JUDICIAL INDEPENDENCE IN AUSTRALIA REACHES A MOMENT OF TRUTH

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I. AN EROSION OF COMMUNITY UNDERSTANDING

In February 1990 Justice R.M. Hope retired after nearly 20 years of judicial service, 18 of those years in the Court of Appeal of New South Wales. In accordance with custom, a ceremony for valedictory speeches was convened in the Banco Court of the Supreme Court in Sydney. The many judges and practitioners who assembled there did so under the watchful eyes of the portraits of the successive Chief Justice of New South Wales, stretching back to the earliest days of the establishment of the British penal settlement at Port Jackson exactly 202 years earlier. The red robes and the long wigs in the portraits, still worn by today's judges, underlined the inheritance by the Australian judiciary of the traditions and constitutional conventions of

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the Royal Courts of England. Those assembled heard Justice Hope express his concern about the erosion of community understanding about judicial independence in Australia in recent years:

> Challenges to, indeed attacks upon, the integrity, and at times the independence, of judges have increased significantly in the last ten years. Judges and the judicial system are, and indeed must be, sufficiently robust to be subjected to informed criticism. But the attrition of continual uninformed and unjustified criticism is not merely an irritant; it could, if not kept in check, cause great, even irreparable harm to the system itself. By tradition it is not answered. Perhaps a system should be devised by which, in some cases at least, the public could be informed of the facts.[1]

II. THE FOUNDATIONS OF INDEPENDENCE

A. CONSTITUTIONAL AND LEGAL

It is timely to review the bases of judicial independence in Australia; to consider some of the recent developments affecting judicial independence; to examine special legislation introduced in the last decade to increase the accountability of the judiciary in ways that present certain risks to its independence and to reflect upon a number of notable cases which help to illustrate the state of judicial independence in Australia.

The basic provisions protecting the judges of Australia's superior courts have not altered for many years. Section 72 of the Australian Constitution provides that justices of the High Court of Australia and other Federal Courts:

> 72(ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;

No Federal judge in Australia has ever been removed pursuant to these provisions. However, as will be mentioned, steps were taken between 1984 and 1986 to inquire into the conduct of Justice Lionel Murphy, a justice of the High Court. His death in October 1986 finally brought those proceedings to a close.

Judges of the superior courts of the States and Territories of Australia, do not, as such, enjoy the protection of s.72 of the Australian Constitution. Their tenure is provided for in ordinary statues. Such provisions do not condition the removal of the judge upon misbehaviour or incapacity, as referred to in s.72 in the case of High Court or Federal judges. A typical provision permits the removal of such judges simply upon "the address of both Houses of Parliament".[2] Indeed, it is possible that in some of the States an argument may

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1 R.M. Hope. Remarks at the ceremony to mark his retirement. Supreme Court of New South Wales, 2 February 1990.

2 See *Judicial Offices Act* 1968 (NSW), s.41. Cf. *Supreme Court Act* 1970 (NSW), s.27(2) (Repealed). See also *Supreme Court Act* 1867 (Qld), s.9; *Constitution Act* 1975 (Vic), s.77(1); *Constitution Act* 1934 (SA), ss.74-5; *Constitution Act* 1899 (WA), ss.54-5; *Supreme Court Act* 1935, s.9; *Supreme Court (Judges' Independence) Act* 1857 (Tas), s.1. Note that

exist that the constitutional and statutory provisions, traced to the *Act of Settlement*, do not exclude the availability of alternative methods of removal of a judge at common law. The better view, however, appears to be that the latter provisions may now be seen as obsolete.[3]

Until very recently, no judge of an Australian State had been removed pursuant to the parliamentary procedure. However, this too has lately changed. In 1989 Justice Angelo Vasta, a judge of the Supreme Court of Queensland, was removed following a report to the unicameral Parliament of that State by a commission of inquiry established by that Parliament.[4] Some features of that case will be referred to. In colonial times in Australia a number of judges were "amoved" by the Governor in Council under the provisions of *Bourke's Act* 1782 (Imp) rather than by removal on an address of Parliament. The establishment of responsible government in the Australian colonies brought with it security of judicial tenure akin to that provided to the English judges by the *Act of Settlement.* Colonial removal became exceptional. The parliamentary removal of Justice Vasta was, in that sense, the more remarkable and unique.[5]

B. CONVENTIONS AND POLITICS

It may seem curious that in a number of the Australian States[6] the reference to judicial tenure and the provisions limiting removal, does not even appear in the State Constitution Act.[7] Wherever appearing, the foundation of State judicial tenure, conventionally seen as so important to judicial independence, is an ordinary Act of Parliament. It may therefore be modified by another Act. There may be conventions and political considerations which inhibit the ready legislative alteration of judicial tenure. However, those conventional inhibitions

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local constitutional and legal rules must now also be seen in the context of internationally accepted principles. See L.J. King, "Minimum Standards for the Independence of the Judiciary" (1984) 58 *ALJ* 340. Within the International Commission of Jurists, the Centre for the Independence of Judges and Lawyers monitors observance of these standards.

3 See J. Crawford, *Australian Courts of Law*, (1982), 55. Cf S.Shetreet, *Judges on Trial* (1976), 90. Note also Australia, Constitutional Commission, *Final Report* (1988), vol 1, 407, fn 162 referring to the writ of *scire facias* and suggesting that it may be obsolete.

4 Pursuant to the *Parliamentary (Judges) Commission of Inquiry Act* 1988 (Qld).

5 *Bourke's Act* 1785 (Imp) (22 Geo III c75). That Act was repealed by the United Kingdom Parliament in 1974. Cf. *Terrell v. Secretary of State for the Colonies and Another* [1953] 2 QB 482. See C. Wheeler, "The Removal of Judges from Office in Western Australia" (1980) 14 *UWALR* 305.

6 See note 2 *supra.* Cf G. Green, "The Rationale and Some Aspects of Judicial Independence" (1985) 59 *ALJ* 135, 139.

7 *Local Courts Act* 1982 (NSW), s.14. See discussion C.R. Briese, "Future Directions in Local Courts of New South Wales" (1987) 10 *UNSWLJ* 127, 131. See also now *Judicial Officers Act* 1986 (NSW), s.41 read with the definition of "judicial officer" in s.3(1).

appear nowadays to be less potent than they were in the past. Statutory changes adopted in New South Wales in 1986 (referred to below) illustrate this fact. Changes have quite readily been made in the tenure of judicial officers of courts other than superior courts. To some extent these changes have enhanced the independence of such judicial officers. This they have done, for example, by divorcing the magistracy of one State (New South Wales) from its former links to the public service, enhancing the necessary qualifications and hence the quality of magistrates and providing more substantial limitations upon their removal from office.[8] But what the Lord giveth, the Lord taketh away. Coinciding with the introduction of this legislation were steps by the Executive Government in the "reappointment" of the magistrates of the predecessor Court of Petty Sessions to the new Local Court which have been held to break established conventions, deny the office-holders natural justice and diminish observance of respect for judicial independence.

Perhaps inspired by this New South Wales precedent, a similar course was adopted by the Federal authorities when, in 1988, the new Australian Industrial Relations Commission was established. All available members of the Australian Conciliation and Arbitration Commission, which it replaced, were appointed to the new body, except one (Justice Staples). Although not a judge of a Federal court (and so entitled to the protection of s.72 of the Constitution) Justice Staples had, by Act of the Australian Parliament, the status and protection from removal of a Federal judge. His effective removal by the expedient of non-reappointment to the new Federal Commission also amounted to a breach of long established conventions hitherto observed by succeeding Federal Parliaments and Governments on the reconstitution of Federal courts and court-like bodies.

In an attempt to respond to at least some of the problems exposed by the case involving Justice Murphy and the perceived fragility of the protection of independence of the tenure of State and Territory judges, the final report of the Australian Constitutional Commission in 1988 made two important recommendations. It proposed that there should be added to s.72 of the Constitution a provision for the constitution of a Judicial Tribunal. Only where such Tribunal had found that allegations of conduct were such as "could amount to misbehaviour or incapacity warranting removal" could the address for removal be made to Parliament. Furthermore, the Commission recommended protection to judges of superior courts of the Australian States and Territories equivalent to these enjoyed by Federal judges.[9] Although the report presents cogent arguments for these and other connected changes, it did not enjoy the unanimous support of the States. The governments of Queensland and Tasmania, at the time non-Labour Party administrations, argued that the provisions in relation to State judges would "intrude into the constitutional

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8 See *Macrae and Others v. Attorney General for NSW* (1987) 9 NSWLR 268 (NSWCA).

9 See Australia, Constitutional Commission, *Final Report* (1988), vol 1, 406, 407.

structures of the States and so undermine their independence".[10] The then Queensland Government also opposed the notion of a national Judicial Tribunal whose members be appointed by the Federal Government to be arbiters of the independence of State judges. It seems unlikely in present circumstances that early action on these recommendations, by way of proposals for constitutional amendment, can be anticipated. The record of constitutional referenda in Australia, including upon earlier proposals advanced by the Constitutional Commission, is discouraging.[11]

C. COMMUNITY RESPECT AND SUPPORT

It would be a mistake to think that the protection of the independence of the Australian judiciary rests only in legal provisions. As has already been demonstrated, those provisions are in some respects inadequate, incomplete or susceptible to ready repeal or circumvention. A much more substantial source of support is community understanding and appreciation of the part which the judiciary plays in ensuring observance of the rule of law and the other values treasured in our form of society. Sir Ninian Stephen - from a background as a State and High Court Judge and Governor General of Australia - expressed this idea well:

> Judicial independence is nourished by, and in the long term only survives in, an atmosphere of general community satisfaction with and confidence in the high quality and total integrity of the judiciary. If that be eroded, community support for judicial independence is likely to decline and the substance of that independence to be placed in jeopardy.[12]

III. DANGERS TO JUDICIAL INDEPENDENCE

A. NOTORIOUS CASES

It is perhaps not accidental that a number of the incidents recounted in this article which illustrate an apparently diminished respect for judicial independence in Australia follow notorious and highly publicised cases in which high judicial officers were accused of impropriety and in some cases charged and even convicted of serious crimes. Justice Murphy of the High Court was convicted by a jury at his first trial, although that conviction was later

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10 *Id*, 408.

11 In 1988 four constitutional referenda were rejected when submitted to referendum under s.128 of the *Australian Constitution*. The popular vote in favour of the various proposals averaged little more than 33% of the electors voting. No proposal achieved a majority in a single State. Only one, (on "fair elections") achieved a majority in one Territory (the Australian Capital Territory).

12 N.Stephen, "Judicial Independence", Blackburn Lecture, reported *sub nom* "Judicial Independence Depends on Standards On and Off the Bench" (1989) 14 *Aust Law News*, 12. See also *Gallagher v. Durack* (1983) 152 CLR 238, 243.

set aside and at his second trial he was acquitted. Judge Foord of the New South Wales District Court stood trial and was acquitted of a serious charge. The Chief Magistrate of New South Wales, Mr Murray Farquhar, was convicted of an offence connected with his judicial office and served a sentence of imprisonment. Justice Vasta, following his removal by the Queensland Parliament, faces criminal charges. Deputy President John Varnum of the New South Wales Industrial Commission - an office holder with judicial status and independence - resigned his office in September 1990. He thereby terminated an inquiry by the Judicial Commission of New South Wales into alleged misconduct whilst a Commissioner.[13] Each of these cases, in an environment of public alarm concerning corruption of officials in virtually all jurisdictions of Australia has gained widespread publicity. This in turn has tended to damage community confidence in the integrity of the judiciary.[14] The cases have created an atmosphere of disrespect in which conventions, long and faithfully adhered to by governments of every political persuasion, are now not always observed.

It is important to remember that the notion of an independent, unelected and only indirectly accountable branch of government, such as the judiciary, is itself "something of a curiosity" in the context of Australia's other organs of government.[15] The legislature is regularly accountable to the electorate. The volatility of electorates today is demonstrated by the frequent changes of government in Australia. The Executive, constituted by the Prime Minister or Premier and Ministers, is in turn elected. These office holders are accountable to Parliament, to the courts, to daily searching scrutiny in the media and to their own electorates. Even the accountability of the bureaucracy has been increased in Australia by the new administrative law.[16] It was always accountable in theory, through the Minister, to Parliament and to courts. But the facilities of judicial review and administrative pre-consideration have greatly increased in recent years.

In these circumstances, the position of the judiciary as a branch of government, exempt from democratic election and immune from the usual modern means of accountability, must be seen, at least in the Australian context, as somewhat peculiar. Lawyers may protest that courts sit in the open and are

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13 Noted *Sydney Morning Herald*, 22 September 1990, 1.

14 See D. Brown, "Themes in an Inquisition: Justice Murphy and the Liberal Press" (1987) 10 *UNSWLJ* 60, 67. See also the essay by the same author (1986) 58 *Aust Quarterly* 348, 352.

15 This was pointed out by Stephen, note 12 *supra*.

16 See M.D. Kirby, "Effective Review of Administrative Acts - Hallmark of a Free and Fair Society" (1989) 1065, SAfLJ. Cf A.F. Mason, "The Courts in Australia and their Relationship with Government" (1988) 15 *Cth L Bulletin* 297, 298.

usually subject to appeal or review where they may be scrutinised.[17] But lay-people point out that courts reach their crucial decisions in private. Lawyers may argue that reasoned decision-making is a legal obligation of courts in Australia.[18] To what extent the reasons may be scrutinized, appealed, and may become the source of proposals for law reform if the community is dissatisfied. But lay-people complain that the reasons are unobtainable or, when obtained, expressed in language which is extremely obscure to the layperson. No Jacksonian movement ever having gained momentum in Australia, none of its judicial officers of the country is elected, in contrast to many in the State judiciary in the United States. None is subject to popular recall such as led to the highly publicised removal from office of three Supreme Court judges including Chief Justice Rose Bird of California. Perhaps it is notable that a political party has recently proposed the election of judges in one Australian State.[19]

B. REALISATION OF THE ANOMALY

Although entirely out of line with Australian traditions heretofore, such a proposal, if adopted, would, in a stroke, remove the "anomalous" immunity of the judicial branch of government from direct democratic accountability. But it would necessarily change the character and composition of the judiciary. There is no doubt that one of the reasons leading to this and other proposals for enhanced accountability of judges is the growing recognition (including amongst Australian judges themselves) of the legitimate and inescapable function of the judge in developing the law and creating new law. In the past, this has tended to happen *sub silentio*. But under the stimulus of academic writing,[20] extra-judicial comment of the highest persuasiveness,[21] media analysis particularly of constitutional decisions of the highest courts, and judicial acknowledgment itself[22] the mythology that judges merely "declare" the pre-existing law, is now seen by almost all judges and lawyers in Australia to be a fiction. Yet if judges do have choices, and sometimes create new law affecting the rights and duties of citizens, conventional democratic theory may not be content with the claim that this judicial law-making is merely done in a principled and neutral way, strictly by analogous reasoning from earlier legal

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17 See discussion *Raybos Australia Pty Ltd and Another v. Jones* (1985) 2 NSWLR 47 (NSWCA) and *John Fairfax & Sons Ltd v. Police Tribunal of New South Wales and Another* (1986) 5 NSWLR 465 (NSWCA).

18 *Public Service Board of New South Wales v. Osmond* (1986) 159 CLR 656; *Pettitt v. Dunkley* [1971] 1 NSWLR 376 (NSWCA).

19 Australian Labor Party (NSW Branch), Platform, 1989.

20 J. Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985), esp ch.4.

21 See e.g. Lord Reid, "The Judge as Lawmaker" (1972) 12 *JPTL* 22.

22 See e.g. *Oceanic Shipping Co Ltd v. Fay* (1988) 62 ALJR 389, 413 (Dean J.); *Halabi v. Westpac Banking Corporation* (1989) 17 NSWLR 26 (NSWCA).

authority. It may logically lead to a greater popular (legislative) involvement in judicial appointments, which until now in Australia (as England) have been virtually the exclusive preserve of the Executive Government. It may lead to a demand for the greater exposure of policy considerations affecting judicial decisions where choice exists. It may also lead to more vocal public criticism - in and out of Parliament - of a judicial decision, once the scales of mechanical legalism are removed from the eyes of the public. The demand for more institutions in Australia to render judges accountable must also be understood against the background of a growing sophistication in the judicial and public understanding of what judges do. It is this recent change which led Sir Ninian Stephen in an earlier address to describe judicial independence as "a fragile bastion".[23]

C. PERCEIVED JUDICIAL ACTIVISM

At least one source of danger to this bastion seems to have passed in Australia. I refer to the proposal for a coherent constitutional charter of rights and freedoms. Australia is now one of the few countries without such a Bill of Rights. On the eve of the celebrations in the United States of the Bicentenary of the first ten amendments to that country's constitution, the Australian people, by overwhelming majorities, rejected proposals to incorporate a number of guaranteed rights in the Australian Constitution.[24] There is now some discussion of alternative, legitimate ways by which international human rights instruments to which Australia is a party can be utilised by judges in the construction of ambiguous statutes or the development and declaration of the Australian common law.[25] But this and specific legislation fall far short of providing the Australian judiciary with the stimulus to judicial activism, afforded by a Bill or Rights, that is such a source of public controversy in the United States, and more recently Canada.[26] The involvement of judges in such frank and highly public tasks of law-making increases to some extent the calls for judicial accountability. But, increasing such accountability will sometimes diminish judicial independence from external pressure.

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23 N. Stephen, "Judicial Independence - a Fragile Bastion" (1983) 13 *MULR* 334.

24 See note 11 *supra*.

25 See M.D. Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *ALJ* 514; M.D. Kirby, "Implementing the Bangalore Principles on Human Rights Law" (1989) 106 *SAfLJ* 484. In *Street v. Queensland Bar Association* (1989) 63 ALJR 715, 737 Deane J pointed out that "the Constitution contains a significant number of express or implied guarantees of rights and immunities".

26 See e.g. S.R. Peck "An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms" 25 *Osgoode Hall LJ*, 701; I.M. Gold "The Rhetoric of Rights: The Supreme Court and The Charter", 25 *Osgoode Hall LJ*, 701; 375.

In Australia there is no coherent constitutional or legislative Bill of Rights, unlike their New Zealand counterparts,[27] Australian judges have specifically denied that there are common law rights that are so fundamental that they are insusceptible to parliamentary alteration.[28] This Diceyan view, adopted in Australia, has been criticised in academic literature.[29] But it has been adhered to repeatedly by the highest courts of Australia.[30] It was specifically upheld in the case of a statute enacted by State Parliament designed to terminate actual judicial proceedings then part-heard before a State court.[31] The litigant in those proceedings asserted that this was an impermissible interference by the State Parliament in the exclusive domain of the State's judiciary. The court upheld the validity of the Act as a reflection of the will of the elected Parliament, clearly expressed. For some, the legislative enactment was a breach of a convention respectful of curial determination of accrued rights in cases already before a court. For others, it was a legitimate assertion of the democratic process which extends in the Australian States, without any constitutional inhibition that has yet been found. This judicial deference to the will of Parliament, when clearly expressed, itself amounts to a safety valve in Australia against the more extreme calls for accountability on the basis of judicial law-making. If, in most things, Parliament can readily undo what judges have found to be the law and if then judges will faithfully implement the changes which Parliament adopts, the ultimate sovereignty of democratically expressed popular will is assured. The need for direct judicial accountability is then, commensurately, diminished.

One of the most powerful arguments voiced in opposition to the entrenchment of fundamental rights in the Australian constitution was the assertion that such a change would involve the judiciary, even more overtly, in political controversy and in the more wide-ranging creation of substantial new law. If the 1988 referendum results are any guide, the Australian community prefers its detailed rights to be reposed in elected legislatures and adheres to a more circumscribed notion of the law-making function of its judiciary.

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27 See e.g. *New Zealand Drivers' Association v. New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Fraser v. State Services Commission* (1984) 1 NZLR 116 (CANZ).

28 See e.g. *Galea v. New South Wales Egg Corporation*, Court of Appeal (NSW), unreported, 21 November 1989; (1989) NSWJB 216.

29 See e.g. I.D. Killey, "Peace, Order and Good Government: A Limitation on Legislative Competence" (1989) 17 *MULR* 24 and note (1987) 61 *ALJ* 53.

30 See *Union Steamship Co of Australia Ltd v. King* (1988) 62 ALJR 645, 648; *Building Construction Employees and Builders' Labourers Federation of New South Wales v. Minister for Industrial Relations & Anor* (1986) 7 NSWLR 372 (NSWCA).

31 See *BLF* case, *ibid.*

IV CHANGES IN LEGISLATION

A. JUDICIAL OFFICERS ACT

I have already referred to the fact that some changes of legislation have tended to enhance the independence, tenure and quality of the judiciary in Australia. The most notable changes in this regard have occurred in the magistracy of several States.[32]

An indirect way in which legislation can affect issues of judicial appointment by changing the respective jurisdictions of superior and other courts is sometimes overlooked. Yet because magistrates and District Court judges in Australia do not typically enjoy the same tenure as judges of superior courts, such shifts in the content of jurisdiction can clearly be relevant.[33] A recognition of this fact, of the anomalies that can occur and other considerations has led to a tendency in more recent legislation to assimilate the protections against removal from office of all judicial officers.[34] Thus, after 1986 in New South Wales the same criteria and machinery for removal apply to all judicial officers, whether of the Supreme Court, District Court or magistracy (or their respective equivalents). This change was criticised in some quarters upon the basis of the need to preserve the special protection from removal of Supreme Court judges who must regularly decide upon the lawfulness of the actions of the other branches of government. More substantially, perhaps, the legislative change was criticised because it was accompanied by companion provisions formalising machinery for the receipt and determination of complaints against judicial officers of every rank. These provisions in the *Judicial Officers Act* (NSW) 1986 were the subject of a great deal of judicial heartburning when introduced into New South Wales. They have since been subjected to severe academic[35] and judicial[36] criticism.

Professor Shimon Shetreet has criticised the sections of the Act constituting a "Conduct Division", to deal with complaints against judges, on a number of bases. He has suggested, for example, that it introduces undue formalism and enhances Executive control of the judiciary, the Judicial Commission being part of the Executive Government. He has also suggested that, by introducing hierarchical patterns into the judiciary in the context of judicial conduct, the

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32 See e.g. *Stipendiary Magistrates Act* 1969 (Tas); *Stipendiary Magistrates Amendment Act* 1979 (WA); *Magistrates' Courts (Appointment of Magistrates) Act* 1981 (Vic), s.5 and *Local Courts Act* 1982 (NSW). See discussion in *Macrae*, note 8 *supra*, 279.

33 This point is made by Sir Ninian Stephen, "Judicial Independence", Inaugural Annual Oration in Judicial Administration, AIJA, Melbourne, 1989, 11.

34 See repeal of s.27(2) *Supreme Court Act* 1970 by the *Judicial Officers Act* 1986, s.55(1) and Schedule 4.

35 S.Shetreet, "The Limits of Judicial Accountability: A Hard Look at the *Judicial Officers Act* 1986", (1987) 10 *UNSWLJ* 4.

36 M.H. McLelland, "Disciplining Australian Judges" (1990) 64 *ALJ* 388.

legislation may have the effect of "chilling" the judicial independence of individual judges by imposing upon it the enforceable opinions of judicial peers. On the other hand it may be hoped that the need to protect "original and unorthodox" judges will be fully appreciated by the Conduct Division.[37] By introducing a right to complain "about a matter that concerns or may concern the *ability* or behaviour of a judicial officer",[38] the formal scrutiny of the Conduct Division was attracted, for the first time, to judicial ability and to allegations of incompetence. As with bias, so with competence. The price for tolerating incompetent judges has, in the past, been borne by society in order to protect the vast majority of competent judges against officious executive interference, opinionated official assessment and the abuse of power.[39] It is clear that Australian society is no longer so willing to tolerate incompetence in judicial officers and is prepared to contemplate institutions and procedures to investigate and determine complaints on that ground.

B. OTHER LEGISLATION

Even more vigorous and detailed was the criticism of the *Judicial Officers Act* 1986 by Justice M.H. McLelland, a Judge of the New South Wales Supreme Court and thus a judicial officer subject to its provisions. Speaking at the Australian Legal Convention in August 1989, he expressed the view that the moves to establish legislative procedures for receiving, investigating and adjudicating complaints against judges presented the greatest threat to the independence of the judiciary since colonial times. He did not confine himself to the legislation of New South Wales. He also referred to the terms of the statutory mandate of the Federal judicial commission of inquiry established pursuant to *ad hoc* legislation under the *Parliamentary Commission of Inquiry Act* 1986 (Cth). This was the body set up to investigate the conduct of Justice Murphy. Justice McLelland also referred to the terms of the *Parliamentary (Judges) Commission of Inquiry Act* 1988 (Qld) pursuant to which Justice Vasta and a judge of the Queensland District Court were investigated. The latter was cleared by the report of the Commission.[40] He also listed the *Official Corruption Commission Act* 1988 (WA) which establishes a commission to "receive information" on any "public officer" who has "acted corruptly". As "public officer" includes "any ... person holding office under ... the State of Western Australia", it presumably includes a judge.

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37 *Judicial Officers Act* 1986 (NSW), ss.21(1) and 22.

38 *Judicial Officers Act* 1986 (NSW), s.15(1).

39 S. Shetreet, note 35 *supra*, 15. Cf. *Re McC (A Minor)* [1984] 3 WLR 1227, 1236 (Lord Bridge). Strong objections were placed before the Attorney General concerning this power, including by Chief Judges who foresaw that it could create difficulties for their positions. It may be expected that the Judicial Commission will closely confine the "incompetence" which warrants action by it.

40 Queensland, Parliamentary Judges Commission of Inquiry, 1989, *Second Report*.

But the chief subjects of Justice McLelland's examination were the two statutes affecting judicial independence enacted by the New South Wales Parliament under governments of different political persuasion. The first was the *Judicial Officers Act* 1986. The second was the *Independent Commission Against Corruption Act* 1988, NSW.

The criticisms of the legislation are too numerous to repeat here. They include the exposure of judicial officers to baseless attacks by disappointed litigants; the very considerable wastage of judicial time and effort in unproductive activity necessary to deal with such complaints; the exposure of a judicial officer to very substantial expense in the event of a hearing and the risk that he or she will be compelled personally to bear those costs; the anomaly that a complaint against a judicial officer may be determined by a body including judges of lower rank in the court hierarchy than the judicial officer complained about; the unprincipled merger in the Conduct Division of the Judicial Commission of the functions of investigation and adjudication which, since the abolition of the Star Chamber, have always been separated in our legal tradition; the absence of appellate rights; the imposition of sanctions short of removal which will undermine the effectiveness and authority of the judicial officer concerned; the undue enlargement of the powers of the Divisional Head and the derogation thereby achieved from the concept of loyalty only to the law and individual conscience, which is central to the traditional idea of judicial independence.

Justice McLelland offers a similar commentary on the *Independent Commission Against Corruption Act* 1988 as it may relate to "public officials" including judges. He points out that the expression "corrupt concept" is defined in that Act in terms which embrace matters which could not possibly be described as "corrupt" in any ordinary sense of the word. Alleged "partiality" for example, which is indeed in the definition, does not have to be dishonest to fall within the ambit of the Act. Many a litigant will assert that a judge who dismissed its case was "partial" in that sense. So much is demonstrated in the many recent cases in Australia involving allegations of judicial bias.[41] Justice McLelland points out that few members of the public are likely to be concerned with unravelling the statutory definition of "corrupt conduct". He suggests that the Act presents the risk of subjecting judges "to publicity ... at the instance of any disappointed litigant or malicious or unbalanced grudge-bearer who happens to have the ear of the media". He asserts that this, and access to the new Commission, could "cause devastating harm to the judicial institutions of

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41 See e.g. *The Queen v. Watson; ex parte Armstrong* (1976) 136 CLR 248; *Livesey v. New South Wales Bar Association* (1983) 151 CLR 288; *Re JRL; ex parte CJL* (1986) 161 CLR 342; *Vakauta v. Kelly* (1989) 63 ALJR 610; *Grassby v. The Queen* (1989) 63 ALJR 630; *Re Keeley; Ex Parte Ansett Transport Industries (Operations) Pty Ltd* (1990) 64 ALJR 495 and *S & M Motor Repairs Pty Ltd and Others v. Caltex Oil (Australia) Pty Ltd and Another* (1988) 12 NSWLR 358 (NSWCA).

the State and irreparable injury and serious embarrassment to judges personally".[42] Justice McLelland concludes his opinion that:

> The insidious erosion of fundamental constitutional principles ... has not yet been widely understood in the community at large. In one sense the problem is a 'sleeper' which, unless remedial action is first taken, is likely to emerge into clear public view at some time in the future in circumstances damaging to society.[43]

It may be said that the sensible people who now administer the two Acts referred to by Justice McLelland (all lawyers) will be sufficiently alert to the conventions of judicial independence as to handle complaints against judges with care to respect those conventions. But personnel may change. Bodies once established may seek to justify their function. Zealots may take command. These were the reasons that led Commissioner G.E. Fitzgerald in Queensland, despite significant findings of official, but not judicial, corruption, to recommend against the establishment of an Independent Commission against Corruption in that State.[44] The legislative departures from ordinary judicial and legal process are at once a reflection on the perceived inadequacies of traditional legal institutions, and a threat to basic civil liberties and judicial independence.

V. JUDICIAL CAUSES CÉLÈBRES

A. THE MURPHY CASE

Any review of the recent history of judicial independence in Australia must include reference to a number of notorious cases. Mention has already been made of the proceedings involving Justice Murphy. Not only due to the fact that he was justice of the country's highest court, but also because he was a former politician, a controversial figure and a radical and well known citizen, his case attracted huge attention both within and outside the legal profession. It took a toll on the public's perceptions of the High Court and the judiciary generally. The stress of successive parliamentary investigations, judicial inquiries, two criminal trials, appeals and many other court challenges as well as relentless media attention also took their toll on Justice Murphy. Many

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42 McLelland, note 36 *supra*, 400f. See, however, s.9(1) of the *Independent Commission Against Corruption Act* 1988 (NSW) which restricts the definition of "corrupt conduct" in s.8 of that Act. See also *Balog v. Independent Commission Against Corruption* (1990) 64 ALJR 400.

43 *Id*, 403. See also Z.Cowen and D.Derham, "The Constitutional Position of Judges" (1956) 29 *ALJ* 705, 713.

44 Queensland, *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, (G.E. Fitzgerald, Commissioner), (1987-1989 paras 9.5.4 and 9.5.5). See comment McLelland, note 36 *supra*, 13.

believe that the stress hastened his death from cancer.[45] No one suggested, least of all Murphy, that he should have been immune from investigation. But in the opinion of many observers it became apparent that, even with the assistance of outside Commissioners, a Parliamentary Committee was not a suitable body to carry out investigations of complaints against a judge. At least this appeared so where the relevant investigations were contested or contentious.[46] The legislation under which the *ad hoc* Parliamentary Commission of Inquiry was established in relation to Justice Murphy has been criticised. Even more susceptible to criticism were the terms of the Queensland legislation which resulted in Justice Vasta's removal. It purported to exclude judicial review. It merged the investigative and adjudicative functions of the Commission. It excluded effective appeal. It provided no guarantee for the payment of the costs reasonably incurred by the judge in appearing before the inquiry.

B. THE VASTA INQUIRY

At the commencement of the inquiry, the Queensland Commission (chaired by Sir Harry Gibbs, former Chief Justice of Australia) recommended to the Speaker of the Legislative Assembly of Queensland that the reasonable costs of Justice Vasta should be paid by the government. When a non-committal response was received, the Commission recommended in its report that:

> The need to preserve the independence of the judiciary puts judges in a special constitutional position. It was the recognition of that fact that led to the establishment of this Inquiry. It would be consistent with that recognition that the question of the judge's costs be given special consideration. Analogies with the costs of parties appearing before other Inquiries may be misleading.[47]

The report also pointed out that although findings adverse to Justice Vasta had been made, "no misbehaviour whatever" had been found in the conduct of his duties as a judge. He had also been exonerated on a number of matters into which the Commission inquired. The Commission further pointed out that the very long inquiry (43 sitting days) was itself the result of the requirement that it

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45 D. Brown, note 14 *supra*. The Murphy case saw a serious fall-out in the relations between the New South Wales judiciary and the State Government of the day. The Premier (N.K. Wran Q.C.) was a close friend of Justice Murphy. In 1987, for statements considered an interference in the fair trial of the judge, Mr Wran was fined $25,000 for contempt of court. See *Director of Public Prosecutions v. Wran* (1986) 7 NSWLR 616 (NSW CA). On 29 April 1986 the Chief Justice, three Judges of Appeal and three trial judges involved in the Murphy case wrote to Mr Wran in relation to the perceived unfairness of his treatment of the Chief Magistrate, Mr Briese, a witness for the prosecution against Justice Murphy.

46 This is the opinion expressed by McLelland, note 36 *supra*. See also R. McGarvie in Australian Institute for Judicial Administration, "The Accountability of the Australian Judiciary: Procedures for Dealing with Complaints Concerning Judicial Officers", Melbourne, 1989.

47 Queensland, Parliamentary Judges Commission of Inquiry, *First Report*, para 13.6.

conduct, in effect, a roving inquiry into "any behaviour" of Justice Vasta. The unfathomable scope of that reference - and its potential for a free roving inquisition into any aspect of the judge's life - was one of the concerns earlier mentioned by Professor Shetreet in the context of the inquiry into Justice Murphy.[48] The spectacle of public advertisements throughout the nation calling for any complaints about such behaviour - as distinct from investigating the complaints which people had troubled to make - alarmed many.

The inquiry into Justice Vasta's "behaviour" arose initially out of suggestions that he had given false evidence in a defamation action relating to the extent and nature of his friendship with Sir Terence Lewis, then Queensland Police Commissioner. Sir Terence was later the subject of allegations in the Fitzgerald Commission of Inquiry and was suspended from office. He has since been charged with several criminal offences. In the course of the Fitzgerald Commission hearing Sir Terence's diaries were produced. They suggested a much closer association with Justice Vasta than the latter had acknowledged in his evidence in the Supreme Court in his defamation case.

But when the Queensland Commission was established, it went far beyond these allegations. It investigated the propriety of Justice Vasta's allegations against the Chief Justice; certain statements he had made to journalists; advice he had given before appointment to the Bench as Senior Crown Prosecutor; various aspects of his financial affairs and eleven complaints from members of the public, all of which were found to have had no substance.

The Commission concluded that the matters found against the judge "warrants his removal". Such a finding was required by s.5(1)(b) of the *Parliamentary (Judges) Commission of Inquiry Act* 1988. There can therefore be no criticism of the Commission for stating its opinion in those terms. But it is otherwise in relation to Parliament's action in asking for such a conclusion. Since the *Act of Settlement*, in respect of superior court judges, that conclusion has been reserved to Parliament itself. It should not be forfeited or delegated (however, convenient and politically attractive that course may be) to a commission of judges. If it is to have a role it should simply be to find the facts. The assessment of the "warrant" for removal should be made by the people's representatives in Parliament. The commission of a judge secures its legitimacy, ultimately, from those representatives. It should be they, alone, representing the people, who decide the warrant for removal. The elected representatives may have values quite different from those of members of the legal profession generally and the judiciary in particular. For example, on the complaint of "off-the-record" discussions with journalists they may be much less concerned than fellow judges. On issues of bias and prejudgment, they may be more concerned than are some judges.[49] Community standards, including as they affect the judiciary, are constantly changing, in Australia as

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48 Shetreet, note 35 *supra*, 15-16.

49 See e.g. discussion in *S & M Motors*, cited note 41 *supra*.

elsewhere. It is desirable that these standards should be reflected in a decision for removal. They should not be surrendered to judicial or expert opinion, however distinguished. Special or permanent commissions reporting to Parliament should confine themselves to a report on the facts found. At the most, they should state whether, as a matter of law, those facts "could" amount to misconduct or otherwise authorised parliamentary removal. The question of whether the judicial officer "should" then be removed should remain where the *Act of Settlement* placed it - in the chambers of Parliament.

The failure of the Queensland government to provide any of Justice Vasta's costs of the inquiry is also a source of concern and is relevant to judicial independence in Australia. It has been mentioned critically by a number of Australian lawyers, including myself.[50] It represents a very bad precedent indeed. It can only discourage judicial officers, faced by complaints and an inquiry, from defending themselves and their office. They will know that they do so at the peril of being required to pay personally very substantial costs. No surer way could be devised to inhibit proper judicial courage in defending a possibly unpopular but perfectly correct judicial act. It may be hoped that the principle involved - and the precedent set for other cases - will even yet be kept in mind in a review of this decision.

C. THE CASE OF MAGISTRATE MACRAE

The remaining judicial causes célèbres concern persons holding judicial office (or its equivalent) who, upon reconstitution of their courts were not reappointed to the new body.

The first instance occurred in New South Wales on the abolition of the Courts of Petty Sessions and the re-constitution of the magistrates' courts as the Local Court. Magistrates of the former court were eligible to apply for appointment as magistrates of the latter. Only five of more than a hundred magistrates were not so "reappointed". These five were not informed of certain allegations of unfitness which had been privately about them to the Attorney General when it was recommended that they should not be appointed to the new court. The New South Wales Court of Appeal set aside the decision of the Attorney General not to recommend their appointment. It held that decision was voided by procedural unfairness. The Court held that the five magistrates were not entitled to an order for appointment but to a declaration which would secure them a full and fair consideration of their applications, freed from the allegations of unfitness which had not been disclosed to them.[51] The High

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50 See e.g. McLelland, note 36 *supra*, 400. Despite a change of government in Queensland, the new Attorney General has said publicly that "no action will be taken" in relation to the payment of Mr Vasta's legal costs. He referred to fears about opening "the floodgates of retrospective legal aid". He thereby treated the case as one of many and not as having any special status because of the judicial status formerly enjoyed by Mr Vasta.

51 *Macrae*, cited note 8 *supra*.

Court of Australia refused to grant special leave to appeal from that decision. It was a decision grounded in the legitimate expectations of the holders of judicial office. Those expectations were, in turn, based upon judicial conventions respectful of the tenure of judicial officers which, until then, had uniformly been observed in Australia upon the reconstitution of courts.

D. THE CASE OF MAGISTRATE QUIN

Unfortunately, this was not an end to the litigation. The Attorney General purported to require of each of the five applicants a fresh application. He stated that they would only be considered, along with other fresh applicants and, by inference, in competition with them. By majority the New South Wales Court of Appeal, in respect of the lone former magistrate who stayed the course, decided that no fresh application was required. His original application should still be considered by the Attorney General, according to law.[52] The Court of Appeal decision included these observations:

> The vice of the course which is followed by the Attorney General is plain. The public interest in the security of judicial tenure upon the reconstitution of a court was given no apparent weight and was not acknowledged ... [There was no] warrant in treating Mr Quin and his colleagues merely as fresh applicants, in competition with other new applicants, when a principal basis of the previous decision was their special position, from which only was derived their special entitlement.[53]

In June 1990 the High Court of Australia reversed the Court of Appeal decision in a majority decision.[54] In effect it held that the relief sought would exceed the requirements of procedural fairness. The Chief Justice said that courts should be extremely reluctant to intervene in the Executive Process of appointing judicial officers.[55]

E. THE STAPLES AFFAIR

An even more serious departure from the forgoing convention occurred in the reconstitution of the National Industrial Relations Tribunal involving Justice Staples. This unfortunate case has been dealt with at length elsewhere.[56] It is true that Justice Staples was not a Federal judge in the constitutional sense. But

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52 *Quin v. Attorney General for and in the State of New South Wales* (1988) 16 ALD 550; (1988) 28 IR 244 (NSW CA).

53 *Id*, per Kirby P., 17.

54 *Attorney General (NSW) v. Quin* (1990) 64 ALJR 327 (Mason CJ., Brennan and Dawson JJ; Deane and Toohey JJ dissenting).

55 *Id*, 333. See discussion of this case in (1990) 64 *ALJ* 670.

56 M.D. Kirby, "The Removal of Justice Staples and the Silent Forces of Industrial Relations" (1989) 31 *Journal of Industrial Relations* 334. See also J. Kitay and P. McCarthy, "Justice Staples and the Politics of Australian Industrial Arbitration" (1989) 31 *Journal of Industrial Relations* 310.

this fact was itself substantially the product of an unexpected quirk of the Australian Constitution, belatedly discovered by the High Court.[57]

Justice Staples was commissioned under an Act by which the Australian Parliament promised him the same status, rank, salary, designation, pension rights, provision against removal and other privileges of a Federal judge. Serious questions arise in his care from the failure of succeeding heads of jurisdiction to assign him normal work in the Australian Conciliation and Arbitration Commission. Indeed, eventually he was assigned no work at all and so could not exercise his commission. A question is thereby presented about limitations on the use of a presiding officer's powers to arrange the business of the tribunal. Also a matter for concern was the failure of any appropriate person to explain why this course was adopted, adequately to explain publicly or to Justice Staples why no action was taken to redress it and candidly to indicate why Justice Staples alone of the office holders of the Commission was not appointed to the new body. It was never alleged that he had been guilty of misconduct or that he lacked ability. The most that was suggested of him, privately, was that he was a "maverick", unsuitable for the sensitive work of industrial relations and given to the use of colourful language in his decisions.

The most interesting feature of the Staples affair for present purposes was the slow, but ultimately strong and virtually unanimous formulation of opinion within the Australian legal profession condemning what had occurred. Even judges, who normally avoid controversy, made public statements drawing attention to the serious departure from judicial independence demonstrated by the case.[58] So did the organised legal profession.

Such was the eventual outcry that a Joint Selection Committee on the Tenure of Appointments to Commonwealth Tribunals was established by the Australian Parliament.[59] The report of that committee contains a number of recommendations designed to uphold the integrity of members of quasi-judicial tribunals of the Commonwealth. The Committee also recommended that a further inquiry should be established to determine the issue of compensation for Justice Staples.[60] So far there has been no action on these recommendations. Justice Staple's appeal for a response has continued to fall on deaf ears. The case provides a most unfortunate precedent. However the public controversy

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57 *R v. Kirby; ex parte the Boilermakers' Society of Australia* (1956) 94 CLR 254.

58 Noted Kirby, note 56 *supra*, 365 ff. See also D. Malcolm, "The Law Into the Nineties - the Independence of the Judiciary" [1989] *NZLRev* 373, 375f.

59 Australia, Parliament of the Commonwealth, Report of the Joint Select Committee on *Tenure of Appointees to Commonwealth Tribunals*, Tenure of Appointees to Commonwealth Tribunals, 1989. Following this report various bodies have approached the Prime Minister to request advice on the response of the Government to the report. For example, the Law Council of Australia wrote to the Prime Minister on 30 May 1990. No response had been publicly announced when this article was finalised.

60 *Id*, xv.

which followed the establishment of the new tribunal and the exclusion from it of Justice Staples may itself provide a sanction against the repetition of similar conduct by an Executive Government. It may also alert Parliaments throughout Australia to the strong professional and public feeling which underwrites and supports judicial independence and tenure and reacts to derogations from them.

It is perhaps not entirely coincidental that in June 1990 the Australian Federal Government, following findings of the Remuneration Tribunal, decided that Presidential Members of the new Industrial Relations Commission should no longer enjoy the parity which had hitherto existed with salaries of Federal Judges. Once the assimilation of these officers with Judges for reasons of the independence of office was fractured the need to continue the relativities of their salaries to those of judges was not self-evident to some. The result was a greater outcry amongst those affected than had marked the earlier actions against Justice Staples.[61]

The unhappy outcome of the Staples case gives point to the criticisms of the proliferation of non-judicial tribunals in Australia. The Judges of the Supreme Court of Victoria, in their Annual Report for 1988 warned of the potential for undermining judicial independence by the proliferation of such tribunals with limited rights of appeal to the general courts. It was a warning repeated by the Chief Justice of Victoria in a public address in August 1990.[62]

IV. CASE LAW

A. CASES AGAINST JUDICIAL OFFICERS

One relevant feature of recent litigation in Australia, as distinct from earlier times, has been a large number of legal proceedings brought against judicial officers in respect of the performance of judicial or associated duties. These cases have principally occurred in New South Wales courts.[63] They have necessitated an examination of the rationale for, scope and limits of judicial immunity from suit.

The decisions of the courts have made it plain that such immunity will not be narrowly construed. For example, in *Yeldham v. Rajski*[64] it was held that the immunity was attracted to a decision by a judge to refuse to grant leave to the

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61 See Joint Statement by Senators Cook and Bolkus, Canberra, 1 June 1990, 5.

62 J. Mc. Young, reported *The Age*, 20 August 1990, 10. See also *The Age*, 10 April 1990, 1. See also A.F. Mason, "Judicial Independence and the Separation of Powers - Some Problems Old and New" (1990) 24 *Uni BC L Rev* 345, and as modified in this Journal.

63 See e.g. *Moll v. Butler* (1985) 4 NSWLR 231; *Attorney General for New South Wales v. Agarsky* (1986) 6 NSWLR 38 (NSWCA); *Rajski v. Powell & Anor* (1987) 11 NSWLR 522 (NSWCA). Cf. *Sirros v. Moore* [1975] QB 118, 135 (Eng CA); *Nakahla v. McCarthy* [1978] 1 NZLR 291.

64 (1989) 18 NSWLR 48 (NSWCA).

disappointed litigant to prosecute a witness for perjury. Although that was a decision which was ministerial in nature,[65] for the purpose of the law of judicial immunity, it was held to attract such immunity because it was a function normally and properly performed by a judge and sufficiently connected with his or her judicial activities. Likewise in *Rajski v. Wood & Ors*[66] a challenge by the same litigant to intracurial judicial arrangements for the assignment of judges to hear the litigant's case was unsuccessful, as such arrangements were found not to be susceptible to judicial review. The majority of the Court concluded that this was because, of its nature, the arrangement was not justifiable. A minority opinion rested the decision on the narrower ground that the application was frivolous and vexatious, being an indirect, unnecessary and impermissible means of raising a challenge of judicial bias.[67]

B. CASES OF ALLEGED BIAS

Just as the number of cases brought against judicial officers in respect of their judicial duties has increased, so has the number of allegations of bias on the part of judicial officers and of misconduct on their part resulting in a mistrial. The high standards required of judges in Australia, the avoidance of the reality or appearance of predetermination of causes has recently been restated in emphatic terms by the High Court of Australia.[68] In each case, as in strong earlier authority, the Court emphasised that the question was not simply one of actual bias but whether, from the comments or the conduct of the judicial officer in question, the public or an impartial lay observer, would form a reasonable apprehension of bias on the judge's part.[69] Encouraged by such strong statements, numerous litigants have challenged judges for bias. The growth in the number and variety of such challenges has led to a cautionary warning that judges must continue to perform their duties and should not be driven from the exercise of their office by an unjustifiable assertion of bias.[70] If this could happen, judicial independence would be impaired because a party might then have an unwarranted influence upon the constitution of the tribunal to determine its cause.

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65 *Commissioner of Police v. Reid*, Court of Appeal (NSW), unreported, 6 June 1989; (1989) NSWJB 90.

66 (1989) 18 NSWLR 512 (NSWCA).

67 *Id*, 521 (Kirby, P).

68 E.g. in *Vakauta* and *Grassby* cited note 41 *supra*.

69 See e.g. *Watson* and *Livesey* cited above note 41 *supra*.

70 Mason CJ in *Re JRL; ex parte CJL* (1986) 161 CLR 342, 352. This was applied in *S & M Motors*, cited note 41 *supra*.

C. OTHER RELEVANT CASES

Several other recent cases, relevant to the independence of the judiciary in Australia should be mentioned. In *Re Tracey; ex parte Ryan*[71] the High Court of Australia returned to the limits imposed by the Australian Constitution on the exercise of the judicial power of the Commonwealth. A restriction upon the exercise by bodies outside Chapter III of the judicial powers of the Commonwealth has advantages that have been referred to many times in the High Court of Australia.[72] It has been described as "one main preservative of the public liberty which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the Executive powers".[73] But in this case it was held that the power of the Australian Parliament to make laws with respect to the defence of the Commonwealth under s.51(vi) of the Constitution provided relevant power to enact a military discipline code standing outside Chapter III and to impose upon those administering it a duty to act judicially. It did not involve the exercise of the judicial power.

The determination of what bodies are "courts" for the purpose of attracting the protections and obligations of the law of contempt has also agitated the courts. Compensation Commissioners were declared to be a "court" for that purpose. The alleged interference in the performance of judicial functions was therefore held to attract the law of contempt.[74] The case the more relevant to the present concern because it involved an alleged interference by the Chief Commissioner in the performance by another Commissioner of her quasi judicial functions. The case was argued by the Bar Association as one involving interference in quasi judicial independence within what might loosely be called the judiciary itself. Independence of the judiciary includes independence from one's colleagues. In the nature of things, pressures from judicial colleagues would rarely come to notice. In Australia it is probably true that his is not only the result of institutional loyalties and judicial avoidance of controversy. It is also because, generally speaking, those who demand independence for themselves readily perceive the obligation to accord it to other judicial officers.

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71 (1988-9) 166 CLR 518. See also *Love v. Attorney General (NSW)* (1990) 64 ALJR 175, 179 where the High Court discusses the judicial power and points out that it is "insusceptible of comprehensive definition".

72 *R* v. *Kirby* (note 57 *supra*). See also *Reg v. Richards; ex parte Fitzpatrick and Brown* (1955) 92 CLR 157, 165.

73 Blackstone, *Commentaries*, 1930, vol 1, 269 cited by Deane J. in *Re Tracey*, note 71 *supra*, 579-80.

74 *New South Wales Bar Association v. Muirhead* (1988) 14 NSWLR 173 (NSWCA).

VII. PRACTICAL PROBLEMS

A. JUDICIAL SALARIES

No contemporary review of this subject would be complete without reference to a number of practical issues relevant to judicial independence. There has been a large debate in Australia in recent years about the erosion of the value of judicial salaries and conditions. The risk to judicial independence is not (in Australia at least) a danger of resort to corruption by reason of poverty. The greater risk, as the Chief Justice of the High Court of Australia (Sir Anthony Mason) has warned, lies in the inability to attract to the judicial office lawyers of the highest talent; the loss of judges who return to private practice; the haemorrhage of dispute settlement to private systems of justice separate from the regular courts and the establishment of more and more statutory bodies to do work formerly done by judges.[75] Significant increases in State and Federal judicial salaries in Australia in 1989 and 1990 have met, partly at least, these concerns. But the need to remove the issue of judicial salaries from the political arena and to sever their linkage with the salaries of other public officials has been suggested. The provision of salary "packages" to public servants, particularly in public commercial enterprises, much more valuable than the amounts paid to the judiciary in Australia, has led to the complaint that this represents yet another reflection of the downgrading of the judicial office that would not have occurred in earlier times.

B. JUDICIAL ADMINISTRATION

Connected to the salaries of judges is the funding of courts themselves. There is a growing appreciation of the need to provide courts with an independent source of income so that they can manage their own affairs an not be beholden in that respect to the Executive Government, usually the Attorney General. The first court in Australia to secure budgetary autonomy and provide for its own administration was the High Court.[76] Now other courts, notably the Federal Court of Australia, the Family Court of Australia and the Supreme Court of South Australia are following suit. A similar proposal has been made in respect of the Supreme Court of New South Wales. These developments are timely for reasons that Sir Anthony Mason has explained. The erosion of the numbers of court staff, despite substantial increases in workload, provides one reason for financial independence.[77] Another reason is the need to reduce the

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75 See Mason, note 15 *supra*, 301. Cf. Stephen, above note 32 *supra*, 11.

76 *High Court of Australia Act* 1979 (Cth).

77 Mason, note 15 *supra*, 300. The issues which lie behind this development, and changes occurring in other jurisdictions, are collected with relevant referees in Malcolm, note 57 *supra*, R.G. McGarvie, "Judicial Responsibility for the Operation of the Court System" (1989) 63 *ALJ* 79 and in I.R. Scott, "Analysis: The Council of Judges in the Supreme Court of England and Wales" [1989] *Public Law* 379.

influence of the Executive Government, a frequent litigant, upon judicial activity. The transfer of the function of listing criminal cases to a Criminal Listing Directorate outside the Supreme Court of New South Wales contained dangers of derogation from judicial independence which were called to public notice at the time.[78]

C. ACTING APPOINTMENTS

In a number of the Australian States the difficulty of attracting to permanent judicial officers lawyers of appropriate talent has now given way to expedients which contain some risk to the independence of the judiciary. These include the extension of the retiring age of judges, the provision for the recall of retired judges as acting judges, and the appointment of increasing numbers of acting judges from the ranks of the legal profession. Although in the Supreme Court this has involved a term appointment, in the District Court the appointee typically returns each day to his or her practice. Such arrangements have had the advantage of meeting an immediate problem facing the courts coping with delays. But they run the risk of reducing the actuality and perception of the independence of judicial decision-makers. Whilst acting judges may return to practice, they can be subjected to pressures by clients and fellow practitioners which do not exist in the case of tenured judges. The recall to judicial service by the Executive Government of some only of the retired judges also carries the risk that it may be seen, at least in some cases, that the government has weighed the judicial "form" of the re-appointee. This is something that is unknown at the time of an original appointment. The same risk is run in establishing a regular system of acting judges. It may be suggested that they are undergoing a test by the Executive Government as to their suitability for confirmation as judges. Acting appointment, if made at all, should be regarded as exceptional. But this is no longer so, at least in New South Wales. Some of the objection to acting appointments mentioned here can also be made in respect of fixed term appointments and part-time appointments to judicial office. Partly in response to difficulties in recruitment of judicial offices and partly for cost-cutting reasons steps have recently been taken to facilitate such developments.[79]

VIII. EVALUATION

This review demonstrates that the fundamental supports for judicial independence in Australia remain substantially unchanged. The constitutional guarantees extend only to High Court and Federal judges. What may happen to

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78 *Ibid.*

79 This controversy has arisen in the Family Court by the appointment of Judicial Registrars. See *Family Law Act 1975*, s.26A. The constitutionality of aspects of this legislation has been questions. See *Harris v. Caladine* 13 Fam LR 755.

State judicial officers outside the constitutional protection is illustrated by the cases of Mr Macrae and Mr Quin. What may happen to the holders of Federal quasi-judicial office is illustrated by the case of Justice Staples. These cases represent serious departures from long established conventions which are defensive of judicial independence and of the independence of persons with similar functions.

Even more disturbing is the manner in which statutes have provided for the conduct of inquiries into allegations against judges. The special legislation in the cases of Justices Murphy and Vasta reveal serious defects, most especially in the surrender by Parliament of the ultimate question hitherto reserved to it ever since the *Act of Settlement.*

Recent cases in Australia, including in the criminal courts, involving judges and magistrates personally have undoubtedly combined to create a milieu in which unfortunate legislative initiatives have been taken. In responding to the still wholly exceptional and rare cases of proved judicial misconduct, legislation has been enacted and extended to judicial officers in some parts of Australia which insufficiently reflect the high public interest in providing judicial officers with a large measure of personal independence. The failure of the former Queensland government to pay Justice Vasta's costs of defending himself before a judicial inquiry is a very bad precedent. It has the tendency to encourage a supine judiciary when courage and self-confidence are, with integrity and ability, prerequisites of the proper discharge of judicial duties.

The legislative provisions designed to make the conduct of judges accountable for complaints has been paralleled in Australia by a growth in the number and variety of challenges to judicial officers based on allegations of bias. Legal proceedings against judges personally have also become a much more common feature of judicial life than was formally the case. Judges, and judicial administration of the courts, face many practical problems which impinge upon judicial independence. All of these developments present challenges to the ill-understood and frequently fragile institution of judicial independence. Even the old convention of restraint in political attacks upon judges has lately succumbed to the temptations of media controversy. "Ultimately", as Chief Justice Mason has declared, "we need to develop a better means of defending the judiciary from baseless and unfair criticisms".[80]

It is probably still true to say that the judiciary of Australia is highly respected. The belated outcry in the Staples case illustrated the high professional, community (and ultimately parliamentary) concern to defend the independence of judicial officers in Australia. But sufficient has occurred in the past decade to make it plain that such independence cannot be taken for granted in Australia. It is the duty of judges, lawyers and other citizens who are concerned to uphold the rule of law, to explain and justify the laws and conventions which defend judicial independence. It is the duty of all to note the

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80 *Id.* See also the comments of Hope JA above, note 1 *supra.*

warnings of the erosion of judicial independence and to strive to repair the assaults upon it.

This need not be done by a blinkered rejection of every change. The judiciary will not, alone of the professions and institutions of society, escape change. But it behoves those who know the history of the judiciary, the nature of its functions and the perils of disturbing essentials, to alert those who would change things about the fragile and precious nature of the institution involved. Parliamentary democracy and an independent judiciary safeguarding the rule of law are the twin pillars of Australian constitutional life. They provide a brilliant symbiosis which has generally served the community well. It would be a great misfortune if, through legislative indifference and Executive over-enthusiasm, the critical balance provided by the judicial branch of government were significantly impaired.

This is not the call of conservatives summoning judges to the defence of elitist values and an unelected institution inherited from the past. It is the call to a liberal democracy for the defence of an institution which keeps the others in balance, restrains excess of power, tempers the tendency to neglect time-honoured values, defends liberty and individual justice and upholds the rule of law.[81]

It is notable that amongst the first reforms introduced in the emerging new governments of Eastern Europe are those designed to enhance legality, to control the exercise of arbitrary power and to place on a firmer footing the institution that is a prerequisite to the attainment of so many other values in a civilised community - judicial independence.

All of this was said well in the infant republic of the United States at the beginning of the 19th century in a New York court:

> Let us beware that in our zeal for securing personal liberty we do not destroy the virtuous independence and rightful authority of our courts of justice, and thereby subvert the foundations of social order. So long as our courts are pure, enlightened and independent, we shall enjoy the greatest of earthly blessings, a government of laws; but whenever these tribunals shall cease to deserve that character, the standard of justice and civil liberty must give place to the sceptre of a tyrant.[82]

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81 G.Green, "The Future of the Magistracy" unpublished address, Hobart, 11 June 1990, 10 where the diminution of respect for judicial independence in Australia is portrayed in the context of other institutional changes - including the "atrophy" of the principle of ministerial responsibility, an independent non-political public service and a Federal system with federal and state powers shared in a realistic way.

82 See *Yates v. Lancing* 5 *Johnson's Rep* 282 (1811) per Platt J.