

**Review of  
Sexual Harassment  
in Victorian Courts**

Preventing and Addressing  
Sexual Harassment in  
Victorian Courts and VCAT

**Appendix 3:  
Judicial independence,  
accountability and the role  
of the Heads of Jurisdictions**

FEBRUARY 2021

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Gabrielle Appleby provided expert advice to the Review in relation to the constitutional and theoretical framing of the report in Section 1.4 of *Addressing and Preventing Sexual Harassment in Victorian Courts and VCAT Report and Recommendations*.

This part of the paper introduces the constitutional and theoretical foundations of the judicial values of independence and accountability, and how judicial accountability mechanisms have attempted to navigate and balance these values. It explains the traditional approach in which the Head of Jurisdiction was responsible for receiving and dealing with complaints before turning to the introduction of independent commissions and exploring how they assist the Head of Jurisdiction with these governance responsibilities. Finally, it explains the current Victorian model as one in which the traditional system has been supplemented by the establishment of an independent complaints commission.

### (1) Judicial Independence and Accountability: Constitutional and theoretical foundations

In Australia, the Commonwealth Constitution protects judicial independence at both state and federal level through the separation of federal judicial power from the political branches of government. At the state level, this is captured by the *Kable* principle, which was developed to ensure public confidence in the integrity of the state courts and the administration of justice.<sup>1</sup> The *Kable* principle has developed from a doctrine anchored in the state judiciaries' position in the federal hierarchy to be implied from the constitutional term "court" and "Supreme Court" in Chapter III.<sup>2</sup> Under the modern approach to the principle, the High Court has required States maintain certain defining characteristics of their judiciaries. These characteristics have been held to include judicial independence and impartiality,<sup>3</sup> fair judicial process,<sup>4</sup> open court,<sup>5</sup> the right to reasons,<sup>6</sup> the maintenance of appropriate judicial discretion,<sup>7</sup> and, for the State Supreme Courts, minimum jurisdiction of judicial review.<sup>8</sup>

These defining characteristics represent what have been referred to as underlying judicial "values". A list of these values to "guide and govern a judiciary" have been articulated by leading Canadian judicial scholars Professors Richard Devlin and Adam Dodek in their book, *Regulating Judges: Beyond Independence and Accountability*.<sup>9</sup> These values were developed by Devlin and Dodek as a regulatory, constitutional and comparative tool. They include traditional and well-accepted judicial legitimacy values: independence, impartiality, and accountability. They also extend those values into areas that are increasingly significant for a modern judiciary: representativeness, transparency and efficiency.

Of course, in the Australian system, not all of these values have been constitutionalised. However, we do see very clearly in the *Kable* requirements the values of independence, impartiality and accountability. We

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<sup>1</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

<sup>2</sup> *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) ('*Bradley*'); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ) ('*Forge*').

<sup>3</sup> See, eg, *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

<sup>4</sup> *International Finance Trust Company v New South Wales Crime Commission* (2009) 240 CLR 319; *Condon v Pompano* (2013) 252 CLR 38.

<sup>5</sup> See discussion in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *Gypsy Jokers Motorcycle Club Incorporated Inc v Commissioner of Police (WA)* (2008) 234 CLR 53; *Condon v Pompano* (2013) 252 CLR 38, 72 [68].

<sup>6</sup> *Wainohu v New South Wales* (2011) 243 CLR 181.

<sup>7</sup> See the decision in *Kable* itself, and also *South Australia v Totani* (2010) 242 CLR 1.

<sup>8</sup> *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

<sup>9</sup> See Richard Devlin and Adam Dodek, 'Regulating Judges: Challenges, Controversies and Choices' in Richard Devlin and Adam Dodek (eds) *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2016) 1, 9. See also Richard Devlin and Sheila Wildeman, *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar, 2020).

see the values of independence and impartiality directly. Indirectly, we see the value of accountability in the requirement for open court, reasons and fair judicial process.<sup>10</sup>

The value of judicial independence is occasionally positioned as in opposition to the value of accountability. However, in their piece, 'The Chief Justice: Under Relational and Institutional Pressure', Professor Gabrielle Appleby and Dr Heather Roberts have argued, this "underestimates the normative complexity of the judicial role and the judicial institution and sets up a false zero-sum trade-off between the two values."<sup>11</sup>

Similarly, in her article 'Ireland's system for disciplining and removing judges', Laura Cahillane argues that a balanced system of judicial accountability promotes judicial independence by promoting public confidence in the judiciary.<sup>12</sup> Cahillane concludes that:

in order to have confidence in the system, the public needs to be assured both that judges will be independent but also that they will be accountable. Thus, the best way to ensure independence and accountability is to provide for a carefully thought-through system of removal and discipline of judges, which would abide by fair procedures.<sup>13</sup>

Professors Appleby and Suzanne Le Mire have explained the interaction between the values of independence and accountability in their article, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity'. They first explain that judicial independence exists to ensure integrity: it is an instrumental value not a good in and of itself, and nor is it a right of judges.<sup>14</sup> As former Chief Justice of Ireland, Susan Denham has stated: "The independence of the judiciary is for the benefit of the community, not the judges. It is a duty not a privilege for a judge."<sup>15</sup> Accountability, then, also plays a role in shoring up the integrity of the courts. Appleby and Le Mire say: "Accountability can strengthen institutional integrity and even independence by ensuring judges act consistently with the institution's underlying values."<sup>16</sup>

In the United States, the Court of Appeals for the 11th Circuit has also explained this connection, saying:

a credible internal complaint procedure can be viewed as essential to maintaining the institutional independence of the courts. If judges cannot or will not keep their own house in order, pressures from the public and legislature might result in withdrawal of needed financial support or in the creation of investigatory mechanisms outside the judicial branch which, to a greater degree than

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<sup>10</sup> See explanation of the manifestation of the value of accountability in these constitutional requirements in Gabrielle Appleby and Heather Roberts, 'The Chief Justice: Under Relational and Institutional Pressure' in Gabrielle Appleby and Andrew Lynch (eds) *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, forthcoming 2021).

<sup>11</sup> Gabrielle Appleby and Heather Roberts, 'The Chief Justice: Under Relational and Institutional Pressure' in Gabrielle Appleby and Andrew Lynch (eds) *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, forthcoming 2021).

<sup>12</sup> Laura Cahillane, 'Ireland's system for disciplining and removing judges', 38(1) *Dublin University Law Journal* (2015), 55-83, 64.

<sup>13</sup> Laura Cahillane, 'Ireland's system for disciplining and removing judges', 38(1) *Dublin University Law Journal* (2015), 55-83, 64.

<sup>14</sup> See, eg, The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct* (3<sup>rd</sup> Edition, 2017), 6.

<sup>15</sup> L Susan Denham, 'The Diamond in a Democracy: An Independent, Accountable Judiciary' (2001) 5 *The Judicial Review* 31, 58.

<sup>16</sup> Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) *Melbourne University Law Review* 1, 38; referring to Francesco Contini and Richard Mohr, 'Reconciling Independence and Accountability in Judicial Systems' (2007) 3(2) *Utrecht Law Review* 26, 29-30.

the [Judicial Councils Reform and Judicial Conduct and Disability Act of 1980], would threaten judicial independence.<sup>17</sup>

Appleby and Roberts explain that accountability both supports judicial independence and:

has an *independent* virtue in promoting confidence in the judiciary amongst a public increasingly expectant of transparency and oversight, particularly in the face of judicial indiscretions.<sup>18</sup>

## (2) Judicial accountability mechanisms: navigating and strengthening accountability and respecting independence

The constitutional and theoretical position support the proposition that both judicial independence and accountability are foundational judicial values that must be protected and promoted to ensure public confidence in the administration of justice. This part of paper then turns to consider how they might interact in a system of governance oversight of individual judicial conduct. Because of the fundamental importance of both values such a system must be carefully crafted so that accountability values can be realised and integrity strengthened, without compromising independence values. Leading constitutional scholar on judicial independence, Professor Shimon Shetreet has acknowledged: “the judiciary must be accountable as judicial independence cannot be maintained without judicial accountability for failures, errors or misconduct”, but states that “procedures and standards should not be formulated so as to exceed the boundaries of judicial independence. The task of balancing between judicial accountability and judicial independence is a difficult one.”<sup>19</sup>

As Professor Devlin has written in the comparative setting:

[T]he design and implementation of a defensible governance regime for judiciaries is a complex challenge. It entails the creation of multiple institutions and procedures, and the careful calibration of a variety of norms tailored to the historical, political and cultural context of a particular jurisdiction.<sup>20</sup>

To say the task is difficult and a complex challenge, does not, however, mean it is unachievable. Or, that careful innovation and reform in this area should be shied away from. The negotiation and balancing between independence and accountability are apparent in the design of judicial commissions, but is also apparent even under the traditional model of judicial governance where this responsibility rests in a limited form with the Head of Jurisdiction.

### (a) The role of the Chief Justice/Head of Jurisdiction

In Australia, the traditional design of governance mechanisms has rested with the role of the Chief Justice, or other Head of Jurisdiction. This has manifested in two ways: through the Head of Jurisdiction’s role in articulating guidance for judicial conduct and in their role in receiving and responding to complaints about judicial conduct.

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<sup>17</sup> *Re Certain Complaints under Investigation; Williams v Mercer*, 783 F 2d 1488, 1507 (Campbell CJ for Campbell CJ, Kearse J and Pell SJ) (11th Cir, 1986), citing Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 USCS §§ 331-2, 372.

<sup>18</sup> Gabrielle Appleby and Heather Roberts, ‘The Chief Justice: Under Relational and Institutional Pressure’ in Gabrielle Appleby and Andrew Lynch (eds) *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, forthcoming 2021).

<sup>19</sup> Shimon Shetreet, “The Limits of Judicial Accountability: A Hard Look at the *Judicial Officers Act 1986*”, (1987) 10 *UNSW Law Journal* 7, as cited in *Cornack v Fingleton* [2002] QSC 391 [30].

<sup>20</sup> Richard Devlin and Sheila Wildeman, *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar, 2020).

First, the Council of Chief Justices of Australia and New Zealand have set out a set of behavioural standards to guide the individual behaviour of judges. The *Guide to Judicial Conduct* lists the principles applicable to judicial conduct to have three main objectives:

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

There are three basic principles against which judicial conduct should be tested to ensure compliance with the stated objectives. These are:

- Impartiality;
- Judicial Independence; and
- Integrity and personal behaviour.<sup>21</sup>

The Guide thus navigates the values of independence and accountability.

The *Guide to Judicial Conduct*, however, is pitched explicitly as a practical guide that is “not prescriptive”, but, rather, “in cases of difficulty or uncertainty, the primary responsibility of deciding whether or not a particular activity or course of conduct is or is not appropriate rests with the individual judge, but it strongly recommends consultation with colleagues in such cases and preferably with the head of the jurisdiction.”<sup>22</sup> The Guide, therefore, is precisely that: an unenforceable but practical guide for judges navigating challenges that might come their way. It provides advice on a number of issues although, notably, it does not provide any advice on conduct that might amount to workplace harassment and bullying, including sexual harassment.<sup>23</sup>

In addition to the Head of Jurisdiction’s role in promulgating the *Guide to Judicial Conduct*, under the traditional system of governance, the Head of Jurisdiction has a responsibility for receiving complaints against individual judges, and using the limited administrative powers of the Head of Jurisdiction, as well as the soft powers of the individual and the office, to support judges whose conduct might transgress what is considered appropriate. As Professor James Crawford has explained, at common law, while a Chief Justice had no inherent supervisory authority over other judges,<sup>24</sup> legislation, convention and practice has established some degree of authority to administer courts in a range of ways which involves some direction to the judiciary.

Under the traditional system of judicial ethics and discipline, the Head of Jurisdiction performs a central role. Informal procedures for dealing with alleged judicial misconduct include, generally, that complaints can be made to the head of jurisdiction, who can then investigate and respond, including by speaking to the judge involved and, if necessary, deploy their administrative powers to assist in resolving the issue. In recognition of the shortcomings of the informal system, Victoria, together with some other jurisdictions have introduced a more formalised commission-led processes.<sup>25</sup>

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<sup>21</sup> The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct* (3<sup>rd</sup> Edition, 2017), 3

<sup>22</sup> The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct* (3<sup>rd</sup> Edition, 2017), 1-2.

<sup>23</sup> See, in relation to this point, letter written by more than 500 women working in the law to the federal Attorney-General, available here: “Deep cultural shifts required: open letter from 500 legal women calls for reform of way judges are appointed and disciplined” *The Conversation* (6 July 2020) < <https://theconversation.com/deep-cultural-shifts-required-open-letter-from-500-legal-women-calls-for-reform-of-way-judges-are-appointed-and-disciplined-142042>>.

<sup>24</sup> James Crawford, *Australian Courts of Law* (3rd ed, 1993) 67.

<sup>25</sup> Victoria (the Judicial Commission of Victoria in 2016: *Judicial Commission of Victoria Act 2016* (Vic)), New South Wales (which established its Judicial Commission of NSW in 1986: *Judicial Officers Act 1986* (NSW)), South Australia (the Judicial

The informality of the traditional process, the limited powers of the Head of Jurisdiction to remedy transgressions, as well as her or his other responsibilities to the court as an institution, have created great difficulties for Heads of Jurisdiction wishing to promote accountability of the judicial institution.

### **(b) Independence and accountability: Head of Jurisdiction v Commissions**

The traditional model of judicial governance oversight has not negated the delicate balancing of judicial values to ensure enhancement of institutional integrity and not inadvertent undermining of judicial independence. As Australian judicial scholars Professors Kathy Mack and Sharyn Roach Anleu explain in their paper, 'The Administrative Authority of Chief Judicial Officers in Australia', conflicts between court administration and judicial independence can arise in a range of ways under the traditional model. For instance, directions from the head of jurisdiction which are administrative in form can indirectly constrain adjudicative independence,<sup>26</sup> and administrative or managerial allocation of work by heads of jurisdiction may amount to a de facto suspension.<sup>27</sup> Further, executive control of resources can impose burdens on a court's ability to carry out judicial functions,<sup>28</sup> and some kinds of performance evaluation for courts could appear to be, or be experienced as, a burden on independent judicial decision making.<sup>29</sup>

Concerns about extensive management powers vested in the head of jurisdiction were also apparent in the case of *Cornack v Fingleton* [2002] QSC 391. In that case, the Queensland Supreme Court explained that management powers backed by compulsion represents a threat to an individual judge's independence. Justice Mackenzie held that:

The principle that judges are independent of one another, or internal judicial independence ... is incompatible with the existence of power to require a judicial officer to attend under compulsion to discuss issues concerning the way in which the judicial officer conducts hearings in court. It would require very plain words to abrogate the principle since it is a fundamental aspect of judicial independence. The notion that a head of jurisdiction could compel a judicial officer to modify how he or she conducted the actual hearing of cases by threat of sanctions is not reconcilable with the principle. Clear and unambiguous legislative provisions would be needed to achieve abrogation.<sup>30</sup>

Justice Mackenzie cited Professor Shetreet as authority for the proposition that giving administrative heads of the judiciary disciplinary powers is a "major problem".<sup>31</sup> According to Shetreet, this is because it

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Conduct Commissioner established in 2015: *Judicial Conduct Commissioner Act 2015 (SA)*), and the ACT (ACT Judicial Council in 2017 via amendments to the *Judicial Commissions Act 1994 (ACT)*).

<sup>26</sup> Kathy Mack and Sharyn Roach Anleu, 'The Administrative Authority of Chief Judicial Officers in Australia' (2004) 8 *Newcastle Law Review* 1, 6.

<sup>27</sup> Enid Campbell, 'Suspension of Judges from Office' (1999) 18 *Australian Bar Review* 6, 77-8; Shimon Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges' in Shimon Shetreet and Jules Deschenes, *Judicial Independence: The Contemporary Debate* (1985) 590,608.

<sup>28</sup> Elizabeth Handsley, 'Issues Paper on Judicial Accountability' (2001) 10 *Journal of Judicial Administration* 179,187-8; P H Lane, 'Constitutional Aspects of Judicial Independence' in Helen Cunningham (ed), *Fragile Bastion: Judicial independence in the Nineties and Beyond* (1997) 4; George Winterton, *Judicial Remuneration in Australia* (1995); Alan Bamard and Glenn Withers, *Financing the Australian Courts* (1989).

<sup>29</sup> Stephen Colbran, 'Judicial Performance Evaluation: Accountability without Compliance' (2002) 76(4) *Australian Law Journal* 235, 244; Douglas Drummond, 'Towards a More Compliant Judiciary? - Part I' (2001) 75 *Australian Law Journal* 304.

<sup>30</sup> *Cornack v Fingleton* [2002] QSC 391 [34].

<sup>31</sup> Simon Shetreet, "The Limits of Judicial Accountability: A Hard Look at the *Judicial Officers Act 1986*", (1987) 10 *UNSW Law Journal* 3



introduces hierarchical patterns into the judiciary that can create “latent pressures on the judges which may result in subservience to judicial superiors” and thereby chill judicial independence. Therefore, while hierarchies are usual in the civil service, they are objectionable in the judiciary, which requires internal independence between colleagues and judicial superiors.<sup>32</sup>

In Australia, the lack of powers of governance and management compulsion has, however, left heads of jurisdiction and the public frustrated. For instance, Chief Justice Wayne Martin of the Western Australian Supreme Court has argued that the current system provided inadequate facilities and mechanisms to properly investigate complaints, and left the Head of Jurisdiction in a very real position where an allegation of conflict of interest in the conduct of the investigation might be made against them by either the complainant or the judge.<sup>33</sup> There are also questions about what might occur when the complaint is about the Head of Jurisdiction.

Further, personal and professional transgressions of judges might be publicly known – either because they are part of the court record,<sup>34</sup> they are made manifest on appeal and are subject to adverse comments by a higher court,<sup>35</sup> or because of media reporting of personal conduct.<sup>36</sup> In these instances, there is often a public admonishment of the behaviour of the judge involved, but a soft administrative response, usually in relation to reallocation of sitting duties, the provision of voluntary counselling, mentoring or judicial education. Many Heads of Jurisdiction are aware that the public will see these responses as inadequate.<sup>37</sup> In 2014, South Australian Supreme Court Chief Justice Chris Kourakis issued a public statement following a District Court judge pleading guilty to driving with excessive blood alcohol following the announcement of her elevation to the Supreme Court. The statement explained his limited powers as Chief Justice, but responding to what he described as ‘the reasonable concerns of the public arising out of offending of this kind by a serving judicial officer’, he explained he had placed the judge on restricted duties in relation to driving and alcohol-related offences.<sup>38</sup>

It is the concerns that the traditional system of governance does not adequately promote the values of judicial accountability so as to shore up public confidence in the integrity of the judiciary, together with concerns about its relationship to judicial independence, that has led many Australian jurisdictions to adopt an independent model of receiving and investigating complaints against judges. These commissions

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<sup>32</sup> Simon Shetreet, “The Limits of Judicial Accountability: A Hard Look at the *Judicial Officers Act 1986*”, (1987) 10 *UNSW Law Journal* 3

<sup>33</sup> Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009), 69 [6.33], quoting Letter from Chief Justice Wayne Martin to Jim McGinty, Attorney-General (WA), 10 November 2006, 2.

<sup>34</sup> For example, the conduct of Judge Greg Borchers in the Northern Territory: see further Jacqueline Breen, ‘NT Chief Judge Elizabeth Morris finalises investigation into complain against judge Greg Borchers’ (ABC News, 11 December 2019) <<https://www.abc.net.au/news/2019-12-11/nt-chief-judges-investigates-complaint-against-greg-borchers/11784300>>.

<sup>35</sup> See, for instance, the comments about the behaviour of Judge Guy Andrew by the Full Court of the Family Court in *Adacot & Sowle* [2020] FamCAFC 215 (28 August 2020). Following this decision, the Chief Judge of the Federal Circuit Court brought this judge down to the Brisbane registry, where he undertook counselling, mentoring, judicial education, and his sittings were monitored: Michaela Whitbourn, ‘Judge moved, receiving training after “rude” conduct triggered retrial’ (3 September 2020, SMH) <https://www.smh.com.au/national/judge-moved-receiving-training-after-rude-conduct-triggered-retrial-20200903-p55s7a.html>. Tragically, the judge took his own life just weeks later.

<sup>36</sup> For example, the conduct of Anne Bampton in South Australia: Sean Fewster, ‘Future of newly-appointed SA Supreme Court Justice Anne Bampton in doubt after allegedly collided with cyclist while drink-driving’ (2 December 2013, *Adelaide Now*) <<https://www.adelaidenow.com.au/future-of-newlyappointed-sa-supreme-court-justice-anne-bampton-in-doubt-after-allegedly-collided-with-cyclist-while-drinkdriving/news-story/08cbddc5743443e6ccaab196adad554a>>.

<sup>37</sup> See further Michael Kirby, ‘Judicial Stress and Judicial Bullying’ (2013) 87 *Australian Law Journal* 516, 524.

<sup>38</sup> See full press release: Chief Justice Chris Kourakis, (Media Release, Court Administration Authority of South Australia, 15 January 2014) <<http://www.courts.sa.gov.au/ForMedia/Pages/General-Media-Releases.aspx?IsDlg=1&Filter=41>>.

have responsibility for receiving complaints, filtering them, and investigating them. Consistently with the principles around security of judicial tenure, complaints that they believe are made out and involve conduct that warrants removal are then referred to the parliament for further consideration in its constitutional function. Complaints involving conduct of a lesser nature are referred back to the head of jurisdiction. The head of jurisdiction then relies on their limited powers available to deal with the complaint internally.

A former Chief Justice of the High Court of Australia has addressed some of the concerns around a more formalised system of judicial oversight that includes stronger powers to discipline judges. In his paper “Public Confidence in the Judiciary”,<sup>39</sup> Murray Gleeson explains:

It is a source of frustration to some people that judges are difficult to remove, ... . Of course, judges, like anyone else, are punishable for breaches of the law. But the sanction of removal is better seen as aimed at protecting the public than at punishing an individual. There may be, within a court, internal administrative measures that can properly be used to address some problems of judicial conduct. But, unless a judge does something so serious as to warrant removal following parliamentary resolution, there is generally no capacity in any person or authority to suspend, or fine, or otherwise penalise for misconduct. It is often wrongly assumed that, beyond their capacity to advise, warn, and take appropriate administrative steps, Chief Justices, and other heads of jurisdiction, have authority to penalise other judges. Judicial independence means, amongst other things, that judges are independent of each other.

As to procedures for dealing with complaints, I would make one comment based on my experience of almost 10 years as President of the Judicial Commission of New South Wales. As a rule, the more serious the complaint, the easier it is to devise means to deal with it. And the converse is true. If a judge is alleged to have committed a crime, then the matter is investigated and tried in the same manner as any other allegation of crime against a citizen. If a judge is alleged to be suffering such incapacity as warrants removal, the procedures to be followed are clear. The difficult cases tend to be those in which the complaint, even if made out, would not justify removal. The complainant is likely to assume that there must be some other sanction available. It can be difficult to satisfy an aggrieved person whose complaint is justified, but who sees no form of sanction visited upon the judicial officer involved. False expectations can be created. I do not put this as an argument against having any form of complaints procedure; but it is a problem that needs to be kept in mind.

*There is a fundamental problem about any course that would leave a judge in office, with both the capacity and the duty to exercise the judicial power of the Commonwealth, or of another unit of the Federation and yet publicly discredited by censure or some other form of disciplinary action.*

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<sup>39</sup> Delivered at the 6<sup>th</sup> Colloquium of the Judicial Conference of Australia at Launceston on 26 April 2002, and reproduced on the High Court of Australia website, cited in *Cornack v Fingleton* [2002] QSC 391 [31].

To some people, both inside and outside government, this is difficult to reconcile with current ideas of accountability. ... It is all the more important, then, that we should be in a position to explain the constitutional principles that are at work.

While Gleeson asserts that a more robust complaints and disciplinary system would represent a threat to the public's confidence in the administration of justice, with sitting judges subject to public censure or disciplinary action, it should be remembered that there are already forms of public censure for individual judges. As explained above, this might be in the form of media reporting of criminal conduct, or in judicial comments in the course of an appeal against a judgment. However, under the current system, these public censures will often not occur after a robust investigation affording transparent due process to the complainant and the judge, and they will often not involve any form of disciplinary action that the public can understand, so as to see consequences for judicial indiscretions. The absence of these elements from the traditional system has been argued to also undermine public confidence in the administration of justice. It stands in contrast to other jurisdictions, for instance California (which has one of the longest functioning judicial commissions and has served as a model for commissions in other jurisdictions) and England and Wales (which introduced reforms to its system of judicial governance and complaints handling in 2005). In these jurisdictions there is power in the Commission on Judicial Performance; and the Lord Chief Justice and Lord Chancellor, respectively, to respond to substantiated complaints about misconduct short of conduct that would justify removal from office with a graduated range of consequences.<sup>40</sup>

As Executive Director of the Arkansas Judicial Discipline & Disability Commission, David Sachar, has written, introduction of a well-functioning judicial commission can support judicial independence by ensuring that all complaints are dealt in a manner that respects due process, and the judiciary are seen to be self-regulating in a robust way:

Judges will complain that the JCC can be a danger to judicial decision-making independence. A properly functioning JCC will not do this and will, in fact, support an independent judiciary. Ensuring that the judiciary is protected from false allegations by guaranteeing due process is accomplished with good investigation policies and procedures. Due process is not an afterthought. Judges, even those accused of the most distasteful behavior must have a fair opportunity to be heard when facing public ethics charges.

However, there cannot be a fear of promulgating strong substantive regulations and procedures. It is incumbent on the judiciary to lead the way on regulation. If not, the public will not trust its ability to regulate itself. That is when other branches of government attempt to intervene and insidious separation of powers concerns creep in, and institutional judicial independence can be threatened.<sup>41</sup>

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<sup>40</sup> See further discussion of comparative models in Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) *Melbourne University Law Review* 1, 56-57.

<sup>41</sup> David Sachar, *#MeToo in the Judicial Workplace: The Role of Judicial Conduct Commissions in Enforcing and Preventing Sexual Harassment and Gender Related Corruption in the Judicial Workplace*, Paper presented to Expert Group Meeting on Gender-Related Judicial Integrity Issues (Seoul) 6-7 December 2018, 23.

### (3) The current Victorian position: the role of the head of jurisdiction and the Judicial Complaints Commission

Here, we look in more detail at the current governance position that exists in Victoria, which has supplemented the traditional role of the Head of Jurisdiction with a judicial commission.

Section 28AAA of the *Supreme Court Act 1986* sets out the powers of the Chief Justice of Victoria broadly and states:

- (1) The Chief Justice is responsible for ensuring the effective, orderly and expeditious discharge of the business of the Court.
- (2) The Chief Justice has the power to do all things necessary or convenient to be done to perform the Chief Justice's responsibilities under subsection (1).

There is a similar provision in the *County Court Act 1958* (section 8E), *Magistrates Court Act 1989* (section 12A) and the *Coroners Court Act 2008* (section 95A). The President of the VCAT has a slightly differently worded power under the *VCAT Act 1998* (section 30):

- (1) Subject to this Act and the rules, the President and the Vice Presidents are to direct the business of the Tribunal.
- (2) The President and the Vice Presidents are responsible for the management of the administrative affairs of the Tribunal.
- (3) The President and the Vice Presidents may determine the places and times for the sittings of the Tribunal.
- (4) In carrying out functions under this section, a Vice President is subject to the direction of the President.

The Chief Magistrate also has some express administrative authority which includes general responsibility for managing the court and ensuring its orderly conduct of business.<sup>42</sup>

In addition, there is also a provision for a council of judges in the Supreme Court,<sup>43</sup> County Court,<sup>44</sup> and Magistrates Court,<sup>45</sup> which must meet at least once a year to consider operation of rules, working of the offices of court, and administration and court procedure. These provisions imply, but do not expressly require, consultation. In contrast, there is an express requirement of the agreement of a majority of the judges of the Victorian Supreme Court before the creation of a new office in the court.

It is clear from these provisions that although the various heads of jurisdiction have some broad powers in relation to the administration of the Court, it is clearly intended that through the council of judges, a collegiate approach is also adopted. How this operates in practice and to what extent it impacts on the power or willingness of a head of jurisdiction to discipline another judicial officer if the circumstances warrant it, is likely to be very fact specific. Informal discussions have indicated that it is not unusual for a Head of Jurisdiction to exercise this power by speaking to members of their jurisdiction when judgments have been significantly delayed for example, but it is not known whether this power could or indeed would be used in the event of other performance or behavioural issues, such as gender-related integrity issues.

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<sup>42</sup> *Magistrates' Court Act 1989* (Vic) sections 5(3), 5A, 6(1), 13(1).

<sup>43</sup> *Supreme Court Act 1986* (Vic) section 28.

<sup>44</sup> *County Court Act 1958* (Vic) section 87.

<sup>45</sup> *Magistrates' Court Act 1989* section 15.

The head of each jurisdiction is also responsible for directing the professional development and continuing education and training of members and may direct all, or some of its judicial officers to participate in a specified professional development or continuing education and training activity.<sup>46</sup>

For example, section 28A (3) of the *Supreme Court Act 1986* provides:

...the Chief Justice may direct—

- (a) all judicial officers; or
- (b) a specified class of judicial officer; or
- (c) a specified judicial officer—

to participate in a specified professional development or continuing education and training activity.

Whilst the power is cast as a discretionary power to ‘direct’ indicating that compliance is required there is no explicit consequence listed for non-compliance unlike in the Federal Court, for example, where the Chief Justice has the explicit power to temporarily restrict a judge to non-sitting duties.<sup>47</sup> Whether or not the general power under section 28AAA includes a power to restrict a judge to non-sitting duties until the directed training activity has been completed is uncertain. For completeness we note also that the question of whether a failure to comply with a direction could amount to misconduct sufficient to warrant dismissal is also uncertain but would appear unlikely.

In Victoria, the role of the Head of Jurisdiction is supplemented by the work of the Judicial Complaints Commission. The Judicial Complaints Commission is constituted by heads of jurisdiction of courts and tribunals across the State and four non-judicial members appointed by the Governor in Council.<sup>48</sup> The Commission receives and investigates complaints against judicial officers. It has the power to (a) dismiss the complaint; (b) if it is serious enough to warrant removal from office, refer the matter to an investigating panel, or (c) for less serious complaints, refer it to the relevant head of jurisdiction with recommendations about the future conduct of the officer concerned. Once a matter is referred back to the head of jurisdiction, they have the power to (a) counsel the officer, (b) make recommendations to the officer as to their future conduct or (c) exercise any other powers that the head of jurisdiction has in relation to the officer concerned.<sup>49</sup>

However as set out above, heads of jurisdiction do not have a vast amount of power over other judges: at common law, by convention or in the legislated regimes. In addition, referring a complaint to a head of jurisdiction removes it from public purview without necessarily leading to an adequate response. Thus, the Victorian approach still means that the ‘chief judge’s unguided and unreviewable interpretation of the conduct in question will dictate if and how discipline is administered’.<sup>50</sup>

Thus, despite the introduction of the Judicial Commission of Victoria as a more formalised commission-led process, that process has not negated the need for Heads of Jurisdictions to exercise a degree of day-to-day management in “ensuring the effective, orderly and expeditious discharge of the business of the Court”. Nor has it negated the need to address misconduct that is not of such severity as to warrant a

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<sup>46</sup> See section 28A of the *Supreme Court Act 1986*; section 17AAA of the *County Court Act 1958*; section 13B of the *Magistrates’ Court Act 1989*; section 108 of the *Coroners Act 2008* and section 38A of the *VCAT Act 1998*.

<sup>47</sup> *Federal Court of Australia Act 1976*, section 15.

<sup>48</sup> *Constitution Act 1975* (Vic) section 87AAM-87AAO.

<sup>49</sup> *Judicial Commission of Victoria Act 2016* (Vic), section 115.

<sup>50</sup> Charles Gardner Geyh, ‘Informal Methods of Judicial Discipline’ [\(1993\) 142 University of Pennsylvania Law Review 243](#), 310

complaint to the Judicial Commission, nor conversely to implement the responses and/or corrective action suggested by the Judicial Commission in response to complaints.

The above analysis of constitutional principle, theory and practice demonstrates two clear points. The first is that judicial independence and judicial accountability are both values that are integral to maintaining public confidence in the integrity of the judicial system in Australia. The second is that the design of any judicial oversight mechanism must be done with an eye to strengthening and not diminishing judicial independence. At present in Victoria, the navigation of these principles appears as a compromise between the relatively newly introduced Judicial Complaints Commission, which receives complaints, and the traditional model, maintaining the Head of Jurisdiction's role in responding to complaints where the conduct involved would not warrant the judge's removal from office. In this report and its recommendations, we look specifically at whether this current system is adequate to deal with the possible incidence of gender-related misconduct.

## Judicial Immunity

Related to the principle of judicial independence is the common law and statutory rule of judicial immunity. The common law principles governing the immunity of judges of the Supreme Court can be summarised as follows:

- (1) A judge of a superior court is immune from suit in respect of acts done in the performance of judicial duties and administrative functions intimately associated with judicial duties.
- (2) The immunity is an immunity from being personally sued and being held personally liable.
- (3) The immunity also extends to protect a judge from being compelled to disclose any aspect of his or her decision-making process (but not the record upon which the judge acted insofar as it does not reveal any aspect of the decision-making process).
- (4) Further, the immunity extends to the revelation, by whatever means (such as the evidence of another person or a subpoena to produce the judge's notes), of any aspect of the judge's decision-making process.

The immunity has been described as:

The principle of judicial immunity is of ancient origin, extending from the time of Lord Coke. In *R v Skinner* (1772) 98 ER 529, Lord Mansfield (at 530) stated the principle in terms that "neither party, witness, counsel, jury, or Judge can be put to answer, civilly or criminally, for words spoken in office." The principle was applied in *Scott v Stansfield* (1868) 3 LR Ex 22, which involved an action for slander brought by a disgruntled litigant against a County Court judge. Kelly CB referred (at 223) to the general proposition that "no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice".<sup>51</sup>

In addition, there are statutes that extend the operation of the immunity to various positions, including judges of the County Court (s19 *County Court Act 1958*), magistrates (s14 of the *Magistrates' Court Act 1989*), VCAT members, and registrars (s24 *Magistrates' Court Act 1989*, s19 *County Court Act 1958*, s24F of the *Supreme Court Act*, 294 of the *Coroners Act 2008*) and mediators.

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<sup>51</sup> *O'Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698.

The Full Federal Court has held that:

At least in the performance of judicial functions, judicial officers are not subject to the [*Disability Discrimination Act 1992*] and any claim of discrimination would be precluded by the principle of judicial immunity... In our view a complaint in respect of action taken or not taken in the exercise of a jurisdiction conferred on a Chapter III judge cannot found an action under the [*Disability Discrimination Act 1992*].<sup>52</sup>

Similarly, in the Supreme Court of Victoria it has been held that judicial immunity, and the statutory extension of it to registry staff, means that the relevant officers cannot be subject to a claim under the EO Act for acts done that are subject to the immunity. However, significantly it was held that:

- whilst the individual officers were protected from liability, because the immunity did not negate the existence of a contravention of a law, s 102 of the EO Act was capable of operating against the employer or principal in relation to the contravention. Accordingly, where an employee or agent contravened the EO Act and was immune from liability for the contravention under another Act, the employer or principal might still be liable if the other Act did not confer immunity;<sup>53</sup> and
- The State cannot be vicariously liable for a judge's or other judicial officer's acts falling within the immunity because judicial officers, in performing acts falling within the immunity, are not acting as employees or agents of the State but as independent judicial officers. However, the State can be a respondent to a claim under the EO Act on the basis of direct rather than vicarious liability so that even where an officer (other than a judicial officer) is protected by an immunity an action may lie directly against the State.<sup>54</sup>

**The independent exercise of judicial power and the protection from liability for judicial decisions or the exercise of related judicial functions should not be conflated with, or seen as any sort of limitation on, the ability of the Parliament to legislate to prohibit, investigate and punish sexual harassment by judicial officers.**

Whilst the immunity may operate to prevent a private action being taken for harassment that occurred in the exercise of a judicial function, for example a comment made by a judicial officer in the course of a hearing, the immunity does not have the effect of converting otherwise unlawful behaviour into lawful behaviour.<sup>55</sup> The behaviour remains unlawful however the remedies under the EO Act for example will not be available.

Given that sexual harassment is most likely to occur in private or outside of formal court hearings and not in the course of exercising a judicial function and, like the acceptance of a bribe, can never fall with the performance of the person's duties, the doctrine of judicial immunity or similar statutory immunities does not operate as a barrier to regulating judicial conduct or sanctioning judicial misconduct including sexual harassment.

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<sup>52</sup> *Luck v University of Southern Queensland* [2014] FCAFC 135 at [41] per Murphy, Pagone and Perry JJ citing *Fingleton v The Queen* (2005) 227 CLR 166 at [36]-[39] per Gleeson CJ citing *Sirros v Moore* [1975] QB 118 at [132] per Lord Denning MR; *Yeldham v Rajski* (1989) 18 NSWLR 48.

<sup>53</sup> *Towie v State of Victoria* (2008) 19 VR 640 at 657 [64].

<sup>54</sup> *Towie v State of Victoria* (2008) 19 VR 640 at 656 [60] and 658 [71].

<sup>55</sup> *Winters v Fogarty* [2017] FCA 51 at [107] per Bromberg J; *Towie v State of Victoria* (2008) 19 VR 640 at 656 [62].