

## **JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY AT THE COALFACE OF THE AUSTRALIAN JUDICIARY**

**Presented by Chief Judge Dr John Lowndes of the Local Court of the Northern Territory of Australia at the Northern Territory Bar Association Conference in Dili East Timor July 2016\***

### **INTRODUCTION**

The principle of judicial independence has attracted much attention and been critically analysed from a number of different perspectives and, not unexpectedly, accorded different meanings. Judicial accountability, which is often considered to complement judicial independence, is a fluid and evolving concept, the precise parameters of which are undetermined.

These two principles are discussed with particular reference to their application to the Australian magistracy and magistrates courts which operate at the coalface of the Australian judiciary.

This paper has a number of aims:

1. to distil the principle of judicial independence and to emphasise the crucial importance of the principle of judicial independence to the proper and effective operation of the Australian judiciary;
2. to outline the various mechanisms for protecting and ensuring judicial independence;
3. to assess the degree of independence enjoyed by the Australian magistracy and magistrates' courts by reference to those mechanisms;
4. to consider the impact of new and innovative therapeutic approaches to "judging" in magistrates' courts on the judicial independence of the magistracy;
5. to discuss the role of the Commonwealth Latimer House Principles and Guidelines and the Commonwealth Magistrates' and Judges' Association Guidelines for Ensuring the Independence and Integrity of Magistrates in the promotion and protection of the independence of the Australian magistracy and magistrates courts;

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6. to analyse the essential and complementary relationship between the principle of judicial independence and the concept of judicial accountability;
7. to examine the extent to which the Latimer House Principles and the International Framework for Court Excellence address judicial accountability and strike a proper balance between judicial independence and judicial accountability.

## **DISTILLATION OF THE PRINCIPLE OF JUDICIAL INDEPENDENCE AND ITS FUNDAMENTAL IMPORTANCE IN A FREE AND DEMOCRATIC SOCIETY**

- **The Essence of Judicial Independence**

The principle of judicial independence is a fundamental aspect of the rule of law in Australia and other common law countries and also the subject of international norms and declarations.<sup>1</sup> As stated by Enid Campbell and H.P. Lee, “it is important to consider what the principle of judicial independence means and why that principle is regarded as being of fundamental importance”.<sup>2</sup>

There is a wealth of literature and jurisprudence on the subject of judicial independence and its meaning. However, one can extract from that body of knowledge some common threads that can be weaved to produce a clear and complete explanation of the principle of judicial independence.

As stated by Lord Justice Bingham:

Any mention of judicial independence must eventually prompt the question independent of what? The most obvious answer is, of course, independent of government. I find it impossible to think of any way in which judges in their decision-making role should not be independent of government. But they should also be independent of the legislature.<sup>3</sup>

The principle of judicial independence focuses on the creation of an environment in which the judiciary can perform its judicial function as the third branch of government without being subject to any form of duress, pressure or influence from any persons or other institutions, in the particular the other two branches of government.<sup>4</sup>

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<sup>1</sup> K Mack and S Anleu “The Security of Tenure of Australian Magistrates” [2006] Vol 30 Melbourne University Law Review 370, 372.

<sup>2</sup> E Campbell and H.P. Lee *The Australian Judiciary* University Cambridge Press 2001, 49.

<sup>3</sup> Lord Justice Bingham “Judicial Independence” (1997) 63(2) Arbitration 86, 89.

<sup>4</sup> Lee and Campbell n 2, 50; J Debeljak “Judicial Independence: A Collection of Material for the Judicial Conference of Australia” Judicial Conference of Australia Uluru April 2001, 2.

Sir Ninian Stephens explained the principle in this way:

What its precise meaning must always include is a state of affairs in which judges are free to do justice in their communities, protected from the power and influence of the State and also made as immune as humanly possible from all other influences that may affect their impartiality.<sup>5</sup>

In a similar vein, Sir Guy Green stated:

[judicial independence] is the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.<sup>6</sup>

It follows, as stated by Nicholson, that the essence of the principle of judicial independence is “the attainment of impartiality in the business of the judiciary”.<sup>7</sup> An impartial and independent adjudicatory process is the essence of judicial independence.<sup>8</sup>

However, the principle of judicial independence connotes more than just the notion of impartiality: it requires that there exist an environment which ensures that the judiciary performs its “central, distinctive function [which is] independent and impartial adjudication<sup>9</sup> and is perceived to perform that important function.<sup>10</sup> It primarily “denotes the underlying relationship between the judiciary and the other two branches of government which serves to ensure that the court will function and be perceived to function impartially”.<sup>11</sup>

It is important to note that the principle of judicial independence is not only concerned with the ability or capacity (both actual and perceived) of the judiciary within the structure of government to perform its judicial function as the third arm of government, but extends to the ability or capacity to perform that function free of any external influence, including other members of the judiciary. Judicial independence requires “freedom from internal control by other judicial officers”<sup>12</sup> and entails the independence of judicial officers from one another.<sup>13</sup> In this regard, judicial independence entails internal judicial independence – an environment or state of

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<sup>5</sup> Sir Ninian Stephens “Judicial Independence the Inaugural Oration in Judicial Administration” 21 July 1989, 6.

<sup>6</sup> Sir Guy Green “The Rationale and Some Aspects of Judicial Independence “ (1985) 59 ALJ 135.

<sup>7</sup> Justice Nicholson “ Judicial Independence and Accountability: Can They Co-Exist?” (1993) 67 ALJ 404, 405

<sup>8</sup> J Lowndes “ The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part 11” (2000) 74ALJ 592, 600.

<sup>9</sup> Sir Anthony Mason “The Appointment and Removal of Judges” in H Cunningham (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond*(1997) 1, 4.

<sup>10</sup> As observed by Campbell and Lee public perception of judicial impartiality is commonly regarded as the essence of judicial independence: Campbell and Lee n 2, 49

<sup>11</sup> MacKeigan v Hickman [1989] 2 SCR 796 per McLachlin J at 826.

<sup>12</sup> Mack and Anleu n 1, 372.

<sup>13</sup> *Re Colina. Ex parte Torney* (1999) 200 CLR 386, 398 ( Gleeson CJ and Gummow J).

affairs in which judicial officers are free from the influence of any other judicial officer (including the head of jurisdiction) in the discharge of their judicial function.<sup>14</sup>

- **Mechanisms For Ensuring Judicial Independence**

A number of aspects are relevant to whether there exists an environment or state of affairs – or an underlying relationship between the judiciary and the other two branches of government – that ensures that the judiciary can properly perform its judicial function in an independent and impartial manner and be perceived to be doing so.

Ananian-Welsh and Williams have identified four key indicators of judicial independence by reference to which the requisite environment, state of affairs or underlying relationship can be assessed:

- appointment, tenure and remuneration;
- operational independence;
- decisional independence; and
- personal independence.<sup>15</sup>

As pointed out by the authors “judicial appointment, tenure and remuneration are crucial to judicial independence”.<sup>16</sup> All three are key mechanisms for providing an appropriate environment for the attainment of judicial independence

As regards judicial appointments, the authors state:<sup>17</sup>

...the consensus suggests that the method of appointing judges must not risk the erosion of actual or perceived independence from the executive. Appointments ought to be based on merit<sup>18</sup> and be exercised in cooperation or consultation with the judiciary.<sup>19</sup> Similarly, any processes for promotion must be based on objective criteria.<sup>20</sup>

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<sup>14</sup> *Re Colina. Ex parte Torney* (1999) 200 CLR 386, 398 ( Gleeson CJ and Gummow J).

<sup>15</sup> R Ananian - Welsh and G Williams “Judicial Independence From the Executive: A First Principles Review of the Australian Cases” Monash University Law Review Vol 40, No 3, 593.

<sup>16</sup> Ananian Welsh and G Williams n 15 , 598.

<sup>17</sup> Ananian - Welsh and G Willaims n15, 598 -599.

<sup>18</sup> LAWASIA Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (1997) clause 11.

<sup>19</sup> The International Commission of Jurists, *The Rule of Law and Human Rights* (1959-62) ch 5 1[2].

<sup>20</sup> Beijing Statement of Principles n 18, clause 11.

Security of tenure is an equally important pre-requisite for judicial independence.<sup>21</sup> As pointed out by Mack and Anleu, security of tenure is a central mechanism for ensuring both external and internal judicial independence :<sup>22</sup>

Security of tenure promotes both internal and external judicial independence by limiting the ability of either the executive or the chief judicial officer to determine the conditions or terms of appointment of judicial officers. Security of tenure “reinforces the independence of mind and action of judicial officers, essential to the proper discharge of their functions”.<sup>23</sup>

Another important precondition for judicial independence is financial security:<sup>24</sup>

Judicial salaries and pensions should be adequate and commensurate with the dignity of the office,<sup>25</sup> and should not be decreased during a judge’s tenure.<sup>26</sup> They should also be established by law and not subject to arbitrary interference from the executive.<sup>27</sup>

As Weinberg J commented in *NAALAS First Instance* (2001) 192 ALR 625, 699 “the arrangements for judicial remuneration are obviously central to judicial independence.”<sup>28</sup> Mack and Anleu have identified the following key features of security of tenure in relation to remuneration:<sup>29</sup>

- remuneration should be at a high enough level to ensure a high quality judiciary;
- there should in place a process for fixing remuneration which is itself independent of political influence;
- Consistent with the need for security of tenure there should be a guarantee against reduction in remuneration.<sup>30</sup>

The next key indicator of judicial independence – or mechanism for establishing and maintaining a sufficient level of judicial independence – identified by Ananian-Welsh and Williams is “operational independence”:<sup>31</sup>

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<sup>21</sup>Ananian- Welsh and Williams n15, 599.

<sup>22</sup> Mack and Anleu n 1, 374.

<sup>23</sup> See *Fingelton v The Queen* (2005) 216 ALR 474, 507 per Kirby J.

<sup>24</sup> R Ananian -Welsh and Williams n 15, 600.

<sup>25</sup> Montreal Declaration (1983) clauses 2.2(1)(b) – ( c); New Delhi Standards (1982) clauses 14-15; Beijing Statement n 18, clause 31.

<sup>26</sup> Except as part of an overall public economy measure: Montreal Declaration n 25 clause 2.21 ( c); Beijing Statement n 18, clause 31; New Delhi Standards n 18, clauses 14-15.

<sup>27</sup> Bangalore Principles: Commentary 41; Bangalore Principles: Implementation Measures 12; Montreal Declaration clause 2.2(a); New Delhi Standards 14-15.

<sup>28</sup> Cited by Mack and Anleu n 1, 371.

<sup>29</sup> Mack and Anleu n 1, 388.

<sup>30</sup> This is subject to the exceptional circumstances described by Ananian -Welsh and Williams n 15, 600.

<sup>31</sup> Ananian- Welsh and Williams n 15, 600.

The daily operational processes and procedures of courts require freedom from executive interference. In essence, the executive should not control the courts, but should support them sufficiently to facilitate their effective and independent functioning. Thus, executive funding and other resourcing to the judiciary must be adequate to allow it to perform its functions,<sup>32</sup> and there should be no interference in respect of the assignment of judges, sittings of the court or court lists.<sup>33</sup> Any power to transfer a judge from one court to another should be vested in a judicial authority and preferably subject to the judge's consent.<sup>34</sup>

There are two other key indicators of judicial independence (or mechanisms for securing judicial independence) which are closely related to operational independence - namely structural and administrative independence.

It was not until the last quarter of the twentieth century that the Australian magistracy was severed from the public service – and hence the executive branch of government.<sup>35</sup> Although prior to the structural separation of the magistracy from the public service branch of government it was generally accepted, as a matter of convention, that magistrates were independent judicial officers,<sup>36</sup> formal separation from the public service was a necessary and positive change in the interests of securing the independence of the magistracy and the courts presided over by magistrates:<sup>37</sup>

Eventually, the potential for, or appearance of, executive interference with judicial officers created by the public service structure was recognised as inconsistent with the right of the public, served by magistrates and magistrates courts, to have their matters heard by a formally independent judiciary. The goal of providing at least some degree of judicial independence for magistrates is clearly expressed in the parliamentary debates in several states and territories in relation to legislation to constitute magistrates courts and separate magistrates from the public service.<sup>38</sup> For example, in South Australia the Attorney-General stated that the purpose of the Magistrates Bill 1983 (SA) was to “place

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<sup>32</sup> Basic Principles on the Independence of the Judiciary 1985 Article 7; Bangalore Principles: Commentary 124; New Delhi Standards, clauses 10 and 13; Siracusa Principles Article 24; Anthony Mason “Judicial Independence and the Separation of Powers – Some Problems Old and New” in Geoffrey Lindell (ed) *The Mason Papers* (The Federation Press) 331, 332-335.

<sup>33</sup> Bangalore Principles; Commentary 35; Siracusa Principles Article 8; Montreal Declaration Clause 2.16; New Delhi Standards clause 11 (c).

<sup>34</sup> New Delhi Standards clause 12; Beijing Principles clause 30; Siracusa Principles Article 9; Montreal Declaration clause 2.18.

<sup>35</sup> J Lowndes “The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part 1” (2000) 74 ALJ 509, 509-518; Mack and Anleu n 1, 374-375.

<sup>36</sup> Mack and Anleu n 1, 376.

<sup>37</sup> Mack and Anleu n 1, 376.

<sup>38</sup> New South Wales, *Parliamentary Debates* Legislative Council 1 December 1982 3584 (JR Hallam Minister for Agriculture and Fisheries).

magistrates, in relation to the exercise of their judicial functions, in the same position as other members of the judiciary.<sup>39</sup>

As pointed out by Lowndes:

The severance of the magistracy from the public service ensured judicial independence to the extent that in a purely structural sense the magistracy was independent of the executive branch of government. Clearly, there cannot be judicial independence without structural independence.<sup>40</sup>

Structural or institutional separation from the public service (and the executive branch of government) is a key indicator of - or mechanism for securing - judicial independence.

The extent to which the judiciary enjoys administrative independence of the executive branch of government – in terms of institutional arrangements for the administration and resourcing of the courts - is another important indicator of judicial independence.

As mentioned in the Fitzgerald Inquiry's Report on Court Administration:

One of the threats to judicial independence is an over-dependence upon administrative and financial resources from a Government department or being subject to administrative regulation in matters associated with the performance of the judicial role. Independence of the Judiciary bespeaks as much autonomy as is possible in the internal management of the administration of the courts.<sup>41</sup>

As long as the judiciary continues to be substantially dependent upon the administrative and financial resources provided by the executive arm of government then the judiciary does not enjoy institutional independence.<sup>42</sup> The point is succinctly made by the Hon Ken Marks:

A more fundamental difficulty is that the judiciary is dependent on the Executive to provide remuneration, courts, equipment and staff. In Australia (save, to an extent the High Court and the federal courts) the courts do not enjoy institutional independence. Judges cannot be said to be truly independent if the purse strings which sustain the court system in which they work are held directly by the executive government.<sup>43</sup>

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<sup>39</sup> South Australia, *Parliamentary Debates* Legislative Council 8 November 1983 1452 (CJ Sumner, Attorney General).

<sup>40</sup> Lowndes n 8, 599.

<sup>41</sup> Report of a Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, pursuant to Orders in Council, Fitzgerald Report (1989) Queensland Govt Printer 1989, p 134.

<sup>42</sup> Lowndes n 8, 599.

<sup>43</sup> K Marks "Judicial Independence" (1994) 68 ALJ 173, 174.

As pointed out by Lowndes:

This problem is acute in Magistrates Courts which, being at the lowest level of the judicial hierarchy, tend to be under-resourced and often the recipients of the bread crumbs from “the fiscal basket.”<sup>44</sup>

There is a direct link between adjudicatory and administrative independence.<sup>45</sup>

Judges concerned with the lack of administrative independence in Australia frequently draw links between adjudicatory and administrative independence, arguing that without the latter the former is put at risk. They point out the potential dangers to adjudicatory independence in a court system administered by the executive branch of government – dependent upon the executive for nearly all their administrative needs, from staffing and financing the courts, to providing equipment and supplies to maintaining the very court buildings in which justice is dispensed... and the ultimate concern is that politicians and bureaucrats could use their control over the necessities of judicial like to pressure courts into rendering particular kinds of decisions. Of more practical day – to-day concern is that excessive judicial dependence on the executive in the operation of the courts may have a deleterious impact on the ability of the courts to provide a high standard of substantive justice.<sup>46</sup>

As observed by Lowndes:<sup>47</sup>

The lines of debate over the links between adjudicatory independence and administrative independence have been firmly drawn. The judiciary argue that the Executive – oriented Australian system of court administration compromises judicial independence while governments contend “the Executive needs to be accountable, especially in Parliament, for the courts, and that is best achieved when the Executive is heavily involved in court administration.”<sup>48</sup>

As further pointed out by Lowndes, “the general judicial view is that the judiciary should to the fullest practicable extent be in control of its own affairs, including all administrative and governance arrangements; the opposing view is that the administrative aspects (as distinct from the purely judicial aspects) of the courts and the provision of courts and court services is the responsibility of the executive arm of government”.<sup>49</sup>

It has been said that “judicial independence cannot be secured without complete control over all court buildings and facilities being vested in the judges and

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<sup>44</sup> Lowndes n 8, 599.

<sup>45</sup> Lowndes n 8, 600.

<sup>46</sup> Church and Sallman *Governing Australia’s Courts* AIJA Carlton Vic 1991, 8 referred to by Lowndes n 8, 600.

<sup>47</sup> Lowndes n 8, 600.

<sup>48</sup> Church and Sallman n 46,10.

<sup>49</sup> Lowndes n 8, 600 where the author refers to Byron “Court Governance: The Owl and the Bureaucrat” (1999) 8 JJA 142 at 129; McGarvie “The Foundations of Judicial Independence in a Modern Democracy” (1991) 1 JJA 1 at 5, 22; McGarvie “Supping With the Devil” in *Courts in a Representative Democracy* (AIJA Melbourne 1995).



magistrates”.<sup>50</sup> This aspect of judicial independence has been commented upon by Sir Guy Green:<sup>51</sup>

By control of court buildings, I mean the right to exclusive possession of the building, the power to exercise control over ingress to or egress from the building, the power to allocate the purposes to which different parts of the building are to be put and the right to maintain and make alterations to the building. If a court is not invested with such rights of control over its buildings, its independence and its capacity properly to perform its function are impaired or threatened in a number of respects.

In varying degrees the quality and the effectiveness of proceedings in court depend upon the nature of the physical environment in which they are conducted and upon adequate facilities being available for the participants and the public...If, as I think it is the case, there exists in the public mind a tendency to identify the administration of the law with outward manifestations, then it would follow that public confidence in the judiciary could be significantly affected by the nature and suitability of its court buildings and its court facilities and by whether those buildings are seen to be controlled by the government or by the judges.<sup>52</sup>

It is clear that “in order to give full force and effect to the general principle that judicial proceedings should take place in public judges must have effective control over court buildings”.<sup>53</sup>

There is also clear potential for tension between the executive and judiciary in other areas such as the increasing pressure applied by the executive on courts to be more efficient and to increase their productivity.<sup>54</sup> The attendant risk to judicial independence under these circumstances is significant, as pointed out in the *Court Management Information* (Discussion Paper) AIJA 1991, p 16:

There may also be a greater risk to judicial independence if, in order to receive additional resources, judges are asked to be more productive. The stage is set for the quality, or timeliness, of justice being bargained for increased resources (see the former Chief Justice of the High Court, Sir Anthony Mason “The Courts and Their Relationship with Government”, Address to the Bicentennial Legal Convention, August 1988) This must be resisted.

Former Chief Justice of the High Court, Sir Gerald Brennan, has highlighted the dangers inherent in placing the budgetary and administrative control of courts in the hands of the executive arm of government :<sup>55</sup>

It has always been the practice – indeed an essential constitutional convention – that executive government, both of the Commonwealth and the States seek an

<sup>50</sup> Lowndes n 8, 600.

<sup>51</sup> Lowndes n 8, 600.

<sup>52</sup> Sir Guy Green n 6, 144 referred to by Lowndes n 8, 600.

<sup>53</sup> Lowndes n 8, 600-601.

<sup>54</sup> Lowndes n 8,601 where the author refers to the observations made by Church and Sallman n 46, 3.

<sup>55</sup> Lowndes n 8, 601.

appropriation and parliament appropriate sufficient funds to permit the courts to perform their constitutional functions. In times of financial stringency, there is a risk that governments might regard the courts simply as another Executive agency, to be trimmed in accordance with the Executive's discretion in the same way as the Executive is free to trim expenditure on the functions of its agencies. It cannot be too firmly stated that the courts are not an Executive agency. The law, including the laws enacted by Parliaments or by the Executive regulation and including Executive orders affecting the government of the country, goes unadministered if the courts are unable to deal with ordinary litigation...

The courts cannot trim their judicial functions. They are bound to hear and determine cases brought within their jurisdiction. If they were constrained to cancel sittings or to decline to hear the cases that they are bound to entertain, the rule of law would be immediately imperilled. This would not be merely a problem of increasing the backlog; it would be a problem of failing to provide the dispute-resolving mechanism that is the precondition of the rule of law.<sup>56</sup>

Budgetary and administrative control of courts by judges and magistrates is often viewed as a solution to removing a potential threat to judicial independence.<sup>57</sup> As part of his Farewell Speech on 16 December 1993, former Chief Judge of the New South Wales Compensation Court, Judge Frank McGrath said:<sup>58</sup>

I believe that there is more to judicial independence than these two matters (that is security of tenure and security of salary). In my view the judges of the various courts must have control of, and responsibility for, the administration of their registries. The various courts should have control of and responsibility for their day-to-day budgets, subject only to the overall supervision of the Auditor General.

According to Church and Sallman, the critical issue is the level and amount of administrative independence required to support a satisfactory level of adjudicatory independence.<sup>59</sup> The quest is to find an appropriate model of court governance.<sup>60</sup>

The degree of autonomy enjoyed by a court in its own internal administration depends upon "the way resources are provided and managed", and this flows from "the basic structural and operational relationships between the judicial and executive branches of government"<sup>61</sup> – in other words, the model of court governance that is adopted and applied.

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<sup>56</sup> The Hon Sir Gerard Brennan "The State of the Judicature" (1998) 72 ALJ 33, 35.

<sup>57</sup> Lowndes n 8, 601.

<sup>58</sup> Lowndes n 8, 601.

<sup>59</sup> Lowndes n 8, 600 citing Church and Sallman n 46, 7.

<sup>60</sup> Church and Sallman n 46, 13.

<sup>61</sup> Justice Michael Moore "Judicial Independence – Breaking Free from the Executive Branch" (FCA) [2010] FedJSchl 27, 5.

Justice Moore conveniently lists and describes the five different models of court governance that can be found in Australian jurisdictions:<sup>62</sup>

- the traditional model;<sup>63</sup>
- the separate department model;<sup>64</sup>
- the federal model;<sup>65</sup>
- the autonomous collegiate model;<sup>66</sup>
- the judicial autonomous model.<sup>67</sup>

Each of these models of court governance is an indicator of the degree of administrative independence – and hence judicial independence - enjoyed by a particular court, as well as serving as a mechanism for securing the independence of the court. The traditional model is considered to render judicial independence less secure (because of the direct connection between the judiciary and the executive) and to compromise the efficiency and effectiveness of a court.<sup>68</sup> The separate department model – although an improvement on the traditional model of court governance – is viewed as not completely solving the problems of compromising judicial independence because the separate department is an arm of the executive.<sup>69</sup> The federal model of court governance is considered to optimise judicial independence and to minimise influence from the executive branch of government.<sup>70</sup> The autonomous collegiate model is also considered to promote a very high degree of independence from the executive.<sup>71</sup> The judicial autonomous model is also very supportive of judicial independence.<sup>72</sup>

The third key indicator of judicial independence identified by Ananian -Welsh and Williams is that of decisional independence, which is concerned with “the

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<sup>62</sup> Justice Moore 61, 5

<sup>63</sup> Under this model administrative services are provided to the judiciary by a department of justice or the Attorney-General’s department, with the court having limited responsibility for the services and no formal control over them.

<sup>64</sup> According to the separate department model administrative services are provided to the judiciary by a department specifically established for that purpose. Again the court has limited responsibility or power over the administration of the court.

<sup>65</sup> Under the federal model the administration is controlled by the court.

<sup>66</sup> The autonomous collegiate model is similar to the federal model.

<sup>67</sup> Under the judicial autonomous model services to the court are provided jointly by a judicial governing council and a separate courts administration authority.

<sup>68</sup> Justice Moore n 61, 6.

<sup>69</sup> Justice Moore n 61, 10.

<sup>70</sup> Justice Moore n 61, 20.

<sup>71</sup> Justice Moore n 61, 11.

<sup>72</sup> Justice Moore n 61, 13.

independence with which a judge exercises his or her decision –making functions”.<sup>73</sup> However, decisional independence is far more than a key indicator of judicial independence: it is, as stated earlier, the core aspect of judicial independence.

As decisional independence “requires that the powers of the judiciary not be controlled by, or conflated with, the powers of the other arms of government”,<sup>74</sup> there needs to be an environment or state of affairs in which such control or conflation of powers is avoided or a mechanism that allows decisional independence to be maintained. Such a mechanism is to be found in the doctrine of the separation of powers, which bolsters decisional independence – and hence the principle of judicial independence.

Although the principle of judicial independence is not historically connected to the doctrine of the separation of powers there is, as pointed out by the former Chief Justice of the Supreme Court of South Australia, the Hon John Doyle AC, an intimate relationship between the two doctrines:<sup>75</sup>

As I observed, it may be that historically the doctrine of separation of powers is not related to judicial independence. But there is a link.

If the arms of government are to be substantially separate, it would seem necessary for the judicial arm of government, and that is what it is, to be independent of the other two arms. If it were not independent, one wonders how there could be true separation of powers. If the judiciary were, for example, under the influence of the executive, then it would not in truth be a separate and distinct power. So it is not surprising that these days the independence of the judiciary is often linked to the separation of powers.

A similar view has been expressed by Winterton:<sup>76</sup>

...judicial independence does not depend upon the courts being seen as a separate branch of government for, as a leading English commentator has acknowledged, the independence of the judiciary “is not related historically to the doctrine of the separation of powers”, although that doctrine undoubtedly protects and reinforces it. Whether or not State judiciaries be considered a separate “power” or branch of government in the full sense, the desirability of

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<sup>73</sup> Ananian –Welsh and Williams n, 15 600-601.

<sup>74</sup> Ananian and Williams n 15 , 601 where the authors refer to the *New Delhi Standards* clause 5 and J S Caird, R Hazell and D Oliver “ The Constitutional Standards of the House of Lords Select Committee on the Constitution (The Constitution Unit, University College London, January 2014) clause 3.1.6.

<sup>75</sup> The Hon John Doyle AC “ Judicial Independence and the Separation of Powers” a paper delivered at the Legal Education Teachers Association of South Australia Annual Conference, 3.

<sup>76</sup> G Winterton “Judicial Remuneration in Australia” AIJA 1987, 10.

judicial independence has long been recognised in Australia<sup>77</sup> and indeed, largely honoured, at least in regard to the superior courts.<sup>78</sup>

Enid and Campell have further explained the close, though not indispensable, relationship between judicial independence and the doctrine of the separation of powers:<sup>79</sup>

Although judicial independence “is not historically related to the separation of powers doctrine”, the development by the High Court and the Privy Council of a separation of judicial power doctrine is a tacit recognition that judicial independence is bolstered by such a doctrine...

Many high Court Justices have also highlighted the importance of guaranteeing judicial independence to justify the strict separation of federal judicial power.

Justice Nicholson has pointed out although the principle of judicial independence has developed independently of the doctrine of the separation of powers – and is a stand - alone principle - a constitutional entrenchment of that doctrine can bolster the principle of judicial independence:

The point to be made in relation to judicial independence is that the presence of the doctrine of separation of powers in that sense is not a necessary foundation for the application of the principle of judicial independence. It cannot be disputed that the presence of and need for judicial independence is much more readily apparent where there is a constitutional document which imposes limitations on the powers of government which require application and enforcement by the judicial power. However, the need for judicial independence is not dependent on such constitutional arrangements because the availability of impartial determination is of equal interest to citizens in the resolution of disputes between them and the State and between each other.<sup>80</sup>

Notwithstanding that the presence of the doctrine of the separation of powers is not an indispensable condition for the application of the principle of judicial independence, Justice Nicholson makes clear the role that a constitutional entrenchment of the doctrine of the separation of powers can play in protecting and strengthening judicial independence:

One of the ways in which judicial independence can be protected from improper exercises of legislative or executive power is for the structure of the judicial branch to be enshrined in the Constitution. We have seen that, to some extent, this is a position often adopted. When that occurs any diminishment in the constitutional position can only come about in compliance with the amending

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<sup>77</sup> See D Neal *The Rule of Law in a Penal Colony and Power in Early New South Wales* (1991) 87-88.

<sup>78</sup> See for example Street CJ’s emphatic reiteration of the need for independence of District Court judges: *Lisafa Holdings Pty Ltd v Commissioner of Police* (1988) 15 NSWLR 1, 4-5 (CA). For an earlier assertion of the independence of District Court judges see *Meymott v Piddington* (1877) Knox 306.

<sup>79</sup> Campbell and Lee n 2, 48-49.

<sup>80</sup> Justice Nicholson n 7, 409-410.

processes in the Constitution itself so that the changes are the subject of public focus and debate.<sup>81</sup>

As stated by Campbell:<sup>82</sup>

A constitution may require an institutional separation of the judicial and non-judicial powers of government so that the judicial powers are exercisable only by courts and so that neither the executive nor the legislative branches of government may require courts or their judges to exercise non-judicial powers. A constitutionally mandated separation of powers may also preclude enactment by parliaments of legislation which intrudes into the performance of the judicial functions reposed in the courts. A constitution may in addition ensure the independence of the judiciary by means of provisions guaranteeing security of tenure.

It is clear from this statement that a constitutional entrenchment of the doctrine of the separation of powers can provide an effective mechanism for securing decisional independence and therefore guaranteeing judicial independence.

However, as pointed out by Ananian-Welsh and Williams, decisional independence also requires that judicial officers should be “independent from their judicial colleagues in the conduct of their decision-making powers”.<sup>83</sup> Mechanisms are also necessary to ensure that judicial officers are independent from improper influences that might stem from sources internal to the judiciary. However, the mechanism for ensuring internal decisional independence or internal judicial independence is not to be found in the doctrine of the separation of powers, but, as pointed out by Debeljak, (Judicial Independence: A Collection of Material for the JCA, 2) in legal and institutional measures that stand outside that doctrine and ensure that judicial officers are independent from other judicial officers in the performance of their judicial functions and duties.

The final key indicator of judicial independence identified by Ananian-Welsh and Williams is “personal independence”:<sup>84</sup>

It requires that a judge not accept, nor should the executive require that he or she will, extra-judicial roles that would be likely to interfere with his or her exercise of judicial power. This potential for interference should be assessed both in fact and according to public perception. Impermissible roles would include jobs at a high, policy-making level of the executive or legislative branch

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<sup>81</sup> Justice Nicholson n 7, 414

<sup>82</sup> E Campbell “Constitutional Protection of State Courts and Judges” (1997) Vol 23 No2 Monash University Law Review 397.

<sup>83</sup> Ananian –Welsh and Williams n 15, 601 where the authors cite the following sources: New Delhi Standards clause 46; S Shetreet “Judicial Independence and Accountability: Core Values in Liberal Democracies” in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 3.}

<sup>84</sup> Ananian - Welsh and Williams n 15, 601

(for example as special policy advisor on matters relating to reform of the administration of justice).<sup>85</sup>

The global resources also recognise a range of extra-judicial roles that a judge may be appointed to – provided that no inconsistency with his or her actual or perceived impartiality or political neutrality arises. For instance, a judge may be a member of a commission of inquiry,<sup>86</sup> represent the state on ceremonial or other occasions,<sup>87</sup> hold a position of administrative responsibility within a court ( for a limited term and provided that the appointment is made by the court itself),<sup>88</sup> and be involved in certain executive activities after retiring as a judge;<sup>89</sup>

As pointed out by the authors, personal independence further requires that judicial officers are neither rewarded nor punished for the performance of their judicial functions, they are afforded immunity from suit for judicial acts and are physically protected against threats of violence.<sup>90</sup>

The foregoing discussion reveals that the principle of judicial independence requires legal and institutional measures to ensure that judges are, and the judiciary collectively is, independent from improper influences that might stem from sources external to the judiciary.<sup>91</sup> Equally, the principle of judicial independence requires that individual judicial officers be independent from their judicial colleagues. The presence or absence of such legal and institutional measures are key indicators of the degree of judicial independence enjoyed by a particular judiciary as well as its individual members.

- **The Fundamental Importance of the Principle of Judicial independence**

It remains to consider why the principle of judicial independence is so fundamentally important to the proper performance of the judicial function?

The answer lies in the rationale for the principle of judicial independence. As explained by Sir Anthony Mason, judicial independence is “a privilege of, and a protection for, the people”.<sup>92</sup>

According to this underlying premise, the concept of judicial independence operates in the public interest, and exists for the benefit of the community in a free and democratic society that adheres to the rule of law.

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<sup>85</sup> Commentary on the Bangalore Principles of Judicial Conduct (2007), 48.

<sup>86</sup> Bangalore Principles Commentary n 85, 107

<sup>87</sup> Bangalore Principles Commentary n 85, 110.

<sup>88</sup> Chief Justices of the Australian States and Territories *Declaration of Principles on Judicial Independence* (1997), 6

<sup>89</sup> Bangalore Principles Commentary n 85, 102.

<sup>90</sup> Ananian -Welsh and Williams n 15, 602.

<sup>91</sup> J Debeljak “Judicial Independence in the Modern Democratic State” (1999) 74 Australian Law Reform Commission Reform Journal 35, 2.

<sup>92</sup> A Mason “The Independence of the Bench, the Independence of the Bar and the Bar’s Role in the Judicial System” (1993) 10 Australian Bar Review 1, 3.

Various commentators have explained the “public interest” function of the principle of judicial independence.

As pointed out by Gleeson CJ in *Fingleton v The Queen* (2005) 216 ALR 474, 486:

It is the right of citizens that there be available for the resolution of civil disputes between citizen and citizen or between citizen and government, and for the administration of criminal justice, an independent judiciary whose members can be assured with confidence to exercise authority without fear or favour.<sup>93</sup>

Furthermore, as stressed by Chief Justice Antonio Lamer of Canada, judicial independence is essential for “the maintenance of public confidence in the impartiality of the judiciary”.<sup>94</sup>

The crucial link between judicial independence and public confidence in the judicial system and the administration of justice is succinctly stated in these terms by Handley:

The independence of individual judicial officers enables impartial adjudication on the merits of each case and so protects parties appearing before the court and the legitimacy of the court system itself.<sup>95</sup>

As pointed out by Campbell and Lee, the rule of law and the concept of judicial independence are inextricably linked - the effective operation of the rule of law requires and depends on a truly independent judiciary.<sup>96</sup>

As the rule of law requires “the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts”,<sup>97</sup> it is imperative that the judiciary be impartial and have the appearance of impartiality.<sup>98</sup> It follows that public confidence in the impartiality of the judiciary also requires public confidence in the judiciary to uphold the rule of law.

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<sup>93</sup> This cited by Mack and Anleu n 1, 373

<sup>94</sup> A Lamer “The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change” (1996) 45 University of New Brunswick Law Journal 3 at 7, which is cited by Campbell and Lee n2, 51. See also Mack and Anleu n 1, 374 where the authors, in referring to various sources, state that the independence of mind and action of judicial officers which is essential to the proper discharge of their judicial functions is also essential for public confidence in the impartiality of courts.

<sup>95</sup> E Handsley “Issues Paper on Judicial Accountability” (2001) 10 Journal of Judicial Administration 179, 187 cited in Mack and Anleu n 1, 372.

<sup>96</sup> Campbell and Lee n 2, 51 where the authors refer to *Lisafa Holdings v Commissioner of Police* (1998) 15 NSWLR 1 at 5 per Street CJ. The authors also refer to the following statement contained in the Final Report of the Constitutional Commission (Canberra: AGPS 1988) 391, para 6.128:

The independence of the judiciary and its separation from the legislature and executive arm of government is, of course, an essential feature of the rule of law. It is regarded as of great importance in all democratic societies.

<sup>97</sup> A V Dicey *An Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> ed, London: MacMillan 1959) 202. See also J Raz “The Rule of Law and Its Virtue” (1977) 93 Law Quarterly Review 195. Both of these sources are cited in Campbell and Lee n 2, 51.

<sup>98</sup> Sir Gerard Brennan “The State of the Judicature” (1998) 72 Australian Law Journal 33, 34, cited in Campbell and Lee n 2, 51.



Mack and Anleu explain how the concept of judicial independence contributes in a variety of ways to the maintenance of the rule of law:<sup>99</sup>

External judicial independence enhances the rule of law in several ways. In cases between citizens, it supports decision-making based on the facts established by the evidence and the legal arguments rather than 'external direction'.<sup>100</sup> When the court must decide disputes between citizens and government, independence from the government reduces the risk of apprehended or actual bias in favour of the government as a litigant.<sup>101</sup> External judicial independence also supports the rule of law by maintaining public confidence in the judiciary and the courts as institutions. 'A judicial officer...who could be dismissed for making a decision of which the government disapproved, would be unlikely to command the confidence of the public'.<sup>102</sup>

In conclusion, the concept of judicial independence plays a vital role in ensuring public confidence in the judiciary and its ability to uphold the rule of law and to administer justice:

Public perception of judicial impartiality, which is the essence of judicial independence, is promoted when the judiciary is seen to be separate from the other branches of government....it is important for the community to have absolute confidence in the impartiality of the judiciary. That confidence exists only if the judiciary is seen to be truly independent [in making decisions in court cases between litigants].<sup>103</sup>

## **THE INDEPENDENCE OF THE AUSTRALIAN MAGISTRACY AND MAGISTRATES COURTS**

Although the independence of the Australian magistracy and magistrates courts has in recent times been enhanced – principally due to the structural severance of the magistracy from the public service ( and hence the executive branch of government) along with the professionalization and “judicialisation” of the magistracy<sup>104</sup> – the independence of both the magistracy and magistrates courts is not as well protected as the independence of the higher levels of the judiciary and their courts.

The key indicators of judicial independence or the mechanisms for ensuring judicial independence are less evident at the level of the magistracy than at the higher levels of the judiciary. Accordingly, there is less of an environment or a state of affairs at the level of the magistracy and magistrates courts for ensuring that magistrates (and

<sup>99</sup> Mack and Anleu n 1, 373.

<sup>100</sup> J Crawford and B Opeskin *Australian Courts of Law* (4<sup>th</sup> ed 2004) 65; E Handsley “Issues Paper on Judicial Accountability” (2001) 10 *Journal of Judicial Administration* 179, 13-14.

<sup>101</sup> Crawford and Opeskin n 100, 65.

<sup>102</sup> Chief Justice Gleeson “Foreword” in H Cunningham (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) xi, xi.

<sup>103</sup> Campbell and Lee n 2, 49.

<sup>104</sup> Lowndes n 35, 510.

in the Northern Territory judges of the Local Court) perform their judicial function independently and impartially.

## Key Indicators of Judicial Independence

- **The Doctrine of the Separation of Powers**

As stated earlier, although the doctrine of the separation of powers is not a prerequisite for judicial independence, the doctrine of the separation of powers operates as a key mechanism for bolstering judicial independence.

It is important to bear in mind that the pure doctrine of the separation of powers does not strictly operate in Australia because the legislative and executive branches of government are not completely separated. The critical element of the operation of the doctrine in Australia is the separation of the judiciary from the executive and the legislature.

The extent to which the doctrine of the separation of powers reinforces the principle of judicial independence in Australia is variable depending upon whether the doctrine is:

- (a) constitutionally entrenched;
- (b) supported by protections arising from statute, common law and convention; or
- (c) recognised by constitutional principles formulated by the High Court over the past three decades emanating from the decision in *Kable v Director of Public Prosecutions*.<sup>105</sup>

As pointed out by Ananias -Welsh and Williams, the Australian Constitution provides the strongest means of protecting judicial independence.<sup>106</sup> Judicial independence (in the form of decisional independence) at the federal level is strongly protected by constitutional provisions “regarding aspects of federal jurisdiction as well as by the strict separation of federal judicial powers”<sup>107</sup>

Although the doctrine of the separation of powers is constitutionally entrenched at the Federal level,<sup>108</sup> that entrenchment does not extend to the Australian judiciary at the State/Territory level as there is no legislative inclusion of the doctrine of the

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<sup>105</sup> (1996) 189 CLR 51

<sup>106</sup> Ananias -Welsh and Williams n 15, 603.

<sup>107</sup> Ananias -Welsh and Williams n 15, 637.

<sup>108</sup> Constitution ss 1, 61 and 71.

separation of powers into State/Territory constitutions.<sup>109</sup> Therefore, as noted by Ananian-Welsh and Williams:

The courts of the States/Territories are in many ways beyond the direct reach of the Federal Constitution – these institutions have traditionally been subject to less stringent protections of their independence from the executive, though these protections have increased dramatically since the 1990's. In the absence of direct constitutional safeguards akin to those relating to federal courts, protections arising from statute, common law and convention have played a larger role in maintaining judicial independence in the States and Territories.<sup>110</sup>

Until *Kable* it appeared that the powers of State governments in relation to their courts were virtually unlimited, and although there were protections, they only existed at “the relatively fragile levels of convention, common law and to a lesser extent, legislation”.<sup>111</sup> These mechanisms, which were ad hoc and often ambiguous, afforded weak protections for the independence of State courts.<sup>112</sup>

However, the decision in *Kable v The Director of Public Prosecutions*<sup>113</sup> significantly changed the constitutional landscape in Australia, and enhanced the level of protection afforded to State courts. In *Kable*, the High Court held that as a State Court may exercise federal judicial power no distinction should be drawn between federal courts exercising federal judicial power and State courts exercising federal judicial power. It was held in *Kable* that State courts (as part of an Australian integrated judicial system, of which the federal courts are the pinnacle) which are vested with federal judicial power are not able to be given non-judicial power by a State parliament that would be incompatible with their exercise of federal judicial power. This protection was extended to Territory courts in *Ebner*.<sup>114</sup>

The *Kable* doctrine, which has evolved into the Institutional integrity principle extends to all Australian courts vested with Federal judicial power, whether State or Territory and whether actually exercising Federal judicial power or not. As held in *Baker*<sup>115</sup> the *Kable* doctrine extends to the institutional integrity of State/Territory courts as potential recipients of federal jurisdiction.<sup>116</sup>

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<sup>109</sup> *Kable v DPP* (1996) 189 CLR 51 and M Greenfeld “The Asymmetry of the Separation of Powers Doctrine in Australia” The WA Jurist Vol 3 2012, 236.

<sup>110</sup> Ananian- Welsh and Williams n 15, 603.

<sup>111</sup> Ananian -Welsh and Williams n 15 , 633 citing Justice Susan Kiefel *Judicial Independence* a paper presented at the North Queensland Law Association Conference Mackay May 2008; Justice Michael Kirby “Judicial Independence in Australia Reaches a Moment of Truth” (1990) 13 University of NSW Law Journal 187, 189-190.

<sup>112</sup> Ananian -Welsh and Williams n 15, 633.

<sup>113</sup> (1996) 189 CLR 51.

<sup>114</sup> (2000) 205 CLR 337, 362-363.

<sup>115</sup> *Baker v The Queen* [2012]245 CLR 632.

<sup>116</sup> See also *Naalas v Bradley* where the High Court held that Chapter 111 of the Constitution also limits the power of Territory courts to exercise non-judicial power as they too are the repository of Commonwealth judicial power. The High Court accepted the proposition that “it is implicit in the terms of Ch 111 of the

As pointed out by Greenfeld, since the decision in *Kable* the High Court has determined that there will only be an incompatibility between the State (and Territory) vesting power and a court's exercise of a federal judicial power in the following circumstances:<sup>117</sup>

- where the State/Territory legislation attempts to alter or interfere with the operation of the federal judicial system established by Chapter 111 of the Constitution;
- where State/Territory legislation vest power in State/Territory courts that affects their capacity to exercise federal jurisdiction under Chapter 11 impartially and competently.<sup>118</sup>

The effect of *Fardon* is that State and Territory parliaments are able to vest courts exercising federal judicial power with non-judicial powers so long as the powers do not undermine their institutional integrity.<sup>119</sup>

While non-judicial functions can be conferred on courts by State and Territory parliaments so long as they are not repugnant to or incompatible with the exercise by those courts of the judicial power of the Commonwealth, neither the *Kable* doctrine nor the institutional integrity principle prevent State or Territory parliaments from investing State or Territory judicial functions in non-judicial bodies.

In *Forge*<sup>120</sup> the High Court held that State courts must answer the description of "courts" in Chapter 111 of the Constitution, and therefore cannot be deprived of the essential or defining characteristics of courts.<sup>121</sup> The explanation for this is as stated by Steyler and Field:

...because Ch 111 of the Constitution postulates an integrated Australian court system (encompassing State and Federal courts) for the exercise of the judicial power of the Commonwealth, State courts, especially the Supreme Courts, must retain their character as "courts", and neither the Commonwealth nor a State may legislate in such a way as to alter or undermine the constitutional scheme set up by Ch 111 and hence the role of State courts as repositories of federal judicial power.<sup>122</sup>

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Constitution and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal".

<sup>117</sup> Greenfeld n 109, 238-239 citing the decision in *Fardon v AG (QLD)* (2004) 223 CLR 575.

<sup>118</sup> See *International Finance Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, 338.

<sup>119</sup> Greenfeld n 109, 239.

<sup>120</sup> *Forge v The Queen* [2006] 228 CLR 45.

<sup>121</sup> Ananian - Welsh and Williams n 15, 622.

<sup>122</sup> C Steyler and I Field "The Institutional Integrity Principle: Where Are We Now and Where Are We Headed" (2011) 35 UWA Law Review 227, 230.

In *Pompano* (2013) 285 ALR 638 659-660 French CJ stated:

The “institutional integrity of a court is said to be distorted if it no longer exhibits in some relevant aspect the defining characteristics which mark a court apart from other decision- making bodies. The defining characteristics of courts include:

- the reality and appearance of decisional independence and impartiality;
- the application of procedural fairness;
- adherence as a general rule to the open court principle;
- the provision of reasons for the courts’ decisions

Those characteristics are not exhaustive. As Gummow, Hayne and Crennan JJ said in *Forge ...* “It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so.”<sup>123</sup>

Although the independence of State and Territory courts has been considerably enhanced by the *Kable* doctrine and its subsequent refinement in a line of subsequent cases by protecting the decision-making powers of courts from usurpation, control or inappropriate interference from the executive branch,<sup>124</sup> State and Territory courts remain “subject to far weaker and starkly less developed protections than their federal counterparts”.<sup>125</sup> Therefore, the independence of State and Territory courts is not bolstered by the doctrine of the separation of powers to the same extent that the independence of Federal courts is reinforced by the constitutional entrenchment of the separation of powers.

The protection afforded to State and Territory courts by way of the *Kable* principle and its subsequent refinement in terms of the “institutional integrity” principle not only falls considerably short of the constitutional protection given to Federal courts, but leaves unanswered a number of pertinent questions concerning the scope and application of the institutional integrity principle, which as identified by Steyler and Field include the following:<sup>126</sup>

- whether a form of “due process” requirement is now applicable in State and Federal courts, and if so, the scope of the requirement;
- what are the minimum structural and other characteristics of a court capable of exercising federal jurisdiction, and might the institutional integrity principle

<sup>123</sup> Ananian -Welsh and Williams n 15, 622-623.

<sup>124</sup> Ananian - Welsh and Williams n 15, 636.

<sup>125</sup> Ananian- Welsh and Williams n 15 , 637.

<sup>126</sup> Steyler and Field n 122, 251-264.

limit the extent to which judicial authority may be given by State parliaments to non-judicial bodies;

- to what extent might the scope of the institutional integrity principle be influenced by assumptions extant at the time of federation;
- is loss of public confidence a sufficient criterion of invalidity,

Steyler and Field also point out a lack of clarity in the decision of the High Court in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.<sup>127</sup> It is unclear whether the States may never abolish any court once created,<sup>128</sup> or whether the States must simply maintain a minimum number of courts for the exercise of federal judicial power.<sup>129</sup> The authors also note that the joint judges in *K-Generation* did not “elucidate upon their (arguably paradoxical) proposition that a court could lack the minimum characteristics of institutional independence and impartiality ‘when established’ and yet fall within the constitutional description of a court”.<sup>130</sup> These further unanswered questions only serve to demonstrate the uncertainty that surrounds the scope and application of the institutional integrity principle at the State and Territory level.

Steyler and Field point out that although the institutional integrity principle provides an element of protection to all Australian courts, it has a fundamental limitation, which may be most felt at the level of the magistracy:

... as the High Court has consistently emphasised, the jurisdictional ubiquity of the institutional integrity principle is tempered by the fact that the Commonwealth must take State courts as it finds them. This institutional integrity does not require or sanction the rationalisation of State courts in accordance with federal standards. This principle recognises an integrated, not a unitary, court system. State and Territory courts are not subject to the same constraints as federal courts established under Chapter 111, and still may exercise non-judicial functions, so long as those functions are compatible with institutional integrity. There is, moreover, no single ideal model of judicial independence, personal or institutional (although, as institutions forming part of Australia’s integrated court system, State and Territory courts must have the “capacity to administer the common law system of adversarial trial). It follows that State and Territory parliaments enjoy more institutional and procedural flexibility in respect of their courts than does the Commonwealth Parliament in respect of federal courts.

Because the institutional integrity does not require the maintenance of uniform standards throughout Australia’s integrated judicial system, care must be taken when considering whether, or to what extent, a given function of characteristic

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<sup>127</sup> Steyler and Field n 122, 236.

<sup>128</sup> The authors point out that plainly the States cannot abolish a State court.

<sup>129</sup> The authors point out that this seems more likely.

<sup>130</sup> Steyler and Field n 122, 236.

will be incompatible with the institutional integrity of a particular court. *Kable* may have established a conduit for the transfer of certain Chapter 111 limitations to the States and Territories, but there remains a possibility that those limitations might become decreasingly onerous as they pass down the ranks of Australia's integrated judiciary.<sup>131</sup>

Ananian -Welsh and Williams have identified a further limitation with the institutional integrity principle: cases such as *International Finance, Totani and Wainohu* which have extended the *Kable* doctrine show that "the principle may prevent executive control or usurpation of judicial powers, but it is less effective at preventing more subtle compromises that nonetheless may undermine decisional independence".<sup>132</sup>

Furthermore, the principle of institutional integrity has had mixed success in placing limits on executive capacity to interfere with the decisional independence of State or Territory courts.<sup>133</sup>

The protection afforded to the independence of the magistracy and magistrates court by the doctrine of the separation of powers is limited because neither the *Kable* doctrine nor the institutional integrity principle imply into the constitutions of the States the separation of judicial powers impliedly mandated for the Commonwealth by Chapter 111 of the Constitution.<sup>134</sup> It follows that State and Territory parliaments enjoy more institutional and procedural flexibility in respect of their courts than does the Commonwealth parliament in relation to federal courts.<sup>135</sup> The protection is also limited by the general effectiveness of the application of the principle of institutional integrity to State and Territory courts and the possibility that the principle may be less strictly applied at the level of magistrates' courts,<sup>136</sup> thereby giving State and Territory governments some capacity to usurp, control or improperly influence the decision making powers of State and Territory magistrates' courts.

Finally, but not least, the principle of institutional integrity remains a flexible doctrine which defies precise definition and therefore engenders uncertainty; and arguably sets too high a threshold for the invalidation of State and Territory legislation.<sup>137</sup>

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<sup>131</sup> Steyler and Field n 122, 237

<sup>132</sup> Ananian-Welsh and Williams n 15, 624 citing G Appleby and J Williams "A New Coat of Paint: Law and Order and the Refurbishment of *Kable*" (2012) 40 Federal Law Review 1, 8-9. See also Ananian -Welsh and Williams n 15, 625 where the authors state that "ultimately the cases show that the *Kable* principle prevents only clear usurpations or severe intrusions into the independence of the judiciary".

<sup>133</sup> Ananian-Welsh and Williams n 15, 626.

<sup>134</sup> Steyler and Field n 122, 230.

<sup>135</sup> Steyler and Field n 122, 237-238.

<sup>136</sup> F Wheeler "The *Kable* Doctrine and State and Legislative Power Over State Courts" (2005) 20 Australasian Parliamentary Review" 15, 27. There the author states:

"The real question is whether the incompatibility test is stricter in the case of the higher courts as opposed to the lower courts. There are hints in *Naalas v Bradley* that this might be so".

<sup>137</sup> A Freiberg "Constitutional Perspectives On Sentencing: Some Challenging Issues" (2012) 36 Crim LJ 335 355.

The separation of powers doctrine remains an incomplete and fragile mechanism for ensuring judicial independence at the level of State and Territory courts – particularly at the level of magistrates’ courts.

- **Other Mechanisms for Ensuring Judicial Independence**

Other mechanisms for ensuring the independence of the magistracy and magistrates’ courts are in many key respects also incomplete and fragile.

### **Security of Tenure**

Whilst protections for the appointment, tenure and remuneration of federal judges are directly provided for in s72 of the *Constitution* – thereby placing these aspects of judicial independence largely beyond the reach of legislative or executive interference - the protections in relation to the appointment of State and Territory judicial officers are far less secure.<sup>138</sup> At the State and Territory level these aspects of judicial independence are “usually governed by legislation and convention, and are therefore subject to change by ordinary Act of Parliament”.<sup>139</sup> Although some States, such as New South Wales, have entrenched protections for judicial tenure, “such instances are rare”.<sup>140</sup>

As noted by Ananian -Welsh and Williams, “as the appointment, tenure and remuneration of State or Territory judges lacks explicit protection under the *Commonwealth Constitution*, these facets of judicial independence are susceptible to interference by the executive or Parliament (with the exception of in New South Wales due to the entrenched protections in its Constitution).<sup>141</sup>

In *Naalas v Bradley* (2004) 218 CLR 146,163, the justices emphasised that the Constitution requires courts to “be and appear to be... independent and impartial, thus indicating that the *Kable* principle operates as a limit on executive capacity to interfere in judicial appointment, tenure and remuneration in a manner that would erode public confidence in judicial independence”.<sup>142</sup>

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<sup>138</sup> Ananian -Welsh and Williams n 15, 603.

<sup>139</sup> Ananian -Welsh and Williams n 15, 604.

<sup>140</sup> Ananian -Welsh and Williams n 15, 604 citing Susan Kiefel “Judicial Independence” ( North Qld Law association Conference, May 2008) p 2. The entrenched provisions may only be altered by referendum: Ananian- Welsh and Williams n 15, 605.

<sup>141</sup> Ananian -Welsh and Williams n 15, 605. The authors refer to a number of cases where courts have recognised the vulnerability of protections for the tenure of State and Territory judges: *McCawley v The King* [1920] AC 691; *McCawley v The King* [1918] 26 CLR 9; *Forge v Australian Securities and Investments Commission* [2006] 228 CLR 45; *McCrae and Ors v Attorney-General (NSW)* [1987] 9 NSWLR 268; *Attorney-General (NSW) v Quin* (199) 170 CLR 1.

<sup>142</sup> Ananian-Welsh and Williams n 15, 610.



However, as noted by Mack and Anleu, the extent of constitutional protection for security of tenure as an aspect of the judicial independence of magistrates in the lower courts of Australia is unclear.<sup>143</sup>

Although the High Court in *Naalas v Bradley* stated that “it is implicit in the terms of Ch 111 of the Constitution, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal”, the court said that there was no constitutional requirement that all judicial officers must have their independence “secured to the highest possible degree in every respect” and some “legislative choice” is allowed in the mechanisms employed to promote judicial independence.<sup>144</sup> The Court went on to say that although it was not possible to exhaustively list the minimum characteristics of an “ independent and impartial tribunal”, important indicators of violations of those minimum standards would be whether the judicial officer is inappropriately dependent on the legislature or executive in a way incompatible with requirements of independence and impartiality, the circumstances compromise or jeopardise the integrity of the magistracy or the judicial system or reasonable and informed members of the public would conclude that the magistracy was not free from the influence of other branches of government in exercising their judicial function.<sup>145</sup> The difficulty with these minimum characteristics is that they are imprecise, flexible and create uncertainty.

As Ananian- Welsh and Williams have observed “obiter dicta in some of the opinions in *Kable* hinted that the principle may have implications for the power of State Parliaments to abolish or regulate courts [and] this may require that the security of tenure of State judges who are capable of exercising federal judicial power meet heightened standards”.<sup>146</sup>

Having reviewed the relevant authorities, Ananian-Welsh and Williams have concluded that “the cases highlight the fragility of protections for judicial appointments, tenure and remuneration in the states and territories, as well as the potential for further development of the *Kable* principle to improve protections in this respect.

In a similar vein, Mack and Anleu have identified a number of gaps and weaknesses in the mechanisms for ensuring the independence of the magistracy and magistrates’ courts, pointing out the respects in which the security of tenure of

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<sup>143</sup> Mack and Anleu n 1, 381

<sup>144</sup> Mack and Anleu n 1, 382

<sup>145</sup> Mack and Anleu n 1, 382.

<sup>146</sup> Ananian - Welsh and Williams n 15, 609 where the authors refer to the following sources: E Campbell “Constitutional Protection of State Courts and Judges” [1997] 23 Monash University Law Review 397, 408 citing *Kable* [1996] 189CLR 51, 110-12, 103, 139.; P Johnston and R Hardcastle “State Courts: The Limits of *Kable* [1998] 20 Sydney Law Review 216, 236-242; K Mack and S Anleu “The Security of Tenure of Australian Magistrates” [2006] 30 Melbourne University Law Review 370, 382; P Keyzer “Judicial Independence in the Northern Territory: Are Undisclosed Remuneration Arrangements Repugnant to Chapter 111 of the Constitution? (2004) 32 University of Western Australia Law Review 30.

magistrates in Australia is not protected to the same extent or in the same way as judges of the higher courts, especially in the key areas of guaranteed remuneration, and procedures and standards for removal and suspension from office.<sup>147</sup> Magistrates generally do not have guaranteed security of tenure when a court is abolished or restructured.<sup>148</sup> One possible way for the executive to terminate the tenure of a magistrate – and indirectly undermine judicial independence – is to abolish the court itself.<sup>149</sup> Only the constitutions of New South Wales and Victoria provide guaranteed security of tenure in event of an abolition or restructuring of a court.<sup>150</sup>

Mack and Anleu have expressed the view that some of the lesser protections for magistrates fall below minimum constitutional standards necessary to ensure the substance and appearance of “an independent and impartial tribunal”.<sup>151</sup> Mack and Anleu argue that “several formal, legal mechanisms to ensure security of tenure” are needed.<sup>152</sup>

### **Operational or Administrative Independence**

As stated by Ananian-Welsh and Williams, “the operational independence of Australian courts is a central facet of their institutional independence, but remains wholly untested in litigation” and “the area is governed primarily by convention, as well as legislation and delegated legislation”.<sup>153</sup> The matter also remains largely controlled by self –restraint on the part of the executive:

On the whole, the executive has restrained itself from interfering in the operational workings of courts, at least in a manner that would give rise to legal disputes. That is not to say, however, that the operational independence of courts is immune from threat.<sup>154</sup>

The operational or administrative independence of courts in Australia is under threat because the dominant model of court governance is the “traditional model”,<sup>155</sup> which

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<sup>147</sup> Mack and Anleu n 1, 374.

<sup>148</sup> Mack and Anleu n 1, 383.

<sup>149</sup> Mack and Anleu n 1, 383.

<sup>150</sup> Mack and Anleu n1 384.

<sup>151</sup> Mack and Anleu n1, 398.

<sup>152</sup> Mack and Anleu n1,398. The authors suggest that:

1. Procedures and standards for the removal of magistrates in some Australian jurisdictions should provide the same protection as is accorded to judicial officers in the higher courts;
2. Provisions for suspension in some Australian jurisdictions should be no different for magistrates than for judges of the higher courts;
3. Clear and explicit protection for security of remuneration with an express prohibition against reduction in salary and allowances of magistrates should be provided in those jurisdictions where magistrates have no such protection.

<sup>153</sup> Ananian-Welsh and Williams n 15, 611.

<sup>154</sup> Ananian-Welsh and Williams n 15, 611.

<sup>155</sup> All Australian magistracies operate within the framework of the “traditional model”. The two exceptions are the Victorian and South Australian magistracies which work with the “autonomous model” of court governance.

as discussed earlier, is considered to render judicial independence less secure (due to the direct connection between the judiciary and the executive) and to compromise the efficiency and effectiveness of a court.

Furthermore, there are no clear constitutional protections for operational or administrative independence of courts in Australia.

Any such protections remain in the realm of speculation:

...potential constitutional protections for operational independence exist in the separation of judicial power derived from Chapter 111 of the Constitution and in the *Kable* principle derived from that separation. These principles provide a basis for broad constitutional protection. They could conceivably be interpreted to prohibit executive interference with the practical functioning of courts where that interference would erode the fundamental constitutional values of judicial independence or integrity... it might be argued that the defining and essential characteristics of a court include practical necessities such as court funding and staff. On this basis these operational features of judicial independence might find constitutional protection.<sup>156</sup>

Furthermore, as pointed out by Ananian-Welsh and Williams:

Despite the centrality of court resourcing to judicial independence....there have been no cases that identify or even suggest constitutional protections for the operational of federal, state or territory courts.<sup>157</sup>

Operational or administrative independence is an essential facet of institutional independence for all courts – particularly in relation to magistrates’ courts because of the significant role they play in the wider Australian integrated judicial system.<sup>158</sup> There is a particular need to strengthen the independence of magistrates’ courts, and to shield them from executive interference in the day to day operation of those courts. Potential constitutional protections for the operational independence of Australian courts may be of little comfort to magistrates’ courts because of the possibility that such protections may be less strictly applied at the level of the magistracy.

### **Personal Independence**

The position is much brighter in relation to the personal independence of Australian judicial officers, as commented on by Ananian -Welsh and Williams:

The personal independence of all judges is now protected by a constitutional limitation on judges being vested with powers that are incompatible with judicial independence or institutional integrity.<sup>159</sup>

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<sup>156</sup> Ananian-Welsh and Williams n 15, 612-613.

<sup>157</sup> Ananian -Welsh and Williams n 15, 612.

<sup>158</sup> Wheeler n 136, 27.

<sup>159</sup> Ananian-Welsh and Williams n 15, 637.

## Particular Risks and Challenges to the Independence of the Magistracy

The independence of the modern Australian magistracy is at risk, or challenged, for a number of reasons.

- **The Legacy of a Bygone Era**

As mentioned earlier structural or institutional separation of the magistracy from the executive branch of government is a key indicator of judicial independence. However, separation from the executive branch of government is not in itself a sufficient guarantee of the independence of the magistracy.

Although the magistracy has structurally broken free from the executive arm of government, today's magistracy remains in the shadows of a public service magistracy of a bygone era. There is a residual tendency on the part of State and Territory governments to treat the magistracy as if it were still part of the public service (and hence part of the executive branch of government) and treat magistrates as public servants: a case of "old habits die hard".

This continuing tendency should come as no surprise. The modern Australian magistracy is the result of a slow evolutionary process which is ongoing.<sup>160</sup> It has developed against the backdrop of a combination of political, administrative and social factors.<sup>161</sup> It is not at all surprising that the executive arm of government has expressed a reluctance to relinquish governance and administrative control of Magistrates Courts.<sup>162</sup>

As observed by Chief Justice Gleeson some years ago, developments in the independence of the magistracy are recent and some of these developments are continuing to work themselves out.<sup>163</sup> Fifteen years on, those observations remain pertinent. In working those developments out, it is necessary to ensure that the structural separation of the magistracy from the executive branch of government translates into a complete conceptual dissociation from the executive, consistent with the doctrine of the separation of powers.

The continuing philosophical connection between the magistracy and the executive is most evident in the fact that most magistrates' courts in Australia continue to operate within the framework of the "traditional model" of court administration and governance, which as noted earlier is considered to render judicial independence the most insecure (because of the direct connection between the judiciary and the executive) and to compromise the efficiency and effectiveness of a court.

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<sup>160</sup> Lowndes n 8, 609; see Lowndes n 35, 509-519

<sup>161</sup> Lowndes n 8, 609; see Lowndes n 35, 509-519.

<sup>162</sup> Lowndes n 8, 609.

<sup>163</sup> Chief Justice Gleeson 'The State of the Judicature' speech delivered on 14 October 2001.

Until the magistracy overcomes the legacy of a bygone public service magistracy and rejects the traditional model of court governance, both the decisional and operational independence of the magistracy and magistrates' courts remain at risk.

- **Challenges at the Coalface of the Australian Judiciary**

The magistracy and magistrates' courts are particularly vulnerable in terms of their independence for a set of reasons that are peculiar to the lower judiciary and its courts.

Magistrates' courts are the "engine house" of the judiciary – similarly referred to by Willis as the "work horse of the judiciary".<sup>164</sup> These courts deal with the great majority of cases coming before the various courts in the States and Territories. Magistrates' courts are the first and often only point of contact that members of the community have with the judicial system. These courts are aptly referred to as the "Peoples Courts".<sup>165</sup>

Although the Peoples Courts are courts of limited jurisdiction, new legislation – of which there has been a proliferation in recent years – is often, or principally, directed at the exercise of that limited jurisdiction, and has its most immediate effect on magistrates' courts. Therefore, if such new legislation has a tendency to undermine or compromise judicial independence its impact is experienced at the level of magistrates' courts; and the threat to judicial independence is most pronounced at the level of the magistracy, which does not enjoy a constitutional entrenchment of the doctrine of the separation of powers (which bolsters judicial independence) nor have the same protective mechanisms for ensuring judicial independence that exist in the higher courts.

The problem is compounded by the fact that the magistracy is not always consulted, or properly consulted, about proposed legislative changes due to the absence of any formal consultative process<sup>166</sup> that would alert the magistracy to any potential executive or legislative interference with the courts.<sup>167</sup> Where there is consultation, the process is often confined to the court concerned, and higher courts in the judicial hierarchy (which might properly have a particular concern with the proposed

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<sup>164</sup> J Willis "The Magistracy : The Undervalued Work-Horse of the Court System" Law in Context 129.

<sup>165</sup> Willis n 164, 134-136.

<sup>166</sup> As long ago as 1994 the Hon Justice Len King AO in an article titled "The Separation of Powers" in *Courts in a Representative Democracy* ALJA, Law Council of Australia and the Constitutional Centenary Foundation Canberra 1994, p 23, stated:

A major defect in the relations between the judiciary on the one hand and the legislature and executive government on the other hand, is the lack of any formal mechanism for the communication of the judiciary's views as to proposals for legislation affecting the judicial system or the law which judges must apply. Sometimes the Attorney-General seeks the views of the judges. Sometimes the judges become aware of the proposed legislation and communicate their views to government. There is, however, no assurance that that will occur. Moreover, if the government does not heed the views of the judges, there is no machinery for the communication of the judges' views to the parliament and the public....What is needed is a mechanism by which the views of the judges, expressed either collectively or individually, can be made known...on issues and proposed legislation with which the judiciary is particularly concerned.

<sup>167</sup> This problem is not confined to magistrates' courts and extends to the higher levels of the judiciary.

legislative changes) are not consulted. Any executive or legislative interference with the functioning of a particular court is a matter that affects the judiciary as a whole, and there ought to be consultation with the entire judiciary. The burden of responding to potential threats to the independence of a lower court should not be solely shouldered by its Chief Judicial Officer.

It is important to note that potential threats to the independence of courts do not always amount to clear usurpations or severe intrusions into the independence of the judiciary, and are often in the nature of subtle compromises that may undermine judicial independence. Therefore, the greater is the need for there to be proper consultation to avoid such nuanced inferences on the part of the executive or the legislature.

The independence of the magistracy and magistrates' courts is also fragile due to the historic uniqueness of the magistracy and the tension between that uniqueness (which continues to characterise magistrates' courts) and the principle of judicial independence.

As pointed out by Willis, magistrates' courts have historically been less bound by tradition and formality and been more responsive to changing needs, new pressures and new demands placed on them.<sup>168</sup> Magistrates' courts have also "been innovative in a number of interesting and innovative ways" and renowned for their efficiency and vitality.<sup>169</sup>

Again, as pointed out by Willis, there has been a tendency for State and Territory legislatures to choose the Magistrates' courts to deal with new problems or initiatives,<sup>170</sup> in the form of problem –solving or solution- focused courts.<sup>171</sup> In some instances, "the impetus for therapeutic jurisprudence approaches in courts has directly emanated from the judiciary".<sup>172</sup>

The establishment of problem–solving or solution-focused courts presents new challenges for the independence of magistrates' courts because the efficacy of such courts requires the conferral of non–judicial functions on the presiding judicial officer. As observed by Duffy:

The post Kable consequence for problem solving courts created by State legislatures is that they may be vested with non-judicial power, to the extent that the exercise of those powers is not repugnant to or incompatible with the exercise of Commonwealth judicial power (Kable incompatibility test). This would

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<sup>168</sup> Willis n 164, 134.

<sup>169</sup> Willis n 164, 129.

<sup>170</sup> Willis n 164, 148.

<sup>171</sup> These are specialist courts within the general structure of magistrates' courts such as drug courts, domestic violence courts and mental health courts.

<sup>172</sup> J Popovic "Mainstreaming Therapeutic Jurisprudence in Victoria: Feelin' Groovy" AIJA monograph p 188.

be the case even if the problem solving court was not actually exercising federal jurisdiction.<sup>173</sup>

The constitutional test for problem solving or solution focused courts is whether they exercise – as a possible repository of federal judicial power - non-judicial power in a manner that compromises independence and impartiality.<sup>174</sup> However, as stated by Gogarty and Bartl:

The difficulty in assessing the constitutional validity of problem-solving courts is magnified by the High Court’s equivocal stance as to when the independence and impartiality of a State Court will be undermined.<sup>175</sup>

As observed by Duffy, the principles of independence and impartiality are imprecise and difficult to define.<sup>176</sup> Furthermore, as made clear by the High Court in *Naalas v Bradley* (2004) 218 CLR 146 there is no single ideal model of judicial independence – personal or institutional. It is also the case – in accordance with what was said in *Forge v ASIC* (2006) 228 CLR 45 – that “judicial independence and impartiality may be ensured by a number of different mechanisms, not all of which are seen, or need to be seen, to be applied to every kind of court”.<sup>177</sup> The difficult question is how independent and impartial does a problem –solving or solution –focused court need to be in order to avoid falling foul of Chapter 111 of the Constitution?<sup>178</sup>

Although problem solving or solution focused courts raise concerns about their independence because of their “co-operative and collaborative efforts with the community and the executive” which have the potential to compromise judicial independence, it does not follow that the institutional integrity of the court will be compromised.<sup>179</sup> The reason is as explained by Duffy:

The characteristics of judicial independence and impartiality do not exist in a vacuum; they take their flavour from forum and context. Judicial independence and impartiality may look very different in a problem solving court to in a mainstream court, but that does not mean that the institutional integrity of a problem solving court is in any way lessened.<sup>180</sup>

Duffy goes on to explain that impartiality, as a judicial value, is to be assessed within the context of a problem solving or solution focused court.<sup>181</sup> Although the

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<sup>173</sup> J Duffy “Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two is Company, Is There a Crowd” [2011] Melbourne University Law Review 14, 10.

<sup>174</sup> Duffy n 173, 11.

<sup>175</sup> B Gogarty and Bartl “Tying Kable Down: The Uncertainty About the Independence and Impartiality of State Courts Following *Kable v DPP* and Why it Matters” (2009) 32 University of NSW Law Journal 75, 76 cited in Duffy n 173, 11.

<sup>176</sup> Duffy n 173, 11.

<sup>177</sup> Duffy n 173, 11.

<sup>178</sup> Duffy n 173, 11.

<sup>179</sup> Duffy n 173, 11.

<sup>180</sup> Duffy n 173, 11

<sup>181</sup> Duffy n 173, 12.

functioning of problem solving or solution focused courts<sup>182</sup> does not sit comfortably with the notion of impartiality<sup>183</sup> and increases the possibility of partiality,<sup>184</sup> “collaboration and the quantum of judicial involvement in a proceeding are, of themselves, not a real measure of judicial impartiality”.<sup>185</sup> Duffy says that judicial impartiality should be “assessed according to the quality of involvement and intervention rather than the quantum”.<sup>186</sup> In a similar vein King suggests:

Giving undue emphasis to the quantum of judicial intervention in considering impartiality is to ignore the multiplicity of situations where judicial involvement is needed. Although excessive judicial involvement in any proceeding has the potential to not only raise issues as to impartiality but to compromise the very purpose of the proceedings, it is the nature of the particular proceedings and the nature of the involvement that are important in considering whether impartiality and other judicial values have been compromised”<sup>187</sup>

Ultimately, the institutional integrity of problem solving or solution focused courts depends upon the existence of appropriate mechanisms for ensuring the independence of these courts,<sup>188</sup> and the ability of the presiding judicial officer not to fuse “the role of the judiciary and executive to such an extent that the institutional integrity of a court is distorted”<sup>189</sup> and to ensure that the processes he or she administers and the behaviour that they present are “consistent with the aspirational (if imprecise) ideals of independence and impartiality”.<sup>190</sup>

Problem solving or solution focused courts are a natural progression of the historically unique innovative character of the Australian magistracy. However, the recent judicialisation of the magistracy has brought with it increased independence. The challenge for the modern Australian magistracy is to ensure that the new forms of “judging” which draw upon the principles of therapeutic jurisprudence do not undermine the enhanced independence of magistrates’ courts.

Problem solving or solution focused courts give rise to the blurring of the separation of powers, particularly where the courts have been “created, implemented and led by

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<sup>182</sup> One of the defining features of problem solving or solution focused courts is judicial involvement.

<sup>183</sup> According to the AIJA Guide to Judicial Conduct impartiality requires a judicial officer “to be fair and even handed, patient and attentive and to avoid stepping into the arena.”

<sup>184</sup> Duffy n 173, 12.

<sup>185</sup> Duffy n 173,12.

<sup>186</sup> Duffy n 173, 12.

<sup>187</sup> King “Judging, Judicial Values and Judicial Conduct in Problem –Solving Courts, Indigenous Sentencing Courts and Mainstream Courts” (2010) 19 JJA 133, 150.

<sup>188</sup> Duffy suggests that those mechanisms include an impartial appointment process, security of tenure and financial security as well as adequate training in therapeutic jurisprudence and related disciplines: n 173, 12.

<sup>189</sup> Duffy n 173, 14. See the following words uttered by former Chief Justice Sir Harry Gibbs: “The independence and authority of the judiciary, upon which the maintenance of a just and free society so largely depends, in the end has no more secure protection than the strength of the judges themselves”: Sir Harry Gibbs “Forward” in Justice BH McPherson *The Supreme Court of Qld 1859-1960: History Jurisdiction Procedure* 1989 iii.

<sup>190</sup> Duffy n 173, 15.



committed judicial officers who have a sense of ownership of the programs”.<sup>191</sup> As explained by Popovic:

Traditionally, and in line with the principle of the separation of powers, judicial officers have been reticent to have any involvement in policy issues and this has been left entirely to government. Therapeutic jurisprudence has altered the role of judges and magistrates in this regard. As the architects of problem –solving approaches, judges and magistrates have taken the policy initiative. It may be that this change of roles is confusing to both judicial officers and government alike.<sup>192</sup>

Furthermore, the change of roles has the clear potential to blur the separation of powers and thereby compromise the independence of the judiciary. This leads Popovic to pose the two following questions:

When is it permissible for judges and magistrates to seize policy initiative? In doing so, do they impinge upon the separation of powers?<sup>193</sup>

There is no easy answer to either question. However, as suggested by Popovic, it is arguable that “it is within the role of judicial officers to be involved in the development and implementation of programs which not only impact on our courts but which have the direct intention of improving the quality of our decisions”.<sup>194</sup>

King has forcefully argued that “properly done, judging in [therapeutic courts] and applying therapeutic jurisprudence in judging in mainstream lists does not violate the judicial function or judicial values of independence, impartiality or integrity”.<sup>195</sup>

King concludes that:

... the conventional role of the judicial officer as arbiter is not abandoned in the case of judging in indigenous sentencing courts and problem-solving courts and in taking a solution-focused approach to judging in

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<sup>191</sup> Popovic n 172, 194

<sup>192</sup> Popovic n 172, 195.

<sup>193</sup> Popovic n 172, 195.

<sup>194</sup> Popovic n 172, 195. The author bases this argument on the following commentary which appears in Justice Thomas’ book *Judicial Ethics in Australia* 2<sup>nd</sup> ed 1997, although it does not directly address judicial involvement in therapeutic innovations connected with court practices and policy:

“It is often necessary for judges to make comments and representations to improve the administration of their own courts or the legal system...it is also acceptable that judges may speak out against proposed legislation that will affect their own court. This frequently involves difference of view between government and the court, each having different perceptions as to the way in which problems should be attacked. It seems to be an acceptable form of self - defence that judges may oppose legislation that may have a deleterious impact upon their court....Judges are in a special position to inform the legislators and the public of the benefits or dangers of such legislation or government initiatives. Sometimes judges are in a uniquely advantageous position.”

<sup>195</sup> King n 187, 133.

other contexts. It is simply that the unique fact-finding and decision-making processes that are used in these situations are designed to promote more comprehensive and therapeutic outcomes. That having been said, it is important that judicial officers presiding in these courts do not depart from the core aspects of the judicial function in pursuing therapeutic goals related to justice system objectives.<sup>196</sup>

The creation of problem solving or solution focused courts has other implications for the independence of magistrates' courts, which have been identified by Popovic:

Most courts are not self-funding.....most courts cannot be fully independent financially. They must obtain their resources from the other branches of government. They must obtain their resources from the other branches of government. Yet the arrangements made concerning those resources may affect the capacity of courts to fulfil their responsibilities; and they may also affect both the reality and the appearance of freedom of courts from executive interference.<sup>197</sup>

While problem solving or solution focused courts at the level of the magistracy need to maintain their independence from the executive branch of government and to respond to the needs of the community and the justice system with adequately funded and appropriate and easily and readily accessible therapeutic programs, the executive is duty bound to implement government policy, to be accountable to Treasury and to operate with budgetary parameters.<sup>198</sup>

The practical functioning of problem solving or solution focused courts brings into sharp relief the perennial tension between judicial independence and the dependence of the judiciary for adequate funding and resources on the executive to ensure the effective and efficient operation of courts. Once established, therapeutic courts sometimes struggle to be adequately funded, and not infrequently cease receiving funding and are discontinued by the executive branch of government, often prematurely before the effectiveness of the problem solving or solution focused has been properly evaluated.

## **THE COMMONWEALTH LATIMER HOUSE PRINCIPLES AND GUIDELINES AND THE COMMONWEALTH MAGISTRATES AND JUDGES ASSOCIATION GUIDELINES FOR ENSURING THE INDEPENDENCE AND INTEGRITY OF MAGISTRATES: STRENGTHENING JUDICIAL INDEPENDENCE**

Given that the independence of the Australian magistracy is not as well protected as the independence of the higher courts, by what means can the independence of magistrates' courts be strengthened.

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<sup>196</sup> King n 187, 146.

<sup>197</sup> Popovic n 172, 187.

<sup>198</sup> Popovic n 172, 194.

The Commonwealth Latimer House Principles and Guidelines provide an effective framework for ensuring the independence of the judiciary as a whole – and in particular the magistracy. The Commonwealth Magistrates and Judges Association (CMJA) Guidelines for Ensuring the Integrity and Independence of Magistrates is also another effective mechanism for enhancing and securing the independence of the magistracy.

- **The Latimer House Principles and Guidelines**

The Commonwealth Latimer House Principles had their genesis at a Joint Colloquium entitled *Parliamentary Supremacy and Judicial Independence: Towards a Commonwealth Model* which was held at Latimer House in the United Kingdom in June 1998.<sup>199</sup> The object of the Colloquium was to promote a dialogue between the participants with a view to formulating a set of guidelines in relation to the practical aspects of the relationship between the three branches of government.<sup>200</sup> The Commonwealth Magistrates and Judges Association (CMJA) along with the Commonwealth Lawyers Association (CLA), Commonwealth Legal Education Association (CLEA) and the Commonwealth Parliamentary Association (CPA) participated in that dialogue and the formulation of those guidelines.

The Colloquium gave birth to the *Latimer House Guidelines for the Commonwealth*. In the following years principles based on these guidelines were developed, resulting in the creation of the text *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*. At a meeting in December 2003 in Abuja, Nigeria these Principles were endorsed by the Commonwealth Heads of Government, and henceforth became known as the *Commonwealth Latimer House Principles on the Three Branches of Government*.

The Latimer House Principles and the set of Commonwealth Guidelines on Parliamentary Supremacy and Judicial Independence, from which the principles were distilled (which serve as an annex to the Principles), are freely available from the Commonwealth Secretariat's website.<sup>201</sup>

These principles (to which all Commonwealth countries have agreed to adhere) structure, confine and define the relationship between the judiciary and the other two branches of government.

The objective of the Latimer House Principles is “to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth’s

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<sup>199</sup> The Colloquium was sponsored by the Commonwealth Legal Education Association, Commonwealth Lawyers' Association, Commonwealth Magistrates' and Judges' Association and the Commonwealth Parliamentary Association. Twenty Commonwealth countries and three overseas territories were represented at the Colloquium and participants included senior parliamentarians and judges, legal academics and lawyers.

<sup>200</sup> Dr K Brewer “Accountability, Separation of Powers and the Latimer House Principles : Ten Years On” Commonwealth Governance Handbook 2013/14 19.

<sup>201</sup> <http://the.commonwealth.org/sites/default/files/history-items/documents/LatimerHousePrinciples.pdf>.

fundamental values.” Those fundamental values are the promotion of democracy, human rights, good governance, the rule of law, individual liberty, egalitarianism, free trade, multiculturalism and world peace.

The Latimer House Principles provide “that each Commonwealth country’s Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability”.

The Principles provide that “relations between parliament and the judiciary should be governed by respect for parliament’s primary responsibility for law making on the one hand and for the judiciary’s responsibility for the interpretation and application of the law on the other hand”. The Principles also provide that “judiciaries and parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner”.

The Principles duly recognise the importance of an independent judiciary:

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.

To secure these aims:

- (a) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure equality of opportunity for all who are eligible for judicial office, appointment on merit and that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of the other historic factors of discrimination;
- (b) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place;
- (c) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought;
- (d) Interaction, if any, between the executive and the judiciary should not compromise judicial independence

Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties. Court proceedings should, unless the law or overriding public interest otherwise dictates,

be open to the public. Superior Court decisions should be published and accessible to the public and be given in a timely manner.

The Guidelines that are annexed to the Latimer House Principles are underpinned by the following principles:

The successful implementation of these Guidelines calls for a commitment, made in the utmost good faith, of the relevant national institutions, in particular the executive, parliament and the judiciary, to the essential principles of good governance, fundamental human rights and the rule of law, including the independence of the judiciary, so that the legitimate aspirations of all the peoples of the Commonwealth should be met.

Each institution must exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by the other institutions.

It is recognised that the special circumstances of small and/or under – resourced jurisdictions may require an adaptation of these Guidelines.

According to the accompanying Guidelines, the relationship between Parliament and the Judiciary should be guided by the following considerations:

1. The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may be constructive and purposive in the interpretation of legislation, but must not usurp Parliament's legislative function. Courts should have the power to declare legislation to be unconstitutional and of no legal effect. However, there may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the legislature to take remedial measures.
2. Commonwealth parliaments should take speedy and effective steps to implement their countries' international human rights obligations by enacting appropriate human rights legislation. Special legislation (such as equal opportunity laws) is required to extend the protection of fundamental rights to the private sphere. Where domestic incorporation has not occurred, international instruments should be applied to aid interpretation.
3. Judges should adopt a generous and purposive approach in interpreting a Bill of Rights. This is particularly important in countries which are in the process of building democratic traditions. Judges have a vital part to play in developing and maintaining a vibrant rights environment throughout the Commonwealth.
4. International law and, in particular, human rights jurisprudence can greatly assist domestic courts in interpreting a Bill of Rights. It can also help expand the scope of a Bill of Rights making it more meaningful and effective.

5. While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.
6. People should have easy and unhindered access to courts, particularly to enforce their fundamental rights. Any existing procedural obstacles to access to justice should be removed.
7. People should also be made aware of, and have access to, important for a for human rights dispute resolution, particularly Human Rights Commissions, Office of the Ombudsman and mechanisms for alternative dispute resolution.
8. Everyone, especially judges, parliamentarians and lawyers should have access to human rights education.

The Guidelines also address the preservation of judicial independence:

#### 1. Judicial Appointments

Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of State acting on the recommendation of such a commission.

The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.

Judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination.

Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.

Judicial vacancies should be advertised.

#### 2. Funding

Sufficient and sustained funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising proper control over the judiciary.<sup>202</sup>

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<sup>202</sup> The provision of adequate funding for the judiciary must be a very high priority in order to uphold the rule of law to ensure that good governance and democracy are sustained and to provide for the effective and

Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary.

As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.

### 3. Training

A culture of judicial education should be developed.

Training should be organised, systematic and ongoing and under the control of an adequately funded judicial body.

Judicial training should include the teaching of the law, judicial skills and the social context including ethnic and gender issues.

The curriculum should be controlled by judicial officers who should have the assistance of lay specialists.

For jurisdictions without adequate training facilities, access to facilities in other jurisdictions should be provided.

Courses in judicial education should be offered to practising lawyers as part of their ongoing professional training.

The Latimer House Principles are predicated upon and give full expression to the doctrine of the separation of powers.

The encapsulation of the doctrine of the separation of powers in the Latimer House Principles provides an important mechanism for ensuring the independence of the judiciary around the Commonwealth. In those Commonwealth countries where the doctrine of the separation of powers is barely adhered to, the Principles perform their most important work. However, even in countries like Australia, the Principles serve to reinforce the doctrine of the separation of powers at the federal level and to considerably strengthen the operation of the doctrine at the State and Territory level.<sup>203</sup>

However, as acknowledged in the Principles themselves, the principles extend beyond the “pure doctrine of the separation of powers and into the grey areas”. As observed by Dr Brewer:

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efficient administration of justice. However, it is acknowledged that a shortfall in anticipated national income might lead to budgetary constraints. Finance ministries are urged to engage in appropriate consultations in order to set realistic and sustainable budgets which parliaments should approve to ensure adequate funds are available.

<sup>203</sup> The doctrine of the separation of powers is not expressly enunciated in the Australia Constitution, although there is a “strong textual and structural basis” within the Constitution for the operation of the doctrine of the separation of powers and the doctrine has “been perceived to be implicit” in the Constitution’s framework. By way of contrast, the doctrine of the separation of powers is not constitutionally entrenched at the State and Territory level with the result that the doctrine exists or operates as a matter of convention or accepted political practice and is only protected by the common law, legislation or by the development of constitutional principles like the Kable doctrine and the principle of institutional integrity.

The principles provide Commonwealth countries with a set of minimum standards and a roadmap for democracy and good governance by outlining practical ways of implementing the fundamental values of the Commonwealth and enhancing mutual respect between the executive, legislature and judiciary. Article 1 provides that each institution is “the guarantor in their respective spheres of the rule of law, the promotion and protection of human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability. In more direct terms, the guidelines emphasised that “each institution must exercise responsibility and restraint in the exercise of the power within its own constitutional sphere so as to not to encroach on the legitimate discharge of constitutional functions by the other institutions”.<sup>204</sup>

Former Chief Justice of the High Court of Australia, the Hon Justice Murray Gleeson, had this to say about the relationship between the three branches of government, prior to the formulation of the Latimer House Principles:

What the community receives as justice is the outcome of a process to which all of the three branches of government, the legislature, the executive and the judiciary contribute, as do litigants, legal practitioner and others. It is fair to say that all of the participants in that process sometimes appear to be better at maintaining their own power and independence than they are at working constructively with others in the interests of the public.

There is a lot of room for a better understanding between the three branches of government, and between the government, the legal profession and litigating public, of each other’s problems and aspirations... co-operation does not necessarily involve surrender of power or loss of independence.<sup>205</sup>

His Honour also referred to the need for comity and mutual respect between the legislature and the judiciary:

Why should not the great institutions of State behave towards one another with comity and mutual respect? If comity is a word of forgotten meaning, then people in public life should once again be made aware of it. Why should conflict and distrust be regarded as the natural order of things. ...We all aim in different ways to serve the public interest. We should behave as if we valued and respected one another. That would be an important contribution to the health and decency of public life in this State.<sup>206</sup>

Similarly, Chief Justice French observed :

The relations between the courts and the Parliament is defined by the Commonwealth and State Constitutions and the common law. To work that relationship also requires the respect of each for the limits of its own function and the proper functions of the other. It requires courtesy and civil discourse between

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<sup>204</sup> Dr K Bewer n 200 19-20.

<sup>205</sup> Justice M Gleeson *Who Do the Judges Think They Are* The Sir Earle Page Memorial Oration, Sydney October 1997, 11-12

<sup>206</sup> Justice M Gleeson n 205, 12.



the institutions. These are necessary aspects of any working relationship however tightly defined by law.<sup>207</sup>

The Latimer House Principles are aimed at creating a better understanding between the three branches of government as to their respective roles and functions and conducting comity, mutual respect and civil discourse between the executive, the legislature and the judiciary - all in the public interest.

It has been duly acknowledged that:

An expected and unavoidable result is that tensions will develop from time to time between the various branches and instruments of government and members of the public and even between the branches and instruments of government themselves. Such is the case in all modern democratic societies.<sup>208</sup>

In a similar vein, the Hon Michael McHugh AC observed that while the doctrine of the separation of powers “constructs a system that avoids concentrating too much power in any one body of government”, the premise of this construct “is not a harmonious relationship, but a checking and balancing of power”, and inevitably, “the checking provides the blueprint for, and generates, tension between the three arms of government”.<sup>209</sup> This led his Honour to conclude that:<sup>210</sup>

Tension between the Executive and the Judiciary is inevitable. It is unrealistic to think that it can be eliminated. But it can be reduced, if the Executive and the Judiciary recognise “that each has a role to perform and that each is better equipped to carry it out than the other”. As Professor Pearce has said “[f]or the good of our society, it is better for the combatants to realise that they are there to serve the people, not their own ends, and to adapt their conduct accordingly

Justice Logan has correctly observed as follows:

These same sentiments apply in relation to relations between the parliament and the judiciary. The virtue and value of the Latimer House Principles is that they specify conduct which can reduce the inevitable tensions between the two branches of government and thus serve the end of the good of a society.<sup>211</sup>

The Latimer House Principles and accompanying Guidelines not only recognise the importance of maintaining the integrity of the roles of the Executive, Legislature and

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<sup>207</sup> Chief Justice Robert French AC, paper presented at the Qld Supreme Court Seminar Brisbane August 2004 and also published as “The Courts and Parliament” (2013) 87 ALJ 820, 830.

<sup>208</sup> Judicial Complaints Process, Victoria Magistrates Court May 2013, 7.

<sup>209</sup> The Hon Michael McHugh AC “Tensions Between the Executive and the Judiciary” (2002) 76(9) ALJ 567-568. This is referred to by Justice Logan in “The Relationship Between Parliament, the Judiciary and the Executive (The Latimer House Principles), a paper delivered at the 27<sup>th</sup> Commonwealth Parliamentary Seminar, Parliament House, Brisbane Qld June 2016, 16.

<sup>210</sup> The Hon Michael McHugh n 209 also referred to by Justice Logan n 209, 17.

<sup>211</sup> Justice Logan n 209, 17.

the Judiciary (in accordance with the separation of powers doctrine), but also enshrine the fundamental principles of the rule of law and judicial independence.

In accordance with the *Bangalore Principles* judicial independence involves responsibilities being placed on judges and courts, as well as both obligations and prohibitions relating to the conduct of the legislative and executive arms of government.<sup>212</sup> Article 1 of the *United Nations Basic Principles on the Independence of the Judiciary* requires that judicial independence “be guaranteed by the State and enshrined in the Constitution or law of the country” and “it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary”.<sup>213</sup> However, as observed by King, it is important to keep in mind that the principle of judicial independence cuts both ways:

“...the value of independence goes both ways: not only must judicial officers be free of the influence of the executive and legislative branches of government, they must also respect the integrity and function of those branches of government. This principle also appears in the Beijing Statement Article 5: “it is the duty of the judiciary to respect and observe the proper objectives and functions of the other institutions of government. It is the duty of those institutions to respect and observe the proper objectives and functions of the judiciary.”<sup>214</sup>

This reciprocal relationship is embedded in the Latimer House Principles.

The Principles and the Guidelines deal with key aspects of judicial independence: institutional independence, security of tenure, financial security, judicial integrity, operational or administrative independence and judicial accountability (through effective, transparent and ethical governance). All of these aspects of judicial independence are bolstered by the doctrine of the separation of powers which is entrenched in the Latimer House Principles.

The Latimer House Principles and Guidelines which provide a framework for the relationship and interaction between the three branches of government have the potential – if properly implemented – to ensure and protect the independence of the judiciary as well as the two other branches of government. In particular, the Principles and the Guidelines enhance the independency of the magistracy which is the level of the judiciary that is less protected against interference from the executive or legislature.

The CMJA – along with the CLA, CLEA, CPA and representative of the Commonwealth Secretariat’s Legal and Constitutional Affairs Division (LCAD) - is a member of the Latimer House Working Group whose purpose is to advance the implementation of the Latimer House Principles and Guidelines across the Commonwealth as an integral part of the Commonwealth fundamental values.

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<sup>212</sup> Ananian-Welsh and Williams n 15, 597.

<sup>213</sup> Ananian-Welsh and Williams n 15, 594.

<sup>214</sup> M King n 187, 148.

However, as recently reported by Dr Brewer, there is still a long way to go with the implementation of the Latimer House Principles across the Commonwealth.<sup>215</sup>

Whilst some jurisdictions have made efforts to separate the roles of the legislature, executive and judiciary, to date only one jurisdiction in the Commonwealth has progressed any implementation of the principles. In 2008 the Australian Capital Territory Legislature instigated an enquiry into the implementation of the [Latimer] principles throughout its territory. The Latimer House Working Group<sup>216</sup> were consulted and made a written submission to the legislature. The Standing Committee on Administration and Procedures issued a report in August 2009.<sup>217</sup> Following the appointment of a consultant to examine practical ways of implementing the principles in the territory a report was published in November 2011 recommending action to improve good governance in the territory in line with the principles.<sup>218</sup> The Latimer House Working Group considers the procedure used by the ACT legislature as a model that can and should be adopted for implementation across the Commonwealth to ensure good governance.

The Latimer House Principles and Guidelines are of particular relevance and value to the Australian magistracy whose independence is not as well protected as the independence of the higher courts.

The doctrine of the separation of powers is relatively weak at the level of the magistracy and although the doctrine has in recent years been considerably extended to the lower courts by a series of cases decided in the High Court, there are many areas where the respective roles of the judiciary and the other two branches of government remain ill-defined. The Latimer House Principles seek to address the void by going beyond “the pure doctrine of the separation of powers, and into the grey areas”.<sup>219</sup>

The Principles and Guidelines go further in underscoring the need for judicial independence in terms of security of tenure and financial security, thereby bolstering the case for remedying the gaps and weaknesses in respect of these mechanisms for securing judicial independence at the level of magistracy.

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<sup>215</sup> Dr Brewer n 200, 20.

<sup>216</sup> The Latimer House Working Group – consisting of representatives of the CLA, CLEA, CMJA and CPA as well as representatives of the Commonwealth Secretariat’s Legal and Constitutional Affairs Division (LCAD) – meets regularly to consider evidence of breaches of the fundamental values in Commonwealth jurisdictions : see Dr Brewer n 200, 20.

<sup>217</sup> A full copy of the report is available at [www. parliament.act.gov.au](http://www.parliament.act.gov.au).

<http://www.parliament.act.gov.au/downloads/reports/LHP%20report%20final.pdf>.

<sup>218</sup> J Halligan (Chair) “ An Assessment of the Performance of the Three Branches of Government in the ACT against the Latimer House Principles”, Australia and New Zealand School of Government (ANZSOG) Institute for Governance, University of Canberra, 2011.

<sup>219</sup> Latimer House Principles , 4.

- **The CMJA Guidelines for Ensuring the Independence and Integrity of Magistrates**

In light of the lesser protections safeguarding the independence of the Australian magistracy and magistrates' courts it remains to consider the CMJA Guidelines for Ensuring the Independence and Integrity of Magistrates and the vital role played by the Guidelines in strengthening the independence of the magistracy around the Commonwealth.

The Commonwealth Magistrates and Judges Association (CMJA) was founded in 1970 as the Commonwealth Magistrates' Association and the current name was adopted in 1988. The CMJA is a unique international judicial association which brings together judicial officers from 53 jurisdictions in the Commonwealth of Nations.

For over 40 years the Association has played a vital role in developing judicial standards and strengthening judicial independence and enhancing the rule of law. Its aims and objectives are:

- to advance the administration of the law by promoting the independence of the judiciary;
- to advance education in the law, the administration of justice, the treatment of offenders and the prevention of crime within the Commonwealth; and
- to disseminate information and literature on all matters of interest concerning the legal process within the various countries comprising the Commonwealth.

At the CMJA's Triennial Conference held in Turks and Caicos in 2009, the General Assembly of the CMJA adopted the following resolution:

This General Assembly deplores the fact that in parts of the Commonwealth the independence of the magistracy is inadequately safeguarded and requests Council in collaboration with the Commonwealth Secretariat to take positive steps to eliminate these breaches of the Latimer House Principles wherever they occur.

In 2009 the CMJA set up a Taskforce to advance this resolution.<sup>220</sup> A copy of the full report of the Taskforce is available at [www.cmja.org/.../Status%20of%20FINAL%20REPORT0213.pdf](http://www.cmja.org/.../Status%20of%20FINAL%20REPORT0213.pdf).

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<sup>220</sup> This taskforce was led by Justice Leona Theron (South Africa) and included Dr Karen Brewer (Secretary General), Sir Henry Brooke (England and Wales), Dr John Lowndes (Australia) and Justice Charles Mkandawire (SADC Tribunal). Regional Council members of the CMJA were consulted on the work undertaken by the Taskforce.

In brief the report made preliminary findings under eight main headings:

- Constitutional/Legislative Protection;
- Appointments;
- Career Progression;
- Security of Tenure;
- Salaries and Benefits;
- Judicial Training;
- Discipline/Removal from Office;
- Institutional Issues Affecting the Status of Magistrates.

After discussing these key issues, the Taskforce made the following three recommendations:

1. That member associations of the CMJA and Heads of the Judiciary in the Commonwealth press for the Law Ministers to fulfil their recommendation from the CLMM ( Commonwealth Law Ministers Meeting) in July 201 to “consider taking appropriate steps to strengthen their domestic legal frameworks and other measures for assuring the independence and integrity of their magistracy;
2. That the CMJA continue to press at the Commonwealth level for appropriate steps to strengthen and ensure the independence and integrity of the magistracy including through the Latimer House Working Group;
3. That the CMJA’s training should focus on ways of enhancing the integrity and independence of magistrates.

The report prepared by the Taskforce had attached to it a document titled “Guidelines for Ensuring the Independence and Integrity of Magistrates”, which is attached to this paper.

The Guidelines address many of the key aspects of judicial independence:

- Structural or Institutional Independence;
- Adjudicatory Independence or Decisional Independence;

- Administrative Independence;
- Internal Judicial Independence; and
- Prerequisites for Securing and Safeguarding Judicial Independence.<sup>221</sup>

These Guidelines are an important positive step towards safeguarding the independence of the magistracy in all Commonwealth countries, following on from the Latimer House Principles and Guidelines. They are relevant to even a country like Australia whose judiciary (including the magistracy) is generally considered to enjoy a high level of independence. In particular they address the current gaps and weaknesses in the independence of the Australian magistracy in the areas of security of tenure and financial security.

The extent to which the Guidelines will be adopted and implemented in Commonwealth Nations remains uncertain. However, at the meeting of Commonwealth Law Ministers and Senior Officials held in Sydney between 11 -14 July 2011, the final communique issued by the assembly addressed the Proposed Guidelines as follows:

The Meeting received a paper prepared by the Commonwealth Magistrates and Judges Association (CMJA) presenting the preliminary results of an examination of the position of magistrates within the Commonwealth, “magistrate” for this purpose including all judges serving in a court which is not a court of unlimited jurisdiction in civil or criminal matters. The paper recorded concerns that in some Commonwealth jurisdictions the independence of the magistracy was without legislative protection, that appointments were made by processes which were not transparent; that in some countries magistrates’ security of tenure was limited; and that adequate resources were not always made available to magistrates’ courts. Ministers shared the experiences of their jurisdictions and noted the importance of issues such as those of remuneration and judicial pensions and the accountability of magistrates.

The Meeting agreed to note suggested Guidelines for Ensuring the Independence and Integrity of Magistrates prepared by the CMJA, and the Ministers resolved:

To consider taking appropriate steps to strengthen their domestic legal frameworks and other measures for assuring the independence and integrity of their magistracy in compliance with the Commonwealth fundamental values, having due regard to the suggested Guidelines.

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<sup>221</sup> These include judicial appointments on merit, promotion (to the extent such a system exists), security of tenure, entitlement following the abolition or reconstruction of a court, financial security, physical security, immunity from suit, welfare, professional judicial training and development and judicial associations.

## THE ESSENTIAL AND COMPLEMENTARY RELATIONSHIP BETWEEN JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

As is clear from the Latimer House Principles that there should be judicial accountability. This part of the paper explores the notion of judicial accountability and its essential and complementary relationship with judicial independence as well as the limits of judicial accountability.

Justice Nicholson has approached the notion of judicial accountability in these terms:<sup>222</sup>

The notion of accountability permeates public life. It is probably fair to say that at the present time it is an expectation of the citizen that all aspects of government ought to be highly accountable. It is probably also fair conjecture that the same citizen would characterise the judicial branch of government as in need of greater accountability. Yet the reality is that the judicial branch of government has probably been historically and in actuality one of the most accountable areas of government ...

Accountability of the judicial branch has been described as legal, public and informal (or professional) accountability.<sup>223</sup> Legal and public accountability takes place through the processes just described.<sup>224</sup> Informal accountability is the obligation which the judicial branch has to discharge its functions in the face of observant legal practitioners and fellow judges whose confidence it is essential to maintain by performance to standards recognised by them as professionally high. Professor Cappelletti has described these issues as follows:

...The legislator in democratic societies is the representative of, and accountable to, the people, whereas it belongs to the very nature of the judicial function that judges shall not be so accountable. The paradox – entrusting unaccountable judges with the function of controlling accountable politicians – is merely apparent, however. In our societies, judges are non-accountable only in the sense that they are not and shall not be held responsible to the other branches or to the people for their individual decisions and philosophies. Their non-accountability, however, holds only in short and medium term. There are many ties which, in the long term at least, connect them with their time and society...When we speak of separation of powers today...we mean ...reciprocal connections and mutual controls. The judicial accountability is a political and a legal non-accountability – and even that with important limitations in cases of serious abuses; it is not, however, a societal non-accountability.<sup>225</sup>

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<sup>222</sup> Justice Nicholson n 7, 413.

<sup>223</sup> S Shetreet "Judicial Accountability: A Comparative Analysis of the Models and Recent Trends" (1986) *International Legal Practitioner* 38; R E McGarvie "The Operation of the New Proposals in Australia" in *The Accountability of the Australian Judiciary: Procedure for Dealing with Complaints Concerning Judicial Officers* AIJA 1989, 13, 16-18.

<sup>224</sup> The processes referred to are: the conduct of court cases in public, the requirement to give reasons for decision and the appellate process.

<sup>225</sup> M Cappelletti "Repudiating Montesquieu. The Expansion and Legitimacy of 'Constitutional Justice'" (1985) *35 Catholic University Law Review* 1, 26-27.

As is implicit in Cappelletti's analysis of judicial accountability, there is a societal dimension to the accountability of the judiciary as an institution and that of individual judges. This important aspect is captured by the International Commission of Jurists publication *Judicial Accountability: A Practitioner's Guide No 13* at pp 15-17:

At the broadest level, the judiciary as an institution should be accountable to the society it serves.<sup>226</sup> However, in a democratic society ruled by law the obligation that the judiciary owes to society is limited to applying the law in an independent and impartial way, with integrity and free of corruption.

The judiciary is emphatically not bound to adopt only those decisions with which a majority of society may agree, nor should individual judges be at any risk of removal simply because a majority of society may disagree with particular judgments. In this sense, the judiciary's accountability to society is made operative first and foremost by ensuring judges are accountable to the law: that they explain their decisions based on the application of legal rules, through legal reasoning and findings of fact that are based on evidence and analysis, and that their decisions can be reviewed and if necessary corrected by the judicial hierarchy through a system of appeals. Societal opinions are relevant to the accountability of the judiciary only to the extent that such opinions are expressed through duly adopted laws that are compliant with the constitution of the State and international legal obligations.

The judiciary as an institution is accountable to society to ensure that all judicial decisions are in fact made independently and impartially, with integrity and free of corruption, and to this end society reasonably expects the judiciary to take action against individual judges who engage in misconduct that compromises these values....

The judiciary is also accountable to the other branches of government – legislative or executive – in the same sense as it is accountable to society more generally: as an institution, it must be able to demonstrate that judicial decisions are based on legal rules and reasoning, and fact-finding based in evidence, in an independent and impartial way free from corruption and other improper influences. The principle of judicial independence precludes, on the other hand, any claim that the judiciary should be accountable to the executive or legislature in the sense of “responsible” or “subordinate” to those branches of government.<sup>227</sup>

In a similar vein, Justice Kirby has also addressed the societal dimension of judicial accountability:

My point is that accountability of the judiciary cannot now be seen in isolation. It must be viewed in the context of a general trend to render governors answerable

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<sup>226</sup> Consultative Council of European Judges (CCJE) Opinion no 18, Position of the Judiciary and its Relation with other powers of state in a modern democracy (2015), CCJE (2105), para 21.

<sup>227</sup> CCJE Opinion No 18.



to the people in ways that are transparent, accessible and effective.<sup>228</sup> Behind this notion is a concept that the wielders of power- legislative, executive and judicial – are entrusted to perform their functions on condition that they account for their stewardship to the people who authorise them to exercise such power. Behind this notion, in turn, is a more fundamental one. It involves the concept that public power, of its character, derives from the source of all lawful coercive power.

Once the citizens are seen as the ultimate sovereign in a nation, the principle of requiring the accountability of the judiciary to the citizens, or their representatives, becomes irresistible.<sup>229</sup>

The Final Report of the Law Reform Commission of Western Australia into Complaints against the Judiciary (2013) also addressed the broader view that is taken of judicial accountability these days:

The concept of accountability refers to a person (or class of persons) being answerable for his or her actions and decisions to some clearly identified individual or body.<sup>230</sup> In the context of a democracy, those who wield public power are considered to be accountable to the community for their actions. Judicial accountability therefore refers to judges being answerable for their actions and decisions to the community to whom they owe their allegiance.

This takes up the point made by Le Sueur that “a mature democracy requires those who exercise power to hold themselves open to account” and that judicial power ought not to be excluded from accountability requirements.<sup>231</sup>

Expanding upon this dimension of judicial accountability, Debeljak says:

Public confidence in the judiciary is indelibly linked to judicial independence – “citizens would not be willing to submit to the decisions of the judiciary if they perceived that the judiciary was unfair or partial in its decision making. Loss of confidence in the impartiality of the judiciary may lead to disrespect for the law generally, threatening the peace and order of the country.

It is those that are governed by the law that are the beneficiaries of judicial independence. Judges have a duty to maintain their independence on behalf of the citizenry.<sup>232</sup>

Finally, but not least, although by virtue of the principle of judicial independence judicial officers are not public servants (as part of the executive branch of

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<sup>228</sup> PD Finn “The Abuse of Public Power in Australia: Making Our Governors and Servant” (1994) 5(1) Public Law review 43.

<sup>229</sup> Justice M Kirby “Judicial Accountability in Australia” Legal Ethic Vol 6 No1 43-44.

<sup>230</sup> Griffith G, *Judicial Accountability*, Background Paper No. 1 (NSW Parliamentary Library Research Service, 1998), 14.

<sup>231</sup> A L Sueur “Developing Mechanisms for Judicial Accountability in the UK” (2004) 24 Legal Studies 73, 74.

<sup>232</sup> Debeljak n 4, 3.

government), there is a hope or expectation that all judges “regard themselves as servants of the public”.<sup>233</sup>

While it is clear that the concept of judicial accountability embraces a very broad element of public accountability, the question that arises is what does that public accountability – in terms of accountability to society or the citizenry – entail, and what are its limits? How accountable are judicial officers as “servants of the public”?

The starting point is that the concepts of judicial independence and judicial accountability, as suggested by Justice Nicholson, “should be perceived as complementary rather than antithetical”.<sup>234</sup> Indeed, this is supported by the following statement which is included in the Preamble to the UN Human Rights Council resolution on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, which was adopted in 2015:

Stressing the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the UN Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards.

However, it is important to bear in mind that, as former Chief Justice of the High Court of Australia has put it, “judicial independence determines the form, not the presence of accountability”.<sup>235</sup>

But what does judicial accountability comprise, bearing in mind its public accountability aspect and its connection with judicial independence?

In addressing the public accountability aspect of judicial accountability, the Western Australian Law Reform Commission’s Final Report on Complaints against the Judiciary 2013 (Chapter 1) identified a number of ways in which the judiciary is made accountable to the community in the interests of the maintenance and preservation of the principle of judicial independence:

- the principle of “open justice” facilitates the scrutiny and evaluation of judicial decisions;
- a large part of the work of a judge is done in the public eye, open to the public and the media;

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<sup>233</sup> Chief Justice Murray Gleeson n 205, 4.

<sup>234</sup> Justice Nicholson n 7, 414 citing Edward D Re “Judicial Independence and Accountability: The Judicial Council’s Reform and Judicial Conduct and Disability Act of 1980” (1981) Northern Kentucky Law Review 221.

<sup>235</sup> Murray Gleeson “Judicial Accountability” (1995) 2 The Judicial Review 117 at 119-120 referred to by Chief Judge Jan Doogue in “Accountability For the Administration and Organisation of the Judiciary: How Should The Judiciary Be Accountable For Their Work Beyond the Court Room?”, a paper presented at the Asia Pacific Courts Conference, Auckland March 2013, 3.

- the way in which judges conduct themselves ( as well as the decision at which they arrive) is open to public scrutiny in the performance of their judicial functions;
- the concept of “open justice” ensures that the media has the opportunity to report on the actions and decisions of judges and can be a strong factor in public scrutiny and attendant criticism of judicial performance;
- the obligation to give reasons for decisions is another aspect of judicial accountability;
- the requirement to give reasons is often explained in the context of the appellate process: judges are by law accountable through the appeal process;
- the requirement to give reasons serves as a bulwark against the arbitrary exercise of judicial power and in this sense facilitates accountability;
- the accountability of judicial officers to society, as is every citizen, for behaviour that contravenes the criminal law;
- the accountability to peer opinion, which is regarded as a particularly powerful form of scrutiny in the judicial context.

All these aspects of judicial accountability, when viewed through the lens of the public dimension of judicial accountability, are in no way antithetical to judicial independence – very much to the contrary they secure accountability, “in a way that is harmonious with, and not damaging to, the essential character and functions of the judicial office”.<sup>236</sup>

Judicial officers are also accountable to the community in that they are expected to act according to certain standards of conduct in court and outside the court:

The quality of independence allowed to the judicial branch is also posited on the premise that the persons in whom it is vested will behave in an ethical manner in their judicial and personal lives. A sense of propriety is expected to accompany the assumption of office to which the independence attaches and attracts the public confidence necessary for continuation of judicial independence. In that sense the independence of judicial office attracts a personal accountability.<sup>237</sup>

The standards expected of judicial officers are referred to in guides such as the “Guide to Judicial Conduct” published for the Council of Chief Justices of Australia by The Australian Institute of Judicial Administration, the Judiciary of England and Wales Guide to Judicial Conduct and The Canadian Judicial Council’s Ethical

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<sup>236</sup> Justice Kirby n 229, 44.

<sup>237</sup> Justice Nicholson n 7, 426.

Principles for Judges. The value of such guides lies not only in the information that they give to judicial officers, but assist the executive and legislature – as well as lawyers and the public – to better understand and support the judiciary.<sup>238</sup> The guides also assist the public in measuring judicial officers against the principles to which they are required to adhere.<sup>239</sup>

However, according to the modern fluid concept of judicial accountability – with its emphasis on accountability to the society that the judiciary serves – both the judiciary as a whole and individual judges can be seen to be accountable in other ways.

In order to properly understand this further accountability, it is necessary to refer to the very useful distinction drawn by Professor Vernon Bogdanor between “sacrificial accountability” and “explanatory accountability”.<sup>240</sup>

While “sacrificial accountability dictates that one institution is subject to the control of another”, explanatory accountability “simply involves the scrutiny of an institution by another body”.<sup>241</sup> Explanatory accountability “seeks to increase transparency in the exercise of public powers”.<sup>242</sup> Explanatory accountability, therefore, is entirely consistent with the societal or public aspect of judicial accountability.

The concept of explanatory accountability which involves “practices which explain, justify and open the area in question to public dialogue and scrutiny”<sup>243</sup> is not a novel concept in the judicial context:

..the duty to give reasons for decisions is a clear example of the “explanatory accountability” which assists transparency and scrutiny by the other branches of the state and the public (as well as facilitating appeals).<sup>244</sup>

While the duty to give reasons is a form of explanatory accountability that is compatible with the independence of individual judicial officers and the judiciary as a whole, there are other forms of judicial accountability - in the sense of explanatory accountability - which are equally compatible with judicial independence.

In *R v Home Secretary ex parte Doody* Lord Mustill referred to “the continuing momentum ...towards openness of decision-making” and “a perceptible trend

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<sup>238</sup> Professor D Woodhouse “Judges and the Lord Chancellor in the Changing United Kingdom Constitution: Independence and Accountability” (2005) 16 PLR 227, 234.

<sup>239</sup> Professor Woodhouse n 238, 234.

<sup>240</sup> Professor V Bogdanor “Parliament and the Judiciary: The Problem of Accountability” 2006 Sunningdale Lecture.

<sup>241</sup> J Harrison “Judging the Judges: The New Scheme for Judicial Conduct and Discipline in Scotland” 2009 Edinburgh Law Review Vol 13 No 3, 429-430.

<sup>242</sup> Harrison n 241, 430.

<sup>243</sup> Judiciary of England and Wales “The Accountability of the Judiciary”, 3.

<sup>244</sup> Judiciary of England and Wales n 243, 4.

towards an insistence on greater openness, or if one prefers the contemporary jargon ‘transparency’, in the making of administrative decisions”.<sup>245</sup>

Over twenty years ago, former Chief Justice Gleeson expressed the firm view that the principle of explanatory accountability applies to administrative decisions made by the judiciary:

The best practical solution...lies in the recognition, by the judiciary, of the right of the legislature, and the executive, and the public, to know what administrative decisions are being taken by the judiciary, and why. Judges have traditionally accepted that the corollary of their adjudicative independence is an obligation to make decisions openly and with full reasons. The same reasoning must apply to their administrative independence.<sup>246</sup>

The *Constitutional Reform Act 2005* (UK) was somewhat of a watershed in the development of the concept of explanatory accountability in the judicial context. The Act gave statutory force to the explanatory accountability of the Judiciary of England and Wales in relation to administrative matters. As pointed out by Judge Doogue, the Act prescribed the ways in which the judiciary is accountable, while noting that the responsibilities of the Lord Chief Justice (as Head of the Judiciary) have equivalents applicable to the judiciary as a whole:

Within the resources provided...the responsibility of the Lord Chief Justice for deployment of individual judges, the allocation of work within the courts, and the well-being, training and guidance of serving (full and part-time) judges, mean that the judiciary is responsible for:

1. An effective judicial system, including the correction of errors;
2. Training judges in the light of changes in law and practice; and
3. Identifying and dealing with pastoral, equality, and health and safety issues concerning serving judges.<sup>247</sup>

Judge Jan-Maree Doogue, Chief District Court Judge of New Zealand, has convincingly argued the case for holding the judiciary accountable to society for its own administration and organisation within the framework of the concept of explanatory accountability.<sup>248</sup> Her Honour has proposed for the purposes of discussion a set of performance measurement areas for judicial administration governed by a number of guiding principles, the primary one being that the measurement of judicial performance should be developed and undertaken solely by the judiciary in order to preserve external independence.<sup>249</sup> The other principles attempt to achieve a proper balance between internal judicial independence and

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<sup>245</sup> [1994] 1AC 531 at 564 and 560.

<sup>246</sup> Chief Justice Murray Gleeson n 235, 135 referred to by Judge Doogue n 235, 8.

<sup>247</sup> Judge Doogue n 235, 8.

<sup>248</sup> Judge Doogue n 235, 1.

<sup>249</sup> Judge Doogue n 235, 13.

administrative accountability.<sup>250</sup>The proposed assessment areas are: timeliness of decisions, statutory timeframes for delivery of decisions, punctuality in court, giving of reasons for decision, judicial training, rostering and allocation of work, monitoring of successful appeals from District Courts, judicial workloads, communication of information to the public and complaints against judicial officers.<sup>251</sup>

The link between administrative accountability and public confidence in the courts is clear. The need for administrative accountability on the part of the judiciary to foster public confidence in the judiciary is reflected in the following observations made by Justice Nicholson:<sup>252</sup>

The quality of independence given to the judicial branch is unique in the political spectrum and in turn requires of the branch that it be accountable in the sense that it perform its functions efficiently. A judicial branch which is (for example) years behind in disposal of its caseload may be independent but it has no political relevance. The quality of independence ceases to matter to citizens if they cannot have it applied in prompt resolution of their disputes. The principle of judicial independence requires of the judicial branch that it be efficient in the dispatch of its business for without efficiency the preservation of public confidence necessary to the existence of the principle will not occur. Public confidence is diminished by delay in the administration of justice.<sup>253</sup>

In a similar vein, Justice Nicholson says:<sup>254</sup>

The preservation of such confidence also requires public knowledge of the works of courts. Recent experience has shown that even in free societies it is necessary for the judicial branch to organise to provide information to the media on the conduct of the business of the judicial branch and to assist public and media understanding of the resolution of complex legal conflicts. Independence cannot mean isolation and the preservation of public confidence by better utilisation of the media is the means by which the judicial branch can account to the community.

However, Justice Nicholson cautions that although “public confidence may be preserved by the introduction of measures designed to improve accountability...it must be recognised that without those measures achieving a proper balance of the relevant principles, they also have the potential to damage that confidence”.<sup>255</sup>

Clearly there are challenges ahead that the judiciary, particularly at the level of the magistracy, will have to meet in terms of working its way through the exact limits of administrative accountability.

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<sup>250</sup> Judge Doogue n 235, 13-15,

<sup>251</sup> Judge Doogue n 235, 16-23.

<sup>252</sup> Justice Nicholson n 7, 424.

<sup>253</sup> As Miller ‘Public Confidence in the Judiciary: Some Notes and Reflections’ (1970) 35 Law and Contemporary Problems 70 at 82.

<sup>254</sup> Justice Nicholson n 7, 424.

<sup>255</sup> Justice Nicholson n 7, 425.

With the emergence of therapeutic courts at the level of magistrates' courts there has been increased tension between judicial independence and accountability, as observed by Popovic.<sup>256</sup>

The tensions between the concepts of the independence of the judiciary and the need for administrative intervention have been described thus:

The modern insistence upon satisfactory accountability of all governmental institutions, which needs to be reconciled with principles of independence, has to be accepted and addressed. A great deal of public money is invested in courts, and the community is entitled to demand that they be administered efficiently and effectively. The public are entitled to expect that individual judges will do their work efficiently, as well as fairly, will manage cases with due regard to considerations of economy, and will deliver judgments promptly. If judges themselves do not take the lead in developing appropriate techniques of accountability in relation to questions such as this, others will, and those other might not share our understanding of, or respect for, principles of independence.<sup>257</sup>

These processes affect the efficiency of courts, and often involve the application of substantial resources. The public, and the other branches of government, want to be satisfied that the courts are using the funds made available to them wisely. Demands for a suitable level of accountability for the way in which courts apply public money are natural and inevitable. The task of devising appropriate forms of accountability consistent with the requirements is a challenge for modern government, including the judiciary.<sup>258</sup>

Further challenges will arise as courts (especially magistrates' courts) move away from the traditional model of court governance towards autonomous models, as in the case of the magistrates' courts in Victoria and South Australia. The increased administrative functions and responsibilities passed onto the judiciary will inevitably prompt a new set of questions (extending beyond those posed by Judge Doogue) as to the nature and limits of the administrative accountability of the judiciary.

There is one final aspect of judicial accountability (in terms of explanatory accountability) that needs to be mentioned. It relates to "the importance of judicial vigilance in respect of every facet of judicial independence".<sup>259</sup> As pointed out by Ananian-Welsh and Williams, judicial officers have played a "strong role in effectively asserting judicial independence from the executive – both through judicial decisions

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<sup>256</sup> Popovic n 172, 193.

<sup>257</sup> The Hon Murray Gleeson "The Role of the Judiciary in a Modern Democracy", paper delivered at the Judicial Conference of Australia, Sydney 8 November 1997.

<sup>258</sup> The Hon Murray Gleeson "The Right to an Independent Judiciary", paper presented at 14<sup>th</sup> Commonwealth Law Conference London September 2005.

<sup>259</sup> Ananian- Welsh and Williams n 15, 594.

and extra-judicial activity”.<sup>260</sup> In particular, the authors refer to the important function performed by judicial assertions of independence outside the court-room.<sup>261</sup>

Judges bear a responsibility for emphasising the nature, importance and boundaries of judicial independence in extra-curial speeches, interviews, writings and by involvement in the organisations such as the judicial commissions. It is through these forums that the judiciary may draw community and government attention to aspects of judicial independence that remain un-litigated or beyond the scope of constitutional protection”.

There is also a particular need for judicial officers presiding over therapeutic courts to be vigilant in respect of every facet of judicial independence. This aspect is stressed by King:

... it is important for judicial officers presiding in problem-solving courts or indigenous sentencing courts and those taking a solution-focused approach in mainstream courts to be sensitive to the risk that their interaction in court may be perceived to display a lack of neutrality. Taking a therapeutic approach to judging does not require overindulging a participant in relation to their attempts at rehabilitation, nor does it require an approach that is unduly sceptical or harsh concerning a participant’s explanation as to their relapse.

To a significant degree the problem concerning perceived violation of neutrality in judicial interaction in court may be prevented by the judicial officer being mindful not only of the therapeutic goals of a court program but also of other values underlying these programs, such as defendant accountability, program integrity, collaborative decision-making (where relevant) and the need to uphold statute and common law principles.<sup>262</sup>

## **THE COMMONWEALTH LATIMER HOUSE PRINCIPLES AND GUIDELINES, THE CMJA GUIDELINES FOR ENSURING THE INDEPENDENCE AND INTEGRITY OF MAGISTRATES AND THE INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE: STRIKING A PROPER BALANCE BETWEEN JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY**

This part of the paper examines the extent to which the Latimer House Principles and Guidelines, the CMJA Guidelines for Ensuring the Integrity and Independence of Magistrates and the International Framework for Court Excellence achieve a proper balance between judicial independence and judicial accountability

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<sup>260</sup> Ananian-Welsh and Williams n 15, 637.

<sup>261</sup> Ananian-Welsh and Williams n 15 636. As noted by the authors while the administrative/operational independence of Australian courts is a central facet of their institutional independence, it “remains wholly untested in litigation” (611).

<sup>262</sup> King n 187, 150.



- **The Commonwealth Latimer House Principles and Guidelines**

The Foreword to the Commonwealth Latimer House Principles stresses the importance of “accountability” as an overarching principle:

On a number of occasions...we have spoken about the primacy of “the accountability of, and the relationship between, the three branches of government”, and stressed the independence of those bodies: the Executive, Legislature and the Judiciary.<sup>263</sup>

Looking beyond the formulation of the Latimer House Principles, the Foreword states:

...our next step is to focus on adherence to the Principles, and to enhance accountability...<sup>264</sup> let us acknowledge the value of our capacity to prioritise our concerns – on issues like accountability.<sup>265</sup>

Finally, but not least, the Foreword reiterates the primacy of the principle of “accountability” that underpins the Latimer House Principles:

These Latimer House Principles are designed to help the business of fair, efficient, transparent, responsive government – government for the people. The confidence, belief and trust people have in their government is the ultimate litmus test.

...we are trying to ensure a system of government whereby citizens have a voice, a role, a future, and that they live in the confidence that they are under the rule of law.<sup>266</sup>

It is clear that the accountability the Foreword to the Latimer House Principles speaks of is accountability to the people - societal accountability which has already been discussed at some length.

As stated in the Principles themselves:

Each Commonwealth country’s Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.<sup>267</sup>

The standards of honesty, probity and accountability apply as much to the judiciary as they do to the other two branches of government.

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<sup>263</sup> Latimer House Principles, Foreword, 3.

<sup>264</sup> Latimer House Principles, Foreword, 4.

<sup>265</sup> Latimer House Principles, Foreword 5.

<sup>266</sup> Latimer House Principles, Foreword 5.

<sup>267</sup> Latimer House Principles 1), 10.

In the interests of preserving the independence of the judiciary, the Principles provide that “interaction, if any, between the executive and the judiciary should not compromise judicial independence”.<sup>268</sup> This statement implicitly recognises the accountability of both the executive and the judiciary to the public to ensure that neither intrudes upon each other’s role such as to compromise judicial independence – judicial independence being, as previously noted, “a privilege of, and a protection for, the people”.<sup>269</sup> Such accountability is entirely consistent with judicial independence.

In the context of the independence of the judiciary, the Principles proceed to address other aspects of judicial accountability.

The first of those is the principle of “open justice”, which is one of the touchstones of judicial accountability:

Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public.<sup>270</sup>

As mentioned earlier, the principle of “open justice” facilitates the scrutiny and evaluation of judicial decisions, and again is compatible with judicial independence.

The principles proceed to deal with the timely delivery of judicial decisions and their accessibility, both of which are an important aspect of administrative accountability that sits comfortably with judicial independence:

Superior Court decisions should be published and accessible to the public and be given in a timely manner.<sup>271</sup>

The next important aspect of judicial accountability dealt with by the Principles is that of suspension or removal of judicial officers from judicial office:

Judges should be subject to suspension or removal only reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.<sup>272</sup>

This principle addresses the “sacrificial” aspect of judicial accountability, with appropriate safeguards put in place to protect judicial independence.

The Latimer House Principles go on to provide that “merit and proven integrity should be the criteria of eligibility for appointment to public office”.<sup>273</sup> This statement of principle indirectly addresses the concept of judicial accountability: judicial officers

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<sup>268</sup> Latimer House Principles 1V (d),11.

<sup>269</sup> A Mason, “The Independence of the Bench, the Independence of the Bar and the Bar’s Role in the Judicial System” (1993) 10 Australian Bar Review 1, 3.

<sup>270</sup> Latimer House Principles IV, 11.

<sup>271</sup> Latimer House Principles 1V),11. There is ample justification to extend the requirement to publish the decisions of all courts in the judicial hierarchy.

<sup>272</sup> Latimer House Principles 1V), 11.

<sup>273</sup> Latimer House Principles V)(a),12.

have a “duty to uphold the status and reputation of the judiciary”,<sup>274</sup> and to that end should display judicial integrity and competence and avoid “any conduct that might diminish public confidence in, and respect for, the judicial office”.<sup>275</sup>

The next aspect of judicial accountability dealt with in the Latimer House Principles relates to ethical governance, which is a principle that also applies to the two other branches of government:

Ministers, Members of Parliament, judicial officers and public officer holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.<sup>276</sup>

This important principle addresses the personal accountability of judicial officers – as well as their wider accountability to the public - in terms of behaving in accordance with certain standards of conduct in court and outside court. In accordance with this principle many jurisdictions (as previously mentioned) have developed guides to judicial conduct which are designed to uphold public confidence in the administration of justice, enhance public respect for the institution of the judiciary and to protect the reputation of individual judicial officers and that of the judiciary<sup>277</sup> – all in the interests of the preservation of judicial independence and the rule of law.

The Latimer House Guidelines (which are attached to the Latimer House Principles) also deal with the matter of judicial ethics:

- (a) A Code of Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges.
- (b) The Commonwealth Magistrates and Judges Association should be encouraged to complete its Model Code of Judicial Conduct now in development;
- (c) The Association should also serve as a repository of codes of judicial conduct developed by Commonwealth judiciaries which will serve as a resource for other jurisdictions.<sup>278</sup>

The AIJA Guide to Judicial Conduct is a prime example of a Code of Ethics and Conduct referred to in the Latimer House Guidelines, and serves as an important accountability mechanism.

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<sup>274</sup> Guide to Judicial Conduct published for the Council of Chief Justices of Australia by the Australian Institute of Judicial Administration Incorporated (AIJA), 2.3, 6.

<sup>275</sup> AIJA Guide to Judicial Conduct n 274, 2.3, 6.

<sup>276</sup> Latimer House Principles V1), 12.

<sup>277</sup> AIJA Guide to Judicial Conduct n 274 2, 3

<sup>278</sup> Latimer House Guidelines V1), 20.

The importance of judicial accountability is further emphasised by the Latimer House Principles in this fashion:

Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.

In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.

The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.<sup>279</sup>

The principles stated in the first paragraph of the this passage capture the essence of the judicial role and function, and strike the appropriate balance between judicial independence and accountability which enhances public respect for the judiciary and upholds public confidence in the judicial system.

The second paragraph refers to the sacrificial aspect of judicial accountability, placing particular emphasis on the need to install appropriate safeguards to ensure objectivity and fairness in disciplinary proceedings to remove a judicial officer from office.

The third and final paragraph of the extract from the Latimer House Principles embodies a key aspect of judicial accountability which is closely aligned with the concept of “open justice”. As stated by Gibbs J:<sup>280</sup>

[the rule that public hearings are essential to the maintenance and preservation of public confidence in the judicial system<sup>281</sup>] has the virtue that the proceedings are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts.

The Latimer House Principles not only require the executive, legislative and judicial branches of the State to “show appropriate respect for the different positions occupied by the other branches”, but also require the three branches of government

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<sup>279</sup> Latimer House Principles V11), 12.

<sup>280</sup> *Russell v Russell* (1979) 134 CLR 495 at 520.

<sup>281</sup> *R v Tait and Bartley* (1979) 24 ALR 473 at 487 cited in Campbell and Lee n, 2 220.

to “respect the importance in a democratic society of vigorous scrutiny [and presumably criticism] by the media”.<sup>282</sup> However:

...the media should recognise the positions of and restrictions on the branches of the State, including the judiciary. The limits of what it is proper for judges to say to Parliamentary Committees, Ministers, the media or in lectures, follow from the need to safeguard the core constitutional responsibility of the judiciary. The corollary should be that government Ministers, Members of Parliament and the media should also respect the need to safeguard and to avoid prejudicing or corroding this core responsibility. That should limit what it is appropriate to say to or about judges and individual decisions.<sup>283</sup>

The Latimer House Guidelines also address the part played by disciplinary proceedings and public criticism as judicial accountability mechanisms:

(a) Discipline

- (i) In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal.

Grounds for removal of a judge should be limited to:

- (A) inability to perform judicial duties and
- (B) serious misconduct.

- (ii) In all other matters the process should be conducted by the chief judge of the courts;
- (iii) Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private by the chief judge

(b) Public Criticism

- (i) Legitimate public criticism of judicial performance is a means of ensuring accountability;
- (ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.<sup>284</sup>

The importance that the Latimer House Guidelines (attached to the Latimer House Principles) attaches to judicial education and training as a means of preserving judicial independence was discussed earlier. However, judicial education and training is also an accountability mechanism. As noted by Justice Nicholson, “at the

<sup>282</sup> Judiciary of England and Wales n 243, 5.

<sup>283</sup> Judiciary of England and Wales n 243, 5.

<sup>284</sup> Latimer House Guidelines V1) 1, 20-21.

heart of the application of judicial independence is the skilled application of the law” and “the principle [of judicial independence] posits the existence of trained judges able to properly apply the law”.<sup>285</sup> Justice Nicholson goes on to point out that judicial education is now an accepted part of judicial life and “judicial independence requires that the judicial branch is accountable for its competency, and that proposition is now accepted as beyond debate”.<sup>286</sup> This is implicit in the Latimer House Guidelines, which require training and education to be organised, systematic and ongoing and under the control of the judiciary through adequately funded judicial bodies.<sup>287</sup>

Finally, but not least, the Latimer House Principles impose a very broad form of accountability on the part of the judiciary which is coupled with a corresponding accountability on the part of the two branches of government. This was adverted to earlier. Article 5 of the Beijing Principles imposes reciprocal duties: “it is the duty of the judiciary to respect and observe the proper objectives and functions of the other institutions of government” and “it is the duty of those institutions to respect and observe the proper objectives and functions of the judiciary”. These reciprocal duties are entrenched in the Latimer House Principles. These duties impose their own accountability on the three branches of government.

The set of guidelines adopted by the Council of Chief Justices of Australia and New Zealand with respect to communications and relationships between the judicial branch of government and the legislative and executive branches fully accords with the duty imposed on the judiciary to respect and observe the proper objectives and functions of the other two branches of government.<sup>288</sup>

The Latimer House Principles and Guidelines achieve an appropriate balance between judicial independence and judicial accountability. The accountability mechanisms established by the Principles and Guidelines are mechanisms that are generally accepted as being compatible with the independence of the judiciary while at the same time they are capable of fulfilling the objectives of judicial accountability, which are to uphold public confidence in the administration of justice, enhance public respect for the judiciary as an institution and to protect the reputation of individual judicial officers and of the judiciary.

However, neither the Latimer House Principles nor Guidelines address the aspect of administrative accountability, the boundaries of which will have to be worked through by the various jurisdictions across the Commonwealth – without the assistance and benefit of a generally accepted body of relevant principles and guidelines.

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<sup>285</sup> Justice Nicholson n 7, 425.

<sup>286</sup> Justice Nicholson n 7, 425.

<sup>287</sup> Latimer House Guidelines 11) 3 Training, 18.

<sup>288</sup> These guidelines can be accessed at the website of the Judicial Conference of Australia at [www.jca.asn.au](http://www.jca.asn.au)

- **The CMJA Guidelines for Ensuring the Independence and Integrity of Magistrates**

Although the CMJA Guidelines for Ensuring the Independence and Integrity of magistrates are almost exclusively concerned with the establishment of mechanisms to preserve judicial independence, the guidelines indirectly deal with three aspects of judicial accountability.

First, in dealing with professional judicial training and development as a means of preserving and enhancing the independence of the magistracy, the Guidelines make the judiciary accountable for such training and development.

Secondly, the Guidelines stress the important relationship between judicial independence and administrative independence:

In order to ensure the institutional independence of the magistracy and the adjudicatory independence of magistrates:

- (a) the assignment of cases and other work to a magistrate must be treated as a matter of internal judicial administration over which the Chief Magistrate has absolute control;
- (b) the magistracy needs to be provided with the means and resources, financial or otherwise, necessary for the proper fulfilment of its judicial functions and duties such as to allow for the due administration of justice;
- (c) the magistracy must be given as much autonomy as possible in the internal management of the administration of the courts over which magistrates preside; and at a bare minimum:
  - (a) the necessary resources provided to the magistracy for the administration and operation of its court(s) should be under the control of those courts;
  - (b) the court staff should be responsible to the court(s) and not to the executive branch of government in relation to all matters pertaining to the business of the court(s);
  - (c) the control of court buildings and facilities should be vested exclusively in the magistracy, with the right to exclusive possession of those buildings and facilities together with the power to exercise control over ingress and egress, to and from those buildings and facilities, and to determine the purposes to which various parts of the buildings and facilities are to be put;
  - (d) the magistracy should have the right to maintain and make alterations to court buildings.<sup>289</sup>

The Guidelines confer expansive administrative autonomy on magistrates' courts to optimise judicial independence; however, with that augmented administrative

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<sup>289</sup> Guidelines for Ensuring the Independence and Integrity of Magistrates, 16.

independence comes greater administrative accountability (in the explanatory sense).

Thirdly, the Guidelines address the vital role played by judicial associations in preserving judicial independence:

Consistent with their fundamental rights, members of the judiciary shall be free to form and join associations or other organisations to:

1. ensure the maintenance of a strong and independent judiciary within a democratic society that adheres to the rule of law;
2. promote and encourage continuing legal, judicial and cross cultural study and learning by members of the judiciary;
3. promote and encourage the exchange of legal (or judicial) educational practical or professional information on best practice between members of the judiciary and other persons or bodies;
4. promote a better understanding and appreciation of the proper role of the judiciary in the administration of justice and the importance of a strong and independent judiciary in protecting fundamental human rights and entrenching good governance and to do likewise within the Executive and Legislative branches of government;
5. seek improvements in the administration of justice and the accessibility of the judicial system; and
6. undertake supporting research that will further the achievement of these aims.<sup>290</sup>

Judicial associations are also an important aspect of judicial accountability. As previously mentioned, the judiciary bears a responsibility for emphasising the nature, importance and boundaries of judicial independence and drawing the attention of both the community and government to such matters as well as the importance of the rule of law within a free and democratic society – both in and outside the court room. This is a responsibility that is elevated to a form of accountability – namely explanatory accountability. Judicial associations provide an extra – curial medium for discharging the responsibility that the judiciary as an institution bears and fulfilling the requirements of explanatory accountability. It is through judicial associations like the CMJA, the Judicial Conference of Australia (JCA) and the Association of Australian Magistrates (AAM) that the judiciary is able to draw the attention of the community and government to the importance of judicial independence and rule of law in a modern democracy.

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<sup>290</sup> Guidelines for Ensuring the Independence and Integrity of Magistrates, 21.



As mentioned earlier the CMJA plays a vital role in the implementation of the Latimer House Principles and Guidelines across the Commonwealth.

- **The International Framework for Court Excellence**

This final part of this paper examines the extent to which the International Framework for Court Excellence achieves a proper balance between judicial independence and judicial accountability.

In 2008 an international consortium comprising groups from Europe, Asia, Australia and the United States developed the International Framework for Court Excellence. As stated in Section 1 of the Framework:

...the goal of the Consortium's efforts [was] the development and maintenance of a framework of values, concepts and tools by which courts worldwide [could] voluntarily assess and improve the quality of justice and court administration they deliver.<sup>291</sup>

The Framework is based on a "clear statement of the fundamental values courts must adhere to if they are to achieve excellence".<sup>292</sup> The Framework provides an invaluable "resource for assessing a court's performance against seven detailed areas of court excellence and provides clear guidance for courts intending to improve their performance".<sup>293</sup> In that respect, it provides "a model methodology for continuous evaluation and improvement that is specifically designed for use by courts".<sup>294</sup>

The Framework recognises 10 core values that courts adhere to and apply in fulfilling their critical role and functions in society.<sup>295</sup>

- equality before the law;
- fairness;
- impartiality;
- independence of decision-making;
- competence;
- integrity;
- transparency;
- accessibility;
- timeliness;
- certainty.

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<sup>291</sup> Section 1, 1 of the Framework

<sup>292</sup> Section 1, 1.of the Framework.

<sup>293</sup> Section1, 1 of the Framework.

<sup>294</sup> Section 1,1 of the Framework.

<sup>295</sup> Section 2,3 of the Framework.

It is immediately apparent that all these core values are in some way connected with the principle of judicial independence and help to ensure a strong and independent judiciary.

Equality before the law is an essential characteristic of the rule of law. As the operation of the rule of law depends on a truly independent judiciary,<sup>296</sup> there is an essential connection between the concept of equality before the law and the principle of judicial independence. As pointed out by Campbell and Lee:

If the governed and the governors are to stand equally before the law it is imperative that the judiciary should be impartial and have the appearance of impartiality.<sup>297</sup>

Impartiality, being an important characteristic of judicial independence, is important to judicial independence.<sup>298</sup> The concept of judicial independence is another aspect of judicial impartiality.<sup>299</sup>

Fairness, which is one of the indicia of judicial impartiality (in court), is an important characteristic of judicial independence and therefore important to judicial independence.<sup>300</sup>

The relationship between the third core court value of impartiality and judicial independence has already been referred to.

The core value of independence in decision making is alternatively referred to as decisional independence or adjudicatory independence. Independence of this type goes to the very heart of the principle of judicial independence.

The value of competence is closely aligned with decisional independence in that it relates to “the ability of the judge to make decisions based solely on a thorough understanding of the applicable law and the facts of the case”.<sup>301</sup>

The core values of integrity and transparency are very much related, and both bear a relationship to decisional independence:

Integrity includes the transparency and propriety of the process, the decision and the decision maker. Justice must not only be done but be transparently seen to be done.<sup>302</sup>

The concept of judicial independence is also another aspect of judicial integrity.<sup>303</sup> Furthermore, the value of integrity requires all judicial officers to behave – in and out

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<sup>296</sup> Campbell and Lee n 2, 51

<sup>297</sup> Campbell and Lee n 2, 51 where the authors refer to AV Dicey *An Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> edition 1959), 34.

<sup>298</sup> K Richardson ‘A Definition of Judicial Independence’ (2005) 2 UNELJ 75, 79.

<sup>299</sup> AIJA Guide to Judicial Conduct n 274 2.2.2, 5.

<sup>300</sup> AIJA Guide to Judicial Conduct n 274 2.1, 3.

<sup>301</sup> Section 2, 4 of the Framework.

<sup>302</sup> Section 2, 4 of the Framework.

of court – according to certain standards of conduct in order to uphold the status and reputation of the judiciary, and to avoid any conduct that might diminish public confidence in the independence and trustworthiness of judicial officers.<sup>304</sup>

The core value of accessibility incorporates “the ease of gaining entry to the legal process and using court facilities effectively”.<sup>305</sup> The value of accessibility – which is a matter of “access to justice” – must be ensured if a society is to be truly based on the rule of law.<sup>306</sup> As this value is connected with equality before the law and the rule of law it also has a vital connection with the principle of judicial independence.

Justice Nicholson has also commented on the relationship between the core court value of accessibility and judicial principle:

...judicial independence is of no political importance to a citizen of a country where it is economically impossible to access the use of the judicial power. The principle of independence of the judiciary requires that the court system be economically and procedurally accessible so that the courts are resolving disputes of relevance to the polity.<sup>307</sup>

The value of timeliness “reflects a balance between the time required to properly obtain, present, and weigh the evidence, law and arguments, and unreasonable delay due to inefficient processes and insufficient resources”.<sup>308</sup> Timeliness, as a core court value, is relevant to the quality of the independence enjoyed by the judiciary. Judicial independence is a privilege of, and a protection for, the people; and as noted earlier, the quality of that independence will cease to matter to citizens if they cannot have it applied in the timely resolution of their disputes.

Finally, the core value of certainty (according to which a decision will at some point be considered “final” whether at first instance or through an appeal process<sup>309</sup>) is relevant to the maintenance of judicial independence because without the guarantee of certainty the quality of the independence of the judiciary will cease to matter to the public.

It is also immediately apparent that each of the ten core court values referred to in the International Framework of Court Excellence are also values that underpin judicial accountability. This is not surprising given the complementary nature of the principles of judicial independence and judicial accountability, as well as the fact that the International Framework for Court Excellence is a tool that is designed to assess and improve the quality of services delivered by courts in fulfilment of their critical

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<sup>303</sup> AIJA Guide to Judicial Conduct n 274 2.2.2, 5

<sup>304</sup> AIJA Guide to Judicial Conduct n 274 2.3,6

<sup>305</sup> Section 2, 6 of the Framework.

<sup>306</sup> “Access to Justice Critical in Ensuring Rule of Law, Speakers Stress as Sixth Committee Continues Deliberations on Principle 10 October 2014: [www.un.org](http://www.un.org) press gal3478.doc.htm.

<sup>307</sup> Justice Nicholson n 7, 424.

<sup>308</sup> Section 2, 4 of the Framework.

<sup>309</sup> Section 2, 4 of the Framework.

role in society – a tool which is laden with the language and values of judicial accountability.

As regards the latter point, the International Framework states that it is the responsibility of the presiding judicial officer of the court as well as the heads of departments and other managers of the courts to encourage understanding of an adherence to core values, such as independence, integrity and timeliness.<sup>310</sup> In so far as this mandate is directed to the judiciary, all judicial officers are judicially accountable (in the explanatory sense) for promoting an adherence to the core court values recognised by the International Framework.

Carrying that accountability forward, the Framework recognises “a fundamental and clear link between court values and the performance of a court” and provides “a clear method for courts to assess whether those values that have been identified as being important are in fact guiding the court’s role and functions”.<sup>311</sup>

Consistent with the philosophy that the judiciary be accountable in the sense that it performs its role and functions effectively as well as efficiently, the Framework states that the achievement of court excellence is:

one of continuous improvement achieved through optimal internal organisation of the courts, strong leadership, clear court policies, quality resource management, effective and efficient court operations, high quality and reliable court (performance) data and a high level of public respect.<sup>312</sup>

As an integral part of the process of assessment of performance and identification of areas for improvement, the Framework divides the roles and activities of courts into seven separate categories collectively referred to as the “Seven Areas for Court Excellence”.<sup>313</sup> Those seven areas of court excellence are:

- Court Leadership and Management;
- Court Planning and Policies;
- Court Resources (Human, Material and Financial);
- Court Proceedings and Processes;
- Client Needs and Satisfaction;
- Affordable and Accessible Court Services;

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<sup>310</sup> Section 2, 4 of the Framework.

<sup>311</sup> Section 3, 5 of the Framework.

<sup>312</sup> Section 3, 5 of the Framework.

<sup>313</sup> Section 3, 5 of the Framework.

- Public Trust and Confidence.

The Framework recognises that each of these areas has “a critical impact on the ability of the court to adhere to its core values and to deliver excellent court performance”.<sup>314</sup> The Framework states that “the values should be reflected in a court’s approach to each of the areas of court excellence and, through the Framework process of assessment and improvement, a court can be aware of how well it is promoting and adhering to the values it espouses”.<sup>315</sup>

Consistent with the modern extended notion of judicial accountability, the Framework stresses the importance of courts publicising the values which guide court performance as well as ensuring “those values are built into the court’s processes and practices”.<sup>316</sup>

In addressing those seven areas of court excellence, the Framework stresses the importance of strong leadership in ensuring a court is “not operating in isolation from the broader community and external partners”.<sup>317</sup> This is consistent with the public aspect of judicial accountability.

Again on the subject of court leadership, the Framework highlights the importance of transparency and accountability:

Other measures of strong leadership include the “openness” of the organisation and clear accountability. This means that courts regularly publish their performance results and provide information on their services, processes and improvements.<sup>318</sup>

This paragraph reinforces the notion that independence cannot mean isolation and courts have a responsibility to open their doors and to provide the public with information about the works of courts, with a view to preserving public confidence in the judiciary.

The societal accountability of the judiciary is very much reflected in the following statements contained in the Framework:

Strong court leadership implies the promotion of the external orientation of courts, a proactive and professional management culture, accountability and openness, an eye for innovation and a proactive response to changes in society.<sup>319</sup>

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<sup>314</sup> Section 3, 5 of the Framework.

<sup>315</sup> Section 3, 5 of the Framework.

<sup>316</sup> Section 3, 5 of the Framework.

<sup>317</sup> Section 3.1.1, 6 of the Framework.

<sup>318</sup> Section 3.1.1, 7 of the Framework.

<sup>319</sup> Section 3.1.1, 7 of the Framework.

The Framework stresses the important role played by court planning and policies in ensuring that a court adheres to and applies the core court values and to realise the objectives that have been formulated in terms of court performance and quality.<sup>320</sup>

The third area for court excellence – quality resource management – requires a court to “manage all available resources [human, material and financial] properly, effectively and proactively.”<sup>321</sup> This is a reflection of the modern view of judicial accountability referred to by Popovic - according to which courts should be accountable for the application of the substantial resources made available to them. And there is no reason why courts should not be accountable to the public (in the explanatory sense) for their use of court resources, particularly as courts progressively move away from the traditional model of court governance towards more autonomous systems of court administration.

The Framework stresses the importance of human resources in the performance of the role and functions of courts in a modern society, and the need for a system for continuing professional education of judicial officers.<sup>322</sup> This reflects the requirement that the judiciary is accountable for its competency and hence for continuing judicial education.

The next area for court excellence relates to court proceedings and processes: “fair, effective and efficient court proceedings are indicators of court excellence”.<sup>323</sup> The Framework points out that excellent courts have fair and timely court proceedings and eliminate or minimise a backlog of cases.<sup>324</sup> This is yet another reflection of the view expressed by Justice Nicholson – namely that “the principle of judicial independence requires of the judicial branch that it be efficient in the dispatch of its business for without efficiency the preservation of public confidence necessary to the existence of the principle will not occur”.<sup>325</sup>

The fifth area of court excellence is that of client needs and satisfaction: “one of the important aspects of the quality approach and the ‘search for excellence’ is that it takes the needs and perceptions of court users into account”.<sup>326</sup> This is a manifestation of the broader accountability that courts have to the public in terms of their responsiveness to the needs and perceptions of all court users in the interests of preserving public confidence and trust in the court system.

According to the sixth area of court excellence, “excellent courts are affordable and easily accessible for litigants” and ensure that “physical access is easy and

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<sup>320</sup> Section 3.1.2, 7 of the Framework.

<sup>321</sup> Section 3.1.3, 8 of the Framework.

<sup>322</sup> Section 3.1.3, 8 of the Framework.

<sup>323</sup> Section 3.1.4, 9 of the Framework.

<sup>324</sup> Section 3.1.4, 9 of the Framework.

<sup>325</sup> See above, p 54.

<sup>326</sup> Section 3.1.5, 10 of the Framework.

comfortable.<sup>327</sup> This sixth area of court excellence is concerned with “access to justice”. The Framework provides that access to justice is facilitated by courts:

- adhering to universal physical access standards;
- providing court interpreters and offering information in the languages spoken in the community served by the court;
- setting court fees at affordable levels;
- working with agencies and the legal community to ensure that legal assistance is available to those financially unable to retain a lawyer;
- providing where feasible, access and information electronically via the internet as well as at the courthouse.<sup>328</sup>

As the principle of judicial independence requires that the court system be economically and procedurally – as well as physically – accessible, the judiciary has an important role to play in ensuring that judicial independence is not compromised by restrictions placed on access to justice. This role stems from the fact that the principle of judicial independence imposes its own accountability – one which requires the judiciary to defend and uphold that principle which is fundamental to the rule of law.

The final area of court excellence relates to public trust and confidence: “In general, a high level of public trust and confidence in the judiciary is an indicator of the successful operation of courts”.<sup>329</sup> According to the Framework, public trust in the judiciary is increased by lack of corruption, high quality judicial decisions, respect for the judges, timely court proceedings and transparent processes. This area of court excellence embodies several facets of judicial accountability. Judicial officers are accountable in the sense that they must act ethically and with propriety, deliver high quality decisions, engender respect for the judicial office and ensure that court proceedings are conducted in a timely and transparent manner. All of these things need to occur in order to ensure public trust and confidence in the judiciary as an independent institution and the court system as a successful organ for the administration of justice.

The International Framework for Court Excellence goes on to deal with the process for assessment of court excellence. This is essentially a four step process. The first step involves a self- assessment of how a court is currently performing.<sup>330</sup> Following the self-assessment, an in-depth analysis is conducted to determine the areas of the

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<sup>327</sup> Section 3.1.6, 10 of the Framework.

<sup>328</sup> Section 3.1.6, 11 of the Framework.

<sup>329</sup> Section 3.1.7, 11 of the Framework.

<sup>330</sup> Section 4, 13 of the Framework.

court's work that are capable of improvement.<sup>331</sup> The next step involves the development of an improvement plan, detailing the areas that require improvement, the actions proposed to be taken and the outcomes sought to be achieved.<sup>332</sup> At the fourth and final stage the implementation of the improvement plan is monitored through a process of review and refinement.<sup>333</sup> This is a prime example of the judiciary assuming accountability for the performance of its courts.

The Framework makes it clear that a court's "pathway to excellence will also be enhanced by open communication regarding its strategies, policies and procedures with court users and the public in general".<sup>334</sup> The Framework stresses the imperative for courts to be open and transparent about their performance, strategies and their processes in order to ensure public respect and confidence in the judicial system and to publish details of what actions they are taking to address problems within the court system.<sup>335</sup>

As part of the communicative process, the Framework recommends the formulation and publication of a court vision statement and/or a mission statement expressing the court's fundamental values and purposes,<sup>336</sup> the publication of the results of the court's evaluations undertaken under the framework and its plans for improvement as well as the publication of annual court reports containing details of the court's role, practice and procedure and performance.<sup>337</sup> The Framework stresses the importance of courts developing a communication plan that identifies the manner in which the court proposes to inform its users and the public in general.<sup>338</sup> The Framework recommends that the communication plan include not only strategies for publishing material and information but also provide for other lines of communication such as the holding of regular meetings with court users and other stakeholders, the provision of information to the media, assistance provided to self-represented persons and disadvantaged persons and feedback and complaints processes.<sup>339</sup>

All of this is consistent with modern thinking that the judiciary must be accountable to society in an explanatory way for their organisation and administration.<sup>340</sup>

As pointed out by Chief Justice Marilyn Warren of the Supreme Court of Victoria, the Framework strikes a balance between recognising that key performance indicators commonly used in political and business contexts cannot be applied to courts and

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<sup>331</sup> Section 4, 13 of the Framework.

<sup>332</sup> Section 4, 13 of the Framework.

<sup>333</sup> Section 4, 13 of the Framework.

<sup>334</sup> Section 4.1, 15 of the Framework.

<sup>335</sup> Section 6, 33 of the Framework,

<sup>336</sup> Section 4.4, 25 of the Framework.

<sup>337</sup> Section 6, 33 of the Framework.

<sup>338</sup> Section 6, 33 of the Framework.

<sup>339</sup> Section 6, 33 of the Framework.

<sup>340</sup> Judge Jan-Marie Doogue n 235, 1.



ensuring that courts are still accountable to the public.<sup>341</sup> In this way the Framework ensures that judicial independence cannot be used as a form of immunity from scrutiny.<sup>342</sup> On the other hand, the distinctive feature of the Framework is that has been developed by the judiciary and, when implemented, solely undertaken by the judiciary – “a form of court –led evaluation”<sup>343</sup> - thereby preserving external judicial independence.<sup>344</sup>

The International Framework for Court Excellence “helps to promote judicial independence and accountability and provides guidance to courts seeking to earn and maintain a high level of community confidence”.<sup>345</sup> Furthermore, it achieves a proper balance between judicial independence and judicial accountability because it properly reflects the complementary nature of the two concepts.

The International Framework for Court Excellence has particular relevance and application in magistrates courts as those courts work at the coalface of the Australian judiciary – often referred to as the “engine house of the judiciary” or the “work horse of the judiciary”.<sup>346</sup> Magistrates courts are invariably referred to as the “Peoples Courts”,<sup>347</sup> being the first and often only point of contact that citizens have with the judicial system. Magistrates courts also do the bulk of the work coming before the courts in each of the eight Australian jurisdictions. Magistrates courts have been traditionally responsive to changing needs, new pressures and new demands imposed on them.<sup>348</sup> Nothing has changed. Traditionally magistrates courts have been innovative in a number of interesting and innovative ways<sup>349</sup>- and continue to do so. These are all compelling reasons why the International Framework for Court Excellence is custom built to assist the busiest courts in the country in delivering quality court services that are essential to fulfilling the critical role and functions undertaken by magistrates’ courts around Australia.

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<sup>341</sup> Chief Justice Marilyn Warren “From Evaluation to Improvement: A Judge’s Perspective” (2014) 4(5) *Onati Socio- Legal Series* 953, 963.

<sup>342</sup> The Hon Justice Peter Murphy “International Framework for Court Excellence: Six Years On”, paper presented at the International Conference for Court Excellence ‘Judiciary of the future’, 25 – 27 September 2016.

<sup>343</sup> Chief Justice Marilyn Warren n 341, 961

<sup>344</sup> Judge Doogue n 235 1..

<sup>345</sup> The International Consortium for Court Excellence Brochure which can be accessed at [www.courtexcellence.com](http://www.courtexcellence.com)

<sup>346</sup> See above p 29.

<sup>347</sup> See above p 29.

<sup>348</sup> See above p 30.

<sup>349</sup> See above p 30.



