THE *JUDICIAL OFFICERS ACT* 1986 (NSW): A DANGEROUS PRECEDENT OR A MODEL TO BE FOLLOWED?

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This is the best thing that has ever happened to the judges. The most unfortunate aspect of it is that they have not yet realised it....[1]

The Bill has the potential to reduce the Judiciary to disciplined subservience. The right of the private citizen to have justice administered 'without fear or favour' is placed at serious risk.[2]

I. INTRODUCTION

The comments set out above were made in relation to the *Judicial Officers Act* 1986 (NSW) (the Act) and are representative of the emotionally-charged and diametrically opposed arguments which the Act provoked. This is not surprising

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1 Statement of the NSW Attorney-General: *NSW Parl Deb* Legislative Assembly 2 October 1986 4473.

2 Public statement issued by the Justices of the NSW Supreme Court on 30 September 1986 (subsequently cited as Supreme Court Statement) and reproduced in the *Sydney Morning Herald* 1 October 1986 p 21.

as the Act can truly be said to be revolutionary, for it established a formalised system of judicial accountability which is the first of its kind in Australia. The Act allows any member of the public to file complaints against NSW judicial officers and be assured that such complaints will be considered by at least one group of experts.

It is the aim of this article to determine whether the Act is a dangerous precedent or a model to be followed by other Australian states. In Part II the events leading to the enactment of the Act will be outlined. Part III contains an outline of the main provisions of the Act. Part IV is devoted to a critical evaluation of the system created by the Act while in Part V the features which, in the view of the writer, systems of judicial accountability should possess will be outlined.

II. BACKGROUND TO THE ACT

In the early 1980s, Mr Justice Kirby, one of the best known Australian judges of our era, indicated that:

> In the last few years there have been calls for a more routine procedure, after American models, to provide for the handling of complaints against judges and for a less extraordinary machinery for their retirement or removal. However, these calls have not yet become a strong political movement, and the need is so rare that it is unlikely to result in legislation in the foreseeable future.[3]

However, this is exactly what occurred in 1986 when the NSW Parliament enacted the Act. It is useful, for a better understanding of the Act, to consider how calls for a formalised system of judicial accountability did "become a strong political movement" in NSW. The issue of judicial accountability had remained dormant until the 1980s, when "a series of cause celebres, scandals, and contested decisions ... placed the judiciary squarely in the public gaze".[4] An article published by the *Age*,[5] on 2 February 1984, set in motion a chain of events that eventually led to the late Mr Justice Murphy, who was then a Justice of the High Court, being tried on two charges of having attempted to pervert the course of justice in relation to the committal proceedings and trial of a Sydney solicitor, Morgan Ryan.[6] Justice

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3 MD Kirby "Australia" in S Shetreet and J Deschênes (ed.) *Judicial Independence : The Contemporary Debate* (1985) p 20.

4 D Brown "Judging the Judges" *Australian Society* 1 April 1984 p 21.

5 "Secret Tapes of Judge" *Age* 2 February 1984 p 1.

6 The allegations against Justice Murphy also led to a Federal Police investigation, a joint Federal-NSW police task force inquiry, the establishment of two Senate Standing Committees and a Commonwealth Parliamentary Commission of Inquiry consisting of three retired judges, a Royal Commission of Inquiry and appeals before the NSW Court of Appeal and the High Court: see HP Lee and V Morabito "Removal of Judges - the Australian Experience" [1992] *Singapore Journal of Legal Studies* 40 at 44-51.

Murphy was, eventually, acquitted on both charges.[7] On 15 March 1985, a former NSW Chief Stipendiary Magistrate, Murray Farquhar, was convicted, and served a prison sentence, for attempting to pervert the course of justice by trying to influence another magistrate, the late Mr Kevin Jones, not to commit for trial the then head of the NSW Rugby League, Kevin Humphries.[8] Judge Foord of the NSW District Court was charged, on 21 November 1984, on two counts of attempting to pervert the course of justice in relation to the committal proceedings and trial of Morgan Ryan.[9] He was acquitted on both charges in October 1985.[10]

On 8 September 1986, a study[11] by Professor Tony Vinson and his team of researchers, was released to the media. After analysing information on 276 drug cases terminating in the New South Wales District Court between 1980 and 1982, Vinson concluded that a judge, referred to as "Judge J", appeared to have exercised selective leniency in dealing with the clients of a particular solicitor, referred to as "Solicitor S".[12] The Vinson Report also contained the conclusion that the system of justice in NSW "is neither systematic nor just".[13]

The level of publicity which the Vinson Report attracted was certainly unprecedented for an academic study.[14] The events which have been outlined

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7 On 5 July 1985, the charge of having attempted to pervert the course of justice in relation to the trial of Ryan was rejected by a jury. Justice Murphy was, however, found guilty in relation to the committal proceedings charge. However, a retrial was ordered by the NSW Court of Appeal and, on 28 April 1986, Justice Murphy was finally acquitted.

8 See T Storey "Farquhar's First Night in Prison - Bail Refused" *Sydney Morning Herald* 16 March 1985 p 1.

9 Judge Foord was alleged to have asked Clarrie Briese, the then NSW Chief Stipendary Magistrate, to approach the magistrate hearing Ryan's committal proceedings in an attempt to stop Ryan being committed for trial. The other charge was based on allegations that Judge Foord had approached Judge Flannery of the NSW District Court in an attempt to influence the trial of Ryan over which Judge Flannery was presiding.

10 L Simpson "Foord: Back to Work" *Sydney Morning Herald* 2 October 1985 p 1.

11 Vinson *et al Accountability and the Legal System: Drug Cases Terminating in the District Court* 1980-1982 Report to the Criminology Research Council, Canberra, 1986.

12 It was subsequently revealed that Judge J was Judge Foord and that Solicitor S was Howard Hilton: see respectively, A Keenan and L Simpson "Foord is Judge J" *Sydney Morning Herald* 9 September 1986 p 1 and *NSW Parl Deb* Legislative Council 11 November 1986 p 5658.

13 It is somewhat ironic that this report which was, without doubt, one of the major reasons for the enactment of the Act was subsequently largely discredited as it was found to have a number of "methodological" weaknesses: see A. Daniel "Flawed statistics that unleashed a legal furore" (1986) 24(10) *Law Society Journal* 42 and R Douglas *et al* "Statistics and the Identification of Judicial Impropriety: A Critical Analysis" (1987) 11 *Criminal Law Journal* 259. The Government could certainly not be said to be unaware of such flaws in the Vinson Report for as early as 13 September 1986, the Attorney-General was reported as saying that the "report itself founders on the most elementary statistical principles": see M Coultan "Foord Faces Tribunal for Judges" *Sydney Morning Herald* 13 September 1986 p 2.

14 See A Keenan "Judge Acted Leniently in Solicitor's Cases: Report" *Sydney Morning Herald* 8 September 1986 p 1; A Keenan "NSW Justice Neither Systematic nor Just" *Sydney Morning Herald* (8 September 1986 p 4; Editorial "Calling Judges to Account" *Sydney Morning Herald* 8 September 1986 p 12; A Keenan and L Simpson "Foord is Judge J" *Sydney Morning Herald* 9 September 1986 p 1; L Simpson and A Keenan "Statistics Quoted in Judge Row Attacked" *Sydney Morning Herald* 11 September 1986 p 3; Editorial "Judge

convinced the NSW Government that the issue of judicial accountability had become a political issue and thus had to be approached like any other political issue, namely, by taking the option which would attract the approval of the majority of voters. The NSW Government formed the view that the adverse publicity generated by the allegations of impropriety against Justice Murphy, Justice Foord and Farquhar, together with the findings of the Vinson Report, had caused the public to lose confidence in the judiciary.[15] Having formed this view, it was in the best interest of the Government to be seen as taking strong and swift action to remedy the perceived problem; in other words, it was vital to portray the image of a tough and courageous Government which is not afraid of dealing with delicate and controversial problems.[16] This is clearly demonstrated by the following comments made, respectively, by the then NSW Attorney-General, Mr Sheahan and the then Premier, Mr Unsworth:

> the current depressing lack of confidence in the justice system demanded to be addressed and rectified;[17] and
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> neither the Leader of the Opposition nor any other member of the Opposition will ever be able to say that the Government is guilty of cowardice when dealing with issues of the day...the bill will have widespread support throughout the community.[18]

In light of the Government's perception of the action that was required, it was not surprising that on 12 September 1986,[19] only four days after the release of the

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Foord and Other Questions" *Sydney Morning Herald* 12 September 1986 p 10 and D Brown "Judge J is Simply Beside the Point" *Sydney Morning Herald* 16 September 1986 p 15.

15 The Government's perception was possibly correct. In fact, a survey conducted by the *Sydney Morning Herald* in June 1986 showed that about 35 per cent of those questioned in New South Wales believed that organised crime had a significant amount of influence on the legal profession and the courts: see A Keenan "NSW Justice Neither Systematic nor Just" *Sydney Morning Herald* 8 September 1986 p 4. Another opinion poll, conducted before the enactment of the Act, found that only 20 per cent of those persons questioned in New South Wales had full confidence in the judiciary; 44 per cent had some confidence; 17 per cent had little confidence and 16 per cent had no confidence: see *NSW Parl Deb* Legislative Council 29 October 1986 5666.

16 For similar views see J Goldring "The Accountability of Judges" (1987) 59 *Australian Quarterly* 145 at 147. The need to make a "popular" decision was reinforced by the fact that on 10 September 1986 it was announced that the Premier's popularity had decreased by 11 percentage points to 26 per cent: see "Unsworth Nosedives in Latest Popularity Poll" *Sydney Morning Herald* 10 September 1986 p 1. On 15 October 1986 a month after the Government's announcement regarding the Act, it was reported that, according to the latest Morgan Gallup poll, Mr Unsworth's popularity had increased by 5 per cent: see "Polls Look a Little Brighter for Barrie ..." *Sydney Morning Herald* 15 October 1986 p 3.

17 *NSW Parl Deb* Legislative Assembly 24 September 1986 3874. See also the comments of Mr JR Hallam, the then Leader of the Government in the Legislative Council: *NSW Parl Deb* Legislative Council 21 October 1986 4997.

18 *NSW Parl Deb* Legislative Assembly 23 September 1986 3724.

19 It needs to be said that the legislation would possibly have been enacted, even without the Vinson Report: "Mr Sheahan said that the Government had been considering the changes for some time, but that the extensive publicity ... [given to the Vinson Report] had made the implementation of the changes more urgent": see M

Vinson Report, Sheahan publicly announced the Government's intention to undertake a number of major reforms to the NSW justice system, which included the establishment of the Judicial Commission of NSW.[20] The *Judicial Officers Bill* was first presented in Parliament on 24 September 1986. It received the royal assent on 18 November 1986 and came into effect on 19 December 1986.

One of the world's leading experts on judicial independence and judicial accountability, Professor Shetreet, indicated that the "draftsmen of the legislation are to be commended for their work... however, the models selected to be implemented by legislation are not free from weaknesses and deficiencies".[21] It is submitted that the weaknesses of the system, created pursuant to the Act, are attributable more to the Act's insufficient clarity and lack of detail than to the deficiencies of the system which has been followed, namely the Californian system. Given the haste with which the Act was enacted and the complexity of the issues involved, it would have, perhaps, been unfair to have expected drafting of a higher quality. As Justice Rogers wisely suggested "who judges the judges is a question that has agitated superior intellects for centuries. Can we solve it in a month?"[22].

III. THE MAIN PROVISIONS OF THE ACT[23]

Under the Act, any person has the right to complain to the Judicial Commission of New South Wales[24] (the Commission) "about a matter that concerns or may concern the ability or behaviour of a judicial officer".[25] "Judicial officers"[26] are

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Coultan "Foord Faces Tribunal for Judges" *Sydney Morning Herald* 13 September 1986 p 2. To support his claim that the Government had intended all along to bring reform, Sheahan indicated that he had visited the Californian Commission on Judicial Performance in 1985 and that officers of his department paid a follow-up visit shortly before the introduction of the Bill: see *NSW Parl Deb* Legislative Assembly 24 September 1986 3873. It was, however, strange that in the speech made by Unsworth when he was appointed Premier on 3 July 1986, which included a list of reforms which he intended to effect, there was no mention of the setting up of the judicial commission: see D. Shanahan "More Jobs, Police on Street in Unsworth Plan" *Sydney Morning Herald* 4 July 1986 p 2.

20 The other reforms are set out in S Shetreet "The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986" (1987) 10 *UNSWLJ* 4 and *NSW Parl Deb* Legislative Assembly 23 September 1986 3723.

21 S Shetreet *ibid* at 6.

22 A Rogers "Judicial Accountability: A Judge's Personal Commentary" (1987) 17 *QLSJ* 21 at 25.

23 As a result of recent amendments, the tenure of NSW judicial officers is also regulated by the *Constitution Act* 1902 (NSW); accordingly, reference will also be made to the relevant provisions of the NSW Constitution.

24 The Commission is established as a statutory corporation and as such administers its own financial appropriation by Parliament from the Consolidated Fund: see Commission *Annual Report 1986-87* p 3.

25 Section 15(1) of the Act. Henceforth all references to sections are sections of the Act.

26 Section 3(1).

defined as justices and masters of the Supreme Court, magistrates, and judges of the Industrial Court, the Land and Environment Court, the District Court, and the Compensation Court.

The Commission is composed of eight members, six of whom are referred to as official members.[27] The official members are the Chief Justice of the NSW Supreme Court, the Chief Judge of the Industrial Court, the Chief Judge of the Land and Environment Court, the Chief Judge of the District Court, the Chief Judge of the Compensation Court and the Chief Magistrate.[28] The remaining two members of the Commission are appointed by the Governor, on the nomination of the Attorney-General.[29] One of the appointed members is a practising lawyer nominated after consultation by the Attorney-General with the President of the New South Wales Bar Association and the President of the Law Society of New South Wales.[30] The second appointed member is a person who "in the opinion of the Minister, has high standing in the community".[31]

The Commission is required to conduct a "preliminary examination" of each complaint it receives.[32] The Act does not provide a clear indication as to what a preliminary examination entails. It simply provides that "the Commission may initiate such inquiries in to the subject-matter of the complaint as it thinks appropriate"[33] and that "the examination or inquiries shall, as far as practicable, take place in private".[34]

Upon completion of the preliminary examination, the Commission must:[35]

1. summarily dismiss the complaint;[36]
2. classify the complaint as serious; or
3. classify the complaint as minor.

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27 Section 5(3).

28 Section 5(4).

29 Section 5(3).

30 Section 5(5)(a). The current member is Mr RD Somervaille. His predecessor was Mr D Moore.

31 Section 5(5)(b). The current member is Mr RJ Cotton. His predecessor was Sir Lenox Hewitt.

32 Section 18(1). The other functions of the Commission are to assist courts to achieve consistency in imposing sentences (s 8); to organise and supervise an appropriate scheme for the continuing education and training of judicial officers (s 9); to give advice to the Attorney-General on such matters as the Commission thinks appropriate (s 11(a)) and to liaise with persons and organisations in connection with any of its functions (s 11(b)). For more details see Commission *Annual Report 1991-92* p 9-30.

33 Section 18(2).

34 Section 18(3).

35 Section 19.

36 The circumstances justifying summary dismissal are set out in s 20 and include the fact that the complaint is frivolous, vexatious, not in good faith or trivial; the matter complained about occurred at too remote a time to justify further consideration; there are satisfactory alternative means of redress; the complaint relates to the exercise of a judicial or other function that is or was subject to adequate appeal or review rights; and the judge concerned is no longer a judge.

A complaint is classified as serious if the grounds of the complaint, if substantiated, could, in the opinion of the Commission, justify parliamentary consideration of the removal of the judge complained about from office.[37] Section 41(1) of the Act and s 53(2) of the *Constitution Act* 1902 (NSW) provide that NSW judicial officers can be removed "on the ground of proved misbehaviour or incapacity". A minor complaint is defined as any undismissed complaint which is not serious.[38] This category covers matters which do not justify parliamentary consideration of the dismissal of the judge but which warrant further examination on the ground that the matter "may affect or may have affected the performance of judicial or official duties by the officer".[39]

A complaint which has not been summarily dismissed by the Commission and which has been classified by it as serious, must be referred to the Conduct Division. A minor complaint must also be referred to the Conduct Division unless the Commission is of the view that the complaint "does not warrant the attention of the Conduct Division", in which case the complaint is referred to the head of the Court on which the judge complained about sits.[40] The Conduct Division comprises several panels of three judges, one of whom may be a retired judge. The members of the Conduct Division are appointed by the Commission and there is no restriction against members of the Commission also being members of the various panels of the Conduct Division.[41] The Act further provides that more than one panel of the Conduct Division may be constituted, and sit, at any time to deal with different complaints[42] and that one panel may deal with two or more complaints if the Commission considers it appropriate.[43]

The Conduct Division is required to conduct "an examination" of a complaint referred to it by the Commission.[44] The description of this "examination" is similar to that of "the preliminary examination" conducted by the Commission.[45] The Conduct Division can reach a conclusion as to the validity and gravity of a complaint on the basis of an examination only, without holding a hearing. In fact, s 24(1) provides that the Conduct Division "may" hold hearings in connection with a complaint; this provision is to be contrasted with s 23(1) which provides that the

37 Section 30(1).
38 Section 30(2).
39 Section 15(2)(b). See also Commission *Annual Report 1988-89* p 22.
40 Section 21(2).
41 Section 22(4).
42 Section 22(5).
43 Section 22(6).
44 Section 23(1).
45 Section 23(2) and s 23(3).

Conduct Division "shall" conduct an examination. This interpretation was confirmed by the Attorney-General when he introduced the Bill in Parliament.[46]

Once the Conduct Division is satisfied that sufficient consideration has been given to the complaint, one of the following "scenarios" will result:

1. If the complaint has not been substantiated or if it falls within one or more of the grounds set out in s 20(1) (that is, the grounds upon which the Commission can summarily dismiss a complaint), the Conduct Division must dismiss the complaint.[47] In relation to serious complaints, the Conduct Division is required to present to the Governor a report setting out its conclusions.[48]
2. If the Conduct Division decides that a minor complaint is wholly or partly substantiated, it can "either so inform the judicial officer complained about or decide that no action need be taken."[49] The Conduct Division is required to furnish a report to the Commission setting out the action which it has taken.[50] A copy of this report must also be supplied to the judge in question.[51]
3. If the Conduct Division decides that a serious complaint is wholly or partly substantiated, it may also form the view that the matter could justify parliamentary consideration of the removal of the judge from office.[52] The Conduct Division is required to present to the Governor a report setting out its conclusions.[53] If the report sets out the opinion of the Conduct Division that a matter could justify parliamentary consideration of the removal of the judicial officer from office on the ground of proved misbehaviour or incapacity,[54] the Governor may remove the judicial officer from office on the address of both Houses of Parliament.[55] Such a report is a mandatory prerequisite for the dismissal of any NSW judicial officer.[56]

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46 See *NSW Parl Deb* Legislative Assembly, 24 September 1986 3876. He indicated that "if the Conduct Division decides it is desirable to hold a hearing into a complaint, clause 24 will permit it".

47 Section 26.

48 Section 29(1). A copy of this report must also be supplied to the judge in question: Section 29(8).

49 Section 27.

50 Section 29(7).

51 Section 29(8).

52 Section 28.

53 Section 29(1). This report is to be laid before Parliament as soon as practicable: Section 29(3). A copy of this report must also be supplied to the judge: Section 29(8).

54 In that case the report must also include the Conduct Division's findings of fact: Section 29(2).

55 Section 41(1).

56 Section 41(1) provides that "a judicial officer may not be removed from office in the absence of a report of the Conduct Division to the Governor under this Act that sets out the Division's opinion that the matters referred to

IV. EVALUATION OF THE ACT

A useful starting point is a discussion of the fundamental principles of judicial independence and judicial accountability. In relation to judicial independence,[57] Shetreet draws a distinction between the independence of the individual judges and the collective independence of the judiciary as a whole. The independence of the individual judge is comprised of two essential elements: substantive independence and personal independence.[58] Section 1(c) of the International Bar Association Code of Minimum Standards of Judicial Independence[59] provides that "substantive independence means that in the discharge of his judicial function, a judge is subject to nothing but the law and the commands of his conscience." This aspect of judicial independence thus refers to the "neutrality of mind of the judge, to his impartiality and his total freedom from irrelevant pressures."[60] Personal independence means "that the judicial terms of office and tenure are adequately secured".[61] Another important aspect of judicial independence is the internal independence of judges which simply requires that a judge be independent from his/her fellow judges regarding his/her adjudicative functions.[62] Judicial independence does not entail total isolation; it only prevents improper pressures or influences on judges and courts. Consequently, "the ideal of independence is not self-contained...[as it] requires judgment as to what forms of pressures are 'proper'".[63] It is also important to remember that the purpose of judicial

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in the report could justify parliamentary consideration of the removal of the judicial officer on the ground of proved misbehaviour or incapacity".

57 On judicial independence see, S Shetreet "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges" in S Shetreet and J Deschênes (ed.) *Judicial Independence: the Contemporary Debate* (1985) 590-681; N Stephen "Judicial Independence" (1989) 71 *Victorian Bar News* 11; N Stephen "Judicial Independence Depends on Standards on and off the Bench" (1989) 14 *Australian. Law News* 12; LJ King "Minimum Standards of Judicial Independence" (1984) 58 *ALJ* 340; "The Independence of the Judiciary" A Statement by the Australian Bar Association (1991) 77 *Victorian Bar News* 18; CR Briese "Commentary on Judicial Independence" (1984) 14 *QLSJ* 175; G Green "The Rationale and Some Aspects of Judicial Independence" (1985) 59 *ALJ* 135; A Mason "Judicial Independence and the Separation of Powers:- Some Problems Old and New" (1990) 13(2) *UNSWLJ* 173; MD Kirby "Judicial Independence in Australia Reaches a Moment of Truth" (1990) 13(2) *UNSWLJ* 187 and V Morabito "Judicial Independence: Time for Major Changes" (1992) 66 *Law Institute Journal* 1091.

58 See S Shetreet *ibid* at 598.

59 The IBA Code was adopted in the Plenary Session of the 19th IBA Biennial Conference held on Friday, 22 October 1982, in New Delhi, India.

60 S Shetreet note 57 *supra* at 630.

61 *Ibid* at 598-9. See also s 1(b) of the IBA Code.

62 See ss 2 and 47 of the IBA Code and Article 3.03 of the Montreal Declaration on the Independence of Justice (adopted on 10 June 1983 at Montreal).

63 J Basten "Judicial Accountability: A Proposal for a Judicial Commission" (1980) 52 *Australian Quarterly* 468 at 469-70.

independence is not to place members of the judiciary in a privileged position[64] but instead to ensure that they exercise, and are seen as exercising, their judicial functions impartially; that is to say, judicial independence is a means to an end, the end being the impartiality of judges.[65]

An equally important value is that in a democratic system "no institution can operate without being answerable to society. The judiciary must also be accountable, as judicial independence cannot be maintained without judicial accountability for failures, errors or misconduct".[66] To fulfil this goal, a modern society requires a mechanism which can promptly, effectively and fairly deal with instances, as well as allegations, of judicial misconduct and/or incapacity.[67]

Judicial accountability and judicial independence are not inherently inconsistent.[68] 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 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.[69] This occurs because "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".[70] This "general

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64 As one American commentator noted, "the provisions for securing the independence of the judiciary were not created for the benefit of the judges, but for the benefit of the judged": see P Kurland quoted in F Greenberg "The Task of Judging the Judges" (1976) 59 *Judicature* 458 at 467.

65 See M Cappelletti "Who Watches the Watchmen?" in S Shetreet and J Deschênes (ed.) note 57 *supra* 550 at 556; RE McGarvie "The Operation of the New Proposals in Australia" *The Accountability of the Australian Judiciary: Procedures for Dealing with Complaints Concerning Judicial Officers* (Australian Institute of Judicial Administration, 1989) 13 at 14; N Stephen note 57 *supra* at 13 and Bar Association Statement 13.

66 S Shetreet note 20 *supra* at 7. See also J Goldring note 16 *supra* at 152; *The Ombudsman Victoria: Annual Report 18: June 30 1991*, 33; A Rogers note 20 *supra* at 21 and Current Topics "New Formalised Judicial Accountability System Established in New South Wales" (1987) 61 *ALJ* 157 at 158.

67 Justice Kirby noted 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: MD Kirby note 57 *supra* at 192 and N Stephen note 57 *supra* at 12.

68 The Supreme Court of Maine warned that "a lack of judicial accountability may itself be the greatest danger to judicial independence": see *NSW Parl Deb* Legislative Assembly 2 October 1986 4465. See also *Ombudsman*, 33 and 43 and Editorial "Judging our Judges" (1980) 4 *Legal Service Bulletin* 171.

69 See J Basten note 63 *supra* at 469 and *The Judiciary* The Report of a *Justice* Sub-Committee (London: Stevens & Sons 1972) at 45-6.

70 N Stephen note 57 *supra* at 12; A Rogers note 22 *supra* at 23; and G Green "Judicial Independence" (1984) 14 *QLSJ* 171.

community satisfaction" with the judiciary should discourage attempts to improperly interfere with the work of judges.

It is frequently argued that "to perform judicial work effectively a judge needs a certain amount of authority and standing. This would be diminished if judges were placed in a position where they were made the subject of a system for the collection of complaints about them",[71] with the result that "the litigant...is unlikely to accept the judgment of the court with that degree of respect which is now the norm."[72] The *Justice* Sub-Committee described this line of argument as the "pedestal" theory of the judiciary, namely that "it is of the essence of the ritualistic aura of the judges that they must be placed in a position where they are apart from all mankind, and their behaviour outside the range of scrutiny or criticism".[73] This theory is clearly out of step with our more sophisticated era where all public institutions are under greater scrutiny and are expected to be accountable to the community they serve. The writer agrees with Scutt that "the idea that judges are somehow higher beings than others; that trust should automatically be theirs, because of their position; that judges are above criticism, removed from the common herd, remote from human failing - has no place in the Australia of the 1980s [and 1990s]. It is more suited to a medieval society."[74] The controversy sparked by certain comments made by a number of Australian judges,[75] in relation to rape, has clearly demonstrated that members of the public are more and more unwilling to believe that judges, upon being "elevated" to the bench, immediately divest themselves of all their prejudices. Furthermore, the NSW system has enhanced, and not diminished, the "authority and standing" of the judiciary. The Commission, itself, has formed the view that "the small number of complaints [lodged pursuant to the Act]... is an encouraging indication of the general

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71 *Australian Judicial System* Report of the Advisory Committee to the Constitutional Commission (Canberra: Canberra Publishing and Printing Co 1987) at 90.

72 JB Thomas *Judicial Ethics in Australia* (1988) p 92. See also A Rogers note 22 *supra* at 23; H Gibbs "Who Judges the Judges?" (1987) 61 *Law Institute Journal* 814, 817 and R Gyles "Judging Judges: Why it won't Work" *Sydney Morning Herald* 13 October 1986 p 11.

73 *Justice* Sub-Committee note 69 *supra* at 45.

74 J Scutt "Who Judges the Judges" *Age* (Monthly Review) March 1987 p 15.

75 Justice Bollen of the Supreme Court of South Australia instructed a jury that "there is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher-than-usual handling". Judge Bland of the County Court of Victoria was reported as instructing a jury in a rape case that "it does happen...that 'no' often subsequently means 'yes'". Justice O'Bryan of the Supreme Court of Victoria indicated that a school girl was not traumatised by a rape because the rapist had first punched her unconscious. Finally, Judge Sinclair of the New South Wales District Court indicated that a woman who was raped by two men in 1988 must not have suffered any substantial psychological damage because she had continued to live with her boyfriend and "obviously continued to have intercourse with him".

community's willingness to accept even adverse decisions if they are made in accordance with due process of law."[76]

The prediction of a former District Court judge that "it is impossible not to foresee a tidal wave of complaints against judges in criminal cases"[77] has so far not been realised. In fact, between December 1986, when the Act came into effect, and 30 June 1992, the Commission has received a total of 160 complaints[78] at an average of approximately 26 complaints per year. The highest number of complaints in a given financial year was seen in the 1988-89 period when 34 complaints were lodged. One development which had been correctly predicted was that "the majority of complaints would be summarily dismissed";[79] in fact, 82 per cent of the complaints which have been lodged with the Commission in the last six years, have been summarily dismissed.[80] The fact that the majority of complaints were unfounded and/or misguided does not provide a credible argument against the establishment of a formalised system of judicial accountability. In fact, if the system put in place has sufficient resources to deal promptly with those complaints and in a manner consistent with judicial independence, then no problem arises.[81]

An indispensable feature of any mechanism to deal with judicial misbehaviour and incapacity is the requirement that disciplinary agencies must comply with the principles of natural justice. The IBA Code, for instance, provides that "the proceedings for discipline and removal of judges should ensure fairness to the judge, and adequate opportunity for hearing."[82] A serious fault with the Act is its failure to expressly incorporate the principles of natural justice. The only reference to the requirements of natural justice is contained in s 24, which deals with the procedure to be followed by the Conduct Division when it decides to hold a hearing

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76 Commission *Annual Report 1991-92*, 26.

77 See M Williams "'Quick Fix' Reaction to Press Blood Lust" *Sydney Morning Herald* 16 September 1986 p 4. See also RE McGarvie note 65 *supra* at 31; A. Mason "The State of the Australian Judicature" (1987) 61 *ALJ* 681, 686 and H Gibbs note 72 *supra* at 817.

78 26 complaints in 1986-87; 29 in 1987-88; 34 in 1988-89; 23 in 1989-90; 24 in 1990-91 and 24 in 1991-92: see the various Annual Reports of the Commission.

79 See RE McGarvie note 65 *supra* at 36; JB Thomas note 72 *supra* at 89; A Mason note 77 *supra* at 685; H Gibbs note 72 *supra* at 817; Advisory Committee note 71 *supra* at 90 and MH McLelland "Disciplining Australian Judges" (1990) 64 *ALJ* 388, 389.

80 2 in 1986-87; 46 in 1987-88; 23 in 1988-89; 19 in 1989-90; 18 in 1990-91 and 24 in 1991-92: see the various Annual Reports of the Commission. The complaints which have been summarily dismissed involved allegations of bias, incompetence, failure to give litigants a fair hearing, rudeness, abuse of power, litigant dissatisfaction, improper associations, negligence and making the wrong decision.

81 For the writer's views on the serious deficiencies of the current forms of judicial accountability existing in all Australian states, other than NSW, which warrant the establishment of a formalised system of judicial accountability, see V Morabito "Are Australian Judges Accountable?" (unpublished manuscript).

82 See s 27 and S Shetreet "Judicial Accountability: A Comparative Analysis of the Models and the Recent Trends" (1986) 2 *International Legal Practitioner* 38. In California the requirements of natural justice are expressly set out in the Californian Rules of Court: see Rules 901-922.

in connection with a complaint.[83] Under the Act, it is possible for the following scenario to occur:

A complaint is received by the Commission which, after conducting a preliminary examination, classifies the complaint as serious and refers it to the Conduct Division. The Conduct Division conducts an examination, at the end of which it decides, without first holding a hearing, that the complaint is substantiated and could justify parliamentary consideration of the removal of the judge from office. It is possible, under the Act, for the judge in question to learn of the events above only after he/she receives a copy of the report which the Conduct Division has provided to the Governor.[84]

The Attorney-General responded to similar criticisms by affirming, first, that "the laws of natural justice will not be enhanced in any way by specific words inserted in this or any other bill. They are inviolable rights of all citizens, whether judges or not"; and secondly, that "if six out of the eight members of the Judicial Commission ... cannot be relied upon to observe the basic rules of natural justice ... then we have reached a sorry state."[85] In relation to his first argument, it needs to be borne in mind that the fact that the Act imposes the requirements of natural justice in relation to one function of the Conduct Division but provides no similar requirements in relation to the other functions and powers of the Conduct Division, as well as the functions and powers of the Commission, may lead a court of law to hold that the common law rules of natural justice have been impliedly excluded by the Act.[86] In relation to the Attorney-General's second argument, one would have thought that, notwithstanding the high calibre of the members of the Commission, principles of fundamental importance need to be spelt out in the legislation if only to reassure judges and the public that the system will operate in a fair and just manner. An even stronger line of argument is that underlying the Act "is the premise that judges, like anybody else, are human and are prone to error and other frailties ... Accordingly, the proponents of this legislation must accept that those

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83 Under s 24, the judge complained about may be represented by a legal practitioner; other interested parties may be similarly represented if the Conduct Division gives its consent. The parties entitled to participate at the hearing "may, so far as the Division thinks appropriate, examine or cross-examine any witness on any matter that the Division considers relevant."

84 Section 29(8) provides that "a copy of any report ... [prepared by the Conduct Division in relation to a given complaint] shall also be furnished to the judicial officer concerned". An even less satisfactory scenario is, of course, where the judge first becomes aware of the complaint when he/she is suspended by the administrative head of the judge's court or when he/she reads about it in newspapers.

85 See *NSW Parl Deb* Legislative Assembly 14 October 1986 4676. In its most recent Annual Report, the Commission indicated that it assesses allegations of bias or failure to give a fair hearing "by examining the detail of what occurred and, *where appropriate*, seeking an explanation from the judicial officer involved" [Emphasis added]: Commission *Annual Report* 1991-92, 26.

86 See SD Hotop *Principles of Administrative Law* (6th ed) p 209.

judges or retired judges who may comprise the Conduct Division are subject to the same proneness of error and frailties as those upon whom they sit in judgment."[87]

A related weakness is the lack of any provision providing for the reimbursement of any legal and other costs incurred by a judge in connection with proceedings conducted as a consequence of a complaint lodged against him/her under the Act. This weakness was adverted to by the Commission in its 1988-89 Annual Report, when it recommended that "the legislation be amended to give the Commission a power, in its discretion, to make a binding decision that the Government should pay to a judicial officer an amount determined by the Commission in respect of his legal costs and expenses of and incident to any complaint made against him under the Act".[88] The failure of the NSW Parliament to make the suggested amendment forced the Commission to reiterate its recommendation in its 1989-90 Annual Report.[89] To date, no such amendment has been made. The Commission correctly justified its recommendation on the ground that "there may be cases in which a judicial officer might be forced to resign rather than bear the cost of representation at a lengthy hearing".[90]

The Act was described by Shetreet as introducing "hierarchical patterns into the judiciary, which in turn have the result of chilling judicial independence".[91] This assessment was justified by the following three features of the Act:

- six of the eight members of the Commission are heads of jurisdiction;[92]
- the power of the Commission to refer minor complaints to the relevant head of jurisdiction;[93] and
- the power of a head of jurisdiction to suspend a judge sitting on his/her court.[94]

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87 MF Willis *NSW Parl Deb* Legislative Assembly 22 October 1986 5171. Another fallacy in the Attorney-General's reasoning is that it ignores the fact that the most important powers are conferred on the Conduct Division and not on the Commission. Thus, faith in the integrity of the members of the Commission does not ensure that the principles of natural justice will be observed by the Conduct Division, an entity over which the Commission has no real control!

88 Commission *Annual Report 1988-89* p 23.

89 Commission *Annual Report 1989-90* p 19.

90 Commission *Annual Report 1988-89* p 23. See also *Second Report of the Parliamentary Judges Commission of Inquiry* (Brisbane: SR Hampson 1989) 90; MD Kirby note 57 *supra* at 202; M McLelland note 79 *supra* at 392 and 400-1 and H Gibbs note 72 *supra* at 817. In California, some judges have apparently resigned rather than incur the legal costs involved in inquiries into allegations of judicial impropriety, notwithstanding that they maintained their innocence of matters complained of: see Mahoney, "Procedures for Dealing with Complaints Concerning Judges" *The Accountability of the Australian Judiciary: Procedures for Dealing with Complaints Concerning Judicial Officers* (Australian Institute of Judicial Administration 1989) 1,8.

91 S Shetreet note 20 *supra* at 11.

92 Section 5(4).

93 Section 21(2).

The provisions dealing with minor complaints are also unsatisfactory. No indication is given as to what matters are to be taken into account by the Commission before exercising its power to refer a minor complaint to a head of jurisdiction nor does the Act prescribe what action is to be taken by the head of jurisdiction once a minor complaint is referred to him/her. Perhaps, the intention is that no action should be taken by the head of jurisdiction. The purpose of this referral power was described by the Leader of the Government in the Legislative Council as ensuring that "judicial officers are not subjected to inquiries by the Conduct Division over minor matters."[95] The rationale behind the provisions dealing with minor complaints which are referred to the Conduct Division is even more difficult to detect. The Conduct Division is asked to consider a minor complaint and, if it reaches the conclusion that the complaint has been substantiated, the only action which it can take is to so inform the judge concerned. What is the point of requiring the Commission and the Conduct Division to each carry out an examination of a minor complaint, if at the end of the process, no corrective action can be taken in relation to substantiated instances of inappropriate conduct?[96]

"If a minor complaint is made, there will be no need for the judge to be suspended or to stand aside. The power should be used sparingly and the Government believes it should be used only when absolutely required".[97] If one were to judge the scope of the power to suspend judges solely on the basis of the observation above, made by Hallam, one would expect this power to be applicable only in very limited and serious circumstances. Sadly, this is not the case as s 40(1)(a) provides that if "a complaint is made about a judicial officer ... the appropriate authority [the relevant head of jurisdiction] may suspend the officer". Therefore, there is no restriction as to when a suspension can take place, following the making of a complaint, or as to the type of complaint which can justify suspension. Thus, it is possible for a judge to be suspended on the basis of a complaint which:

(a) has not yet been considered by the Commission;
(b) concerns a minor instance of judicial impropriety; and
(c) is ultimately found to be completely groundless.

It is irrational and contradictory to allow the exercise of a very drastic disciplinary measure such as the suspension of a judicial officer simply because a

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94 Section 40.

95 Hallam *NSW Parl Deb* Legislative Council 21 October 1986 5003.

96 The issue of the desirability of disciplinary sanctions short of removal will be canvassed more fully in Part V. So far, seven minor complaints have been referred by the Commission to the relevant head of jurisdiction: see Commission *Annual Report 1990-91* p 16 and Commission *Annual Report 1991-92* p 24.

97 *NSW Parl Deb* Legislative Council 11 November 1986 6002.

complaint has been lodged against that judicial officer and at the same time, provide that no disciplinary action can be taken by the Commission or the Conduct Division in relation to a judicial officer against whom an allegation of impropriety, not sufficiently serious to warrant his/her removal from office, has been formulated and found, by the Conduct Division, to be substantiated![98] It is also ironic that while s 40(1)(a) is indecently unrestricted, the other three criteria for the suspension of judicial officers deal with very specific and grave circumstances![99]

The Advisory Committee was of the view that "it is difficult in Australia to see how a system of complaints could operate without the judge receiving publicity ... any publicity that a judge's conduct is the subject of complaint to an official organisation would detract from the judge's reputation. Loss of reputation brings a corresponding loss of effectiveness as a judge".[100] As it has already been indicated in relation to the "pedestal theory", it is not necessary nor healthy to isolate the judiciary from criticism. As the *Justice* Sub-Committee indicated, "it is possible that confidence in the judiciary is decreased by inviolability from informed criticism or investigation, rather than the contrary."[101] However, great care must be taken to ensure that criticism of judges is not manipulated or sensationalised to the detriment of a particular judge or the judiciary as a whole. Unfortunately, the performance of the Australian mass media over the last few years has demonstrated, without a shadow of a doubt, that it cannot be trusted to deal with allegations of judicial impropriety in a fair and balanced manner. The following description of the treatment received by Mr Vasta from the Queensland press, when he was a Justice of the Supreme Court of Queensland,[102] is equally

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98 In fact s 27 provides that "if the Conduct Division decides that a minor complaint is wholly or partly substantiated, it shall either so inform the judicial officer complained about or decide that no action need be taken".

99 Where the Conduct Division is of the view that the matter complained about could justify parliamentary consideration of the removal of the judge from office (s 40(1)(a)); where a judge is charged in NSW or elsewhere with an offence punishable by imprisonment for 12 months or more (s 40(1)(b)(i)) and where a judge is convicted in NSW or elsewhere of the abovementioned offence (s 40(1)(b)(ii)).

100 Advisory Committee note 71 *supra* p 90; see also JB Thomas note 72 *supra* at 91; M McLelland note 79 *supra* at 390; H Gibbs note 72 *supra* at 817; RE McGarvie note 65 *supra* at 34; Mahoney note 90 *supra* at 8; A Mason note 77 *supra* at 686 and D Milne "Act About as Bad as you Could Get (1991) 4 *Australian Law News* 28 at 29.

101 *Justice* Sub-Committee 45.

102 Evidence before the Fitzgerald Commission of Inquiry showed that Vasta may have lied when giving sworn evidence in a defamation action in 1986 and that both Vasta and Judge Pratt of the District Court of Queensland had a close association with Sir Terence Lewis, the then Queensland Police Commissioner who was subsequently charged with a number of offences. These allegations prompted the Queensland Government to establish the Parliamentary Judges Commission of Inquiry, composed of three retired judges. The Commission was required to advise the Queensland Legislative Assembly whether any behaviour of Vasta and Pratt warranted their removal from office. The Commission found in favour of Pratt but found that the behaviour of Vasta in relation to certain matters warranted his removal from office. The Queensland

appropriate to describe the conduct of the Australian media in relation to the allegations of impropriety which had been formulated against the late Justice Murphy and Judge Foord:[103]

> following the making of the allegations on 27 October 1988, Mr Justice Vasta continued to receive a battering from the press, a word carefully chosen, and continually with the innuendo that he committed perjury and it was up to him to disprove it.[104]

Parliament is also not an appropriate forum for a discussion of specific instances of judicial misconduct or specific complaints under the Act.[105] If members of Parliament become aware of any judicial impropriety they should simply lodge a complaint under the Act instead of utilising such information in Parliament, or through the mass media, for their own political ends. The conduct of some members of Parliament following one of the first complaints lodged with the Commission left a lot to be desired. Shortly after the Act came into effect, the *Sydney Morning Herald* reported an allegation of impropriety concerning a District Court judge. It concerned a report that the judge had provided to the NSW Court of Criminal Appeal in 1984 about the way in which he resentenced a prisoner and revoked the man's licence. Aspects of the report were alleged to differ significantly from the recollections of others involved in the case.[106] The complaint was first raised in Parliament by an Independent MP in the following manner:[107]

> I give notice that tomorrow I shall move:

Parliament accepted the recommendation and removed Vasta from office. For more details see *First Report of the Parliamentary Judges Commission of Inquiry* (Brisbane: SR Hampson 1989).

103 See D Brown "Themes in an Inquisition: Justice Murphy and the Liberal Press" (1987) 10 *UNSWLJ* 60; G Sturgess "Murphy and the Media" in JA Scutt (ed) *Lionel Murphy: A Radical Judge* (1987) pp 215-229 and M Williams "'Quick Fix' Reaction to Press Blood Lust" *Sydney Morning Herald* 16 September 1986 p 4. More recently, the reporting by the media in relation to the controversial judicial comments concerning rape, (note 75 *supra*) left a lot to be desired.

104 Queensland Commission *First Report*, 85.

105 For an account of the unsatisfactory performance of Queensland's politicians in relation to the Vasta inquiry see S Voumard "Ahern and the Nationals Stumble Towards that Elusive Place in History" *Age* 10 June 1989 p10.

106 See "Motion Critical of Judge is Allowed" *Sydney Morning Herald* 19 February 1987 p 8; A Keenan "Collins Ready to be the First Judge to Face Commission" *Sydney Morning Herald* 20 February 1987 p 2; H Gibbs note 72 *supra* at 817; A Mason note 77 *supra* at p 686 and P Clark "Judge Rejects 'Cowardly' attack" *Sydney Morning Herald* 20 February 1987 p 2.

107 J Hatton *NSW Parl Deb* Legislative Assembly 17 February 1987 8333. As if that wasn't enough, Hatton added that "it was monstrous for the Full Court of Criminal Appeal...to accept a handwritten report from District Court Judge ..., knowing that...[the judge in question] lied and misled the court": *NSW Parl Deb* Legislative Assembly 19 February 1987 8511.

1. That this House expresses alarm at the action of District Court judge ... in lying in a handwritten report to the Court of Criminal Appeal in the case of Andrew John Williams.

The writer fully shares the concern expressed by the Attorney-General that "the honourable member ... saw fit not to use his undoubted rights as a member of Parliament and as a citizen to lodge a complaint in accordance with the statute and decided to bring this serious allegation to the Parliament in such colourful language".[108]

The abovementioned weaknesses of the mass media and Parliament inevitably lead to the conclusion that the only forum for criticisms of judges should be the complaints mechanism. Once this conclusion is accepted, attempts should be made to ensure that, as far as practicable, the proceedings of, and information considered by, the Commission and the Conduct Division are kept confidential. The traditional justifications for confidentiality include:

> Protecting judges from injury resulting from publication of unexamined and unwarranted complaints; maintaining the integrity of the judiciary by avoiding premature announcement of groundless claims of judicial misconduct or disability; encouraging retirement as an alternative to costly and lengthy formal hearings; protecting commission members from outside pressures; and avoiding media exploitation.[109]

The NSW Government did recognise the need for confidentiality and the Act makes a valiant attempt to fulfil this need. However, more can, and should, be done. Section 36 provides an excellent example. It deals with release of information and allows the Conduct Division "to give directions preventing or restricting the publication of evidence given before the Division or of matters contained in documents lodged with the Division". A contravention of a direction made pursuant to this section is punishable "by a fine not exceeding 100 penalty units or imprisonment for a period not exceeding one year, or both". An obvious weakness of this provision is that it does not "activate", following the receipt of a complaint, a ban on the disclosure or publication of the making of, and information contained in, a complaint filed with the Commission; the earliest point at which any restriction can be imposed is when the matter reaches the Conduct Division. By this time, a complainant whose only motive for making the complaint was to

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108 See *NSW Parl Deb* Legislative Assembly 17 February 1987 8345. It should be noted that the Speaker of the NSW Legislative Assembly ruled that the *sub judice* rule does not apply to preliminary examinations of complaints by the Commission: *NSW Parl Deb* Legislative Assembly 18 February 1987 8420.

109 See T Montgomery "Towards Greater Openness in Judicial Conduct Commission Proceedings: Temporary Confidentiality as an Alternative to Inviolate Confidentiality" (1989) 64 *Washington Law Review* 955 at 956; RE McGarvie note 65 *supra* at 34; Advisory Committee note 71 *supra* p 90; JB Thomas note 72 *supra* at 91; M McLelland note 79 *supra* at 389 and A Mason note 77 *supra* at 686.

damage the reputation of the judge in question may have already disclosed the information to the media.[110]

The Commission and the Conduct Division are required to conduct their examinations, as far as practicable, in private.[111] The Conduct Division is required to hold its hearings in private, when dealing with a minor complaint,[112] and in public, when dealing with a serious complaint (unless it is of the view that it is desirable to hold the hearing in private).[113] One would have thought that the need for confidentiality would be greater for allegations of serious misconduct than it is for minor complaints as the former would be far more likely to attract the interest of the media. The conduct of the NSW media since the commencement of the Act is certainly consistent with this assessment. The allegation that a District Court judge had deliberately misled the Court of Criminal Appeal in a report which he provided to that Court was given far more coverage in the print media[114] than a complaint concerning public comments made by a magistrate concerning allegations of mismanagement by the Department of Aboriginal Affairs.[115] The best option is, of course, to require confidentiality in relation to both types of complaints.

The Act and the NSW Constitution provide that NSW judicial officers can be removed from office "on the ground of proved misbehaviour or incapacity".[116] Section 4(1) of the Act, which was recently repealed, contained the terms "ability and good behaviour".[117] The use of the term "incapacity[118] rather than "ability" does not appear to eliminate incompetence as a criterion for the removal of judges. In fact, s 15(4) expressly provides that a complaint can be made in relation to a judicial officer's competence in performing judicial or official duties, so long as the

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110 Hallam admitted that "it is true that there is nothing to prevent a complainant making his complaint known to the community": *NSW Parl Deb* Legislative Council 11 November 1986 5967. A number of complaints lodged under the Act were freely discussed in the print media: see, for example, J Slee "Judges: So Far, Few Complaints" *Sydney Morning Herald* 3 February 1987 p 8; A. Moffitt "Even Judges Need Freedom of Speech" *Sydney Morning Herald* 10 February 1987 p 11; J Slee :Judges: How Immune?" *Sydney Morning Herald* 10 November 1987 p 16; P Clark "O'Shane Upset by Judicial Inquiry" *Sydney Morning Herald* 26 April 1989 p 3; M Coultan "Judge Rejects Complaint About Overseas Trip" *Sydney Morning Herald* 18 October 1988 p 1; K McClymont "Resignation Ends Impropriety Probe" *Sydney Morning Herald* 22 September 1990 p 4 and the articles mentioned in note 106 *supra*.

111 See sections 8(3) and 23(3).

112 Section 24(3).

113 Section 24(2).

114 See the articles mentioned in note 106 *supra*.

115 See P Clark "O'Shane Upset by Judicial Inquiry" *Sydney Morning Herald* 26 April 1989 p 3.

116 See, respectively, s 41(1) and s 53(2).

117 See s 4 and Schedule 2 of the *Constitution (Amendment) Act* 1992 (NSW).

118 It is interesting to note that, in October 1986, the then Attorney-General rejected a proposal by seven judges of the NSW Court of Appeal to substitute the term "capacity" for "ability": see M Coultan "More Resignations, Judge Warns" *Sydney Morning Herald* 11 October 1986 p 3.

Commission is satisfied that the matter, if substantiated, could justify parliamentary consideration of the removal of the judge in question or that the matter "may affect or may have affected the performance of judicial or official duties by the officer".[119] The vast majority of commentators who have addressed this issue are of the view that incompetence is such a subjective notion that it would be dangerous to allow it as a criterion for the dismissal of judges.[120] A number of countries specifically exclude the ground of incompetence as a reason for dismissal.[121]

The original drafts of the Act required the Commission to formulate a code of judicial conduct. Unfortunately, by the time the Bill made its first appearance in Parliament this requirement had disappeared as the Government caved in to pressures from the justices of the Supreme Court for the removal of this requirement.[122] Chief Justice King of the Supreme Court of South Australia warned that "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".[123] It is clearly unsatisfactory to have unclear criteria for the removal of judges from office under any system but especially so in a formalised system of accountability which facilitates the detection of, and the taking of formal action in relation to, instances of judicial misconduct.

Another strange feature of the system created under the Act is that while it creates a 'prestigious' entity like the Commission, the major powers rest with the Conduct Division, an entity which is not comprised of full-time members, as its members are appointed by the Commission each time a complaint needs to be

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119 In September 1986 Sheahan was reported as agreeing "that incompetence would be a ground for removing a Judge or magistrate": M Coultan "Foord First Judge to Face New Tribunal" *Sydney Morning Herald* 13 September 1986 p 1.

120 See Advisory Committee note 71 *supra* p 77; S Shetreet note 20 *supra* at 14-15; *Justice* Sub-Committee, 59 and MD Kirby note 20 *supra* at 197.

121 See S Shetreet note 57 *supra* at 40. The problems caused by judicial incompetence can be prevented and/or diminished by effective mechanisms for the appointment of judges, by providing training to newly appointed judges as well as continuing judicial training and by effective mechanisms for dealing with judges who are affected by physical or mental illness as, usually, incompetence is a direct result of physical or mental disability.

122 See *NSW Parl Deb* Legislative Assembly 2 October 1986 4478; T Sheahan "Why I Want New Rules for Our Judges" *Sydney Morning Herald* 15 October 1986 p 13 and D Shanahan "Govt Surrenders to Rebellion by Judges" *Sydney Morning Herald* 18 September 1986 p 1.

123 L King note 57 *supra* at 345 and J Goldring note 16 *supra* at 155-6 and 160. Clause 2.34 of the Montreal Declaration provides that "all disciplinary action shall be based upon established standards of judicial conduct". For a detailed critique of "misbehaviour" as a criterion for the removal of judges, see V Morabito "Time for an Australian Code of Judicial Conduct" (1993) 67 *Law Institute Journal* 614.

reviewed by the Conduct Division. The power to appoint three judicial officers to the Conduct Division to consider a complaint against a judge, once the identity of that judge is known, can be manipulated by the Commission in order to ensure a particular outcome. The appointment process must be as impartial as possible in order to ensure that, as far as possible, the appointment of a judge to a panel of the Conduct Division is not attributable to that judge's opinion of the judge who is under investigation. But even a completely objective mechanism for the appointment of judges to the various panels of the Conduct Division is inferior to a single panel, comprising full-time members, which considers all complaints referred to it by the Commission. It is, in fact, necessary to maintain some continuity in the way the Conduct Division addresses the matters coming before it as well as ensuring that all judges who appear before the Conduct Division are treated in a similar manner. The problem of potential inconsistencies between the standards applied by the various panels of the Conduct Division is exacerbated by the lack of any guidelines as to the type of conduct that can be regarded as constituting "proved misbehaviour or incapacity". The ability of the Commission to "formulate guidelines to assist the Conduct Division in the exercise of its functions"[124] does not rectify this problem as s 10(3) provides that "the Conduct Division is not obliged to act in conformity with any guidelines of the Commission".

The composition of the Conduct Division is open to other criticisms. Allowing current judges to constitute two-thirds of every panel of the Conduct Division may create an intolerable situation whereby the working relationships of fellow judges may be impaired as a result of the known possibility that one day a judge may have to inquire into the conduct of his/her peers or be on the 'receiving' end of such an inquiry. On a more practical level, it may be difficult to find serving judges, of at least the same 'rank' as the judge against whom the complaint was lodged, who would be willing to sit on the Conduct Division. Recruiting judges of lower rank than the judge complained about is not an entirely satisfactory alternative while utilising judges from other states may not be feasible. Another criticism which can be put forward in relation to the membership of the Conduct Division is the absence of lay members. Including lay people on the Conduct Division would enhance the credibility of the mechanism and would inject a different perspective and outlook into the proceedings.[125]

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124 Section 10(1).

125 The Attorney-General revealed that he would have preferred the inclusion of a consumer's representative on the Conduct Division but that he did not proceed with this idea because the Chief Justice of the NSW Supreme Court was against it: *NSW Parl Deb* Legislative Assembly 2 October 1986 4478. Lay persons form a majority in Judicial Commissions in Iowa, New Mexico, North Dakota and Wisconsin. They are the largest

When the Act was debated in Parliament the Attorney-General confidently proclaimed that "it is quite clear that the decisions and the processes of the Conduct Division of the Judicial Commission are amenable to the supervision of the Supreme Court".[126] There has been no attempt by complainants and judges, in the six years that this system has been on foot, to seek any relief or remedy from the Supreme Court in relation to the decisions or conduct of the Commission and the Conduct Division. Regardless of whether this state of affairs will continue in the future, once it is decided to establish a specific mechanism to deal exclusively with complaints against judges, every effort should be then made to ensure that the system is self-contained. There is no point in carefully designing important features of a system of judicial accountability such as the requirements of confidentiality and the membership of the Conduct Division and the Commission, if we allow complainants and judges to run to the courts each time they are not happy with a decision of the Commission or the Conduct Division. The potential problems are nicely highlighted by the following scenario:

> The inevitable result of the Supreme Court's intervention by the way of a prerogative writ in relation to the activities of the Conduct Division will mean that we shall have Supreme Court judges sitting in judgment on fellow judges of the Supreme Court sitting in the Conduct Division in judgment of the conduct of a fellow judge or judges of the Supreme Court![127]

Another major deficiency of the Act is the retention of Parliamentary address as the procedure for the removal of judges from office. The original plan of the government was to remove Parliament altogether from the removal mechanism by allowing the Governor to effect judicial dismissal by acting on a report of the Conduct Division. However, Parliamentary address was restored because of concern expressed by many NSW judges, most notably the Chief Justice of the Supreme Court.[128] This change was effected before the Bill was presented in Parliament. Subsequently the Bill was amended to the effect that the Conduct Division would no longer be required to recommend removal from office when an appropriately serious complaint was substantiated, but only to express an opinion that parliamentary consideration of the removal of a judicial officer could be justified. The purpose of the latter amendment was to ensure that Parliament

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single group on the tribunals in Florida, Illinois, Minnesota and Rhode Island: see S Shetreet note 82 *supra* at 42.

126 *NSW Parl Deb* Legislative Assembly 15 October 1986 4816.

127 *NSW Parl Deb* Legislative Assembly 22 October 1986 5176. Similarly, Justice Thomas has drawn attention to the numerous legal actions which have been initiated in the United States against members of Judicial Commissions on the grounds of impropriety or error in releasing confidential information: JB Thomas note 72 *supra* p 91.

128 See D Shanahan "Govt. Surrenders to Rebellion by Judges" *Sydney Morning Herald* 18 September 1986 p 1 and *NSW Parl Deb* Legislative Assembly 1 October 1986 4335.

would not act merely as a "rubber stamp" for the Conduct Division's recommendations.[129] The removal of the Conduct Division's power to make a recommendation is a cosmetic change only which will not achieve its intended purpose.[130] In fact, leaving to Parliament the final decision after a group of experts have reached a conclusion, even if not in the form of a recommendation, is an illusory power. If Parliament decides that the facts do not justify removal from office, the public will probably regard it as a decision which has been based solely on the political interests of the relevant parties and not on the merits of the case, whether or not that is in fact the case, for the simple reason that Parliament's conclusion will be regarded as being contrary to the earlier decision made by a group of independent and politically-neutral experts, the Conduct Division. It is doubtful whether the public will accept that there is a real difference between a decision as to whether facts could justify removal, on the one hand, and a decision as to whether the same facts "do" warrant removal, on the other. What confidence will there be in a judge who has been allowed to continue his/her tenure in such circumstances?

The unworkability of mechanisms which combine judicial tribunals and Parliament was clearly shown by the Vasta Inquiry. Despite the fact that the Queensland Commission was only making a recommendation and that, therefore, the decision as to Justice Vasta's fate was entirely within the discretion of Parliament, the Premier, and consequently the members of the party in power, "seemed to feel that the report of the commission of inquiry had to be slavishly followed; that it was somehow an impertinence for any member of the Parliament to question the report and its findings, because any questioning of the report and its findings was somehow a reflection on the three learned gentlemen who made up the commission of inquiry".[131]

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129 See *NSW Parl Deb* Legislative Assembly 14 October 1986 4636 and T Sheahan "Why I Want New Rules for Our Judges" *Sydney Morning Herald* 15 October 1986 p 13.

130 So far the Conduct Division has yet to reach the conclusion that a given complaint could justify the removal from office of the judge complained about. However, two judicial officers have resigned following the referral by the Commission to the Conduct Division of "serious" complaints which had been lodged against those judicial officers: see K McClymont "Resignation ends impropriety probe" *Sydney Morning Herald* 22 September 1990 p 4; Commission *Annual Report 1989-90*, 18 and Commission *Annual Report 1990-91*, 17. It should be noted that Judge Foord resigned on 19 November 1986, on medical grounds, following the Attorney-General's announcement that the Vinson Report was the basis of a complaint which he intended to lodge with the Commission against Judge Foord: see respectively, "Ministerial Statement" *NSW Parl Deb* Legislative Assembly 20 November 1986 6939 and *NSW Parl Deb* Legislative Assembly 24 September 1986 3874. According to the Premier, the Commission would have also been asked to investigate allegations that Judge Foord was photographed in 1979 at a party attended by drug dealers and associates of the crime boss Robert Trimbole: see M Coultan "Inquiry on New Foord Allegations" *Sydney Morning Herald* 15 September 1986 p 5.

131 See statement of Mr Hamill *Qld Parl Deb* 7 June 1989 5324.

Overall, the biggest deficiency of the Act is its failure to set out more fully the rights of judges against whom complaints are lodged and the restrictions on the powers of the Commission and the Conduct Division. The ability of the Commission and the Conduct Division to operate largely out of public scrutiny makes it essential that all necessary safeguards be expressly and clearly set out in the Act rather than being simply left to the discretion of the Commission and the Conduct Division.

V. A PROPOSED SYSTEM OF JUDICIAL ACCOUNTABILITY

It is submitted that an ideal mechanism of judicial accountability should have the following major features:

1. A three-tier scheme consisting of:
   (a) a group of independent lawyers (the "investigative officers");
   (b) a Board consisting of two retired justices (Supreme Court Justices from other states or Federal Court Justices) and one lay person; and
   (c) a Commission consisting of three retired justices (High Court Justices or Supreme Court Justices from other states) and two lay persons.

   The retired judges and the investigative officers are appointed, for 3 years, by the Bar Association and the Law Society. The lay members are appointed, for 3 years, by some type of community committee to be made up largely of nominees of community organisations with interests in the operation of the legal system.[132] There is no doubt that judges are the most appropriate persons to determine matters concerning the assessment of facts and the propriety of judicial conduct and for this reason should constitute a majority on the Board and the Commission.[133] Excluding Parliament and the Executive from the process of appointment will dispel any suspicion that the members of the Board and the Commission will adopt a stand favourable to the government of the day.
2. The Commission should be assigned the task of formulating a detailed Code of Judicial Conduct. Thereafter, disciplinary action against judicial officers can be taken only if there is a clear breach of one or more of the provisions of the Code.

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132 See the proposal put forward in J Basten note 63 *supra* at 482.

133 See Advisory Committee note 71 *supra* p 80. In California, 5 of the 9 members of the Commission on Judicial Performance are judges.

Such a Code would establish standards to govern the conduct of judges and provide a structure through which disciplinary agencies can regulate and enforce proper conduct. Furthermore, by providing more clear and specific guidelines as to what constitutes unacceptable judicial conduct a Code would make it more difficult for disciplinary agencies to abuse their powers.[134]

3. Anyone can complain about judicial misbehaviour or incapacity except:
   (a) anyone who is regarded by the Board as a "vexatious complainant";[135] and
   (b) a person who is listed to appear, whether in civil or criminal law proceedings, before the judge against whom the person proposes to lodge a complaint with the Board. The complainant would be allowed to lodge the complaint after the judicial proceedings in question have terminated. The rationale for this restriction is to deal with the concern that "litigants might .. seek to abort part-heard proceedings, or to exercise a power of veto as to whom is to hear pending proceedings by lodging a complaint with the Judicial Commission against the judge hearing or designated to hear those proceedings, with the object of inducing the judge to disqualify himself".[136]

Allowing members of the public to lodge complaints with the Board has a number of advantages:

(a) It will enhance the credibility of the system;
(b) It is more likely to lead to the discovery of instances of judicial disability or impropriety;
(c) It will provide an effective, cheap and direct means for a private citizen to seek relief against the wrongful act of a judge;
(d) Because of the confidentiality of the proceedings, it also provides a medium through which the disgruntled litigants may air their grievances against judges without causing any detriment to those judges.

The danger is, of course, that some individuals will use the system to launch personal attacks on judges or to put it more colourfully, that "if judges are presented as an available target, it is inevitable that many people will roll up for a shot".[137] The main way in which members of the public can cause detriment to judges is by making public complaints against judges in such a

134 See V Morabito note 123 *supra* at 614-6.

135 Under s 38(1) of the Act, a vexatious complainant is one who "habitually and persistently, and mischievously or without any reasonable grounds" lodges complaints.

136 M McLelland note 79 *supra* at 391. See also RE McGarvie note 65 *supra* at 34.

137 JB Thomas note 73 *supra* p 89.

way that the reputation of those judges will be adversely affected. The strict provisions dealing with confidentiality which the writer proposes are likely to ensure that this will not occur. It must also be borne in mind that using the media to publicly harass and embarrass judges is an option which is currently available, in states other than NSW, to disgruntled litigants and others despite the absence of a formalised system of judicial accountability. In fact, the likelihood of trial by media is greater in the absence of a complaints system, as was unequivocally demonstrated by the allegations against Murphy, Vasta and Foord. The lack of a recognised procedure to deal with allegations of judicial impropriety leads to those allegations being given a degree of credibility which frequently they do not deserve and the result is damage to the image of the judiciary. In this scenario, the mass media will be able to mount a campaign against the judge in question by advocating the initiation of formal action by the Government. Once the Government caves in to those requests, the mass media can portray itself as having been the guardian of the public interest by having detected alleged instances of judicial impropriety and successfully convinced the Government to investigate those allegations.[138] On the other hand, if the Government decides, for whatever reason, not to take any action, the suspicion that the allegation is true will always remain hanging over the judge's head and will therefore affect his/her reputation. The mass media would not be able to get the same *mileage* out of allegations against judges where there is a publicly available and recognised procedure pursuant to which complaints about the conduct of judicial officers can be dealt with and which can be activated and conducted without the intervention and control of the Government.

4. A complaint must be set out on a special form upon which there is clearly stated that making a complaint automatically entails being under a duty not to divulge to others the making of the complaint as well as any of the information contained therein. This duty of silence would only be lifted where the judge complained about is removed by the Board.

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138 The role of the *Age* in the Murphy saga provides an excellent illustration. The editors of the *Age* claimed that the publication of the *Age* tapes was "justified in the public interest": see Editorial "An Evil Web to be Unravelled" *Age* 6 February 1984 p 1. The writer finds the reasoning of the then Commonwealth Attorney-General, Senator Gareth Evans, more persuasive; he pointed out that "the material [the *Age* tapes] was, if it was at all authentic, obtained in manifestly illegal circumstances; it manifestly involved outrageous invasion of privacy in so far as individuals were ... identified; and it involved putting at risk the credibility and status of, and public regard for, the whole institution of the judiciary...These considerations should at least have led the paper to wrestle with its collective conscience before publishing, and to actively explore alternative course of action. There is no evidence that it did so": G Evans "Ministerial Statement" *Senate Hansard* 28 February 1984 22, 28.

Since the mass media is undoubtedly the group which represents the greatest danger to the confidentiality of the system, a total prohibition should be placed on its ability to report on, or disclose any information concerning, specific complaints which have been, or are intended to be, lodged with the Board.[139]

5. The investigative officers will investigate each complaint lodged except those lodged by the persons referred to in Feature 3 above.

   At the end of the investigation, the complaint can be summarily dismissed by the investigative officers:

   - if the matters alleged therein are found to be unsubstantiated; or
   - if the view is formed that the complaint falls within one or more of the grounds upon which the NSW Commission can summarily dismiss complaints.

   Leaving the preliminary screening to a group of lawyers who can work on a full-time basis constitutes a more efficient and effective mechanism than the one established by the Act, pursuant to which the initial sifting is carried out by the heads of jurisdiction.

6. If the complaint has not been dismissed, it must be referred, together with the findings of fact of the investigative officers and the evidence upon which those findings were based, to the Board.

   The Board will hold a hearing at the end of which it will decide:

   (a) whether the matters alleged in the complaint are true;
   (b) if so, whether they constitute a breach of the Code of Judicial Conduct; and
   (c) if the above two requirements are satisfied, whether to privately admonish the judge or remove him/her from office.

   This system will ensure that the functions of investigation and adjudication are not conferred on the one entity.[140] It will also provide judicial officers with the guarantee that a hearing is to be held, before a decision can be made by the Board as to the validity and gravity of a given complaint. The taking of disciplinary action against judges, short of removal, was described by Justice McLelland as "objectionable in principle" as

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139 The writer does not share the view of Hallam that "there is no way that this legislation or this Government can prevent irresponsible journalism": *NSW Parl Deb* Legislative Council 11 November 1986 5969.

140 To confer functions of investigation and adjudication on the one entity would be "alien to common law traditions of fairness and justice": M McLelland note 79 *supra* at 393.

> there is a powerful public interest in preserving his effectiveness and authority as a judge from serious damage ...which the imposition of some sanction short of removal, would cause. Litigants and practitioners may not have full confidence in a judge with some kind of 'black mark' on his record.[141]

The argument of Justice McLelland loses strength, however, in a system which ensures that the formal action taken against a judicial officer will not be publicised.[142] It is submitted that the power to "privately admonish", in cases of improper judicial conduct not serious enough to warrant removal, is the most effective and fair means of correcting improper tendencies in judicial conduct.[143] The Hon RE McGarvie does not agree as he feels that

> a judge in the Australian context who departs from proper standards despite the potential pressures of judicial colleagues, the legal profession and public opinion obviously has a very insensitive and unresponsive personality. Such a person would often react with a response of truculent antagonism to an official organisation carrying a threat of the imposition of disciplinary sanctions.[144]

It is submitted that, while superficially attractive, the Victorian Governor's analysis does not withstand close scrutiny. Judicial colleagues, the legal profession and the public do not have any formal powers at their disposal to deal with a judge who is engaging in inappropriate conduct. Moreover, there might be a reluctance to attempt to initiate Parliamentary proceedings for the removal of the judge because of the adverse publicity which it will create. On the other hand, the imposition of a private caution is an effective way of letting the judge know that if he/she doesn't change his/her conduct, under the proposed system, the Board will probably become aware of the continuing misconduct and will have the power to promptly take appropriate action. It can be safely said that most, if not all, judges, including those who have committed improprieties, do not like to suffer the indignity of being removed from office and will do everything within their power, including ending inappropriate conduct, to avoid this taking place.

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141 *Id.*

142 In the first drafts of the Act the Conduct Division was conferred the power to reprimand judges: see S Shetreet note 20 *supra* at 9 and T Sheahan "Why I Want New Rules for Our Judges" *Sydney Morning Herald* 15 October 1986 p 15.

143 In California on the recommendation of the Californian Commission the Supreme Court may publicly censure a judge for specified improper conduct occurring not more than 6 years prior to the commencement of the judge's current term. The Commission itself may privately admonish a judge found to have engaged in an improper action or dereliction of duty subject to review by the Supreme Court: see Article VI, s 18(c) of the Californian Constitution.

144 RE McGarvie note 65 *supra* at 33; see also JB Thomas note 72 *supra* p 92-3 and Advisory Committee note 71 *supra* p 89.

7. An appeal can be lodged with the Commission in relation to a decision of the Board to remove or admonish a judge. The Commission can review the merits of the Board's ruling and substitute its own decision for that of the Board. Finally, it should be expressly provided in the legislation that no aspect of the mechanism, other than its constitutional validity, can be reviewed by a court of law.

   Feature 7 will provide judicial officers with fundamental safeguards[145] and, at the same time, will ensure that the system is self-contained.

8. The following safeguards should be set out in the legislation:[146]
   (a) the judicial officer is to be informed of the receipt of the complaint immediately, together with full details of the complaint;
   (b) the judicial officer is to be afforded a reasonable opportunity in the course of the investigation by the investigative officers to present such matters as the judge may choose;[147]
   (c) the judicial officer is to have the right to be present at any hearing relating to the complaint, and to have the absolute and unconditional right to legal representation at such hearing;
   (d) the judicial officer is to be provided in advance of any hearing with full details of all evidence proposed to be called at the hearing;
   (e) the judicial officer is to have the absolute right to give evidence and call witnesses at the hearing and to cross-examine those witnesses called in support of the complaint; and
   (f) the judicial officer should be fully reimbursed for all legal costs incurred as a result of the complaint lodged against him/her.

9. The power to suspend judicial officers should only be exercised by the Board and only when a judge is charged with, or is found guilty of, a crime that is punishable by imprisonment for 12 months or more or when the Board has decided that the judge should be removed and an appeal is pending before the Commission.[148]

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145 It cannot be denied that "a right of at least one appeal from a final judicial decision is accepted in modern times as a normal and valuable feature of the administration of justice": M McLelland note 79 *supra* at 393.

146 This is a modified version of a press release dated 10 October 1986 and prepared by the NSW Law Society; it is reproduced in *NSW Parl Deb* Legislative Council 22 October 1986 5173.

147 See Rule 904.2 of the Californian Rules of Court.

148 In California "a judge is disqualified from acting as a judge, without loss of salary, while there is pending (1) an indictment or an information charging the judge in the United States with a crime punishable as a felony under California or federal law, or (2) a recommendation to the Supreme Court by the Commission on Judicial Performance for removal or retirement of the judge": Article VI, s 18(a) of the Californian Constitution. In addition, the Supreme Court "may suspend a judge from office without salary when in the United States the judge pleads guilty or no contest or is found guilty of a crime punishable as a felony under California or federal

In the writer's view, the power to suspend judicial officers is a draconian measure which should be exercised only when it is absolutely necessary.

10. The investigations of the investigative officers and the hearings of the Board and the Commission are to take place in private. This 'veil of secrecy' is to be maintained until and unless the Board has ruled that the judge should be removed and the time allowed for an appeal to the Commission has expired.[149]

11. There should be uniformity in the tenure of all officers who exercise judicial functions. In light of the frequent extensions to the jurisdiction of Magistrates' Courts[150] and intermediate courts, it can no longer be accepted that a higher degree of independence should be conferred on judges of superior courts.

12. A legally qualified person is to be appointed by the Attorney-General to oversee the operation of the proposed system (the Inspector) This Inspector is to have access to all documents concerning complaints lodged against judicial officers, and must attend every hearing held by the Board and the Commission. Every 4 months, the Inspector must produce a report, which is to be forwarded to the Attorney-General, setting out, firstly, the Inspector's views as to the overall fairness and effectiveness of the system and, secondly, information concerning abuses of power by the disciplinary agencies.

    The ability of the disciplinary agencies to exercise extensive powers 'behind closed doors', makes it essential that they, themselves, be subject to external supervision. Under the proposed system, if any problems are encountered, the Attorney-General will be able to take appropriate action, on the basis of the information provided by the Inspector.

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law or of any other crime that involves moral turpitude under that law": Article VI, s 18(b) of the Californian Constitution.

149 In the United States, in twenty-four states, confidentiality ends with a finding of probable cause of a violation and the subsequent filing of a formal complaint against the judge. Nineteen states go further and conduct secret fact-finding hearings, ending confidentiality only when a recommendation for discipline is filed with the state Supreme Court. Eight states maintain confidentiality until discipline is ordered by the state Supreme Court: T Montgomery note 109 *supra* at 957.

150 According to Justice Thomas "well over 90 per cent of all cases are dealt with in the Magistrates' Courts": JB JB Thomas "The Ethics of Magistrates" (1991) 65 *ALJ* 387 at 389. See also C Briese note 57 *supra* at 179.

VI. CONCLUSION

The system of judicial accountability proposed in Part V would enhance the accountability of non-NSW judicial officers by[151]:

(a) being likely to detect instances of judicial misconduct and disability;
(b) ensuring that complaints against judges are treated promptly and with an appropriate seriousness in an appropriate forum;
(c) establishing publicly recognisable and accessible procedures pursuant to which complaints about the conduct of judges may be dealt with;
(d) providing the ordinary citizen with a means of redress against judicial misbehaviour;
(e) enhancing the effectiveness and reliability of the judiciary through external supervision;
(f) ensuring that appropriate sanctions are available to deal with proven instances of judicial misbehaviour or disability; and
(g) providing a more effective and speedier mechanism for determining the validity of allegations of judicial disability or misconduct.

The proposed complaints system would enhance the independence of all Australian judicial officers by[152]:

(a) enhancing, or restoring,[153] public confidence in the judiciary, through the public's knowledge that instances of judicial misconduct and disability will be appropriately dealt with;
(b) equating the level of independence of all officers exercising judicial functions to that presently enjoyed by Supreme Court judges;
(c) conferring the power to impose official sanctions on an impartial and politically-neutral body comprised of persons with greater expertise than politicians;
(d) ensuring that complaints against judges will be dealt with fairly through the observance of the principles of natural justice, operating on a

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151 With the exception of item "f", the benefits listed above have already been attained by the current NSW system. However, the lack of sanctions to deal with substantiated "minor complaints" makes it impossible to conclude that the current NSW system ensures that "appropriate sanctions are available to deal with proven instances of judicial misbehaviour or disability".

152 It should be noted, however, that the advantages formulated in items "a" and "b" already exist under the current NSW system: see, respectively, p 15 and pp 6 and 7 above.

153 In Victoria, for instance, the Victorian Ombudsman has revealed that he received 68 written complaints concerning courts between 1 July 1989 and 30 June 1991: see Ombudsman, 34. This is quite remarkable when one considers that, firstly, the Victorian Ombudsman has no jurisdiction to investigate action taken by courts of law, judges and magistrates and that, secondly, in the same period the NSW Commission had only received 47 complaints!

confidential basis, providing more specific guidelines as to what type of conduct is inappropriate, conferring a right of appeal, the clear and narrow specification of the power to suspend judicial officers and the reimbursement of legal costs incurred as a result of defending an allegation of impropriety or incapacity;

(e) removing Parliament and the mass media as forums for dealing with allegations of judicial impropriety or incapacity;

(f) excluding political influences and considerations in matters concerning judicial conduct; and

(g) taking away from administrative heads of jurisdiction the power to take disciplinary action against judicial officers sitting on their courts.