Should Judges Have Performance Standards?

John Basten QC

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In 1980 I wrote a short piece for the *Australian Quarterly* supporting the establishment of a Judicial Commission.[1] As I then noted, the suggestion was by no means novel. I proposed that

> *"... each jurisdiction in Australia should establish a Commission with two principal functions: first, the selection of a small group of candidates for appointment to each judicial office and, secondly, the investigation of complaints of misconduct on the part of all judges and magistrates within that jurisdiction. Ancillary functions could include the organisation of training workshops and seminars for magistrates and judges and the preparation of a code of judicial conduct."* [2]

By a coincidence of history, a Judicial Commission was established in New South Wales in 1986.[3] That legislation, like all significant matters of law reform, had many causes. The most widely acknowledged cause was a series of public scandals arising out of *"The Age"* tapes in February 1984. However, the speedy reaction of the Government of the day was possible partly as a result of work which had already been undertaken by, amongst others, the Law Foundation of NSW, then under the guidance of Terence Purcell.

Why then, in 1995, do we continue to debate the issue of accountability? The answer is that, as with so many important legal reforms, they tend to inspire rather than quell public discussion. This is not a perverse result, nor does it indicate that a reform is misguided. Rather, significant legal reforms tend to reflect underlying public concerns and, once enacted, provide a focus for continuing debate and for refinement of the response. More importantly, there were some important omissions from the *Judicial Officers Act* which require consideration.

Public discussion of judicial accountability always seems to raise concerns about intrusions upon judicial independence. Thus, independence and accountability appear to be mutually inconsistent. That, however, is not necessarily the case at all: indeed, the contrary may be true. As one commentator on the NSW Act has argued:

> *"Judicial accountability and judicial independence are not inherently inconsistent. It is true that the more we scrutinise the behaviour of judges, the greater the likelihood that attempts will be made to exert improper pressure on them; but whether or not judicial independence is, in fact, impaired will depend on the features of the system of accountability which is in place. If a given system of judicial accountability has sufficient safeguards to ensure that it cannot be manipulated to the detriment of the judges and is also able to generate or enhance public confidence in the judiciary, through the public's knowledge that instances of judicial misconduct and disability will be appropriately dealt with, it will provide judicial accountability and, at the same time, enhance judicial independence."*[4]

Mr Morabito, from whom the foregoing quotation was taken, has suggested a number of changes to the *Judicial Officers Act* which, he persuasively argues, would improve its effectiveness. One matter to which he adverts is the absence of any power in the Commission to establish a code of judicial conduct. He asserts that a provision which would have required the Commission to formulate such a code was withdrawn by the Government under pressure from the judges of the Supreme Court.[5]

Without staying to analyse the basis on which this pressure was brought (let alone questioning the propriety of such judicial lobbying (if it occurred)) the author quotes in reply from the former Chief Justice of the South Australian Supreme Court, who warned:

> *"...if security of tenure is to mean anything, it must at least mean that the security can only be disturbed for breach of some clearly enunciated and promulgated rule of conduct. Strangely, however, codes of judicial conduct are unknown in England and in the countries whose legal systems derive directly from the English system."* [6]

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The need for an appropriate level of specificity in defining "proved misbehaviour" being one acknowledged element of relevant misconduct has been argued by Professor Goldring, now Dean of the Law School at Wollongong University.[7] Professor Goldring thought it would have been appropriate for Parliament itself to spell out relevant guidelines, leaving the detail to the Judicial Commission.[8]

In considering what might be considered inappropriate conduct on the part of a judicial officer, it is necessary, as the NSW Act does, to distinguish conduct which might disqualify

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1. J Basten, "Judicial Accountability: A Proposal for a Judicial Commission" [1980] AQ 468-485.
2. Ibid, p 481.
3. See the *Judicial Officers Act* 1986 (NSW).
4. V Morabito, "*Judicial Officers Act*, 1986 (NSW): A dangerous precedent or a model to be followed?" (1993) 16 UNSWLJ 481, 490.
5. Ibid, p 500.
6. L J King, "Minimum Standards of Judicial Independence" (1984) 58 ALJ 340, 345.
7. J Goldring, "The Accountability of Judges" [1987] AQ145, 155-6.
8. Ibid, p 160.

from office from that which might justify a lesser sanction. However, whilst the distinction is clearly appropriate, its consequences are less obvious. Some care must be taken to establish what sanctions are appropriate for misconduct not warranting removal.

It is also necessary to distinguish conduct in office (and possibly professional misconduct preceding appointment) from personal misconduct. I am inclined to think that the Australian community takes a somewhat more robust view of youthful indiscretions (particularly of a personal kind) for people in public office than appears to be the case, for example, in America. Nor do we appear to be quite so fixated on the sexual antics of our public figures as do the British.

It is also useful to distinguish pre-appointment and post-appointment conduct. If possible, pre-appointment conduct should be dealt with by appropriate screening, although there will always be cases in which earlier misconduct will only be discovered after appointment. This matter is likely to have increasing significance if, as I hope, governments will tend to heed calls to ensure that the judiciary is representative of our society and, so far as reasonably possible, not merely recruited from the senior members of the Bar. If this trend, which is already apparent, is to continue, there is increasing danger that informal selection and appointment mechanisms will no longer be effective and that a greater degree of formality in screening will be seen as necessary. If that be the case, it is preferable to establish mechanisms before a scandal arises.

In my view, both these goals can be substantially achieved through the vehicle of the Judicial Commission. First, as I suggested in 1980, I think it appropriate that the Commission have a role in recommendations for appointment and in screening candidates for appointment to judicial offices under its scrutiny. I do not recommend that the power of appointment be taken away from the Executive arm of government, as that in itself involves a level of public accountability. However, the process of appointment should be as transparent as possible if accountability is to mean anything. Whilst I support the view that the Judicial Commission should have minority representation from outside the legal profession and the judiciary, it would not be appropriate to give the Commission too great a say in the appointment process or it would become a self-perpetuating oligarchy. On the other hand, an attorney general may be less willing to promote to high office a friend who may appear to lack the necessary skills and experience if the proposed appointment were subject to comment by the Judicial Commission because the Commission could be required in its annual report to indicate whether or not it had reported adversely on any appointments in fact made by the attorney.

Secondly, the Commission should, subject to appropriate parliamentary consent, establish a code of conduct which should specify the standards expected of judicial officers and also the consequences which might obtain in the case of contravention. Despite the cases of inappropriate behaviour which have arisen from time to time, both in this country and elsewhere, there is surprisingly little agreement on what constitutes conduct which should properly give rise to removal from office. Given the regularity with which members of the professions are deregistered and the presumably higher standards expected of the judiciary, it is surprising that such matters have not been more precisely defined, but perhaps it may be thought that any element of corrupt conduct in office would be sufficient to warrant dismissal. On the other hand, as the ICAC has demonstrated, corrupt conduct is itself a phrase of imprecise denotation. Turning to personal standards, there is equally little discussion of whether a judicial officer who commits an offence punishable with imprisonment should be subject to dismissal or whether the offence should be one of dishonesty. Would subjection to an apprehended violence order be sufficient to warrant dismissal? Do we expect higher standards of our politicians than of our judiciary?

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Perhaps more importantly in practical terms, what is to be done with cases of misconduct falling within the lower range of culpability? This too is an area on which the *Judicial Officers Act* is curiously unhelpful. The drafter appears to have assumed that such matters could best be dealt with by the chief judicial officer of the court or tribunal in which the offender sits.[9] This does little in principle to assist with complaints of consistent rudeness in court, consistent lateness on the bench or other similar misconduct, minor in terms of each infraction but rising, possibly, to a level of moderate severity when part of a pattern of dereliction.

Similarly, one would wish to have, adopting the phraseology of Justice Sackville, guidelines as to effective communication (especially in relation to litigants in person) and the identification of appropriate responses to sensitive cultural and social issues. The response of the *Judicial Officers Act* in such cases is apparently to formalise the responsibility of the head of a court to provide a tactful rap over the knuckles or other form of reprimand or instruction. On the other hand, there may be legitimate concerns about the power exercised by a chief judge. He or she may already have significant control over listing arrangements, which may or may not be exercised democratically within the court. Although it took various turns in the course of the years, the case of Justice Jim Staples started with the refusal of the head of the Australian Conciliation and Arbitration Commission to assign him to hearings as part of the normal work of the Commission.[10]

9. See *Judicial Officers Act*, s.21: the matter may, if sufficiently serious, be referred to the Conduct Division.
10. See M D Kirby, "Judicial Independence in Australia Reaches a Moment of Truth" (1990) 13 UNSWLJ 187, 210.

In putting forward these suggestions, I am conscious that judges are accountable in many ways. For example:

(a) they conduct hearings in open court and must publish reasons for their decisions;
(b) their judgments are subject to appeal;
(c) they are subject to applications that they not hear cases (and ultimately to appeal) on the ground of bias;
(d) they are now subject to the disciplinary powers of the Conduct Division of the Judicial Commission; and
(e) they are required to retire at 70, which at least limits the scope for inadequate performance based on old age.

There are three further points which deserve closer scrutiny than they have had in recent times. First, there is the difficult area of "incompetence". Whilst it may be said that incompetent judicial performance can be remedied by appeals, there are at least two respects in which this answer is unsatisfactory. First, appeals are costly (to all parties to litigation and to the public purse) and should really provide a remedy for the correction of unexpected error rather than routine correction of inappropriate decisions. Secondly, many modern tribunals are immune from correction on the basis of factual error. This latter phenomenon appears to reflect two policies: first, there is the attempt in specific areas to vest exclusive fact-finding power in specialist bodies and, secondly and more generally, an attempt to limit the expense and delay caused by rights of appeal.

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For people with small disputes, it is not a sufficient response to say that rough justice is adequate. Whilst individual remedies may be inappropriate, greater attention should be paid to improvement of judicial performance, especially in areas where judicial officers are not subject to factual review. Better selection procedures, mechanisms for identifying areas of judicial weakness and schemes for improving judicial performance are required. As Justice Ronald Sackville recently noted:

> *"The emergence of judicial education programmes is an acknowledgement that judging requires a combination of skills not all of which are necessarily possessed by every appointee to judicial office. The idea that all judges (including magistrates) arrive fully equipped in terms of legal and procedural knowledge, administrative and technical skills, temperament, the ability to communicate effectively and respond sensitively to cultural and social issues, is hardly tenable."* [11]

Each of the matters to which his Honour referred are no doubt susceptible to programmes of education, although the courts appear to be still in the process of working out how such education can be most effectively provided. Whether mandatory courses are feasible seems open to doubt: if feasible, there is equal reason to doubt whether they would be effective. On the other hand, do those judges most in need of further training attend the relevant voluntary sessions? Judges, especially on the superior courts, still generally come from the Bar, which contains a collection of notoriously egocentric characters unused to working collectively or under instruction. These are perhaps cultural matters which will need to change.

There are also structural pressures which will apply to some judges and in some circumstances. Thus, whatever may be said in principle about the independence of the judiciary arising from its secure tenure, some judges are appointed on an acting basis and others may well hope for promotion. Such exigencies do, as Justice Michael Kirby has noted, derogate from judicial independence without promoting appropriate accountability.[12]

Further, the foregoing comments have been directed to judicial accountability at the individual level. It is also necessary to consider accountability in terms of allocation of court resources and, indeed, allocation of public resources to courts and tribunals. In these areas, the tenets of judicial independence have provided, not always persuasively, a platform from which to launch demands for judicial self-governance. In short, the power of the Executive to limit and control the judiciary through financial constraints (particularly in inflationary times) has given rise to concern, especially within the courts. New South Wales has tended to be less concerned than, for example, South Australia and the Commonwealth in heeding demands for self-governance. However, it is clear that self-governance itself will lead to a new relationship between the judiciary and the Executive. As Justice Sackville has persuasively argued:

> *"Administratively autonomous courts, like other public sector bodies must not only compete for resources, but must actively press their claims through the political and budgetary processes. They can no longer rely - if they ever could - on Ministers or departments to carry the burden of protecting and advancing the interests of the judiciary. ... It follows that judges must to some extent participate in the community debate about the allocation of public funds. Of necessity, they must sometimes be caught up in matters of political controversy."* [13]

There are other aspects to judicial accountability which should also be considered. One has the feeling (although it

11. R Sackville, "The Access to Justice Report: Change and Accountability in the Justice System" (1994) 4 JJA 65, 71.
12. M D Kirby, op cit, p 209.
13. Ibid, p 74.

would be interesting to know if the feeling is objectively supportable) that judges are increasingly active in other spheres in recent years. By that I do not refer to the tendency of judges of a court to be involved in professional disciplinary tribunals, although that is a common phenomenon, because there they continue to exercise judicial functions. Rather I refer to the expectation that judges will issue search warrants, preside over commissions of inquiry and even speak out on matters of public importance. Inevitably, the response to such requests and expectations is neither uniform nor unambiguous. On the other hand, the tendency for judges to be seen in roles where demands for accountability will not be tempered by respect for judicial independence may flow over into consideration of judicial functions. I do not seek to argue that the purity of the judicial function should be preserved at all costs, but would suggest that some care must be taken in formulating appropriate mechanisms for accountability, specifically in relation to the exercise of non-judicial functions.

Finally, in terms of public accountability, it is worth noting the role of the media. In a country which is proud of its free press, and remains conscious of threats of monopolistic influence, there will always be an important role for the media in publicising the work of courts and judicial officers and highlighting apparent misconduct. There remains debate about the extent to which such public comment in the press is useful or constitutes "the attrition of uninformed and unjustified criticism" which could, "if not kept in check, cause great, even irreparable harm to the system itself".[14] The increasing willingness of the courts and some justices to respond to public criticism, despite the tradition that they not comment on cases in which they have been involved, is no doubt a response to the fear of harm to the institution as well as, at least in some cases, the unwillingness to accept public criticism without reply. On other occasions, the President of the Bar Association has considered it desirable to reply on behalf of the court or individual judge. Sometimes these replies provide useful information and a convincing answer to the criticisms. At other times, they appear to do more harm than good to their own cause. What may be noted in this context is that there is a diminishing likelihood of charges of contempt of court being used to protect the judiciary from criticism, except in defence of the jury process. This must be recognised as a move towards greater public accountability, although the results may be debatable in individual instances.

Conclusions

In Australia in 1995, I do not believe that calls for improved judicial accountability are either unexpected or even controversial. The system for delivering justice in our community is under strain and must adapt. Whilst we are rightly proud of our tradition of judicial integrity, that tradition will only survive if we adopt appropriate principles in its defence. These principles apply both at a structural level and at an individual level. Over-worked judges can make mistakes and delay in bringing down judgments. It is nevertheless clear that some judges perform better than others. Similarly, judges will bring a range of views, experience and abilities to their work. We must continue to develop systems to limit incompetence without outlawing variety and to improve performance without inappropriately altering the balance between the judiciary and the Executive. However, if judges are required to perform, they must know in advance what standards are required of them. Those standards should encompass both personal and judicial behaviour. As a society we must decide whether a judge who regularly reserves judgments for more than, say, nine months is performing properly. We must also decide whether a judge convicted of tax evasion or for domestic assault is entitled to continue in office. Such cases have arisen in the past and will undoubtedly arise again. If at all possible, standards should be established without the public clamour for resolution of a particular scandal. The Judicial Commission should be restructured as recommended by Mr Morabito and should set about the task of preparing a code of judicial conduct. ❑

14. Comment of Justice Hope of the NSW Court of Appeal on his retirement, quoted by Justice Kirby, op cit, p 188.

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