shall be kept separate from each other".

5 *Australian Constitution*, s 71:
Judicial power and Courts.
The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

In this constitutional and institutional sense, it is in the very nature of this provision for an independent judiciary that, as an institution, the judiciary is not accountable either to parliament or to the executive for the exercise of judicial power either in particular cases or generally. The institutional term "judiciary" is but a collective name for individuals appointed under the constitution as judges. The national constitutions of Australia and Papua New Guinea each buttress the independence of each individual member of the judiciary by confining judicial accountability to misbehaviour or incapacity proven either to parliament, in the case of Australia[6] or, in the case of Papua New Guinea, to an independent tribunal. In neither country is an individual member of the judiciary accountable in any other way or in respect of any other subject.

Reflecting national constitutional positions of which Australia's and Papua New Guinea's are exemplars, one of the unifying threads which binds the modern Commonwealth is a shared belief in the fundamental importance of this separation of the sovereign power of a nation state for the peace, order and good government of a member nation.

That belief is manifested and its features detailed in the Commonwealth (Latimer House) Principles, adopted by Commonwealth Heads of Government in Abuja, Nigeria in 2003.[7] The fourth of these principles concerns judicial independence.

---

6 *Papua New Guinea Constitution*, ss. 157 and 158:

157. Independence of the National Judicial System.

Except to the extent that this Constitution specifically provides otherwise, neither the Minister responsible for the National Justice Administration nor any other person or authority (other than the Parliament through legislation) outside the National Judicial System has any power to give directions to any court, or to a member of any court, within that System in respect of the exercise of judicial powers or functions.

158. Exercise of the judicial power.

(1) Subject to this Constitution, the judicial authority of the People is vested in the National Judicial System.

(2) In interpreting the law the courts shall give paramount consideration to the dispensation of justice.

7 These came popularly to be called the "Latimer House Principles" because the initiative for their adoption may be traced to a conference sponsored by the Commonwealth Parliamentary Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Lawyers' Association, which was held in the United Kingdom at Latimer House, Buckinghamshire, in June 1998. The product of that meeting was considered by a working group of Law

In his July 2008 Forward to the Commonwealth's official publication of the Latimer House Principles, the then Secretary-General of the Commonwealth, a great Indian diplomat, Mr Kamalesh Sharma, observed:

> [E]very Commonwealth member must continuously pose itself the question: how well does it observe the separation of powers? Do our Executives respect the freedom of the Legislature and the Judiciary to discharge their responsibilities?
>
> Theirs, of course is the greatest temptation to jettison these Principles – and there was a time, perhaps a generation ago, when many Legislatures and Judiciaries wilfully complied with over-reaching Executives. In other words, they didn't properly believe in their own independence and power, as a key element of the sharing of power.
>
> For *all* of us, from time immemorial, power has been difficult to separate, and thereby to control. All are complicit, and in being so make ourselves dangerously vulnerable to poor governance, corruption and instability.
>
> [Emphasis in original]

Secretary-General Sharma's understanding highlights an enduring hazard presented by undivided sovereign power. His observations are hardly idiosyncratic or even unique to the Commonwealth. What is of profound importance about Secretary-General Sharma's observations is his affirmation that the hazard mentioned, and means of addressing it via adherence to the Latimer House principles, is not confined in relevance to the developed world.

Ministers drawn from Commonwealth member countries, adopted by Commonwealth Law Ministers and then, at their meeting in Abuja, Nigeria, in December 2003, endorsed by Commonwealth Heads of Government. The text of the Latimer House Principles is readily accessible via the Commonwealth Secretariat's website http://thecommonwealth.org/sites/default/files/history-items/documents/Latimer HousePrinciples.pdf. Accessed 22 December 2022.

One of the founders of an independent United States of America, was the 18th century statesman, Alexander Hamilton. He had experience of what he perceived as despotic, as opposed to representative, government in the pre-revolution, fiscal administration of Great Britain's American colonies. In his Federation Paper, "The Judiciary Department", Hamilton wrote with respect to that department of government, "In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws."[8]

The sense of grievance that informed Hamilton and his fellow revolutionaries was their understanding that, as British subjects resident in the then American colonies, they were being denied rights enjoyed by those resident in Great Britain which had by then come about there as a sequel to the constitutional and political compact, often termed a Westminster system of government, that had followed cataclysmic events in the British Isles in the 17th century.

It is that compact which has been taken up in the separation of powers found in the national constitutions of Australia, Papua New Guinea and other members of the Commonwealth. Each national constitution is based on an acceptance that that system is a proven, effective check on abuse of sovereign power.

Therefore, no discussion of judicial accountability or of related threats to judicial independence is complete without understanding how that compact came about. I shall explore this topic in detail shortly. First it is desirable to reflect about the nature of power.

---

8 Alexander Hamilton, The Federation Papers, No 78, "The Judiciary Department": McLean's Edition, New York, as reproduced in Yale Law School, Lillian Goldman Law Library, Avalon Project: https://avalon.law.yale.edu/18th_century/fed78.asp Accessed, 30 January 2023.

Separation of Powers: Westminster origins

Famously and in relation to the possession and exercise of power generally, the British politician and historian, John Dalberg-Acton, 1st Baron Acton opined in his 19th century correspondence with Bishop Creighton about the moral dilemmas presented by writing a history of the Inquisition conducted by the Roman Catholic Church, "Power tends to corrupt and absolute power corrupts absolutely."[9]

It may be that Lord Acton's view as to the tendency of power to corrupt is too absolute. Modern psychological studies of human behavioural characteristics suggest that the conferral of power on an individual is not universally conducive to moral corruption and worse, but instead heightens pre-existing ethical tendencies.[10] So it may be that the rationale for an independent exercise of judicial power is to address a tendency rather than a certainty of abuse of absolute sovereign power. It is elementary history that not all dictators are, or at least remain, benign.

What then were cataclysmic events in 17th century Great Britain and the constitutional and political compact which followed? As will be seen, in those events are exemplified enduring human behavioural tendencies in the exercise of power which make it impossible reasonably to dismiss the resultant compact as a neo-colonial irrelevancy.

I shall do that which shall be fit for a judge to do

A sequel to the Norman invasion of England in 1066 was the concentration of sovereign power in a monarch, King William I, known as William the Conqueror,

---

9 Reproduced in Online Library of Liberty: https://oll.libertyfund.org/quote/lord-acton-writes-to-bishop-creighton-that-the-same-moral-standards-should-be-applied-to-all-men-political-and-religious-leaders-included-especially-since-power-tends-to-corrupt-and-absolute-power-corrupts-absolutely-1887 Accessed, 30 January 2023.

10 Christopher Shea, Why Power Corrupts, Smithsonian Magazine, October 2012, referring to studies led by Professor Katherine A. DeCelles, a professor of management at the University of Toronto, published in the Journal of Applied Psychology: https://www.smithsonianmag.com/science-nature/why-power-corrupts-37165345/ Accessed, 30 January 2023.

and his successors. By the 17th century, the practical and also political impossibility of all aspects of such power being exercised personally by the monarch, or even the monarch assisted by his or her appointed councillors, had seen aspects of that power at least in part devolved, the legislative to a parliament and the judicial to persons learned in the law appointed to courts established by the monarch. Nonetheless, the view persisted under the early Stuart kings, King James I (in Scotland, King James VI) and his son, King Charles I that the holding of kingship was a Divine Right, which necessarily conferred monarchical supremacy such that a monarch could, if so disposed, dispense at will with either parliament or judges and govern alone.

I highlighted particular events concerning relations between these early Stuart kings and the judiciary in relation to the exercise of judicial power, and accountability for its exercise in a paper which I delivered in 2016 at a Commonwealth Parliamentary Association Seminar.[11] The following account of those events is taken from that paper.

In 1607, King James purported himself to adjudicate and pronounce upon a controversy between parties. That controversy and the King's ability himself to resolve it came before Coke in the Court of Common Pleas in what is known as the *Case of Prohibitions*.[12] Coke overturned the King's judgement, holding, "The King in his own person cannot adjudge any case, either criminal or betwixt party and party; but it ought to be determined and adjudged in some Court of Justice, according to the law and custom of England."[13]

---

11 J A Logan, "The relationship between parliament, the judiciary and the executive ("the Latimer House principles"), 27th Commonwealth Parliamentary Seminar, Parliament House, Brisbane, 9 June 2016: https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-logan/logan-j-20160609 Accessed, 30 January 2023.

12 (1607) 12 Co.Rep. 64; 77 ER 1342; [1607] EWHC KB J23; British and Irish Legal Information Institute (BAILII) website: http://www.bailii.org/ew/cases/EWHC/KB/1607/J23.html (Accessed, 7 May 2016).

13 In the report of the Case of Prohibitions, Coke reported the following exchange which had occurred between The King and him:
A controversy of land between parties was heard by the King, and sentence given, which was repealed for this, that it did not belong to the common law: then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that

In 1610, Chief Justice Coke was summoned to appear before the King's Privy Council. There he was requested to furnish a legal opinion on the subject of whether the King might, by proclamation, as opposed to Act of Parliament, prohibit new buildings in London, or the making of starch or wheat. This subject had been referred to the King by the House of Commons as a grievance and as supposedly against law. Coke requested and was granted time to consult his fellow judges, such was the importance of the question.

Coke's answer, which represented the collective view of the judges, has come to be known as the *Case of Proclamations*.[14] That answer included the following pronouncements:

- "the King by his proclamation of other ways cannot change any part of the common law, or statute law, or the customs of the realm"; and
- "the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law, and to make an offence which was not".

These and other pronouncements as to the role and independence of the judiciary did not endear Coke to King James. At that time, judges did not enjoy security of tenure. They served at the pleasure of the King. Initially, Coke was transferred from the Court of Common Pleas to be the Chief Justice of the Court of King's Bench. That was probably because the jurisdiction of the latter court was concerned with individual rights whereas that of the former was with the rights

---

true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debed esse sub homine, sed sub Deo et lege* [That the King ought not to be under any man but under God and the law].

[14] (1611) 12 Co. Rep 74; 77 ER 1352; [1610] EWHC KB J22: BAILII website: http://www.bailii.org/ew/cases/EWHC/KB/1610/J22.html (Accessed, 7 May 2016).

of the Crown. The transfer, so it was thought, gave Coke less opportunity to vex the King by his assertions of judicial independence.

In 1616, came the *Case of Commendams*. The name of that case is taken from the use by the King of an *in commendam writ* as a means of transferring income producing ecclesiastical property belonging to a bishophric to a Bishop while at the same time relieving the holder of that office from having in person to perform the duties of that office and allowing another to perform them in place of the bishop. The writ was a convenient means of rewarding those who deferred to the King. King James used such a writ to allow one Richard Neile to hold office as the Bishop of Coventry and enjoy the income from two properties associated with that bishophric without performing personally the duties of that office. The grant of the property to Bishop Neile by the King was contested before the Court of King's Bench by two individuals who claimed that the property in question belonged to them. The case touched on the King's prerogative to issue *in commendam writs*.

Coke and his fellow King's Bench judges were about to hear the case when, on behalf of King James, his Attorney-General, Francis Bacon, appeared to assert the prerogative of *Rege inconsulto* [that the King has the power to advise judges before they rule] and ordered them to stay the proceedings until His Majesty advised them. Instead, the judges proceeded to hear and determine the case, holding that the *in commendam writ* procedure was illegal. The judges thereafter sent a letter to King James in which they stated "in case any letters come unto us contrary to law, we do nothing by such letters, but certify your Majesty thereof, and go forth to do the law notwithstanding the same".[15] The judges were then summoned before the King who ripped up their letter in front of them, stating that "I well know the true and ancient common law to be the most favourable to Kings

[15] Hostettler, John (1997). Sir Edward Coke: A Force for Freedom. Barry Rose Law Publishers (Hostettler), p. 90.

of any law in the world, to which law I do advise you my Judges to apply your studies".[16] While all the other judges were repentant, Coke maintained the position stated in the letter, informing the King "When the case happens I shall do that which shall be fit for a judge to do". For this defiance of Royal authority, Coke was dismissed from his office as Chief Justice of the Court of King's Bench.

King James' assertion, and exercise, of a purported power to summon judges before him to explain their judicial determinations, and a related power to dismiss them if he deemed that explanation or the determination to be unacceptable to him offers a paradigm example of an assertion that the judiciary is accountable to the executive.

King James successor, his son King Charles I, persisted in his father's beliefs that both the judiciary and parliament were accountable to him for the exercise of judicial and legislative powers respectively, and that he could dispense with either or each and govern alone at will. History instructs that, after his defeat in a vicious civil war between his forces and those of parliament, King Charles I paid for such beliefs with his life. Yet history also instructs that regicide and the republican ideal soon evolved in mid-17th century Great Britain into the military dictatorship of Lord Protector Cromwell, backed by the New Model Army.

As I also recalled in that Commonwealth Parliamentary Association paper, on Cromwell's death, peace was preserved by a restoration of the monarchy but on terms that, over the course of the reign of King Charles II and his successors, led to an acknowledgement of the supremacy of parliament within the field of its legislative competence and to the affirmation of the separate role of an independent judiciary by express provision for the continued tenure in office of judges, subject to capacity and good behaviour. The instruments by which these

[16] Hostettler, p. 91.

features of what has proved to be an enduringly successful system of government were enshrined were:

- The Declaration of Breda of 4 April 1660, by which King Charles II undertook, if restored to power, to issue a general pardon for crimes committed during the Civil War and the period of the Protectorate for all those who acknowledged him as the lawful monarch; to uphold the right of those who purchased property during that period to retain that property; religious toleration; to pay arrears owing to members of the army, and that the army would be reconstituted under the service of the Crown. It was on this basis that the English Parliament resolved on 2 May 1660 that "government ought to be by King, Lords and Commons", which is the essence of a constitutional monarchy. In this lie the origins of the Westminster system of government in which Ministers appointed by the Crown or other Head of State hold office only while they enjoy the confidence of parliament.
- The Declaration of Rights of 1688, which recited the infractions of King James II of the laws of England during his reign and formed the basis upon which his successors King William III and Queen Mary II were invited and agreed to accept the Throne in succession from him. This declaration was later recited and the rights it specified enacted by the English Parliament in the *Bill of Rights 1689* (Eng).[17] Article 9 of the Bill of Rights is the foundation of the freedom of speech in parliament:

  > "**Freedom of Speech.**
  >
  > That the Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament."

[17] For the original text of the Bill of Rights 1689, see the Yale Law School's Avalon Project website: http://avalon.law.yale.edu/17th_century/england.asp. As presently in force in the United Kingdom, the text of the Act is to be found at legislation.gov.uk: http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction. Each accessed, 12 May 2016.

(as rendered in modern English form)

In conformity with this freedom, courts do not permit the tendering in court of statements made in parliament for the purpose of drawing an adverse inference against a member of parliament and a member of parliament may not be sued for defamation for statements made in parliament.

- The *Act of Settlement 1701* (Eng), which provided for the succession to the Throne and for the terms of that succession after the failure of King William and Queen Mary and their successor, Queen Anne to produce a surviving heir. Clause 7 of Article III of that Act provided:

  > "That after the said Limitation shall take Effect as aforesaid Judges Commissions be made *Quam diu se bene Gesserint* and their Salaries ascertained and established but upon the Address of both Houses of Parliament it may be lawful to remove them."[18]

Judicial tenure *Quam diu se bene Gesserint* is tenure during good behaviour. It affords the judiciary a tenure not enjoyed by Chief Justice Coke and facilitates the discharge of the judicial function he defended.

There is nothing uniquely historical or English about officers of the executive asserting a right to hold the judiciary accountable.

[18] Original text, British History Online website: http://www.british-history.ac.uk/statutes-realm/vol7/pp636-638 Accessed, 12 May 2016. As the Act of Settlement as in force today in the United Kingdom, see legislation.gov.uk: http://www.legislation.gov.uk/aep/Will3/12-13/2/section/III Accessed 12 May 2016.

Australia and Papua New Guinea: comparative approaches

Papua New Guinea

The troubles

On 12 December 2011, the Supreme Court of Papua New Guinea gave judgment in *Re Reference to Constitution section 19(1) by East Sepik Provincial Executive*.[19] At the heart of that case was whether the great architect of Papua New Guinea's independence and then Prime Minister, Grand Chief the Rt Hon Sir Michael Somare had, by an absence from three meetings of parliament, forfeited his seat in parliament and thus also his office as Prime Minister. By majority, the court held that he had not. The corollary of this was a conclusion that the Hon Peter O'Neill, who was then at least purporting then to serve as Prime Minister in a government in coalition with the Hon Belden Namah as Deputy Prime Minister had not been duly elected as Prime Minister.

The members of the majority included the then Chief Justice, Sir Salamo Injia and Justice Nicholas Kirriwom.

A period of high political tension in Papua New Guinea, even turmoil, attended this court case and its aftermath. I gave an account of the events of this period in a paper which I delivered last year concerning the rule of law in Papua New Guinea. The following is taken from that account.

In between November 2011 and May 2012, Injia CJ was twice purportedly suspended from office and twice arrested.[20] There was no substance in any of

---

19 [2011] PGSC 41; SC1154.

20 I detail the circumstances of these purported suspensions and arrests in my paper, A Year in the Life of an Australian Member of the PNG Judiciary, paper delivered at the 18th Commonwealth Law Conference Stream C - Constitutionalism, Human Rights & the Rule of Law – "Lawyers on the Frontline", Cape Town South Africa.
15 Apr 2013: https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-logan/logan-j-20130415 accessed, 30 January 2023.

these purported suspensions and arrest charges. Justice Kirriwom was also arrested, again without any substance in the charge.

According to evidence tendered in a later Leadership Tribunal proceeding, [21] the circumstances attending the second occasion on which Injia CJ was arrested were particularly dramatic. While the Chief Justice was engaged in May 2012 in hearing a contempt proceeding at the Law Courts at Waigani, the Hon Belden Namah, accompanied by some other MPs and some members of the Royal Papua New Guinea Constabulary and the Defence Force stormed into the courtroom with Mr Namah shouting:

> "Chief Justice, I want your immediate resignation now. Resign now Chief Justice, your immediate resignation. You are not a credible person. You are bringing country down. You have got to respect the people of Papua New Guinea. You are only one man, you are bringing this country down. Arrest him, follow him. Arrest him, arrest him, arrest him. Enough is enough. Enough is enough. Take him straight to the car. *Paitim em* [ie seize him]. Arrest him. He asked for it, he will get it."

According to that evidence, the Chief Justice exited the court room. His Associate attempted to close the door behind him but was injured in this endeavour and the door was forced open by some of the accompanying police officers and soldiers, who then rushed through searching for the Chief Justice.

Proceedings on the charge against the Chief Justice were in short order stayed and it was later dismissed.

Although this Leadership Tribunal concluded that Mr Namah engaged in misconduct to which the evidence mentioned attested, and made a

---

21 *Namah, In re* [2018] PGLT 1; N7194 (LT), at [30].

recommendation to the Governor-General that Mr Namah be dismissed from office, Papua New Guinea's National Court later held,[22] on an application for judicial review of the Tribunal's decision by Mr Namah, that this recommendation had been made without affording him an opportunity to be heard as to penalty. Further, taking into account delay in the institution of proceedings before a Leadership Tribunal, that this was the second occasion in which such a proceeding had been brought before such a tribunal, that the Tribunal's reasons had conflated in a way not able to be disentangled findings as to the occurrence of charged conduct and penalty, that contempt proceedings against Mr Namah in respect of the same alleged conduct had been discontinued in 2013 and that Mr Namah had, since the alleged misconduct, twice been re-elected to parliament, the court decided to quash this tribunal's decision and recommendation and to permanently stay Leadership Tribunal proceedings in respect of the alleged incident. An appeal against these orders was subsequently dismissed as an abuse of process.[23]

The position which therefore obtains is that there is no subsisting finding of a court or tribunal on the evidence mentioned that the Hon Belden Namah was guilty of misconduct.

Also in the period November 2011 to May 2012, Papua New Guinea's parliament enacted the *Judicial Conduct Act* 2012. This provided for a mechanism for the suspension and removal of judges which was not readily reconcilable with the provisions in the PNG Constitution on these subjects.[24] I visited Papua New Guinea for two Supreme Court sittings over this period, in February and in April 2012. How well I recall the air of tension that pervaded the judicial branch during this period, especially in April 2012. For resident judges, their very livelihood

22 *Namah v Higgins* [2020] PGNC 189; N8415.
23 *Independent State of Papua New Guinea v Namah SC2037*, 16 December 2020.
24 PART VI—Division 5, Subdivision H.—Removal from Office of Senior Judicial and Legal Office-holders., PNG Constitution.

and life's vocation in the Law was in jeopardy via the Judicial Conduct Act. And how enduring is my admiration for the way in which the PNG judiciary continued independently to do justice according to law. Business as usual, in those unusual times.

The aftermath

Since 2012, Papua New Guinea has again held national elections in 2017 and 2022. Over this period, government has changed, based on an ability to command a majority in parliament. Moreover, in the immediate aftermath of the death in 2021 of Sir Michael Somare, the Hon Belden Namah made a fulsome and public apology for his behaviour in that period of tension in 2011 to 2012 in and in relation to Sir Michael Somare, Sir Salamo Injia and the judiciary generally. So, too, did the Hon Peter O'Neill tender a public apology for his part in the political impasse which occurred as a sequel to the Supreme Court's decision.[25] In 2013, the PNG Parliament also repealed the Judicial Conduct Act.[26]

Other examples but to no different effect of such overt and dramatic assertions of judicial accountability to the executive might be drawn from the shared experience of the Commonwealth in modern times.

In the Commonwealth, any assertion that the judiciary is responsible to the executive for its decisions is met, as I have mentioned, by constitutional provision to the contrary.

In Australia, judicial accountability is solely via a procedure for removal from office by the Governor-General in Council but only "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".[27] That accountability mechanism

---

25 Post Courier, 16 March 2021.
26 *Judicial Conduct (Repeal) Act 2013*.
27 Australian *Constitution*, s 72(ii).

is a direct legacy of the security of judicial tenure for which the Act of Settlement provided.

Papua New Guinea's constitution also provides for removal of the senior judiciary from office on the ground of misbehaviour or incapacity. However, taking up an assessment by Papua New Guinea's Founding Fathers about the stage of national development as at Independence in 1975, the constitutional accountability mechanism which commended itself to the people of Papua New Guinea in respect of judicial behaviour was to consign the making of a value judgement as to whether there are "good grounds for removing" the judge concerned to a tribunal consisting of three presently serving or former judges of the Supreme Court or the National Court or "of a court of unlimited jurisdiction of a country with a legal system similar to that of Papua New Guinea, or of a court to which an appeal from such a court lies".[28]

Papua New Guinea has had occasion to constitute such a tribunal to investigate and report upon alleged judicial misconduct (alleged gross delay in delivery of reserved judgements). However, the judge concerned resigned before the tribunal had completed its investigation thereby removing occasion for any furtherance of that investigation by that tribunal.[29] It proved unnecessary, in light of its expeditious repeal, for the validity of a separate accountability mechanism in Papua New Guinea's Judicial Conduct Act ever to be judicially determined.

---

28 PNG *Constitution*, ss 179, 180 and 181.

29 For proceedings concerning this tribunal and the occasion for it being established, see *Sakora v Judicial and Legal Services Commission* [2017] PGNC 291; N6991 (19 September 2017) and *Application Pursuant to Constitution, Section 18(1) by Justice Sir Bernard Sakora* [2020] PGSC 76; SC1980 (31 July 2020).

Australia

Federal and constitutional dilemma

That same irreconcilability objection has not yet been voiced, and perhaps never will be, in relation to a current proposal by the Australian Government to establish a judicial accountability mechanism beyond that enshrined in the Australian Constitution. The Australian government has signified in principle support for a federal judicial commission of some sort. It has released a discussion paper[30] as a sequel to an Australian Law Reform Commission Report (ALRC)[31] which recommended the establishment of a federal judicial commission. The ALRC did not recommend any particular model for that commission.

In the government's discussion paper, it is stated:

> Proponents of an independent complaints body have argued that it would promote judicial accountability by providing a more accessible, structured and transparent procedure for complaints to be raised and dealt with.
>
> In its submission to the 2021 ALRC inquiry, the Australian Bar Association expressed the view that, '[a]bsent a federal judicial commission, there is no readily available, independent of the court recourse for improper behaviour on the part of the federal judiciary'.
>
> [Footnote references omitted]

Insofar as the quoted view of the Australian Bar Association (ABA) might be thought to suggest that there is *no* existing mechanism for addressing federal

30 Australian Attorney-General's department, Scoping the establishment of a federal judicial commission: https://consultations.ag.gov.au/legal-system/federal-judicial-commission/supporting_documents/discussionpaper.pdf

31 Australian Law Reform Commission, Without Fear or Favour: Judicial Impartiality and the Law on Bias (ALRC Report 138, December 2021) 310 [9.25]: https://www.alrc.gov.au/publication/ji-report-138/

judicial misbehaviour, that view is incorrect, for reasons already given. Ever since the several Australian colonies federated and gained independence from the United Kingdom on 1 January 1901 there has been the constitutionally ordained mechanism mentioned namely, a parliamentary value judgement that misbehaviour by a particular judge has been proved and a consequential address by each House to the Governor-General praying for the removal from office of that judge. But the emphasis in the ABA submission is, I think, on "readily available".

Seemingly implicitly, the view has been taken by the ABA, and highlighted by the Australian government in the discussion paper, that correspondence to a member of the national parliament, or the presentation by members of the public of a petition to parliament promoting a case for a judge's removal via the constitutionally ordained mechanism is not "readily available" to any Australian. Some, with respect, might see such a view of the accessibility of members of the national parliament to Australians as odd. But it is hardly a unique view in Australia. Notwithstanding that their processes for removal of judges are also ultimately parliamentary, judicial commissions of one sort or another, charged with the initial handling of complaints in respect of conduct by State judicial officers, have been established in most Australian States.

Perhaps it is that the contemporary attraction in the Australian political class and the ALRC for judicial commissions stems from a recognition of a deficiency in civic education and understanding about the ability of parliament to remove a judge and the related accessibility of a member of parliament. Perhaps it lies in an acceptance that, however this may be, there is no general public confidence that the political class would, without more, react to such a complaint. Or there may be other reasons, for example, an acknowledgement that the other demands on the time of the political class are such that it would just not be practical for them to investigate and report on a complaint of judicial misbehaviour. Whatever

the reasons, there is no denying that judicial commissions have been seen by many legislatures as conducive to maintaining public confidence in the judiciary by the general public by providing a mechanism for supporting parliaments to hold judges to account for misbehaviour (or incapacity).

While the model for a federal judicial commission, and perhaps whether there will be one, has yet to be settled, there is no suggestion either in the ALRC report, or the government's discussion paper, that any commission established would be other than deferential to the constitution. In other words, the determination of whether there existed proved misbehaviour (or incapacity) would remain with the parliament.

Under existing Australian law, there is already statutory provision for the appointment, by parliamentary resolution, of a commission to investigate and report to the parliament upon a specified allegation of misbehaviour or incapacity of a specified Commonwealth judicial officer.[32] A "Commonwealth judicial officer" is defined so as to apply to judges of Australia's ultimate appellate court, the High Court of Australia, and judges of all other courts established under the Australian constitution.[33] Membership of any such commission must include at least one former judge in a commission of three persons.[34]

There is, and, given the absence of express prescription in that regard in the Australian constitution, probably could not be, any obligation on the part of parliament to avail itself of a reference to such a commission in dealing with an allegation of misbehaviour (or incapacity) warranting the removal of a federal judge.

Reasonable minds might perhaps reasonably differ as to whether the present, non-binding Australian provision for the investigation of alleged judicial

---

32 *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012*.
33 *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012*, s 7.
34 *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012*, s 13.

misbehaviour, by a commission not even a majority of which need be former judges,[35] or even a former superior court judge, is or is not better than Papua New Guinea's constitutionally entrenched, adjudicative tribunal model. Such a tribunal can be comprised only of currently serving or former superior court judges. In theory, although unlikely in practice, under present Australian law a commission investigating alleged misbehaviour on the part of a judge of the High Court of Australia might lawfully comprise one inferior court judge and two adults who finished their formal education without completing secondary school, with questions being decided by majority.

s72: What constitutes misbehaviour? The Murphy Commission

The current, Australian statutory provision at least has the advantage of being a standing model for the investigation of alleged judicial misbehaviour (or incapacity). That is in contrast to the *ad hoc* provision for a parliamentary commission of inquiry,[36] adopted by the parliament in respect of the only occasion in respect of which the subject of alleged misbehaviour by a federal judge warranting removal has arisen for consideration by the Australian parliament. That concerned alleged misbehaviour by the Honourable Lionel Keith Murphy, then a justice of the High Court of Australia. In contrast to the current Australian statutory provision, the members of that commission (the Murphy Commission) could only be current or former Australian superior court judges.[37] Thus, this *ad hoc* model had greater membership affinity with the composition of a Papua New Guinea tribunal than the current Australian standing provision. As it happened, although the Murphy Commission embarked upon its

35 The definition of "Commonwealth judicial officer" includes "a judge or justice of a court created by the Parliament" and thus would include a judge of the Federal Circuit and Family Court of Australia (Division 2), which is not a superior court of record: *Federal Circuit and Family Court of Australia Act 2021*, s 10(1).

36 Parliamentary Commission of Inquiry Act 1986.

37 Parliamentary Commission of Inquiry Act 1986, s 4(3) and s 3 definition of "judge".

investigation, Murphy J died in office prior to the completion of that investigation, thus removing any occasion for any report to parliament by it.[38]

What constitutes misbehaviour for the purposes of the removal of a federal judge under the Australian constitution has never been the subject of definitive judicial authority. It was, however, addressed in detail in an opinion furnished by the then Australian Solicitor General[39] to the Australian Senate Select Committee on the Conduct of a Judge, the report of which to the Senate in August 1984 preceded the establishment of the Murphy Commission.[40] The conclusion reached by the Solicitor General was as follows:

> Misbehaviour is limited in meaning in section 72 of the *Constitution* to matters pertaining to -
>
> (1) judicial office, including non-attendance, neglect of or refusal to perform duties; and
>
> (2) the commission of an offence against the general law of such a quality as to indicate that the incumbent is unfit to exercise the office.
>
> Misbehaviour is defined as breach of condition to hold office during good behaviour. It is not limited to conviction in a court of law. A matter pertaining to office or a breach of the general law of the requisite seriousness in a matter not pertaining to office may be found by proof, in appropriate manner, to the Parliament in proceedings where the

---

38 Brian Galligan, 'Murphy, Lionel Keith (1922–1986)', Australian Dictionary of Biography, National Centre of Biography, Australian National University, https://adb.anu.edu.au/biography/murphy-lionel-keith-15823/text27022, published first in hardcopy 2012, accessed online 31 January 2023. The Parliamentary Commission of Inquiry Act was repealed later in 1986 by the *Parliamentary Commission of Inquiry (Repeal) Act 1986*.

39 The then Mr Gavan Griffith QC, now Mr Gavan Griffith AO KC.

40 Opinion of the Australian Solicitor General dated 24 February 1984, Appendix 6(ii), Senate Select Committee on the Conduct of a Judge, Report to the Senate, August 1984: https://www.aph.gov.au/-/media/02_Parliamentary_Business/Parliamentary_Commission/Class_B_documents/In_the_matter_of_section_72_of_the_Constitution.pdf?la=en&hash=60A0C98B7FE2C54D1F7F53BD8927FB19F716BFCD Accessed 5 February 2023.

offender has been given proper notice and opportunity to defend himself.

The Solicitor General accepted, and it must follow from the language employed in the Australian constitution, that parliament retained a discretion not to resolve to pass an address seeking the removal of a judge, notwithstanding it was satisfied that there misbehaviour had been proved.

The meaning of "misbehaviour" proved controversial before the Murphy Commission. Counsel for Murphy J submitted that, as used in the Australian constitution, it meant:

(a) misconduct in office, and
(b) conviction for an infamous offence.[41]

Each retired judge constituting the Murphy Commission ruled upon this submission and offered related detailed reasons. None accepted it to be correct. Each was of the opinion that misconduct need not be misconduct in office in order to constitute "misbehaviour".

The view of the Murphy Commission's presiding member, the Honourable Sir George Lush was, "the word 'misbehaviour' in s. 72 is used in its ordinary meaning, and not in the restricted sense of 'misconduct in office'. It is not confined, either, to conduct of a criminal nature." He added in respect of judicial conduct, "If their conduct, even in matters remote from their work, is such that it would be judged by the standards of the time to throw doubt on their own suitability to continue in office, or to undermine their authority as judges or the standing of their courts, it may be appropriate to remove them."

---

[41] Murphy Commission: Commission Hearings, Ruling on 5 August 1986 on the meaning of s 72 of the Constitution: https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Tabled_Papers/Parliamentary_Commission/Class_B_Records Accessed 5 February 2023.

A like expansive view of what may constitute "misbehaviour" is evident in the ruling of Sir Richard Blackburn, "The material available for solving this problem of construction suggests that 'proved misbehaviour' means such misconduct, whether criminal or not, and whether or not displayed in the actual exercise of judicial functions, as, *being morally wrong*, demonstrates the unfitness for office of the judge in question." (Emphasis added).

The remaining member of the Murphy Commission, the Honourable Andrew Wells, offered a reflective rationale for his similarly expansive view of "misbehaviour", which is desirably quoted at some length:

> The office of judge differs markedly from that of many other public officials. The performance of his duty calls on him to display, of a high order, the qualities of stability of temperament, moral and intellectual courage and integrity, and respect for the law. Those and other like qualities of character and fitness for office, if displayed by a judge in the exercise of his judicial function, are unlikely to be found wanting in his conduct when not acting in office. If they are said to be genuinely possessed and not feigned, they would stand uneasily with conduct in private affairs that testifies to their absence.
>
> There are, however, other qualities that do not carry the same guarantee of stability, integrity, and respect for the law in private life. For example, a man may possess profound learning, intellectual adroitness, and an accurate memory, and, by using them, adequately discharge the duties of many public offices; but, without more, he could not discharge the duties of judicial office.
>
> In short, a man's moral worth, in general, pervades his life both in and out of office.

It is not surprising to find, therefore, that if, in the general affairs of life beyond his judicial functions, a judge displays aberrations of conduct so marked as to give grounds for the view that he lacks the qualities fitting him for the discharge of his office, the question is likely to arise whether he should continue in it. Such a question cannot be resolved without establishing standards of conduct by reference to which the consequences of proven misconduct may be assessed.

In determining the standard of conduct called for by section 72, it is both logical and inevitable that regard should be had to the legislative and constitutional framework, referred to above, in which section 72 speaks.

At this point, one must be cautious. The Constitution was meant to apply to mankind, and it would be unreasonable to require of a judge a standard of extra judicial conduct so stringent that only a featureless saint could conform to it. It is only to be expected that High Court judges, like everyone else, will vary in character, temperament and personal philosophy. But there is, I have no doubt, a clear distinction between, say, mere eccentricity of conduct, or the fervent proclamation of personal views upon sane matter of public concern, on the one hand, and plain impropriety, on the other.

There may be degrees of departure from wholly acceptable conduct outside the judicial function that fall short of misbehaviour in the foregoing sense. Without attempting to fix an exhaustive range of categories, it is possible to predicate conduct that is unwise, or that amounts to a marked, but transient, aberration or a momentary frenzy, or that would be seriously deprecated by other judges or by the community, but yet would not be so wrong as to attract the condemnation of s. 72. Indeed, one may go further, and affirm that there

> may be conduct of such a kind that, if displayed habitually or on several occasions, could amount to misbehaviour, within the meaning of section 72, that nevertheless, if displayed only once or twice, or perhaps on a handful of occasions or in special circumstances, would not.
>
> The issue raised by section 72 would thus appear to pose questions of fact and degree. Somewhere in the gamut of judicial misconduct or impropriety, a High Court judge's conduct, outside the exercise of his judicial function, that displays unfitness to discharge the duties of his high office can no longer be condoned, and becomes misbehaviour so clear and serious that the judge guilty of it can no longer be trusted to do his duty. What he has done then will have destroyed public confidence in his judicial character, and hence in the guarantee that that character should give that he will do the duty expected of him by the Constitution. At that point, section 72 operates.

Mr Justice Murphy did institute a proceeding in the High Court concerning the meaning of misbehaviour in s 72 of the Australian *Constitution* but this proceeding was withdrawn by him before it was heard, because by then the imminence of his death, and the related futility of any report by the Murphy Commission, had become obvious.[42]

Aside from the present standing provision for the establishment by parliament by resolution of a commission to investigate and report upon alleged misbehaviour warranting removal, the legislation under which federal courts are established presently provides for the handling by a head of jurisdiction of complaints in respect of "a complaint about the performance by another Judge of his or her

[42] Annotation on High Court file concerning Sydney Registry proceeding No 87 of 1986, Records of the Commission of Inquiry, class B records: https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Tabled_Papers/Parliamentary_Commission/Class_B_Recordsm Accessed, 5 February 2023.

judicial or official duties".[43] In dealing with any such complaint, the head of jurisdiction may be assisted by a "complaint handler", who need not be a judge.[44]

Quite how this current Australian federal, head of jurisdiction complaint handling mechanism interplays with the constitutional provision for the removal of judges on grounds confined to proved misbehaviour or incapacity has never been explored in authority. One might hope that no occasion for any such exploration would ever arise.

Existing checks and balances

The Australian constitution does not envisage any response short of removal for proved misbehaviour on the part of a federal judge. To trivialise what constitutes judicial misbehaviour is to trivialise the whole rationale for judicial independence as a check on the exercise of arbitrary or otherwise unlawful power by the executive or the enactment of statutes beyond constitutional legislative competence by the parliament. Presumably, were a head of jurisdiction to form a view, as a sequel to his or her handling of a complaint, that another judge of his or her court may have engaged in conduct constituting misbehaviour, that head of jurisdiction would so inform the Attorney-General, who, if similarly satisfied, would then promote the passing of the requisite resolutions to establish a commission under the standing statutory provision to investigate and report upon specific allegation of judicial misbehaviour.

<u>The role of the Chief Justice</u>

In respect of complaints and generally in the management of a court, the contemporary Australian federal approach has been to codify judicial administrative powers which, in my view, are implicit in the office of Chief

---

43 See, for example, in respect of the Federal Court of Australia, *Federal Court of Australia Act 1976* (Cth), s 15(1AA)(c).

44 *Federal Court of Australia Act 1976* (Cth), s 15(1AAA).

Justice as *primus inter pares*, first among equals. Thus, in respect of the Federal Court of Australia, there is now express provision for the Chief Justice to "take any measures that the Chief Justice believes are reasonably necessary to maintain public confidence in the Court, including, but not limited to, temporarily restricting another Judge to non-sitting duties".[45] The extent to which there is virtue in stating what some might see as obvious doubtless depends on the virtue one sees in codification. In no sense, however, is a Chief Justice a supervisor of subordinates. To some extent, the current provision in respect of complaint handling might encourage a misconception about that. In this sense, the transference of complaint handling to a federal judicial commission might offer a superior model. But it may just encourage a misconception that such a commission has a supervisory role in relation to federal judges.

Constitutionally, in Australia, this can never be. As already noted, each federal judge is responsible solely to parliament and then only in respect of what parliament adjudges to be proved misbehaviour (or incapacity). At most, all that a federal judicial commission can do is to draw to parliament's attention, in a non-binding way, judicial conduct which that commission considers might amount to misbehaviour in the constitutional sense.

Accountable to reasons: the appellant jurisdiction

Constitutional accountability and related supporting investigatory mechanisms aside, judges in both Australia and Papua New Guinea other than at ultimate appellate level are accountable in respect of their judgements via avenues of appeal ordained in law. Further, in both Australia[46] and in Papua New Guinea,[47] the national ultimate appellate court has a separate, constitutionally entrenched jurisdiction judicially to review by orders in the nature of prerogative writs the

45 *Federal Court of Australia Act 1976* (Cth), s 15(1AA)(d).
46 Australian *Constitution*, s 75(v).
47 PNG *Constitution*, s 155(4).

judicial acts of, respectively, other Australian federal courts or, as the case may be, other Papua New Guinea courts.

At all levels of the judiciaries of both Australia or Papua New Guinea, and be it in the exercise of original or appellate jurisdiction, in respect of all but the most formal of procedural orders, a judge is obliged to give reasons for the making of an order, either at a pre-hearing or final stage of a proceeding. Such reasons may be given orally (and permissibly later revised in respect of matters of grammar or style but not so as to change the substance of the oral reasons) or in writing. Moreover, such reasons for judgement must be published, usually by via their delivery in open court.

Judges are thus accountable to the law. They explain themselves via their reasons for judgement. Although never as a substitute for such reasons, so as to increase understanding of those reasons, some well-resourced courts which do not have high caseloads also choose to publish related short summaries of facts, issues and reasons either in respect of each case or in respect of those assessed as having an interest wider than that of the parties.

Subject to the issuing of any such explanatory statement, judges speak only via their reasons for judgement as to why particular cases which they determined were decided in a particular way.

Fixed tenure

In neither Australia nor Papua New Guinea are judges elected. In each instance, this is a deliberate constitutional choice, reflecting a preference for a tenured rather than elected judiciary. In Australia at the federal level, that tenure is until attaining 70 years of age.[48] In Papua New Guinea, judicial tenure is measured by a term of years, fixed at the time of appointment, with reappointment possible

[48] Australian *Constitution*, s 72(2).

and overwhelmingly usual, subject to an overall age limitation – the attainment of 70 years of age (subject to a limited discretion to extend an appointment to 75 years of age).[49]

Ever since the Act of Settlement in the early 18th century, the experience in England and in those countries such as Australia and Papua New Guinea which have chosen to adopt a like judicial system has been that a tenured, rather than elected judiciary, is conducive to judicial independence. In turn, that assurance of independence has been regarded as essential to public confidence that legal controversies, civil or criminal, great or small will be resolved according to law and without fear, favour, affection or ill-will be that related to a party or otherwise. In this sense, no judge in either country is responsible to an electorate for continuance in office.

Contemporary issues

Judicial accountability in the digital age

The observations by the members of the Murphy Commission concerning misbehaviour were made in 1986, before the onset of the internet and digital age. The ability of any individual to disseminate information near-instantaneously, enduringly and to the world at large has added a dimension to judicial conduct other than as a judge beyond the contemplation of those who authored those observations.

The experience of now former Associate Chief Justice of the Court of Queen's Bench of Manitoba (Family Division), Lori Douglas offers a case in point. That office is a Canadian federal judicial appointment. The basis for removal of a

[49] PNG Organic Law on the Terms and Conditions of Employment of Judges, s 2. The maximum appointment term for a judge who is a PNG citizen is 10 years with that for a non-citizen being 3 years.

federal judge in Canada is broadly similar to that which prevails in Australia, Papua New Guinea and elsewhere in the Commonwealth.

Douglas ACJ became the subject of an anonymous complaint to, and subsequent investigation by, the Canadian Judicial Council in respect of whether alleged conduct might constitute grounds for her removal from office by parliament. The Canadian Judicial Council is an example of the judicial commission model for dealing with complaints.

The alleged conduct had its origins in consensual sexual conduct in which the then Ms Douglas had engaged, prior to her appointment to judicial office. The precise allegations made against her are set out in documents published on the Council's website.[50] At the risk of over-simplification and generalisation, prior to her appointment, photos of her engagement in the conduct concerned had been posted to the internet by her husband without, Douglas ACJ maintained, her consent. Those photos became part of the background to a controversy between Douglas ACJ's husband and a third party. Prior to her appointment to judicial office, that controversy had been compromised by her husband by payment of money to that third party with funds said to have been borrowed from the then Ms Douglas. When she was under consideration for appointment to judicial office and as is common practice these days, she had completed a personal circumstances form one question on which was, "Is there anything in your past or present which could reflect negatively on yourself or the judiciary, and which should be disclosed?" The then Ms Douglas answered "No" to this question. The photos concerned continued to be available on the internet.

Three instances of alleged conduct which it was alleged might constitute grounds for removal from office came to be the subject of the investigation:

---

[50] They are set out in the Council's ruling of 4 November 2014 in the course of its inquiry: Available: https://cjc-ccm.ca/en/what-we-do/review-procedures/inquiries-listings#380 Accessed 6 February 2023.

(a) an alleged failure to disclose in the application process;
(b) an alleged incapacity as a result of the public availability of the photos;
(c) an alleged failure to fully disclose facts to former independent counsel.

In the result, the Council's inquiry was discontinued, without any findings being made, when Douglas ACJ indicated that she would retire.[51]

In love and war: shifting attitudes

A recent Australian example of a Chief Justice dealing with an issue of judicial conduct is offered by a report concerning a State Supreme Court judge said to have been seen kissing his female Associate in a nightclub following an Opening of the Law Year observance. The judge concerned was counselled by the Chief Justice of the State concerned about this behaviour.[52]

At least with respect to alleged sexual harassment, conduct during office which comes to light only after the judge concerned has left office has nonetheless in Australia recently been regarded as apt for administrative inquiry by the court concerned, and publication of the result of that inquiry by the head of jurisdiction on behalf of the court, as opposed to just being a subject for the seeking by a complainant of such remedies as the general law confers in respect of the alleged conduct.[53]

Self-evidently in the modern era, such a complaint about a former judge directed to a current head of jurisdiction is no longer regarded as aptly met by a statement

---

51 See the reasons for the Council adjourning its inquiry dated 24 November 2014. Those reasons give a full chronology of the inquiry: Available: https://cjc-ccm.ca/en/what-we-do/review-procedures/inquiries-listings#380 Accessed 6 February 2023.

52 Tasmanian Supreme Court Justice Gregory Geason has been counselled by the Chief Justice: The Mercury, 20 February 2021: https://www.themercury.com.au/truecrimeaustralia/police-courts/tasmanian-supreme-court-justice-gregory-geason-has-been-counselled-by-the-chief-justice/news-story/e3a3f85b7b3d24af5fbae557d3451335 Accessed 6 February 2023.

53 See the statement by the Honourable Susan Kiefel AC, Chief Justice of the High Court of Australia concerning allegations of sexual harassment made with respect to the Honourable Dyson Heydon AC, a former judge of that court: https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf Accessed 8 February 2023. It must be emphasised that no court has made any finding adverse to the Honourable Dyson Heydon AC in respect of any of the conduct alleged.

by the head of jurisdiction that the subject of the complaint is no longer a judge. That is not to say that the reception of a complaint might not hitherto have provoked a review of the adequacy of internal reporting procedures. But the need publicly to be seen to have done something more has proved a powerful one.

This type of accountability, even after leaving judicial office, is undoubtedly a new development. Even to question its appropriateness is to risk being accused of being an apologist for the alleged behaviour concerned. But there must, with respect, surely be limits to this. If the alleged past conduct were criminal and still amenable to prosecution, to publish a statement that complaints had been born out and that apologies had been tendered would be fraught, at least while the subject of the complaint was living and amenable to earthly justice. If that publication were made by an ultimate appellate court, it is difficult to see how then members of that court could, absent a rule of necessity, sit on an appeal against conviction by the subject of the complaint, if a conviction were ever forthcoming. To be clear, sexual harassment is to be deprecated but populism, preservation of civil liberties and due process make for a volatile mix.

Not all inter-personal relationships end amicably. And “recollections may vary” about conduct during such a relationship. Contemporary ease of image taking may facilitate a form of fury after being scorned in ways not encountered by earlier generations. Further, there is the possibility of later, enduring publication to the world at large via the internet of images of lawful, private, pre-judicial office conduct, be it youthful indiscretion or otherwise.

In relation to judicial accountability, there is both benefit and burden in the digital age, ease of image taking or audio-recording may offer corroboration for an allegation of sexual harassment or even just questionable conduct in ways that were impossible in an earlier age. But, as the experience of Douglas ACJ shows, it also offers ways in which lawful, wholly private, sexual conduct may be made known enduringly.

Of course, serious criminal conduct prior to assuming judicial office is one thing, and never acceptable. But as to other conduct and for example, what to one is clumsy, late adolescent ineptitude in seeking, or during, a relationship may be sexual harassment to another, even assuming there is any acceptable proof that such alleged conduct occurred. Decades later, allegations as to sexual harassment, or worse, never earlier made public or even at all may be prompted by publicity associated with a proposed appointment to judicial office. It is salutary to transpose the experience in 2018 of now United States Supreme Court Associate Justice Brett M. Kavanaugh in the course of his Senate Judiciary Committee confirmation proceedings[54] into the context of a complaint of alleged judicial misbehaviour to a parliament of the Commonwealth, to a head of jurisdiction or, where one exists, to a judicial commission.

Inter-personal relationship issues aside, some who enter the legal profession and later judicial life have earlier callings outside the law. In the 20th century, two generations entered the legal profession and, later, the judiciary after military service during a world war. Prior military service of any kind is uncommon in the judiciary these days. The possibility of greater incidence of such experience might seem remote until the very moment hostilities occurred. The invasion of Ukraine by Russia a year ago should remind us of that. Years later, a judge who had served his or her country in armed conflict in their youth might be accused of having committed or covered up a war crime. Heinous conduct in war ought always be condemned. Area bombing of civilian targets was common place during the Second World War. But sometimes what was once acceptable is by the standards of a different age no longer. Some who served, for example, in Air Crew Europe in the Allied Air Forces in the Second World War later became

[54] One Julie Swetnick alleged to the Judiciary Committee that, while at Gaithersburg High School, Judge Kavanaugh participated in conduct which included targeting girls for gang rape. This was emphatically denied by the judge, denials supported by other statements made to the committee. In the result, the United States Senate voted 50-48 to confirm his nomination an Associate Justice of the US Supreme Court: See the Judiciary Committee file in relation to the nomination: https://www.judiciary.senate.gov/nominations/supreme/pn2259-115 Accessed 6 February 2023.

judges.[55] As the war progressed, many German cities were repeatedly bombed by Allied Air Forces (as the Germans did to Allied cities). By later standards, and perhaps even at the time (although that is controversial), indiscriminate area bombing of cities might be regarded as a war crime.[56] It is not hard to envisage a campaign for judicial removal, given megaphone quality via internet publication, based on alleged or even acknowledged conduct during prior military service.

Love and war aside, reflection on the subject yields the thought that there may be a range of human behaviours, lawful at the time and conducted in private circumstances which, if later publicised and by the standards of a different age, may be considered questionable. Moreover, in the age of Twitter, trolling and "#Metoo", allegation may be equated with proof in terms of a public clamour for removal and attractive to some in the political class and even some in the judiciary on the basis of "reputational risk".

In short then, one development in relation to judicial accountability is the potential presented by the internet for preservation and universal publication of conduct long ago and related commentary and allegations. For some at the Senior Bar, and quite apart from a near inevitable reduction in income, this may operate as a disincentive for accepting public judicial office. In turn, that may adversely affect the quality of the senior judiciary. The submission, rejected by the Murphy Commission members, that pre-appointment behaviour not constituting criminal conduct at the time was not "misbehaviour" for the purposes of the removal provision at least had the advantage of precision of application. Yet so confining

---

55 For example, Lord Geoffrey Lane AFC, later Lord chief Justice of England and Wales, served as a bomber pilot in the RAF in WW2: biographic note, Wikipedia: https://en.wikipedia.org/wiki/Geoffrey_Lane,_Baron_Lane Accessed 6 February 2023. Judge Edmund Broad DFC was another who served as a bomber pilot in the RAAF in WW2: Queensland Supreme Court Library Biographic Note: https://www.sclqld.org.au/judicial-papers/judicial-profiles/profiles/ebroad Accessed 6 February 2023.

56 See the Practice in Relation to Rule 13, Area Bombardment, International committee of the Red Cross, International Humanitarian Law Databases: https://ihl-databases.icrc.org/en/customary-ihl/v2/rule13 Accessed: 6 February 2023.

the meaning of that term has all of the disadvantages identified in the reasons for ruling of the members of the Murphy Commission.

Executive criticism

I have dwelt on these personal behavioural aspects of judicial accountability, because it is all too easy when considering that subject just to focus on the more obvious dimension of tensions between the executive and the judiciary arising from particular judicial decisions.

As to tensions between the executive and the judiciary arising from particular judicial decisions, such criticism is, in my experience and to my observation, ever increasingly personal. That may not just be a form of intimidation but also a stratagem to divert attention from the merits of judicial reasoning in a particular case.

Publication via the internet both magnifies and preserves this type of criticism. Moreover, no longer, as once in an age of publicity confined to the print medium, is a report of today's ministerial "doorstop" or folksy banter with a chosen radio "shock jock" tomorrow's fish and chips wrapper. Ministerial commentary aside, the same phenomenon is evident in relation to media reports of court outcomes generally. A conspiracy theorist whose views might in earlier times have been heard no further than a voice could carry from a soapbox in a public park, and which would never have been published in a newspaper, may now publish to the world at large via the internet.

In 2011, the High Court of Australia invalidated federal legislation directed to the end of the off-shore processing in Malaysia of those seeking asylum in Australia.[57] The then Australian Labor Party Prime Minister, the Honourable Julia Gillard MP, described the High Court's judgement as a "missed

[57] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32, (2011) 244 CLR 144.

opportunity", as if the members of the High Court had responsibility for the conduct of foreign affairs and migration policy.[58]

In Australia, such criticisms are hardly confined to one side of politics or even as muted. In 2017, three Ministers in the then Liberal National Party coalition government of Australia were found *prima facie* to have committed contempt of the Victorian Supreme Court by making statements, published prominently in The Australian newspaper, that the judges of that court were soft on terror at a time when that State's Court of Appeal was reserved on a Crown appeal in respect of alleged leniency of sentences in respect of certain terrorism offences.[59]

The statements mentioned of then Prime Minister Gillard and those three federal Ministers are all the more lamentable because each of their authors had been admitted as a legal practitioner.

This type of behaviour is also evident at State level in Australia. Last month, Queensland's Deputy Premier, the Hon Steven Miles (who is not a lawyer) described a decision by a magistrate to release a number of youth defendants on bail as a "media stunt" and that the magistrate had put "the community of Townsville in danger".[60] Yet Queensland's *Youth Justice Act* 1992 contains an imperative statement requiring the release by a court of a youth defendant from custody in connection with a charge, subject only to very narrow exceptions.[61]

---

58 Prime Minister Julia Gillard says High Court moving to outlaw Malaysian Solution is missed opportunity, Courier Mail, Brisbane, 1 September 2011: https://www.couriermail.com.au/news/national/navy-on-alert-for-boats/news-story/cd948a00432dc00a08b0b699cc6c851d Accessed 6 February 2023.

59 Turnbull MPs narrowly avoid contempt charges, Australian Financial Review, 23 June 2017: https://www.afr.com/politics/victorian-court-of-appeal-increases-terror-sentences-20170623-gwwxhf Accessed 6 February 2023.

60 "'Cracked the s**ts': Outrage as magistrate releases 13 young offenders at same time": Courier Mail, 11 February 2023: https://www.couriermail.com.au/truecrimeaustralia/police-courts-qld/cracked-the-sts-outrage-as-magistrate-releases-13-juvi-crims-at-same-time/news-story/f2a84f578db4426a9b6aa00485b2f3d8 Accessed, 1 March 2023.

61 Youth Justice Act 1992, s 48 provides:
48 Releasing children in custody in connection with a charge of an offence
(1) This section applies if a court or police officer is deciding whether to release a child in custody in connection with a charge of an offence or keep the child in custody.

The Deputy Premier's statement was preceded by a spate of publicity in the media about youth offending. The Deputy Premier's statement was promptly condemned by the Queensland Bar Association[62] But the experience in 2017 of Federal ministerial officers did nothing to deter it and, unlike a newspaper report, the statement lingers to the world at large on the internet.

This type of personalisation concerning judicial decisions is hardly confined to Australia. Notoriously in 2016, three judges of the Court of Appeal for England and Wales, including the then Lord Chief Justice, were described by the Daily Mail as "Enemies of the People"[63] for holding that the United Kingdom's withdrawal from the European Union required a prior referendum, not just an enactment.[64]

The capacity for incitement of disaffection by the executive with the independent exercise of judicial power via ill-considered statements is enhanced by the internet and other means of universally available mass communication.

Of course none of this means, and never has meant, that the reasoning in judicial decisions is immune from criticism, either by the executive or by other commentators. But to attribute or allude to base motives for such reasoning, contrary to the judicial oath or affirmation, may reveal as much about the character or civic responsibility of the author as it does about the judicial officer concerned. One of the greatest threats to a system of government according to law is the notion that judges must yield to some prevailing populist whim,

---

(2) The court or police officer must decide to release the child unless required under this Act or another Act to keep the child in custody or exercising a discretion under this or another Act to keep the child in custody.

62 Queensland Bar Association Media Release, 13 February 2023: https://qldbar.asn.au/general-news/0/0/media Accessed, 1 March 2023.

63 Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis, Daily Mail, 4 November 2016: https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html Accessed 6 February 2016.

64 *Miller & Anor, R (On the Application Of) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin). This judgement was later upheld by an emphatic majority by the UK Supreme Court: *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union* (Rev 3) [2017] UKSC 5.

whether that whim is as perceived by a minister or a journalist or commentator or otherwise.

A less obvious but perhaps more pernicious thrust to ordained accountability mechanisms and grounds is an endeavour to subvert their role in buttressing independence by appointing persons thought to have views sympathetic to those espoused by particular political actors. In the United States of America, sharp political differences are evident in relation to appointments of judges to the Supreme Court. The appointment of Kavanaugh J, already mentioned, offers but one recent example. Many others might be cited from that country. In the United Kingdom[65] and, save for the position of Chief Justice, in Papua New Guinea,[66] appointments to the senior judiciary are made not directly on the advice of a political officer but rather via an appointments commission of which political officers are either not members or in a minority. Not so in Australia.

The Administrative Appeals Tribunal (the AAT) is a quasi-judicial merits review tribunal, the President (or acting President) of which must be a judge of the Federal Court of Australia. The AAT is charged with the independent review of a large and diverse range of decisions by ministers, their delegates or other officers of agencies of the executive. If one accepts the majority view of the Australian Senate's Standing Committee on Legal and Constitutional Affairs,[67] membership of the AAT had by 2022 and to a significant extent, become a sinecure for those associated with the Liberal National side of politics.

---

65 In the United Kingdom, appointments are made by the Judicial Appointments Commission: see Courts and Tribunals Judiciary – Judicial Appointments: https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/jud-appts/ Accessed, 6 February 2023.

66 In Papua New Guinea, the Chief Justice is appointed on the advice of the National Executive Council. Each other member of the senior judiciary is appointed by the Judicial and Legal Service Commission on which politicians are in the minority: PNG Constitution, ss 169, 170 and 183.

67 Australian Senate Standing Committee on Legal and Constitutional Affairs Report on Performance and integrity of Australia's administrative review system: Interim Report, March 2022, adopted without further substantive report June 2022: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Adminreviewsystem/Interim_Report Accessed 6 February 2022. The 4-2 majority was drawn from Australian Labor Party and Australian Greens members of the committee. The minority comprised the Liberal National members of the committee.

The current Australian government (Australian Labor Party) has, by the Attorney-General, signified an intention to implement the recommendations of the Senate Committee to legislate to abolish and replace the AAT (thereby removing all members from office) and to provide for a transparent appointment process independent of the government of the day.[68]

Lurking behind the position thought revealed by the majority of this Senate Committee may be an alternative method by which the executive seeks to subvert independent decision-making. If members of courts or quasi-judicial tribunals rebuff calls by ministers to conform to populist positions, as opposed to deciding cases according to law and without fear, favour, affection or ill-will, an attractive alternative to some in the executive may be to appoint those in whom, by reason of association or affiliation, one apprehends a likelihood of such conformity. Where the relevant law reposes in such decision-makers a zone of discretion it may be very difficult for a person adversely affected by the decision of a judge or tribunal member appointed because of such an apprehension on judicial review even to establish an apprehension of bias. Judicial commissions are not a panacea for this.

Indeed, in the very preference of parliaments in modern times for tribunals comprised of short term appointees, as opposed to tenured judiciaries, for the resolution of a vast range of controversies great and small, to some of which the executive is one party, may lie a perhaps unwitting wholesale subversion by avoidance of constitutional accountability mechanisms and related grounds for removal.

---

[68] Attorney-General's Department, A new system of federal administrative review: https://www.ag.gov.au/legal-system/new-system-federal-administrative-review. Accessed 6 February 2023.

In the aftermath of the highly controversial appointment by his government in 2014 of the Honourable Tim Carmody as Chief Justice of Queensland,[69] the by then former Premier of Queensland, the Hon Campbell Newman called for the establishment of a judicial commission. He envisaged a commission of ten members, three of whom would be judicial officers, the balance drawn from the wider community. He stated, "I'm after a quiet revolution that will bring the courts under the control of the people of Queensland, in a responsible way,"[70] At the same time, Mr Newman expressed particular concern about the cost of litigation and accessibility to the courts.

A recollection of history confirms that Mr Newman's proposal was, with respect, undoubtedly revolutionary. Once again, the political compact which was the sequel to 17th century revolutionary tumult is replicated in Queensland's Constitution.[71] This has always made State judges accountable, via the State parliament, to the people but only in respect of proved misbehaviour (or incapacity). Further, providing it leaves the Queensland Supreme Court as a recognisably independent body in which to invest judicial power,[72] it has always been within the legislative remit of the Queensland parliament to enact measures designed to reduce the cost of litigation and accessibility to the courts.

In Australia, a judicial commission the function of which was other than deferential to a manifestation of the constitutional compact mentioned may well

---

69 For an account of circumstances relating to this appointment and its aftermath see Rebecca Ananian-Welsh; Gabrielle Appleby; Andrew Lynch, The Tim Carmody affair: Australia's greatest judicial crisis, New South Books, Sydney, 2016 ("Carmody Affair"). In Queensland, controversy concerning an appointment to the office of Chief Justice, while hardly the norm, is also hardly confined to one side of politics. The legal and political controversy concerning the appointment of the Honourable T W McCawley as Chief Justice by the Australian Labor Party Government of Premier T J Ryan offers such an example. For those who would read further of this, I commend reference to Nicholas Aroney, --- Politics, Law and the Constitution in McCawley's Case [2006] MelbULawRw 21; (2006) 30(3) Melbourne University Law Review 605: http://classic.austlii.edu.au/au/journals/MelbULawRw/2006/21.html#fn20 Accessed 8 February 2023.

70 Premier auditioned and rejected arrogant judges for top job, Courier Mail, 16 September 2018: https://www.couriermail.com.au/news/queensland/crime-and-justice/premier-auditioned-and-rejected-arrogant-judges-for-top-job/news-story/566d27731c8ecbd2a6d12a67e9b2aed8 Accessed 6 February 2018.

71 *Constitution of Queensland Act 2001* (Qld), s 61.

72 *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1; (2010) 239 CLR 531.

be unlawful. A judicial commission is not a means of "controlling" the judiciary, only a means of assisting parliament to discharge its constitutionally limited role in relation to judicial misbehaviour or incapacity.

Chief Justice Carmody resigned his office as Chief Justice in July 2015 but remained a member of the Queensland Supreme Court until 2019, by which time he had become eligible for the judicial pension. The period in which he held the office of Chief Justice was noteworthy for internal disharmony within the Supreme Court concerning his legal and judicial administrative abilities, the existence of which was made clear in a retirement speech delivered by a judge at a valedictory sitting in late March 2015.[73]

The period in office of Carmody CJ may perhaps highlight an aspect of judicial accountability rarely made public. The existence and metes and bounds of the accountability of judges one to the other are uncertain. Superior courts are collegiate. All judges are expected to co-operate in the exercise of a court's jurisdiction according to law and as efficiently as possible given the resources available. Judges expect each other to pull their weight. Yet the constitutionally ordained remedy in respect of a lawfully appointed judge, perceived by his or her peers underperforming is not internal ostracising, but only parliamentary removal for proved incapacity or misbehaviour.

Such is the importance of tenure as a bulwark of judicial independence these grounds leave no room for inexact proofs. Recognising this, as well as a need to maintain public confidence in the judiciary and exercise a court's jurisdiction, it is not unknown for other judges to accept that they must do more or more difficult

[73] See The Carmody Affair, Chapters 4 and 5 and Justice Alan Wilson, 'Notes' [for speech delivered at the valedictory ceremony to mark his retirement, Banco Court, Brisbane, 26 March 2015: https://www.sclqld.org.au/judicial-papers/judicial-profiles/profiles/awilson/papers Accessed, 6 February 2015. It should be recorded that, in the 2002 Australian Queen's Birthday Honours List, The Hon Tim Carmody was appointed a Member of the Order of Australia, "For significant service to the law, and to the judiciary": Governor General of Australia, The Queen's Birthday 2022 Honours List: https://www.gg.gov.au/queens-birthday-2022-honours-list Accessed 6 February 2022.

trial or appellate cases, because a lawfully appointed colleague is unable or unwilling to do so.

Gageler J: on the separation of executive and judicial function

The subject of judicial accountability is indeed a large one. But understanding to whom judges are accountable and to whom they are not and why is but one part of understanding the rationale for, and necessary features of, the separate exercise of judicial power under a Westminster system of government, or even that adopted in the United States Constitution (where the executive does not sit in parliament).

These features been much rehearsed in the earlier writings of judges much more eminent than I. In this regard and recently is a paper, "Judicial Legitimacy" authored by Gageler J of the High Court of Australia.[74] His Honour's paper was evidently prompted to deliver his paper by the various recommendations in the ALRC report to which I have made reference above. Those recommendations ranged beyond a recommendation that a federal judicial commission be established. Another was the establishment of an independent judicial appointments commission akin to that in the United Kingdom.

As Gageler J highlights in his paper, four interweaving and necessary features underpin the successful achievement in practice of addressing the vice of the exercise of arbitrary sovereign power by separating the judicial function from those of the executive and the parliament. These features are:

(a) judicial independence (which he takes to mean "that measure of protection from external influence which needs to exist if a competent and impartial

[74] The Hon S Gageler AC, Judicial Legitimacy, (2023) 97 (1) Australian Law Journal 28: also available High Court of Australia Judges' speeches and papers: https://www.hcourt.gov.au/publications/speeches/current/speeches-by-Justice Gageler. Accessed 7 February 2023.

judiciary is to do its job of deciding controversies according to law without fear or favour");

(b) "judicial legitimacy" (which he takes to mean "that level of public confidence which needs to exist for a competent and impartial judiciary to do its job of deciding controversies according to law without fear or favour");

(c) judicial competence; and

(d) judicial impartiality.

I respectfully commend his Honour's paper to those who would read further about these features of judicial power and threats to the success in practice of the separation of judicial power from other types of sovereign power.

Conclusion

As I have endeavoured to highlight in this paper, an attempted subversion by the executive of the successful, good governance compact entailing the separation of powers need not only come in the form of asserted accountability by physical intimidation by officers of the executive (as in the Namah example) or in ill-informed ministerial public statements which suggest the judiciary must defer to prevailing public sentiment or executive government policy, as opposed to the law. It may come in ministerial endeavours to "stack" a bench, irrespective of competence, with those expected to conform to the prevailing executive government's view of the law. Or it may come in measures which sidestep the judiciary as society's forum for the resolution of a range of public and private controversies.

Addressing misconceptions about judicial accountability is but one part of addressing a wider threat to the societal governance benefit of separating the exercise of judicial power into a system of justice which has each of the four features mentioned by Gageler J.

I conclude this perhaps overlong paper by drawing attention to observations made now a quarter-century ago by another eminent Australian jurist, the Honourable Sir Gerard Brennan when Chief Justice of Australia:

> Over recent years, politicians and other interested parties, showing little interest in the Court's function of administering the law but versed in the techniques of political struggle, public controversy and media relations, have criticized the Courts, not for their reasons for decision but for the decisions they have made. Criticism which pays little or no attention to the reasons for decision may be politically successful because, as surveys have shown, the public generally are not familiar with the Constitution and with the powers which are distributed under it. Even less is the public familiar with statute law and less again with the common law. Nor is the public familiar with the step by step reasoning that leads a judge to a conclusion in accordance with his or her understanding of the law. But the public is accustomed to the cut and thrust of political debate. Consequently, if no defence is made to a political attack on a Court, some will regard the attack as unanswered or unanswerable. No effective answer can be given by the Courts themselves. The Courts cannot be advocates to plead their own cause in justification of their judgments. If they were, they would be induced to temper their judgments to protect their own interests. Impartiality would be gone, traded for protection from attacks. To quote Sir Frank Kitto again:
>
> > "Every Judge worthy of the name recognises that he must take each man's censure; he knows full well that as a Judge he is born to censure as the sparks fly upwards; but neither in preparing a judgment nor in retrospect may it weigh with him that the harvest he gleans is praise or blame, approval or

> scorn. He will reply to neither; he will defend himself not at all."[75]
>
> [Footnote omitted]

As Brennan CJ noted in this speech, in Australia it had hitherto been regarded as the role of the Attorney-General to denounce unfounded attacks on the judiciary. In the modern era, the holders of this office in the Australian government have indicated that this is no longer their role.

Wherever in the Commonwealth that is the case, that means that it is more important than ever for the legal profession and its peak professional bodies such as the Commonwealth Lawyers Association to undertake not only the role of defending the judiciary from ill-founded criticism but also of highlighting to whom judges are truly accountable, on what grounds and why this is so. A failure to do this is to yield the field of justice according to law to those different in title but not in animus to the Stuart Kings. In this regard, there are no new developments, only modern replications of that old vice.

The price of the civil liberty of justice according to law is eternal vigilance with respect to its subversion by the executive and populists.

[75] Brennan CJ, The State of the Judicature - Opening of the 30th Australian Legal Convention, Melbourne, 19 September 1997: High Court of Australia Former Judges' Papers and Speeches: https://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_judicat.htm Accessed 6 February 2023.