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**COMMONWEALTH
JUDICIAL
JOURNAL**

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EDITORIAL

Next year, 2018, will mark the 20th anniversary of the Commonwealth Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence and the 15th anniversary of the Commonwealth (Latimer House) Principles on the Accountability and Relationship between the three branches of government which were endorsed by Commonwealth Heads of Government at their meeting in Abuja in 2003. These instruments have formed an integral part of the Commonwealth fundamental values since 2005 and the Commonwealth Charter since 2013.

The CMJA has acted as the catalyst for the advancement of the Principles and subsequent Plans of Action (Nairobi 2005 and Edinburgh 2008) in an effort to ensure that the Principles are implemented across the Commonwealth. It continues to play an important role as the Secretariat of the Latimer House Working Group which monitors the implementation across the Commonwealth and has been involved in a number of projects to advance and develop the Principles. The Working Group is composed of representatives from the Commonwealth Lawyers Association (CLA), Commonwealth Legal Education Association (CLEA), Commonwealth Parliamentary Association (CPA) and the CMJA as well as the Rule of Law Section of the Commonwealth Secretariat).

Dr Karen Brewer, CMJA Secretary General, Dr Peter Slinn, CLEA Vice-President, and His Hon. Keith Hollis, former CMJA Director of Programmes, and members of the CJJ Editorial Board, were instrumental in the drafting of a Toolkit commissioned by the Commonwealth Secretariat with a view to enhancing and strengthening accountability and the relationship between the three branches of government and to encourage better understanding and respect through dialogue. The Toolkit was completed in 2015 and was launched in August 2017 by the Commonwealth Secretary General in London. The Principles were widely acclaimed during the Commonwealth Law Ministers Meeting in the Bahamas in October 2017 and it is hoped that the Toolkit will be rolled out soon by the Commonwealth Secretariat.

Although several years have passed since the Latimer House Principles were adopted, their relevance particularly with respect to the issue of accountability and relationship between the three branches of government, remains as timely as ever. This is in view of the various strains and pressures that judiciaries, both within and outside the Commonwealth, have been under in recent years.

In Kenya, after the Supreme Court ruled that the August 2017 presidential elections had been “invalid, null and void” – a ruling which was described as unprecedented in Africa – members of the judiciary reported threats and intimidation against the Supreme Court. According to one report in the *NewStatesman* (“The judges who defied the president: why Kenya’s election is being rerun”, 12 October 2017), although the incumbent, President Uhuru Kenyatta, pledged to abide by the Supreme Court’s decision and stand for re-election, he denounced the judiciary. Hours after Chief Justice David Maraga read the ruling, Kenyatta called the judges a bunch of wakora (“crooks” in Kiswahili) during an impromptu speech. He promised to “fix” the courts and accused them of “a judicial coup” subverting the will of the people. *Deutsche Welle* further reported that senior political leaders in Kenya threatened the judiciary promising to cut it to size and teach judges a lesson (“Political tension grips Kenya after Supreme Court backs Kenyatta win”, 21 November 2017). This sort of rhetoric may serve to engender a climate of intimidation which severely inhibits the judiciary from undertaking its role.

There are, unfortunately, several other cases of strains on the judiciary in recent years also from outside the Commonwealth. In the United States, President Donald Trump’s oblique threats to the judiciary, in the context of the travel ban to the US, are well known. In a series of tweets, he stated “If these judges wanted to help the court in terms of respect for the court, they’d do what they should be doing,” stating “It’s so sad.” He added: “I don’t ever want to call a court biased, so I won’t call it biased. But courts seem to be so political, and it would be so great for our

justice system if they would read [the law] and do what's right." According to the Washington Post, Trump suggested to the judges of the US Court of Appeals for the 9th Circuit that they would marginalize themselves politically if they decide the wrong way ("Trump is not-so-subtly threatening the judicial system, and even his Supreme Court nominee is upset", 8 February 2017).

In Poland, the government introduced a series of profound changes to the rules governing the functioning of the Constitutional Tribunal, the highest court in Poland, which make it possible for the government to remove judges, set a minimum quorum of 13, change the definition of a majority needed for a verdict from half to two-thirds of judges and take away the Tribunal's ability to choose cases. Subsequently, the Polish government refused to publish a ruling of the Constitutional Tribunal of March 2016, which declared these rule changes to be unconstitutional, effectively stymieing the legal effect of this ruling. According to a report of the Venice Commission, a body of legal experts within the Council of Europe, these changes endanger "not only the rule of law, but also the functioning of the democratic system" in Poland ("On Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland", 11-12 March 2016).

The above cases show that modern judiciaries continue to face severe threats and challenges, and underscore the continued relevance of the the Latimer House Principles on the importance of accountability and the relationship between the three branches of government.

Our readers are reminded to register for the CMJA 18th Triannual Conference in Brisbane, Australia, with the theme of "Becoming

Stronger Together", 9-14 September 2018. Please visit www.cmja.biz for more details. The Commonwealth Heads of Government Meeting (CHOGM) will also be organised in 2018, with the theme of "Towards a Common Future".

This issue opens with a tribute to the lives of Chief Justice Kipling Ernest Douglas and Chief Justice Robin Rhodes Millhouse. LexisNexis have kindly given us permission to reproduce a reflection by Michael Kirby on the *Law Reports of the Commonwealth Foundation General Editors (1985-2016)*: James S. Read and Peter E. Slinn. In *Quality of Justice – Myth or Reality*, William Young explores a series of connected ideas about the quality of justice. Subsequently, in *Social Media: A Judicial Survival Guide*, Barry Clarke provides a detailed insight into the way technology and social media are transforming all aspects of life and the impact of these changes on the judiciary. John Lowndes examines new and emerging forms of judicial accountability in his article on *Judicial Accountability as an Evolving and Fluid Concept*. Finally, Keith Hollis provides a brief note on the interest and value of legal blogs in *A Note on Blogging*.

The Journal has collaborated with LexisNexis to publish two cases from the Law Reports of the Commonwealth (LRC). There are *Bar Association of Belize v Attorney General*, which concerns, *inter alia*, appointment and re-appointment of Justices of Appeal, and *Law Society of Botswana and Another v President and Others*, which relates to the binding nature of the advice of Judicial Service Commission. These reports have been reproduced by permission of RELX (UK) Limited, trading as LexisNexis.

OBITUARY

Chief Justice Kipling Ernest Douglas, 1930 - 2017

We are saddened at the passing of our colleague and friend Kipling Douglas. We wish to take a moment, publicly, to pay a tribute in recognition especially of his service to the Cayman Islands. Justice Douglas lived a long and admirably fruitful and productive life.

He started professional life as a civil servant in Jamaica where he worked for three years before going to England in 1951 to study journalism. He worked in England until 1954 when he returned to Jamaica where he worked with the *Daily Gleaner* until 1956. He then next served as editor of the *West Indian Law Magazine* and as assistant News Editor at *Radio Jamaica*.

He returned to England in 1957 and while working at the London County Council he studied Latin which was in those days a requirement for matriculation to study law. He registered at Middle Temple in 1960 to study law and was called to the bar there in 1963.

He had by that time been married to his wife Leslie for some four years and they, and their first child Mark, returned to Jamaica in 1964 where lawyer Douglas entered private practice.

Over the course of the ensuing twenty years, he practiced law in Jamaica and became Resident Magistrate for a number of parishes, most latterly, the Resident Magistrate for Hanover, based in the parish capital Lucea.

He is most fondly remembered there by the nick name “clip-wing Douglas” for the sharp but firm and appropriate sentences he imposed, frequently accompanied by wise and witty words of advice.

On 1 May 1983, he was appointed Magistrate of the Summary Court in the Cayman Islands and in 1988 he was appointed as the Islands’ first Chief Magistrate.

While in that post he was appointed from time to time to act as a judge of the Grand Court and on occasion as Acting Chief Justice, in the absence of then Chief Justice, Sir John Summerfield.

In 1993 Justice Douglas was appointed Chief Justice of the Turks and Caicos Islands in which post he served for three years until retirement in 1996.



But as a consummate lawyer and judge, he was not given to full retirement and so from time to time accepted appointments as acting judge of the Grand Court until 2004 when he finally left judicial life to accept appointment as legal advisor to the newly established Financial Reporting Authority, within the Attorney General’s Office.

As a final crowning achievement of a long and distinguished career, a legal report carried this caption about Justice Douglas in June 2011: “Legal Heavyweight Leads New Cayman Firm”.

It announced his appointment with attorney Janet Francis to head SmeetsLaw (Cayman), a member of the GCA Smeets Law Network, which was then made up of independently-run firms in the Caribbean, Latin America and Europe.

Notwithstanding his many successes as a lawyer and his lasting contributions as a Magistrate and Judge, Kipling Douglas is reported as saying that his crowning achievement within the legal fraternity was his election to the Executive Council of the *Commonwealth Magistrates’ and Judges’ Association*(CMJA) in 1985, where he served until 2016, firstly as Regional Vice President and then as President from 1994-1997. He was then in 1997, as Honorary Life Vice President.

Justice Douglas’ judicial career is possibly best encapsulated in his own words penned in his book “*The Courtroom, the Poor Man’s Theatre*” in which he shares a collection of anecdotes spanning his 37 years in the courtroom.

Still many others will remember him for his elegant and informative travel articles which he published from time to time in the local press.

Among his colleagues and friends within the judiciary and legal fraternity of the Cayman Islands, Justice Douglas will always be remembered most fondly for his insightfulness, his wonderful wit and sense of humour and all in all, as a very fine gentleman.

Our condolences go out to his wife Leslie, his children Mark and Elizabeth, grandchildren, his brother Lawson and extended family. May his soul rest in peace.

Kipling Ernest Douglas passed away in Jamaica Sunday at the age of 86.

The Chief Justice of the Cayman Islands
The Honourable Chief Justice Anthony
Smellie Q.C.

Chief Justice Robin Rhodes Millhouse, 1929 - 2017

Robin was born in 1929 in Adelaide, South Australia. He died in April 2017 aged 87. He was the son of Supreme Court Judge Vivian Rhodes Millhouse. In the Citizen's Military Force he reached the rank of Major and was commanding officer of the University Regiment. He served with the Army in the Vietnam War. Although he followed his father into the law and completed his LLB in 1951, becoming a barrister soon after, he initially followed a different career path in the law by becoming the Liberal and Country member of Parliament for Mitcham. He was to represent Mitcham for over 27 years firstly as Liberal and Country member then as a part of the Liberal Movement.

He had an extremely successful political career and was described by politicians in South Australia as a reformer, activist and rebel. He was responsible for the introduction of legislation on seatbelts in South Australia amongst other important reforms in relation to prostitution (whilst not agreeing with the practice, he was one of the first to recognise that it was important to introduce legislation on social reforms) and abortion. He was a devout Christian.

He became Attorney General in 1972 and also had responsibility for Aboriginal Affairs, Social Welfare, and Labour and Industry. However most of his political career was spent in opposition. In 1979 he became a Queen's Counsel. In 1982, he resigned from politics to take up an appointment at the Supreme Court of South Australia, a post he held until he retired in 1999. But that was not the end of his judicial career.

In 1999 he took up the post of Chief Justice of Kiribati, a post he held for 13 years, until 2011. He was also Chief Justice of Nauru from 2006-2010. He claimed to be the only Chief Justice to have sat in two separate jurisdictions in the Pacific on the same day. He always said that he enjoyed his time in both jurisdictions but was saddened that his contracts to both were ultimately terminated for political reasons. More recently he served as Judge of the High Court in Tuvalu. He was very concerned that lawyers and judicial officers in the Pacific were not being given sufficient training and he was always trying to encourage them to get further training to ensure the highest of standards of litigation in court.

His association with the Commonwealth was long standing. In 1945, whilst still at school he won second prize in the Royal Commonwealth Society's Essay Competition for his essay on the topic: What was the British part in the suppression of the African slave trade? Whilst in Kiribati he became the unofficial representative of the Royal Commonwealth Society (RCS) there, having renewed his long association with the RCS.

In 2003, he was elected to the CMJA Council and served as Council Member for the Pacific until 2009 when he became Regional Vice President for the Pacific Region, a position he held until 2012. Robin was very much admired by all who served on the Council. He was dedicated to advancing the objectives of the CMJA within his region and represented the CMJA at a number of fora within the region. He became a life member of the Association and would regularly contact the

CMJA about developments in the Pacific. He would often come to the office to visit when he came to see his family in London.

In his personal life he was a fitness enthusiast and a talented runner. He was a naturalist too. As a runner, and at the age of 59, he ran the London Marathon in 3 hours and 15 minutes and he was privileged to carry the Queen's Baton for the Commonwealth Games

in two occasions; in Melbourne in 2006 and in Kiribati in 2010. He was a cycling enthusiast, often riding to court and back on his bike.

We send our condolences to his three daughters and two sons.

Dr Karen Brewer
CMJA Secretary General

I was very sad to hear the news of Robin and Kipling's deaths, although in both cases the news was not entirely unexpected. In their very different ways Robin and Kipling were staunch supporters of the Commonwealth Magistrates' and Judges' Association, and great judges, dedicated to promoting the rule of law and judicial independence in the various jurisdictions in which they sat. They regularly attended and contributed to CMJA meetings, often at significant personal expense.

They were both "island" men; in Kipling's case by birth and history, in Robin's case by adoption following his first judicial retirement and move to be Chief Justice in Kiribati, an island nation which he became very fond of. They were both very kind and supportive to me personally during my period as Director of Studies (and latterly Director of Programmes) for the C.M.J.A., with much helpful advice and guidance. Their contributions to our conferences were always witty and enlightening. I well remember the beginning of a paper

on environmental law that I had persuaded Robin to give, which started with the words "I know nothing about environmental law", but continued with a moving description of environmental degradation on the Pacific Islands, and a considered assessment of what the law, both national and international, could and should do to help. In Kipling's case I can recall a number of quite tense moments at Council meetings, simply diffused by a joke from Kipling's great store, and told with his easy humour.

The jurisdictions they served were small in population, but they were nations nonetheless and their citizens deserved, and received under their judicial leadership, fair and sympathetic justice. They remain a great example of dedication and professionalism to their successors.

H.H.Keith Hollis.
CMJA Honorary Life Member

THE CMJA WISHES TO REMIND YOU THAT...

The next **REGIONAL MEETINGS** for the Election of Regional Council Members will take place at the Brisbane Conference Centre during the CMJA Conference on 11 September 2018

The **CMJA GENERAL ASSEMBLY** will take place on on 13 September 2018

Further details will be circulated in due course.

LAW REPORTS OF THE COMMONWEALTH FOUNDATION GENERAL EDITORS (1985-2016): JAMES S. READ AND PETER E. SLINN

His Honour Judge Michael Kirby AC CMG. Former Justice of the High Court of Australia and President of the Court of Appeal of Solomon Islands. Reproduced by permission of RELX (UK) Limited, trading as LexisNexis.

Abstract: *The Law Reports of the Commonwealth (LRC) were designed to bring, inter alia, local decisions to the scrutiny of a global audience. In this way, they were hoped to contribute to the maintenance of judicial integrity and independence as vital features of Commonwealth countries. And to remind judges in each of them that they would be subject to the scrutiny of colleagues in other lands who would study their reasoning and evaluate it for its honesty, candour, logic and persuasiveness. This note provides an overview of the LRC and a tribute to the foundation General Editors of this series, Professor James Read and Dr Peter Slinn, who relinquished their appointments in December 2016.*

Keywords: Law Reports of the Commonwealth – comparative law – Commonwealth judiciaries – scrutiny

The foundation General Editors of this series, Professor James Read and Dr Peter Slinn, relinquished their appointments in December 2016 after editing 138 volumes over 32 years. This note records and celebrates their achievement.

The dream of a global system of harmonious public and private law was realised in part, in the heyday of the British Empire, by the decisions of the Judicial Committee of the Privy Council. The reports of that distinguished court and other works such as the *English and Empire Digest* (1919) gave readers an insight into the commonalities and differences arising in nearly 70 national and sub-national jurisdictions of the British Empire, sharing many common approaches to the law and judicial reasoning. However, by 1985, most of the newly independent countries of the Commonwealth of Nations had terminated judicial appeals to Her Majesty in Council. The desirability of retaining a contemporaneous record of important judicial decisions on shared problems and common themes became obvious.

To turn this new dream into reality required a rare

initiative to get the project underway.

The idea of the *Law Reports of the Commonwealth* ('LRC') was first raised in Nairobi, Kenya in a chance meeting between Mr Kevin Cassidy (then Marketing Director of Professional Books Limited) and James Read (then Professor of Comparative Public Law at the School of Oriental and African Studies ('SOAS'), University of London and a barrister of Gray's Inn). Out of their conversation, the LRC series emerged. Its first volume was published in 1985. By then, Dr Peter Slinn, a solicitor of England and Wales and colleague of Professor Read at SOAS, was added to form the duumvirate of General Editors. Astonishingly, this team continued to edit the series, to a very high standard of excellence, for more than three decades.

The first volume contained a foreword by the then Commonwealth Secretary-General, Mr (later Sir) Shridath Ramphal QC. At the seventh Commonwealth Law Conference in Hong Kong in 1983, he had praised the 'special richness of our contemporary Commonwealth jurisprudence'. In his foreword to volume 1, he called the LRC series 'a remarkable initiative in the area of comparative law'. It was also a reflection of the way, in the law, that the Commonwealth of Nations operated by freely sharing legal concepts and judicial reasoning—no longer demanding obedience, simply persuasion and utility. From the start, the series placed a premium on 'fearless advocacy in vindication of fundamental rights and freedoms' (see [1985] LRC (Const)). By sharing decisions, the nations of the Commonwealth would continue to draw on common themes in a context of abundant legal variety.

Writing their 'Editorial Introduction' in that first volume in 1985, Read and Slinn acknowledged that their enterprise was 'ambitious and daunting'. They took as their criteria for publication whether a case dealt with issues of general comparative interest; whether it derived from tribunals of high status in the respective Commonwealth court

systems; whether it was likely that the case would be reported quickly elsewhere in a widely available form; whether it was likely to have significance beyond a purely local audience; and whether the mix in each volume would afford a 'broad range of subject matter without an over-preoccupation with [particular] categories'.

A manifest purpose of the General Editors was to preserve the best of the high tradition of the past. Although there were doubtless many faults in the judiciary of the imperial era, the ideal of hard working, politically neutral, uncorrupted and skilled professional judges was an important legacy of that time. The LRC was designed to contribute to the continuance of the best of that legacy. By bringing local decisions to the scrutiny of a global audience, it was hoped to contribute to the maintenance of judicial integrity and independence as vital features of Commonwealth countries. And to remind judges in each of them that they would be subject to the scrutiny of colleagues in other lands who would study their reasoning and evaluate it for its honesty, candour, logic and persuasiveness.

By contributing so long to the LRC series, and later supplementing the series with the *Editorial Reviews* that summarised the chief themes of each year of the reports, Read and Slinn made a remarkable contribution to law in the Commonwealth of Nations. But also to the rule of law globally, which is the underlying postulate of the series as it has developed. At the outset, the LRC, with the strong support of the then Director of the Legal Division of the Commonwealth Secretariat (the late Jeremy Pope of New Zealand), a small editorial committee was created. I was then serving as President of the New South Wales Court of Appeal in Australia. I had the honour to be appointed as a consultant. In 1988 Butterworths Limited (now LexisNexis) acquired Professional Books and the estimable Kevin Cassidy. The preparation of draft notes, for revision by the General Editors, enhanced the production schedule. A managing editor, James Neville, brought skilful and dedicated energy to support the General Editors. He too deserves acknowledgement. Over the past 20 years, meetings of the Editorial Committee were held in London.

Originally, the series had been divided into three thematic volumes, reporting cases respectively in the fields of constitutional and administrative

law; commercial law; and criminal law: each with a brief introduction by the General Editors. In 1993, a new format was adopted. Each year four (subsequently increased in 2000 to five) volumes were published, no longer differentiated by topic but substantially by the date of judgment. Busy judges and lawyers throughout the Commonwealth of Nations, who could not read every decision in the series, were afforded *Editorial Reviews*, brilliant summaries that described the big and important cases; the emerging trends; and the common themes arising in several jurisdictions: assisted sometimes by the cross-pollination of ideas published in the LRC. Whilst the *Editorial Reviews* have now been discontinued, the LRC volumes continue to shine a light on common issues across the Commonwealth, providing ample material for further academic, and indeed judicial, discussion.

Possibly because of the earlier special engagement of Professor Read and Dr Slinn with several Commonwealth countries in Africa, the series became particularly popular in that continent. At a time when access to judicial decisions from Australia, Canada, India, Nigeria and the United Kingdom was difficult to come by, the LRC reports ensured the availability of the leading decisions from those jurisdictions. The General Editors also endeavoured to report notable cases from small and developing jurisdictions. The cases from Grenada, Lesotho, Pakistan and Fiji took the reader into the legal challenges that arose following constitutional breakdown. Other cases witnessed the emergence of entirely new legal themes on women's rights, sexual rights and the rights of religious minorities. The series will be a lasting intellectual legacy of James Read and Peter Slinn. Few other instances of legal reporting can boast such longevity and dedication. None contains those qualities in combination with a truly global and intercontinental perspective.

On behalf of the publishers, the readers and users of the LRC series, I express heartfelt thanks for the heroic work of the foundation General Editors. Theirs has been an intellectual labour of great dedication. They helped found and keep alive the ideal of comparative law in the Commonwealth of Nations. They found a market and excellent publishers for their idea. They worked with unyielding devotion to maintain the series. Their optimism and dedication will inspire their successors.

QUALITY OF JUSTICE – MYTH OR REALITY

His Honour Judge William Young KNZM. Judge of the Supreme Court of New Zealand. This article is based on a paper delivered at the Pacific Judicial Conference, Port Moresby, September 2016.

Abstract: *This paper explores a series of connected ideas about the quality of justice, how it is perceived by others, including those on the receiving end, the significance of such perceptions and how quality improvements (including the dispelling of myths, particularly on the part of judges) can be, and have been, made. It is written primarily by reference to New Zealand.*

Keywords: Judicial reputation – Judicial training – witness credibility – juries – changes in judicial behaviour

“O wad some Pow’r the giftie gie us to see
oursels as others see us!”

Robert Burns

Judicial reputation – general comments

Nuno Garoupa and Tom Ginsburg in their recent book, *Judicial Reputation*, note:

Reputation ... is particularly important for courts, which famously lack the purse or the sword. Armed only with pens, judges can only be effective if they are persuasive and authoritative to the parties before them, the legal community, and the public as a whole. To be authoritative requires, at bottom, a reputation for good decision making.

I can illustrate the point they are making with a simple example. The courts exist to determine controversies with finality. Assume a defendant is (rightly) found guilty of murder. In a well-respected judicial system, the verdict will, in the absence of an appeal, be accepted by the public as the end of the story. So the quality of the process – whether it achieves its purposes – is not just a function of its accuracy (that is whether the defendant really was guilty) but also how it is perceived. Lord Hewart was making very much the same point in *The King v Sussex Justices ex parte McCarthy* (*The King v Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at 259) when he said:

... it is not merely of some importance but is

of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.

As Garoupa and Ginsburg also make clear, there are feedback loops between justice quality, performance and perception. Without a reasonable measure of public confidence in the courts, there will be unwilling and patchy compliance with court processes. Those with choices will not submit their disputes to the court. A poorly regarded judiciary will be badly remunerated and resourced. Such a judiciary will be difficult to recruit into. Internal morale will be low. Performance will be correspondingly poor. The feedback loops between poor performance and lack of public confidence will result in a vicious cycle from which it may be difficult to break out.

In contradistinction, the greater the public confidence in the courts, the better it is for judges as individuals, the judiciary as an institution and the public. A well-regarded judiciary is likely to be well-resourced and remunerated. Judging will be an attractive career. Judicial morale will be high and the performance of judges will be enhanced by the expectations of both the public and their colleagues. In this instance, the feedback loops create a virtuous cycle.

Litigation tends to be a zero sum game – that is with as many losers as winners. Given this, the best that judges can expect is that the public will regard judicial process as fair and reasonably well-calibrated to produce accurate outcomes and will accept the odd error or wrong decision. To put this another way, “a reputation for good decision making”, to use Garoupa and Ginsburg’s expression, can be achieved in the real world notwithstanding the realities that the possibility of error is the inevitable concomitant of human activity and that perception of error by losing parties is also inevitable.

In the past, judges have been remarkably comfortable about how they are seen by

the public. Lord Hewart in his *Essays and Observations* (1930) recorded that at the Lord Mayor of London's Banquet in 1928 he had said, "My distinguished colleagues ... are not really dissatisfied with the combined affection and admiration in which they are almost universally held." Lord Hewart may have been guilty of some hyperbole. And as will become apparent, it could not be fairly claimed that New Zealand judges today are regarded by the public in quite those terms. I do, however, see public confidence in the New Zealand courts as being at least sufficient in terms of the functionality of the judiciary.

There is some but only limited published material as to public perceptions of the New Zealand court system and judges. Most significantly there was a survey conducted for the Ministry of Justice over seven years commencing in 1999 (Ministry of Justice *Public Perceptions of the New Zealand Court System and Processes* (March 2006)). The questions are attached as "Appendix One". Perceptions as to cost and delay were generally negative but others were favourable in particular in response to questions whether the courts (a) are an important part of the democratic process, (b) provide services for all New Zealanders, (c) are modern in systems and processes, and (d) treat people with respect and are fair. There was also a somewhat broader survey on the operation of the New Zealand justice system which was carried out in 2009 by two academics, Saskia Righarts and Mark Henaghan (Saskia Righarts and Mark Henaghan "Public Perceptions of the New Zealand Court System: An Empirical Approach to Law Reform" (2010) 12 OULR 329). Consistently with the Ministry of Justice survey, the results were generally negative as to cost and delay but favourable as to whether (a) participants would get a fair hearing in a New Zealand court, and (b) judges treat people with respect.

All reflective judges recognise that it is critical to a high quality justice system that those who come before it feel that their case will be dealt with on its merits. Parties are not entitled to insist on a judge of their own ethnicity, religion, gender, sexual orientation, or social class. They are, however, entitled to expect that the Judge (a) will not be adversely affected by stereotypical thinking,

and (b) will make a conscientious effort to see what happened through their eyes and with empathy and imagination. By the 1970s and 1980s, there was widespread recognition that these expectations could not be satisfied by a judiciary which was made up exclusively of white men in late middle age. Since then considerable progress has been made towards a diverse judiciary.

When sitting, New Zealand courts are open to the public. Those who go to court will see judges wearing either business attire or gowns over business attire. There are no wigs except on ceremonial occasions. The courts are reasonably well equipped with computers and audiovisual technology. Evidence is recorded efficiently and at normal speaking speed. There are websites which contain information about the courts and on which some judgments are posted (See "Judicial Decisions of Public Interest" Courts of New Zealand www.courtsofnz.govt.nz). We have some press liaison assistance. There are open days at the courts, so that members of the public can be shown around. We permit television cameras in court with the result that footage of trials and appeals (usually brief snippets only) are shown on television. There may be live streaming in respect of major cases. Judges are not expected to live reclusively and often give papers to sections of the community.

Another factor contributing to the public reputation of the New Zealand judiciary is trial by jury. There are around 2,500 jury trials a year in New Zealand. This means around 30,000 jurors a year serve on juries – around 1% of the adult population – and are exposed to, and participate in, the justice system in a very direct and intense way. While there is scope for criticism of, or at least debate about, the rules which govern the conduct of jury trials, I would be very surprised if there were many jurors who did not see the criminal trial process as fair and impartial.

In light of all of this I think the public perceptions as recorded in the surveys are broadly accurate. In particular New Zealand has a modern court system which treats those who come before the courts fairly and with respect. In this sense, New Zealand justice has a pretty reasonable brand. There are, however, two qualifications which I will mention.

The first is that the levels of public confidence in judges (and in particular levels of distrust) do not warrant complacency. By way of example, a Colmar Brunton survey in which members of the public were asked how much trust they had in various groups, “to do the right thing” produced these results for judges and courts:

- (a) I have complete trust, 7%;
- (b) I have lots of trust, 28%;
- (c) I have some trust, 48%;
- (d) I have little trust, 14%; and
- (e) I have no trust 3%.

Judges and the courts fared worse than medical practitioners, the police, and colleges and schools. And, although judges and courts rated higher than universities, charities, churches, local government, TV/print media and members of parliament, the results fall well short of the almost universal “affection and admiration” claimed by Lord Hewart.

The second relates to limitations in surveys of the kind I have discussed. Opinions of the justice system on direct exposure, as a party, witness or juror, are likely to be more intense than those based on the media or idle chitter chatter with friends and family. This is not captured by general surveys such as that carried out by Colmar Brunton and addressed only to a limited extent in the Ministry of Justice and Righarts and Henaghan surveys. More generally, there is very little focused material available as to the perceptions of court users (or particular groups of court users) regarding judges. One exception is in respect of jurors and I will come to this shortly.

Improving the quality of justice and dispelling myths

Some general comments

In Robert Pirsig’s 1974 work, *Zen and the Art of Motorcycle Maintenance: An Inquiry into Values*, the protagonist narrator is obsessed with quality and very good at motor cycle maintenance. He derives great satisfaction from the rational resolution of mechanical problems. Although the book is not an easy read, it contains some great passages, for instance, this one:

Other people can talk about how to expand

the destiny of mankind. I just want to talk about how to fix a motorcycle. I think that what I have to say has more lasting value.

To paraphrase Pirsig, I think that talking about “how to” conduct a trial and decide cases provides “more lasting value” to the quality of justice than talking about the judicial equivalent of “how to expand the destiny of mankind”. So what I like very much about this conference is its “how to” focus.

Assuming a basic level of judicial competence, it is as easy to decide a case well as to decide it badly. From the point of view of the individual judge, deciding cases well does not require more resources or awkward decisions about judicial priorities. It is elementary that the best way of achieving and maintaining “a reputation for good decision-making” is to be good at decision-making. So it seems to me that a first priority in terms of improving judicial quality is improving the decision making of judges.

Judges by training and experience are inclined to follow precedent and established practice. More generally, judges do not face much risk of scrutiny based on subsequent adverse events analogous to that faced by engineers whose bridges fail and doctors whose patients die. New Zealand judges are recruited from the legal profession in middle age. Their professional backgrounds generally provide confidence in their ability and willingness to do the job. Judicial conduct which falls below accepted standards can be addressed by heads of bench or on appeal. But while aberrant behaviour can be addressed, it is not easy for heads of bench to insist on change. And the same is true of appellate courts whose ability to promote change is limited by, amongst other things, perceptions as to the proper role of such courts.

The combined effect of these factors, and perhaps others, is to create a risk of judicial complacency and in particular a tendency towards, and toleration of, sub-optimal practice.

Despite the difficulties, it is possible to produce changes in the way in which judges deal with cases. This can be addressed systematically on a whole of judiciary (or whole of court)

basis. The International Framework for Court Excellence provides a model for this. The Pacific Judicial Strengthening Initiative represents another and complementary model for Pacific jurisdictions. Each is the subject of later sessions at this conference. So rather than cover the same ground now, I propose to discuss something rather different: targeted improvement involving the identification and remedying of particular problems by those who are in a position to do so. By way of illustration of this, I will refer to three changes in judicial practice which have occurred in New Zealand over the last 15 years or so. Judicial education and training has played a supporting, although not really an initiating, role in all of them and so, before I come to the three changes in question, a comment on judicial education and training is appropriate.

Judicial education and training

Formal judicial education and training in New Zealand started in 1988 when the office of the Chief District Court Judge established an orientation course for new District Court Judges. Newly appointed High Court and other judges began to participate in this programme in the 1990s. A key feature of this programme which enhanced its acceptability to judges was that it was judicially led. The success of the orientation programme resulted in pressure for a more systematic approach to judicial education and the establishment in 1998 of the judiciary-wide Institute of Judicial Studies.

There have been many judicial sensitivities which have had to be addressed. But over the last 18 years – that is since the Institute was established – the judiciary as a whole has become far more accepting of the appropriateness of judicial education and far less challenged by the idea of judicial training. Indeed, many of the programmes contain a substantial element of training – for instance involving learning by doing and being critiqued. There are still some judges who are very sensitive to processes which involve their efforts being critiqued by others but my impression is that they are now distinctly in the minority; indeed what I think is an increasingly small minority.

I have attached a copy of the current curriculum to provide an indication of the way in which

the Institute operates (Appendix Two).

Changes in judicial behaviour: example one, demeanour-based credibility assessments

In an English case from the 1970s (which is when I started my professional career), the presiding magistrate in giving reasons for a decision to convict the defendant was candid enough to say this:

Quite the most unpleasant cases that we have to deal with are those where the evidence is a direct conflict between a police officer and a member of the public. My principle in such cases has always been to believe the evidence of the police officer and therefore we find the charge proved (*R v Bingham JJ ex p Jowitt* (1974) *The Times* 3 July).

Many of the stipendiary magistrates before whom I appeared seemed to operate on the basis of the same “principle”, albeit that they tended to express their conclusion in terms of a general credibility assessment along the lines of: “Having seen and heard the evidence of the police officer and the defendant, I unhesitatingly accept the evidence of the former and reject the evidence of the latter”. This practice was conclusory and in particular did not convey to the losing party, in a meaningful way, the actual reasons why he or she had lost the case. It was also objectionable as founded on a myth – that is, that it is possible for an experienced judge or magistrate to make reliable credibility assessments based on demeanour.

Reservations about demeanour-based credibility assessments are not recent. More than 90 years ago, Atkins LJ commented in *The Palitana (Société d’Avances Commerciales (Société Anonyme Egyptienne) v Merchants’ Marine Insurance Co (The Palitana)* (1924) 20 Lloyd’s Rep 140 at 152):

... the existence of the lynx-eyed Judge who is capable at a glance of ascertaining whether a witness is telling the truth or not is more common in works of fiction than in fact on the Bench, and for my part, I think that an ounce of intrinsic merit or demerit in the evidence, that is to say the value of the comparison of the evidence with the known facts, is worth pounds of demeanour.

Given the force of these observations, I see the willingness of trial judges to decide cases by reference to demeanour and the tolerance of this practice by appellate courts as indicating the tendency towards complacency to which I have referred. When I was appointed to the bench in 1997, more than 70 years after the *Palitana* was decided, the prevailing – although not universal – view of my colleagues was that a judgment which rested on a generally expressed demeanour-based assessment was adequately supported by reasons. Indeed in 2000, I was criticised by the Court of Appeal for telling a jury that “demeanour-based credibility assessments are very difficult to make and are not particularly reliable”. The Court noted that what I said was “contrary to the orthodox direction usually given to juries on this topic” (*R v Tongontongo* CA313/00, 20 September 2000 at [21]).

Since then there has been a sea-change in judicial thinking. This was substantially contributed to by two articles in 2006 by Australian judges, Peter McClellan and David Ipp. It has been reinforced in New Zealand by an influential article by a former Judge, Robert Fisher QC. Criminal barristers are well-aware of the background research. It is now simply not tenable for judges to ignore the evidence. Current practice (albeit primarily with respect to jury trials) is reviewed in the very recent decision of the New Zealand Supreme Court in *Taniwha v R* (*Taniwha v R* [2016] NZSC 121).

There is not much point telling judges what not to do unless they are also told what they should do. Significantly to my way of thinking, good practice has been reinforced by the programmes run by the Institute of Judicial Studies.

Changes in judicial behaviour: example two, jury directions

There has never been any mystery about how judges should sum up to juries. As to the law, the position was succinctly explained by Professor Edward Griew many years ago (Edward Griew “Summing up the Law” [1989] Crim LR 768 at 779):

It should be the function of the Judge to protect the jury from the law rather than to direct them on it. The Judge does in practice

typically tell the jury that the law is for him and facts are for them. This should become more profoundly true than it now is. A brief statement of the law will be unavoidable if the case is to be intelligible. But what is said should not be by way of formal instruction. When it comes to instructing the jury on their task, the job of the Judge should be to filter out the law. He should simply identify for the jury the facts which, if found by them, will render the defendant guilty according to the law of the offence charged and of any available defence.

And as to the facts, it is difficult to do better than Lord Devlin in *Trial by Jury*:

All the material which gets into the ring that is kept by the rules of evidence is not of course of equal value, and the task of counsel and then of the judge is to select and arrange. In discharging this task counsel can be helpful but not disinterested and the jury must look chiefly to the judge for direction on the facts as well as the law. It is his duty to remind them of the evidence, marshal the facts and provide them, so to speak with the agenda for their discussions. By this process there emerges at the end of the case one or more broad questions – jury questions – which have to be decided in the light of common sense.

Despite the clarity of the advice and the simplicity of putting it into practice, judges conducting jury trials in New Zealand had, by the late 1990s, developed some very bad habits. Their primary focus was the avoidance of the sort of error which might result in an appeal being allowed. Judges would often put together a summing up on a cut and paste basis using precedents which were necessarily in general terms. The practical assistance offered to jurors which was specific to the case at hand usually did not go much beyond repetition of the closing addresses of counsel. Appeal-shy judges who treated the Court of Appeal as their primary audience paid next to no attention to what the jurors would make of what was said. There was no inquiry into whether juries could remember the detail of evidence given orally. Transcripts of evidence were never provided. What happened in jury rooms and particularly during deliberations was very much a no go area. There was a general sense that inquiry into jury processes would open a Pandora’s Box.

Justice Marcia Neave of the Court of Appeal of Victoria recently gave a paper to the Supreme and Federal Court Judges Conference provocatively titled “Jury Directions in Criminal Trials – Legal Fiction of the Power of Magical Thinking”. The expression “magical thinking” seems to me to aptly describe the absence of a rational evidence-based underpinning for the way in which New Zealand judges used to sum up. I would like to think, however, that by the time Justice Neave gave her paper, “magical thinking” was no longer an accurate summary of the position in New Zealand.

In 1999 Professor Warren Young and others published “Jury Trials In New Zealand - A Survey Of Jurors”. This was based on research they had carried out into 49 jury trials, research which had been supported by the Chief Justice and the Chief District Court Judge. Unsurprisingly, this report recorded that contemporary jury trial management was not well-suited to the needs of jurors.

By way of example only, the report noted that juries sometimes struggled to recall the evidence. Most of jurors interviewed during the research project had taken some notes during the trial. The jurors who were interviewed sometimes mistrusted the accuracy or completeness of the notes taken by other jurors. These concerns were not misplaced because the researchers recorded that some of the notes made by jurors were indeed inaccurate. The response of the judiciary to this problem has been to provide transcripts of the evidence to juries, a simple and commonsense element of trial management, but one which had not been deployed prior to the publication of the report.

More generally Professor Young’s research encouraged judges to look at trial practice from the perspective of jurors. This has resulted in the adoption of a jurycentred approach to the judicial management of trials and, in particular, considerable change in practice as to the ways in which judges sum up. The details of all of this are beside the point for the purposes of this paper – particularly as jury trial is not a feature of a number of Pacific Island jurisdictions. But what may be more interesting is how this change of practice occurred. This involved a number of steps.

The first was a result of what might be called bottom-up change, that is the adoption by trial judges of new methods of trial management, by way of examples, providing juries with transcripts, issues sheets, questions trails and the like.

The second was an acceptance by the Court of Appeal of these innovations, an acceptance which was manifested only by the dismissal of appeals in which complaints were made about such innovations.

The third was that the Court of Appeal began to insist on trial judges summing up in accordance with best practice. Those who did not would be criticised. Since Court of Appeal judgments always identify the name of the trial judge, there was an element of naming and shaming in this.

The fourth was proselytising by Court of Appeal judges to slow-to-convert trial judges. These conversion exercises were carried out at conferences and seminars.

The fifth (overlapping with the fourth because of the participation of Court of Appeal judges) was via judicial education and the Institute of Judicial Studies.

Changes in judicial behaviour: example three, structured sentencing

One of the topics for later discussion at this conference is sentencing consistency. I support promoting consistency of sentencing and, to this end, requiring sentencing judges to use a structured sentencing methodology which results in a reasonable measure of consistency. I favour this for two reasons. The first is that inconsistent sentencing is unfair to defendants and is seen to be unfair by the public. The second is more pragmatic: the more predictable sentencing outcomes are for defendants and their lawyers, the more guilty pleas there will be, particularly so where defendants and their lawyers can be confident that pleas of guilty will receive tangible recognition in sentence discounts.

I accept that there is scope for different views. In particular, I am inclined to accept that the use of structured sentencing methodology to achieve consistency may have the tendency to

increase the length of prison sentences. I also accept that substantial discounts for guilty pleas are functionally the same as substantial sentence uplifts for those who plead not guilty. Such discounts thus put considerable pressure on defendants to plead guilty. Finally, there is a related set of arguments along the lines that structured sentencing methodology is unduly constraining of judicial discretion and that it lies outside the proper role of an appellate court to develop and insist upon compliance with prescriptive rules around such a methodology. There are thus, as I accept, arguments in favour of what my Australian friends may call “instinctive synthesis” (See, The Hon Justice Grant Hammond “Sentencing: Intuitive Synthesis or Structured Discretion?” [2007] NZ L Rev 211).

What I call structured sentencing was explained by the Court of Appeal in *R v AM* in this way (*R v AM* [2010] NZCA 114, [2010] 2 NZLR 750 at [14]):

... the sentencing judge’s first step is to identify a starting point sentence which appropriately reflects the intrinsic seriousness of the offending. This “starting point” sentence is, at the next step, adjusted up or down to reflect circumstances which are personal to the offender More recently there has been something of a development of the ... methodology in cases where there have been guilty pleas or assistance to the authorities. It is now seen as best practice to arrive at a provisional sentence which reflects all factors other than the guilty plea and/or assistance to the authorities, and then, in a third step, discount that provisional sentence to allow for those factors.

There are thus three stages. The first is the identification of the starting point which captures the intrinsic seriousness of the offending. This is often arrived at by reference to what used to be called “tariff cases” and are now more commonly described as guideline judgments. The second step is to adjust the starting point to reflect all factors relevant to the offender (other than a plea or assistance to the authorities). The provisional sentence thus arrived at can then be adjusted, if necessary, to allow for a guilty plea or assistance to authorities; any such adjustment being the third stage of the process.

The idea of sentencing by reference to a tariff is not new. The second edition of D A Thomas, *Principles of Sentencing*, shows that by the late nineteenth century English judges had agreed upon a “customary scale of punishment” and that this customary scale later came to be “formally but privately stated in an agreed memorandum of the judges of the Queen’s Bench Division in 1901”. R M Jackson in *Enforcing the Law* discusses this memorandum at 234–235 and sets it out in full at 391–399. Jackson further notes at 235 that “[i]t is of considerable historical interest not only in itself but because it is the only occasion on which the judges have sought to agree on what are normal sentences.”

The Court of Criminal Appeal in England and Wales (which was established in 1907) presumably built (albeit not very transparently) on the existing informal system. For instance, in *R v Woodman* the Court observed (*R v Woodman* (1909) 2 Cr App R 67 at 67):

It is one of the advantages of this tribunal that it tends to a standardisation of sentences. Of course, no invariable tariff can ever be fixed, for it is impossible to classify guilt so nicely as to indicate it, even approximately, by the names given to the various crimes. But, with time, it is to be expected that the revision of sentences by this Court will tend to harmonise the views of those who pass them, and so to ensure that varying punishments are not awarded for the same amount of guiltiness.

It is difficult to believe that common room tariffs did not, at least, informally influence sentencing in New Zealand. For instance, through the 1960s and into the early 1970s, three years imprisonment was a very standard sentence for rape.

Professor Ashworth in *Sentencing and Criminal Justice* discusses the history of guideline judgments in England. While the English Court of Criminal Appeal has since its inception issued judgments establishing certain principles of sentencing, it was not until the 1970s that it began issuing sentence appeal judgments containing general guidelines on sentencing for particular offences. These judgments, pioneered by Lawton LJ, are described by Ashworth as setting out:

general parameters for dealing with several variations of a certain type of offence, considering the main aggravating and mitigating factors, and suggesting an appropriate starting point or range of sentences.

No doubt influenced by English developments, the New Zealand Court of Appeal also began to give tariff guidance. So in *R v Pawa* (*R v Pawa* [1978] 2 NZLR 190 (CA)) and *R v Pui* (*R v Pui* [1978] 2 NZLR 193 (CA)), sentences imposed for rape were reduced to bring them into line with “the existing pattern of sentencing for sexual offences” and this after, in the *Pui* case, extensive review of sentencing decisions. Then in *R v Smith* (*R v Smith* [1980] 1 NZLR 412 (CA)) and *R v Dutch* (*R v Dutch* [1981] 1 NZLR 304 (CA)) there were extensive reviews of sentencing decisions in relation to cannabis offending. In *R v Urlich* there was a similar exercise in relation to class A drug offending (*R v Urlich* [1981] 1 NZLR 310 (CA)). These five cases are the first (or at least amongst the first) New Zealand tariff cases. An important feature of these cases, which distinguishes them from more recent decisions, is that the purpose of the exercise, from the point of view of the Court of Appeal, was to work out *existing* sentencing patterns and, having done so, to reinforce them. This involved a bottom-up approach to tariffs and rested on the doubtful assumption that first instance sentencing decisions, if correctly analysed, would provide a basis for consistent sentencing.

There are now a number of guideline judgments which establish in some detail appropriate sentencing bands in relation to particular types of offence. *R v Taueki* which establishes guidelines for sentencing in case of serious violence is an example (*R v Taueki* [2005] 3 NZLR 372 (CA)). These cases all have one feature in common: they involve, to a greater or lesser degree, top-down tariff setting in that the sentencing bands arrived at are not necessarily derived from existing sentencing practice.

Tariff or guideline judgments inform stage one of the structured sentencing methodology, that is the fixing of a starting point sentence. Where there are no relevant judgments, judges can be expected to look to existing sentencing practice when fixing the starting point.

From the particular perspective of the Court of Appeal – which for a number of years was my perspective – consistency, which provides the justification for guideline judgments, would be undermined if adjustments to starting point sentences and, particularly, the methodology by which such adjustments were determined were entirely at large. As well, in relation to discounts for pleas of guilty, it seems to me to be sensible for the sentencing process to operate transparently so as to make it clear to the offender who pleads guilty the difference between the sentence actually imposed and the sentence which would have been imposed if he or she had gone to trial. The upshot was that during the first decade of the present century, the Court of Appeal, came to insist, and with increasing firmness, on the use by sentencing judges of a structured sentencing methodology involving the three steps which I have explained.

The Court of Appeal judgment in *R v Hessel* (dealing with discounts for pleas of guilty) was, as it turned out, a step too far in the direction of prescription (*R v Hessel* [2009] NZCA 450, [2010] 2 NZLR 298). The key determinant of the discount for a plea, as proposed by the Court of Appeal, was timing with a maximum discount of one third being available for a prompt plea. This discount was to encompass all but “exceptional remorse” and was available irrespective of the strength of the prosecution case.

The Supreme Court, on appeal, disagreed with that approach, instead directing sentencing judges to engage in a more flexible and evaluative exercise to produce a discount reflecting all the circumstances in which the plea is entered, including whether it is properly regarded as early or late and, as well, the strength of the Crown case (*Hessel v R* [2010] NZSC 135, [2011] NZLR 697). In the course of its judgment, the Supreme Court observed:

[72] The Court of Appeal’s approach requires the sentencing court first to reach a provisional sentence for the crime, which takes into account the inherent culpability of the offending together with aggravating or mitigating factors relating to the offender’s personal circumstances. These include, where applicable, “extraordinary” remorse. The guilty plea factor is then addressed by applying

a sliding scale reduction to the provisional sentence, fixed principally by reference to when the plea was entered. *For the reasons given in this judgment, we consider that the heavily structured nature of this approach involved an inappropriate departure by the Court of Appeal from the statutory requirement of evaluation of the full circumstances of each individual case.* As well, the particular approach carries the unacceptable risk of pressuring persons to plead guilty to offences charged when they were not guilty.

[73] There is no objection in principle to the application of a reduction in a sentence for a guilty plea once all other relevant matters have been evaluated and a provisional sentence reflecting them has been decided on. Indeed, there are advantages in addressing the guilty plea at this stage of the process (along with any special assistance given by the defendant to the authorities). It will be clear that the defendant is getting credit for the plea and what that credit is. This transparency validates the honesty of the system and provides a degree of predictability which will assist counsel in advising persons charged who have in mind pleading guilty (emphasis added).

There is an ambiguity in the italicised sentence, as to whether it applies to the entire three-stage structured sentencing methodology developed by the Court of Appeal (which the Supreme Court rather awkwardly compressed into two stages), or merely to the “sliding scale reduction” for a plea “fixed principally by reference to when the plea was entered”. The Court of Appeal adopted the latter interpretation in *R v Clifford*, meaning that three stage structured sentencing remains the norm (*R v Clifford* [2011] NZCA 360. Leave to appeal was later declined by the Supreme Court, see *Clifford v R* [2011] NZSC 125.).

Drivers of change

The substantial abandonment of the practice of making demeanour-based credibility assessments seems to me to have been largely result of a judiciary wide acceptance of weight of evidence against the reliability of such assessments.

The other two changes were driven very much by the Court of Appeal which in each case

developed a policy which it then implemented through appeal judgments and participation by its judges in discussions at judicial forums and involvement in judicial education and training in which they sought to persuade trial judges of the merits of the changes and to help them to adapt to the new requirements.

A last word

The passage I cited from *Zen and the Art of Motorcycle Maintenance* was preceded by this:

The place to improve the world is first in one’s own heart and head and hands, and then work outward from there.

Appendix One

Questions from Ministry of Justice *Public Perceptions of the New Zealand Court System and Processes* (March 2006) at 32–33.

1. Courts provide services for all New Zealanders?
2. Courts provide services without unnecessary delay?
3. Court processes treat people with respect?
4. There is a lack of information about the services that the courts provide?
5. Courts are an important part of democratic processes?
6. Court processes are fair?
7. Most people can’t afford to take cases to court?
8. New Zealand has modern court systems and processes?
9. People are not safe in or immediately around court buildings?
10. Most people who have a **fine** can get away with not paying it?
11. Most people who are ordered to pay **reparation** can get away with not paying it (reparation is compensation

the Court has ordered offenders to pay to victims)?

12. Have you been in a court building within the last two years?

Appendix Two

Institute of Judicial Studies Curriculum
Structure - 10 June 2016

IJS Curriculum Structure

A. ROLE OF THE JUDGE

1. Induction

- Judicial induction courses for all of bench and bench-specific

2. The role of the Judge

- Constitutional role of the Judge
- Judicial conduct and ethics
- *The development of the New Zealand judiciary [constitutional/legal history]*
- *When justice fails – miscarriage and injustice*
- *Technology and the delivery of justice*
- *Judicial philosophy in New Zealand law*

3. Special functions/Courts/delivery

- Annual seminars for High, District and special jurisdictions
- Mentoring [*may alter format to takeaway materials rather than face-to-face course*]
- *Judicial education module*

B. CONTEXT

4. Social context

- Tikanga
- Marae visit
- Te Reo intensive
- Te Reo 12 week programme
- New Zealand society trends:
 - *Poverty*
 - *Crime, criminal statistics and corrections*
- Media for Judges
- Cybercrime
- *Family & sexual violence*
- *Mental health issues in the law*

5. Legal context

- Substantive law updates
- Common room sessions
- [*Possible topics: statutory interpretation and regulatory reform; new themes in the law of obligations*]

C. SKILLS AND JUDGE CRAFT

6. Management skills

- Courtroom management and communication
- Leadership
- Settlement conferences
- Unrepresented Litigants
- *Case management*
- *Time management*
- *Complex trial management*

7. Evaluative skills

- Evidence and Procedure
- Assessing Witnesses
- Witnesses: vulnerable; hostile
- Decision-making
- Solution-focused judging
- Accounting evidence
- Forensic evidence
- *Bail and risk assessment*
- *Expert witnesses*
- *Exercising discretion*

8. Delivery skills

- Oral judgments
- Judgment writing
- Summing up
- Communication skills/youth
- *Sentencing and sentencing options*
- *Reasons: philosophy and requirements of decision-making*
- *Appeals and multi-Judge panels*

D. RENEWAL

9. Renewal

- *New tricks : judging in the second decade*

SOCIAL MEDIA: A JUDICIAL SURVIVAL GUIDE

His Honour Judge Barry Clarke, Regional Employment Judge (Wales) and a deputy chair of the Central Arbitration Committee. This article is based on a paper presented at the CMJA Conference, Dar-es-Salaam, September 2017.

Abstract: *If judges are to be modern and diverse, and properly reflective of the societies they serve, they should be familiar with the way technology and social media are transforming all aspects of life. If they choose to be aloof from social media services – an understandable, admirable but increasingly difficult aspiration – they should at least be aware of their influence. If they choose to engage, they should do so with their eyes open and they should proceed with caution, aware of the security risks arising from their digital footprints and with the benefit of guidelines about appropriate online behaviour. Effective judicial training is essential to protect judges and to maintain compliance with ethical standards. Furthermore, they will radically change the nature of what judges do. This article explores the strengths and challenges posed by social media and sets out a number of principles for a judicial code of conduct on social media activity.*

Keywords: Social media – artificial intelligence – judicial code of conduct – security – confidentiality – judicial behaviour

Introduction

When speaking to judges about the impact of social media and the “big data” industry that has grown up alongside it, I often ask them to cast their minds back a decade. In UK popular culture, for example, 2007 was the year that saw the publication of the final Harry Potter book. In that light, 2007 does not seem so very long ago. In technological terms, however, it was a lifetime ago.

In the UK, as 2007 began, few people in the UK had a Facebook account (Facebook had only launched in the UK to those over the age of 13 in September 2006). No one owned an iPhone (Apple launched the first iPhone in the USA in June 2007 and in the UK in November 2007). eBay had been going for just over a year and Twitter about nine months. Online banking and online shopping were in their infancy. If a person wanted to watch television, they turned on their television set. If they wanted to listen to

music, they put on a CD or turned on a radio.

How things have changed. Ten years later, we are living what social scientists Anabel Quan-Haase and Barry Wellman call “hyperconnected” lives. Technology suffuses every aspect of our existence and continues to transform it. We hear phrases like “Web 2.0” and the “Internet of things”. The smartphones in our pockets operate as digital Swiss Army knives. These devices, and the apps on them that we use, have become our window to the wider world: email, GPS navigation systems, taking and sharing of photographs, messaging services, traffic updates, word processors, news consumption and, increasingly, a platform for paying for goods and services. Diagnostic health services are coming. (Occasionally, we even use these devices to make phone calls.) These devices have, at the same time, become our main means of escaping the world: streaming of video and audio content, gaming and internet browsing. They are part of the fabric of daily life. A strong case can be made that they have expanded our knowledge and our horizons and enabled us to make richer connections with wider circles of people.

At the centre of these trends are the innovative companies that enable us to search the world wide web and connect with one another through social media. In doing so, the world is often reflected to us as *we would like it to be*, not as *it is*; witness, for example, the growth of echo chambers and their impact on how we consume and share news of world events. Then again, some might say that there are good reasons to avoid the world as it is. The growth of social media has been accompanied by a coarsening of public debate and an increase in online attacks on public figures including judges.

All these services, and the way we use them, leave lasting digital footprints online for each of us. Those footprints are analysed by advanced algorithms. They are repackaged. They are sold for profit. The organisations that perform these tasks have become known collectively as the “big data” industry. The vast amount of data

that we now broadcast online – sometimes known as a “data exhaust” – gives this industry an unparalleled insight into how we behave, the choices we make and, increasingly, the choices we are *going to make*. It has delivered a mechanism for making predictions about how we will spend our money, the entertainment we will consume, how healthy we will be (and the cost of our insurance) and perhaps even how we will vote.

Yet, if we lose the devices by which we access these services and transmit this data to the world at large, the resulting “fear of missing out” can, for some, negatively influence psychological health.

In summary, when discussing social media, the “pros” and the “cons” are both in abundance. But, whether we think that these trends have been a force for good or not, they cannot be ignored. For several reasons, they are of great importance to holders of judicial office.

Relevance for judges

I noted above that the devices and apps we use are now part of the fabric of daily life. That provides the first, and perhaps most compelling, reason for judges to be interested in these trends. Social media engagement is one of the mechanisms by which marriages, friendships and business relationships form and are broken. Social media platforms offer a rich vein of raw material for the cases we are asked to decide. They have even contributed to an evolution of the language we use. To develop Benjamin Franklin’s famous quotation, the stuff of life is there, which means that the stuff of dispute is there too. This compels us to keep up to date; we must be judges of 2017, not of 2007 or 1997.

The second reason for judges to be interested in these trends is because, in the years to come, they will radically change the nature of what we do. Those who have followed the writings of Richard Susskind will be familiar with his prophecies on how the internet and artificial intelligence will influence the development of the legal profession. Machine learning is already here; its use in assessing the risk involved in legal disputes will only increase. Any judge who doubts this should spend some time browsing the website of the legal analytics company

Lex Machina, the result of a joint venture between Lexis Nexis and the law and computing departments of Stanford University.

However, it is on two other reasons that I shall concentrate. The first concerns the online security of judges. The second concerns their online conduct.

Security

I shall begin this section with a personal anecdote. In face-to-face training that I have delivered on this topic, the part of the session with the most impact is where I demonstrate the ready availability online of sensitive personal data about individual judges.

Using publicly available information from data aggregation websites, which facilitates “jigsaw research”, I can often locate a judge’s home address and year (or precise date) of birth. In one case I obtained the maiden name of a judge’s mother, the names of his wife and daughter and pictures of his extended family; this was a judge who did not use social media at all. In another case I located the school attended by a judge’s children and, in yet another, the park in which a judge ran a 5K race every Saturday morning. This was all done swiftly from the comfort of a desk; 20 years ago, a private detective would have been required. Such are the risks judges now face.

Given the sensitive, confidential and sometimes life-changing nature of the work judges do, they need to learn how to protect themselves. They need to develop wisdom about the way they interact with new technology. They need to educate their friends and family members too, since their use of technology and social media also creates a digital footprint that captures their judicial relatives.

When I started delivering these training sessions in 2012, it was typically the case that about a quarter of those attending owned a smartphone and an even smaller number used social media. Moreover, those who did use social media could be described as “light users”; for example, they might have set up a Facebook account simply to stay in touch with travelling adult children. As we near the end of 2017, the situation has markedly shifted. Now, I find that a large majority owns a smartphone (and

often a tablet as well) and somewhere around two-thirds actively use social media. It will not be long, if we have not arrived there already, when most candidates for judicial office will bring with them a social media history – a digital “baggage”. In addition, the range of social media services being used by judges has increased. The use of Twitter, which can be a popular platform for spreading legal news, is widespread. I am especially interested in the numbers now using Instagram and WhatsApp, since few judges realise that both services are owned by, and share data with, Facebook.

I set out below some suggestions to help judges use technology and social media more wisely. If followed, they will enhance privacy and security, and minimise the chances that a disaffected party can trace a judge to his or her home address. They will reduce, to some extent, the way in which data about judges’ lives as citizens, parents, voters, workers and consumers becomes a tradeable commodity in the “big data” world described above. My suggestions are:

- Find out what information about you is public and remove/amend it where you can. Make every effort to ensure that your home address and telephone number are not online (for example, through holding a company directorship).
- When signing up for online services, enter the minimum amount of authentic information possible. Consider providing a memorably bizarre rather than truthful answer to a security question – for example, that your first pet was called “Do you like pizza?”
- If you don’t use social media, protect yourself by speaking to and educating those who do. If you do use social media, use common sense. Take care of your privacy. Check who can see what you post: friends, friends of friends, everyone? Don’t announce online holiday plans or a house move, except perhaps to a limited circle of trusted contacts. Be careful of the photographs you share. Ask friends not to “tag” you in photographs.
- Consider using a pseudonym as your social media handle.
- Check the default settings of websites and browsers you use. Can you increase the privacy settings? Be wary of signing up to websites using your social media profiles. Turn on two-step verification where it is available.
- Change your passwords regularly. Don’t use the same password for everything. Make sure they are good passwords (a password manager app, like mSecure, will help you remember your passwords and even suggest secure and random new ones).
- Maximise privacy settings on your smartphones. Turn off location services. Don’t allow apps to access all your contacts. Back up your data. Use encryption services. Use anti-virus and anti-spyware software. Keep software up to date, since that is how weaknesses are identified and repaired.
- Be wary of using free public WiFi, which is usually not encrypted, for work use.
- Buy (and use) a shredder for disposing of personal mail.
- Consider using more than one email address. For personal use, consider using an email address that does not contain your name.
- Treat unsolicited text messages and emails warily. Do not reply. Do not open attachments if you are not confident that the source is safe.

These are matters that can and should be emphasised through judicial training. Ultimately, however, the clock cannot be turned back. In the words of Pete Cashmore, the CEO of the digital media website Mashable, “Privacy is dead. And social media holds the smoking gun”.

Conduct

As judges, we are mercifully more likely to be exposed to the crass things said and done online when they are said and done by the parties appearing before us rather than when said and done by judges. Nonetheless, it is worth reflecting for a moment on why people say and do such crass things online. This may make judges approach their cases in a more nuanced

fashion and it may also promote understanding of the impulses that drive risky behaviour. I propose four reasons.

The first reason is that social media communication, like email and text messaging before it, uses a much less formal style. A chatty exchange over email may begin with an informal salutation and end with a light-hearted comment in a way that formal letters or memoranda would never have done. In the context of exchanges on internet bulletin boards, an early form of social media, one judge described this communication as “*rather like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or give and take*”. One might say that less formal conversation is less filtered conversation.

The second reason is that social media communication can exhibit narcissistic or attention-seeking elements, often related to low feelings of self-esteem among those using it. There is a burgeoning field of psychological research into the relationship between social media activity and self-esteem and the tendency of people to project false version of themselves online. Efforts to appear witty, relevant or likeable may prove counterproductive. This is perhaps especially true in the field of sexual offences, where judges would be wise to heed the sage words of the Court of Appeal: “*The complex mixture of motives which impels people, especially young people, to post messages on such sites includes, the court suspects, the desire to attract attention, admiration from peers and to provoke the interest of others in the person posting the material. We suspect that objective truth and the dissemination of factual evidence comes low on the list.*”

The third reason is the ubiquity of devices by which social media content is accessed. A few decades ago, a person’s irritation with a colleague at work might not survive a good night’s sleep – certainly not long enough for them to use a typewriter to prepare a document to be placed on a public message board in the workplace. Nowadays, the ever-present smartphone might mean that a comment is made online in the heat of the moment, perhaps with less awareness of

who might read it, resulting in dismissal. These are devices that we touch an average of 2,617 times a day. Around the world more people have access to a smartphone than a toothbrush or a toilet. The average person responds to a text within 90 seconds (rather than 90 minutes for an email) and many will look at their device within five minutes of waking up.

The fourth reason, connected to the third, is the addictive nature of the devices and the social media apps they contain. It has long been noted that social media services have addictive qualities. Indeed, they were designed to be so, through a “hook” system involving variable reward, just like a slot machine. The red badge for alerts and notifications, for example, was deliberately chosen because it is a trigger colour.

These four reasons combine to form a toxic brew. The opportunities for unfiltered comment are obvious. Judges would do well to bear these features in mind when criticising parties for their online conduct. However, they should take note of them for another purpose: judges are human beings and, therefore, are not immune to the same impulses. Against that backdrop, what guidance can and should be given to judges, particularly those joining the judiciary in 2017 and bringing their digital baggage with them?

Around the world, judicial codes of conduct or statements of judicial ethics draw from the Bangalore Principles, compiled in 2002 by a meeting of chief justices now known as the Judicial Integrity Group. An extensive commentary was produced in 2007. Both documents predate the emergence of social media and the “big data” industry and, at first blush, cast little light on judicial conduct online. That said, potentially problematic behaviours online are simply an extension of potentially problematic behaviours in the real world. For that reason, the Bangalore principles provide a workable platform on which to construct additional guidance.

The six Bangalore values are independence, impartiality, integrity, propriety, equality and, expressed as a single value, competence and diligence. In respect of each value, a principle is expounded followed by examples of its application. For example, the second value of impartiality provides for this principle: “*Impartiality is essential to the proper discharge*

of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.” As an example of its application, we are told that “a judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary”. The third value of integrity provides for this principle: “Integrity is essential to the proper discharge of the judicial office.” We are told that “a judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.”

In the context of online conduct, it is the fourth value – “propriety” – that is most pertinent. The principle says this: “Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.” The examples of its application include the following:

- *As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.*
- *A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge’s court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.*
- *A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.*
- *A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge’s family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.*

It is clear that the highest standards are expected of a judge on and off the bench and, by extension, in respect of his or her digital life. In practice, does this mean that judges should not engage in social media at all? I would suggest not. That would be too onerous and intrusive a requirement. A person becoming a judge in 2017 could no more divest themselves of a social media life than they could divest themselves of the ability to shop or bank online or consume news and entertainment services online. In any case, requiring judges to abandon their digital lives upon appointment might lessen their effectiveness as decision-makers. We should bear in mind, admittedly out of context, the words of Lord Denning: “If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both” (*Packer v Packer* [1953] 2 All ER 127).

A similar sentiment was expressed by an appellate court in Texas, which was asked to decide whether a criminal trial had been unfair because of a Facebook friendship between the judge and the victim’s father (*Youkers v State of Texas*, Court of Appeals (Fifth district of Texas), 05-11-01407-CR). In the course of deciding that the trial was not tainted by the appearance of bias, the court said this:

Allowing judges to use Facebook and other social media is also consistent with the premise that judges do not “forfeit [their] right to associate with [their] friends and acquaintances nor [are they] condemned to live the life of a hermit. In fact, such a regime would ... lessen the effectiveness of the judicial officer.” Comm. on Jud. Ethics, State Bar of Tex., Op. 39 (1978). *Social websites are one way judges can remain active in the community. For example, the ABA has stated, “[s]ocial interactions of all kinds, including [the use of social media websites], can ... prevent [judges] from being thought of as isolated or out of touch.”* ABA Op. 462.

The ruling nonetheless made clear that judges should be mindful of their responsibilities under applicable judicial codes of conduct. In the Texas case, the judge had properly placed on the record the fact that he was friends on Facebook with the victim’s father and that he had received a plea for leniency from him; he treated it as an inappropriate *ex parte* communication.

I am not aware of any judicial code of conduct that explicitly prohibits judges from using social media altogether. Given the difficulty in defining social media activity (would it extend to reviews of products on Amazon, sellers on eBay or hotels on TripAdvisor?) this is not surprising. Our focus should therefore be on the use of social media that is consistent with accepted norms around judicial ethics. I would suggest that the following guidelines to judges can be developed from the Bangalore principles and offer a sound basis for future discussion:

- First and foremost, avoid expressing views online that, were it to become known you hold judicial office, could damage public confidence in your own impartiality or in the impartiality of the judiciary in general.
- Unless running an authorised blog (intended, for example, to demystify the work of the judiciary), do not use your personal social media networks to publicise your appointment or your work as a judge or to identify yourself in a judicial capacity.
- Be wary of “following” or “liking” particular advocacy groups, campaigners or commentators if association with their views could damage public confidence in your impartiality. If you wish to follow certain political commentators, avoid creating your own echo chamber by ensuring a breadth and diversity of views.
- Avoid expressing views that are indicative of prejudgment of an issue of fact or law. Do not comment on actual or pending cases, whether your case or another judge’s case. Do not engage in private exchanges over social media sites or messaging services in respect of such cases. Do not post comments on websites in support of your own decisions.
- Avoid looking up the parties online or engaging in private research in respect of their digital lives; this is an extension of the rule that a judge should not engage in independent investigation of the case. Do not indulge idle curiosity.
- Be circumspect in tone and language and

professional and prudent in respect of all interactions on social media. Consider in respect of each comment or photograph: what might its impact on judicial dignity be? Treat others with dignity and respect too; do not use social media content to trivialise the concerns of others. Behave in a manner that promotes a safe and healthy working environment.

- Consider whether any pre-appointment digital content might damage public confidence in your impartiality. If it does, remove it (it may be necessary to take advice on how to do so).
- Be wary about extending or accepting “friend requests” to and from lawyers or representatives who may appear before you. The risk is that the connection might suggest a degree of leverage that a lawyer has over a judge, in the sense of being in a privileged position to influence the judge. Such an online friendship will not always be a disqualifying factor, but it will be a matter of degree and perception.
- If you have been insulted or abused online, seek advice from senior judicial colleagues. Do not respond directly.

These are again matters that can and should be emphasised through judicial training. The risk otherwise is that judges may face disciplinary action which, in many jurisdictions, is done publicly.

Conclusion

If judges are to be modern and diverse, and properly reflective of the societies they serve, they should be familiar with the way technology and social media are transforming all aspects of life. If they choose to be aloof from social media services – an understandable, admirable but increasingly difficult aspiration – they should at least be aware of their influence. If they choose to engage, they should do so with their eyes open and they should proceed with caution, aware of the security risks arising from their digital footprints and with the benefit of guidelines about appropriate online behaviour. Effective judicial training is essential to protect judges and to maintain compliance with ethical standards.

JUDICIAL ACCOUNTABILITY AS AN EVOLVING AND FLUID CONCEPT

His Honour Chief Judge Dr John Lowndes, CMJA President and Chief Judge of the Local Court (Northern Territory). This article is based on a paper presented at the CMJA Conference, Dar-es-Salaam, September 2017.

Abstract: *This article discusses new and emerging forms of judicial accountability and demonstrates how these forms of accountability are legitimised by a modern model of judicial accountability. As a fluid concept, judicial accountability is evolving in a number of areas, most of which are interrelated, including: (a) accountability for the administration of courts; (b) the societal obligation of the judiciary to engage the community; (c) the duty to improve the quality of justice; (d) the duty to promote and enhance access to equal justice; (e) the duty to enhance the well-being of individuals and the community; and (f) the impact of the concept of sustainable justice on judicial accountability. The article concludes that the judiciary should be held accountable to the public for meeting these obligations in the overall interest of ensuring that the independence of the judiciary as an institution continues to be of worth or value to the public.*

Keywords: accountability – administration of courts – judicial independence – quality of justice – sustainable justice

Judicial accountability has traditionally been viewed as requiring the judiciary to be accountable to the law and its members to conduct themselves according to certain standards – independence, impartiality and integrity – which are designed to enhance public respect for the institution of the judiciary, to uphold public confidence in the administration of justice and to protect the reputation of individual judicial officers and of the judiciary.

However, as observed by the former Chief Justice of the High Court of Australia, the Honourable Murray Gleeson AC, “the concept of accountability is flexible and, in its practical application, varies according to the context in which it is being considered” (Hon Murray Gleeson “Judicial Accountability” (1995) 2 TJR 117). This equally holds true in relation to the concept of judicial accountability.

The concept of judicial accountability is an evolving and fluid concept, the substantive content of which is influenced by societal changes. However, the defining characteristic of judicial accountability is that it is firmly anchored to the principle of judicial independence which ultimately structures and defines the forms and limits of judicial accountability in an ever changing society.

Primarily, the judiciary should be accountable to the extent that is necessary to protect, reinforce and preserve the principle of judicial independence as a core court value, which underpins the ultimate responsibility of the judiciary – that of doing justice according to law. Secondly, it should be accountable to the extent that is necessary to maintain other related core court values – such as equality before the law and access to justice, fairness, impartiality, transparency and timeliness – without which the principle of judicial independence is nothing but a hollow concept, and the judiciary cannot do justice according to law. Thirdly, the judiciary should be accountable to the extent that is necessary to ensure that the principle of judicial independence retains its relevance and value in a modern society, having regard to those values as well as the objectives of the justice system. Finally, but not least, the judiciary should be accountable to the extent that is necessary to ensure that the principle of judicial independence in conjunction with those values and objectives results in an effective judicial system.

The judiciary should be held accountable in all of these respects for the purposes of upholding public confidence in the administration of justice, enhancing public respect for the institution of the judiciary and protecting the reputation of individual judicial officers and of the judiciary. This model of judicial accountability is entirely consistent with the rationale behind the traditional view of judicial accountability.

This paper discusses new and emerging forms of judicial accountability and demonstrates how these forms of accountability are legitimised by this modern model of judicial accountability.

As a fluid concept, judicial accountability is evolving in a number of areas, most of which are interrelated:

- Accountability for the administration of courts;
- The societal obligation of the judiciary to engage the community;
- The duty to improve the quality of justice;
- The duty to promote and enhance access to equal justice;
- The duty to enhance the well-being of individuals and the community; and
- The impact of the concept of sustainable justice on judicial accountability.

Administrative Accountability and the International Framework for Court Excellence

In recent times courts have become increasingly accountable to the public for the administration and organization of the judiciary. This new form of accountability is generally referred to as “administrative accountability”.

As noted by Chief Judge of the District Court of New Zealand, Her Honour Jan- Marie Doogue, the administrative accountability of the judiciary has emerged as a result of a number of factors:

- rapid societal change which has led to all democratic institutions (which includes the judiciary) being subject to increasing scrutiny and to the immense importance to contemporary society of having an independent but modern accountable judiciary;
- the democratic principle that no branch of government should have power without accountability and the concomitant requirement for all power, including the exercise of judicial power, to be responsible and responsive to the community; and
- the need for the judiciary, as the third branch of government, to adapt and respond to the changing demands of the public in an era of unprecedented access to and expectation of information.

However, these factors alone do not justify making the judiciary accountable for the administration and organisation of its courts. It is the nature of the judicial function and the concomitant principle of judicial independence that legitimises the administrative accountability of the judiciary.

As Sir Anthony Mason explained, judicial independence is “a privilege of, and a protection for, the people: it is a fundamental element in our democracy, all the more so now that the citizen’s rights against the state are of greater value than his or her rights against another citizen”. The Hon John Doyle and Chad Jacobi have also highlighted the fact that the members of the judiciary must accept responsibility for the state of the institution of the judiciary and should see themselves as the custodians, rather than the owners of the institution.

It follows that the judiciary, as an institution, is responsible to the public for ensuring that the judicial independence it enjoys “serves and protects the governed” and operates for the benefit of the community that it serves. Judicial power is given by society to an independent judiciary on the assumption that this is beneficial to society.

This is a core aspect of the overarching responsibility of the judiciary for the functioning of the institution and its maintenance.

Judicial independence is indispensable to the performance of the judicial function.

As stated by Campbell and Lee:

The judiciary occupies a very important place in the framework of government. In a society which is regulated by the rule of law, disputants place their faith in the judicial institutions to resolve their conflict.

Disputants place their faith in the judiciary to resolve their conflicts in an independent and impartial manner. They implicitly place their faith in the courts to exercise their independence and impartiality in a way that is beneficial to – and serves the interests of – the community. The judiciary is accountable to the public in this regard.

Furthermore, judicial independence and the administration of justice are connected: as Rafiqui and Solaiman point out, an independent and impartial judiciary is “a means for the administration of justice according to the rule of law”. Accordingly, courts and judges, in the exercise of their independence, are “accountable to the public for the manner in which they administer justice” This is a “form of accountability that the system of justice upholds”.

It surely follows that the quality of justice administered by the judiciary and its courts in the course of resolving disputes is highly relevant as to whether an independent and impartial judiciary – which is the privilege of the people – is in fact serving the interests of the community.

The importance of judicial independence in the resolution of disputes between the State and its citizens and between citizens cannot be overstated. However, unless disputes are resolved according to the rule of law in an accessible, procedurally fair, efficient, cost effective and professional manner, the value of the independence of the judiciary – which is “a private right of citizens, who have a vested interest in having a neutral, independent court system to protect their fundamental rights from interference by the State and others” – will be diminished, and judicial independence as a privilege of, and a protection for, the people will gradually be eroded. As neatly put by Chief Judge Doogue, “in order for judicial independence to be of any worth or value to the public”, justice needs to be administered in a fair, efficient, accessible and professional manner.

This point was elegantly made by Justice Nicholson almost a quarter of a century ago:

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.

The Chief Judge of the District Court of New Zealand, Her Honour Jan-Marie Doogue has come to this inescapable conclusion regarding the administrative accountability of the judiciary:

The judiciary is, as an institution, accountable to society to administer and organize itself so as to provide for the resolution of disputes in a way that is not only fair, just and in accordance with the rule of law, but also efficient, cost effective and with a high degree of professionalism and skill.

The fairness, justness, effectiveness, efficiency and professionalism with which disputes are resolved within the judicial system affect the quality of justice that is dispensed by the courts. The judiciary is accountable for the quality of justice it delivers.

The effectiveness and efficiency with which judicial business is conducted is dependent upon the administrative decisions and actions taken by the judiciary as an independent institution. Given that such independent decisions and actions affect the quality of justice and attendant court services, it follows – as stated by Chief Judge Doogue – that the judiciary should be subject to some form of administrative accountability in respect of such administrative decisions and actions. The judiciary should be accountable to the public in an explanatory way. As the former Chief Justice of the High Court of Australia, the Hon Murray Gleeson, has said: the judiciary must recognise and accept “the right of the legislature, and the executive and the public to know what administrative decisions are being taken by the judiciary and why”.

This form of accountability requires the judiciary to make available to the public such information about the operations of the courts as is necessary to assure members of the public that in the independent exercise of its administrative functions the judiciary

is making decisions or taking actions that maintain the value of the principle of judicial independence as a privilege of, and a protection for the people.

The public needs to have confidence in the independent administrative decisions and actions taken by the judiciary because of the impact of those decisions and actions on the quality of the independence possessed by the judiciary. That public confidence is engendered by the judiciary informing the public about the administrative operation of its courts.

This form of accountability complements judicial independence in that it protects, reinforces and preserves its existence by maintaining public confidence in the judiciary as the guardian and guarantor of the principle of judicial independence.

All courts should aspire to being “excellent courts”, delivering high quality court services to the public that they serve and for whose benefit there exists an independent judiciary that adheres to the rule of law. Excellent courts should embrace core court values, as well as being efficient, effective and accountable. The public deserves no less than an excellent judicial system. The judiciary should be held accountable to the public (in an explanatory sense) for the quality of justice and court services that it delivers.

But what should an “excellent court” look like?

In 2008 an International Consortium consisting of groups and organisations from Europe, Asia, Australia and the United States of America developed the International Framework for Court Excellence (IFCE).

The IFCE is a framework of values, concepts and tools by which courts worldwide can voluntarily assess and improve the quality of justice and court administration they deliver. The foundation of the IFCE is “the clear statement of the fundamental values courts must adhere to if they are to achieve excellence”. The Framework provides an invaluable guide and tool kit for those courts that want to embark upon the journey to excellence and become “excellent courts”:

The Framework ...represents a resource of assessing a court’s performance against seven detailed areas of court excellence and provides guidance for courts intending to improve their performance. It provides a model methodology for continuous evaluation and improvement that is specifically designed for use by courts. It builds upon a range of recognized organizational improvement methodologies while reflecting the special need and issues that courts face.

The benefits of adopting the IFCE are set out in the Framework:

Adoption of the Framework will help ensure courts are able to deliver the quality court services essential to fulfilling their critical role and functions in society.

Fair, accessible and efficient courts create positive relations among citizens and the State. Public trust and confidence that a court will provide accessible, fair and accountable proceedings is, in turn, naturally enhanced by an effective and efficient court system. Confidence within the business community and therefore in business investment are likewise heightened. A sound justice system enable positive economic growth and healthy social development.

IFCE recognises ten internationally accepted core values that courts apply in carrying out their role and which are key values to the successful functioning of the courts:

- equality before the law;
- fairness;
- impartiality;
- independence of decision making (adjudicative independence);
- competence;
- integrity;
- transparency;
- accessibility;
- timeliness; and
- certainty

As stated in the Framework, these core or key values “guarantee due process and equal protection of the law to all those who have business before the courts”. These values also “set the court culture and provide direction for all judges and staff of a proper functioning

court”. The IFCE provides “a methodology for building a court’s performance on the basis of the internationally accepted court core values and their application to every area of a court’s activities”. Acknowledging that there is a “fundamental and clear link between court values and the performance of a court”, the IFCE 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”.

In order to simplify the process of assessment of performance and identification of areas for improvement, the IFCE divides these area of activity and roles into seven separate categories collectively called the Seven Areas for Court Excellence”. The Framework goes on to say:

Each area conveniently captures an important focus for a court in its pursuit of excellence. Each area has a critical impact on the ability of the court to adhere to its core values and to deliver excellent court performance.

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. It is important for courts to not only publicise the values which guide court performance, but also to ensure those values are built into the court’s processes and practices.

The seven areas for court excellence identified by the IFCE 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; and
- public trust and confidence.

As stated in the IFCE, the framework provides a continuous methodology which ensures that a court actively and continuously review its performance and looks for ways to improve its performance. The methodology is based on a four step process:

1. a self-assessment, involving an analysis of court performance across all seven areas of excellence, is undertaken;
2. following this self-assessment, an in-depth analysis is conducted to identify those areas of the court’s activities that are capable of improvement;
3. an improvement plan is then developed that details the areas identified for improvement and actions proposed to be taken and the outcomes sought to be achieved;
4. through a process of review and refinement the implementation of the improvement plan is closely monitored.

This four stage process is repeated when the court is ready to undertake a fresh self-assessment to determine its progress.

The central feature of the IFCE is that it offers courts a model for self-reflection and self-assessment in relation to the critical role and functions they fulfil in society. It provides courts with a blueprint for self-accountability, which is alternatively referred to as personal accountability. The Framework enables courts to be honest with themselves and to be answerable and responsible for what they say and do. It gives courts the ability to look beyond the immediate moment to consider the consequences of the administrative decisions and actions they take or fail to take. By these means, it enables courts to cultivate a well-developed sense of self-accountability.

The IFCE implicitly recognises that self-accountability is a critical first step towards improving court leadership and in identifying those areas of court activities that the judiciary should be accountable to the public in the interests of building and maintaining public trust and confidence in the judiciary.

The message conveyed by the IFCE is loud and clear. The judiciary should be personally accountable – and ultimately accountable to the public – for the delivery of quality court services that incorporate the core values of a court and reflect the areas for court excellence that are identified in the IFCE. Without that accountability courts cannot fulfil their critical role and functions in society.

The ten core values that courts apply in carrying out their role are unquestionably vital to the successful functioning of courts. Each value is in some way connected with the principle of judicial independence or its concomitant – the rule of law- and helps to ensure a strong and independent judiciary that adheres to the rule of law. Unless these core values are adhered to, the independence of the judiciary and the rule of law – which exist for the benefit of the community – are compromised, if not rendered meaningless and valueless in the eyes of members of the community. Consequently, public trust and confidence in the judiciary is eroded.

As the seven areas for court excellence have a critical impact on the ability of courts to adhere to its core values and deliver excellent court performance, courts that fail to aspire to excellence run the risk of losing public trust and confidence. The risk of a loss of public trust and confidence in the judiciary is an effective mechanism for ensuring judicial accountability in a free and democratic society.

As made clear in the Framework, courts that aspire to excellence need to systematically measure their performance – that is “the quality as well as the efficiency and effectiveness of the service they deliver”. In order to properly undertake that exercise, courts “need to maintain a collection of both [reliable and accurate] quantitative and qualitative data”. The IFCE provides courts with performance indicators and tools to assist in “the quantitative and qualitative assessment of the functioning of courts”.

The IFCE stresses the need for courts to be accountable to the public for their activities to ensure public respect, trust and confidence in the judiciary and the judicial system:

To ensure public respect and confidence a court must be open and transparent about its performance, strategies and its processes... It is important that courts are open about their current position but more importantly publish details of what actions they are taking to address the problems...

By being transparent about its performance, engaging with its users and stakeholders and communicating its reform strategy courts will

engender greater confidence and trust in the community and its stakeholders.

The IFCE emphasises the importance of judicial engagement and communication with the public as an integral part of the administrative accountability of the judiciary:

A court should communicate widely to the bar, public prosecutors, law enforcement, other governmental and non-governmental agencies, and the general public its commitment to undertaking Framework implementation... Courts should publish the results of its evaluations and its plans for improvement. Annual reports should also contain detail of a court’s role, practice and procedure and performance. Where practical a court throughout the year should keep court users, government and the community informed of its performance and reform initiatives.

An important aspect of an Improvement Plan should be the development of a Communication Plan identifying how a court intends to inform its users and the community. The plan should include not only strategies for publishing material and information but also outline other forms of appropriate communication, including:

- regular meetings with key users and legal groups
- the provision of information to the media
- assistance provided to litigants in person or disadvantaged groups
- feedback and complaint processes

Finally, but not least, the IFCE imposes an obligation on courts to “manage all available resources (human, material and financial) properly, effectively and proactively”. As pointed out by Lowndes:

This is a reflection of the modern view of judiciary 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.

As stated by the Honourable Marilyn Warren, former Chief Justice of Victoria, the IFCE provides a means for “court accountability through self-assessment and self-improvement without compromising judicial independence”. Consistent with the philosophy and objectives of the ICFE, the Chief Justice reported:

Under the rubric of the IFCE the Supreme Court of Victoria has developed a strategic statement aspiring to be an outstanding superior court. We define our purpose as safeguarding and maintaining the rule of law, and ensuring:

- equal access to justice;
- fairness, impartiality and independence in decision-making;
- processes that are transparent, timely and certain;
- accountability for the court’s use of public resources; and
- the highest standards of competence and personal integrity.

Together, these elements are all part of the Supreme Court’s ongoing improvement of its transparency and accountability.

Judicial Independence and the Societal Obligation of the Judiciary to Engage the Community

It is readily apparent that the developing administrative accountability of the judiciary to the public it serves entails a high level of communication with the community in relation to the performance of courts. The IFCE encourages this interaction by stressing the importance of strong leadership in ensuring a court is “not operating in isolation from the broader community and external partners”.

However, communication between the courts and the community should be more generalized and commonplace. As Bookman has recently put it, the judiciary as an institution and a collective entity has an ethical obligation to engage – and communicate with - the community in a much broader sense.

Bookman’s definition of community engagement is pivotal to understanding the nature of this ethical obligation. He defines

“community engagement” in these terms:

A relationship between judges and their local communities, whereby each party imparts information to, and learns from, the other. This relationship may take different forms, but its ultimate objective is to promote the understanding of each party to the other.

The “community” includes court users, stakeholders and the general public.

The judiciary clearly has an ethical obligation – indeed a societal obligation - to engage the community in the manner suggested by Bookman because as an important social institution the judiciary needs to impart information to the public concerning its role, functions and activities in order to sustain its legitimacy – which is derived from the community it serves – and to maintain public confidence in it as a branch of government. This societal obligation to engage the community gives rise to a legitimate form of public accountability (of the explanatory type) which is entirely consistent with the principle of judicial independence and which is an essential condition for ensuring the legitimacy of the judiciary and public trust and confidence in the judicial system.

Judicial engagement “provides an opportunity for education about the court system. As noted by Bookman, “the justice system cannot operate effectively unless the public understands how it works”. In particular, the judiciary needs to explain the sentencing process which is an important aspect of the judicial function. The imparting of such information enables members of the community to contextualize and understand sentencing decisions. It also promotes and enhances public confidence in both the judiciary and the judicial system.

Given that judicial independence underpins the justice system and an independent judiciary is a privilege of, and protection for, the people, the public needs to understand the workings of the justice system in order to have trust and confidence that the independence of the judiciary is in fact operating in the best interests of the community. The judiciary is accountable to the public in this very fundamental respect.

Improving the Quality of Justice and Judicial Accountability

As discussed earlier, the IFCE is a quality management system that assist courts in improving and enhancing the quality of justice they deliver. As pointed out by Richardson, Spencer and Wexler, the Framework “promotes innovation and reform with the aim of creating excellent courts that are fair, efficient, effective, impartial and that enable access to justice for their users”.

As stated by former Federal Attorney General Robert McClelland, “an effective justice system must be accessible in all its parts”, and “without this, the system risks losing its relevance to, and the respect of, the community it serves”. Furthermore, access to justice is an essential element of the rule of law and therefore of democracy. It is also a matter that goes to the quality of justice:

Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.

Finally, but not least, “improving access to justice is a means of promoting social inclusion”.

As former Chief Justice Murray Gleeson of the High Court of Australia persuasively stated, access to justice is a core aspect of a functional and effective judicial system:

For courts, effective functioning includes dealing with the business of the court with due dispatch and by procedures which are fair and which serve the ends of justice and which allow for reasonable access to the court by citizens. For the judiciary as an institution, effectiveness includes the maintenance of the rule of law and the preservation of a just society.

Just as the judiciary should take a leading role in protecting its independence and upholding the rule of law, it should take a leading role in promoting access to justice. In addition, it should be proactive in enhancing access to justice.

The IFCE emphasises that “fair, accessible and efficient courts create positive relations among citizens and between the individual citizen and the State” and that “public trust and confidence that a court will provide accessible, fair and accountable proceedings is, in turn, naturally enhanced by an effective and efficient court system”. It follows that an accountable, effective and efficient judiciary needs to promote and enhance access to justice.

A recent and prime example of this form of judicial accountability is the judiciary- led National Framework to Improve Accessibility to Australian Courts for Aboriginal and Torres Strait Islander Women and Migrant and Refugee Women (the National Framework).

In 2014 the Australian Council of Chief Justices endorsed the formation of the Judicial Council on Cultural Diversity (JCCD) for the purposes of assisting Australian courts, judicial officers and court administrators to positively respond to the changing needs of Australian society and ensure that all Australians have equal access to justice. The National Framework acknowledges that Australia is “one of the most ethnically, culturally and linguistically diverse countries in the world” and that “in a multicultural, multilingual and multi-faith society, it is fundamental that strategies are put in place to ensure the accessibility of the courts”. The National Framework believes that “both Aboriginal and Torres Strait Islander women and migrant and refugee women require the development of a national framework to improve access to justice, particularly in the context of family violence and family breakdown”.

The JCCD has used the IFCE as the key organising structure for the National Framework. Using that structure, the National Framework is put forward as:

a national approach to improving access to justice and achieving equality before the law for Aboriginal and Torres Strait Islander women and migrant and refugee women.

The National Framework is “intended to serve as an aspirational set of principles and best practice guidelines for Australian courts around operational actions they can take to improve accessibility”.

The key features of the National Framework are:

- it embraces all of the core values of a court as identified in the IFCE;
- its underpinning value/principle is the achievement of equal justice for all court users – regardless of their sex, race, religion, language or national or ethnic origin;
- it emphasises the point that “equal justice requires that courts are free from unconscious bias and discrimination and that proceedings are fair and impartial”;
- in implementing these underlying principles and values, it aligns itself with the seven areas of court excellence outlined in the IFCE;
- it stresses the importance of leadership from senior judicial officers and court administrators in demonstrating “a court’s commitment to providing equal justice for Aboriginal and Torres Strait Islander women and migrant and refugee women”;
- it attaches equal importance to the need for “a more uniform and systemic approach to the complexity of cultural and linguistic issues facing the courts”, as well as to the need for courts to adopt measures to modify structures and policies throughout the court system in order to tackle “the distrust and poor familiarity with court processes that exist amongst such diverse court users”.
- it stresses the need for courts to meaningfully engage with local communities to develop and implement the framework and to “ensure that courts and their staff are open and accountable around their operations”.

The National Framework points out that “rigorous planning and policies are required for courts to continuously demonstrate that they are responsive to the needs of diverse court users”. The Framework also recommends that courts develop clear plans to implement the framework and formulate strategies for working with diverse groups. Accordingly, in furtherance of its objectives, the Framework recommends:

- the establishment of cultural diversity committees within the courts;
- partnerships and co-operation with other

organisations;

- community education forums;
- regular meetings with key stakeholders;
- working with the legal profession;
- Community visits;
- Court open days and tours; and
- Celebrating diversity.

Again in alignment with the IFCE, the National Framework emphasises the need for courts to:

- “efficiently and proactively manage their resources to meet the demands of the justice system and address the needs of court users”;
- review their judicial education and professional development programs in light of the objects of the framework;
- ensure that court staff are “trained to understand the needs of diverse court users so they can respond appropriately”;
- employ indigenous court liaison officers and cultural liaison officers to further the objects of the framework;
- ensure that all court users are able to understand the processes in which they are participating and to contribute fully to the proceedings so that courts can operate fairly, effectively and efficiently;
- seek to improve the collection of data concerning the cultural, linguistic and gender diversity of their court users in order to advance the objects of the framework;
- introduce or enhance mechanisms to assess satisfaction levels among diverse court users.

As stated in the National Framework, a key objective of the framework is to promote higher public trust and confidence in Australian courts and the judiciary. The framework seeks to make the judiciary accountable to the community it serves in a fundamental and significant respect:

Courts need to demonstrate that they are aware of the barriers faced by diverse court users, that they are attempting to address these barriers, and that they are responsive to honest feedback about the justice system and its impact on Aboriginal and Torres Strait Islander women and migrant and refugee women.

The Framework recommends that courts meaningfully engage with diverse communities in the development and implementation of the matters and measures outlined in the framework with a view to building that all important public trust and confidence in the judiciary as a responsive social institution - whose independence is a privilege of and a protection for the people. The independence of the judiciary is of little value to an ethnically, culturally and linguistically diverse community unless there is equality before the law and equal access to justice.

The Framework concludes on this fitting note:

Managing responsibility and accountability within the court system for the introduction and maintenance of measures to ensure equality before the law and access to justice for Aboriginal and Torres Strait Islander women and migrant and refugee women is critical.

Enhancing the Wellbeing of the Community and the Individual and Judicial Accountability

As pointed out by Richardson, Spencer and Wexler, there is “a growing emphasis on the role of justice systems to improve the wellbeing of individuals and the communities that justice systems serve”. In that regard, Michael King has convincingly argued that an “ethic of care” is an important judicial value that should be added to the traditional values of judicial conduct of independence, impartiality and integrity.

In a broader vein, Richardson, Spencer and Wexler argue that the promotion of wellbeing and improvement of the experience of court users is “another goal that excellent courts should ideally strive for; and that this goal can be achieved by using the principles of therapeutic justice (TJ) and the IFCE. As the authors point out, both TJ and the IFCE (a quality management system for courts) are “complementary in that both are directed at improving the quality of justice”. We are reminded by the authors that the IFCE acknowledges “the role of a sound justice system not only for positive economic growth but also for healthy social development”.

Relevantly, Richardson, Spencer and Wexler

point out that the core court values identified in the IFCE are all aspects of “the justice system that encourage social and economic growth” and “enhance the wellbeing of those who come into contact with the court and the community in which a court sits”. Furthermore, TJ, which has the primary goal of maximising the wellbeing of individuals and communities, intersects with many of the core court values identified in the IFCE, and therefore the promotion and enhancement of the wellbeing of individuals and communities should be included as a core value of court excellence.

As noted earlier, the judiciary is responsible and accountable to the public for the quality of justice it administers and delivers, and in the performance of that role its courts should aspire to “court excellence”. Given that responsible and accountable courts should adopt the IFCE – which in part acknowledges the role of the judicial system in facilitating healthy social development – and the intersection between this aspect of the IFCE and TJ’s emphasis on enhancing wellbeing, the judiciary should therefore be responsible and accountable for maximizing the wellbeing of the individuals and the communities it serves. The IFCE and TJ provide the analytical tools by which the courts can achieve this objective.

Judicial accountability for enhancing the wellbeing of individuals and communities is a form of “societal accountability” that stems from the principle of judicial independence, which is not a privilege of the judiciary – but a privilege of, and a protection for, all members of the community. If that privilege and protection is to be of any relevance or value to the community the judiciary must ensure that it embraces the wellbeing of individuals and the community as both a core court value and objective of the justice system. This is so because the primary purpose of the judicial system is to maintain social harmony, and the maximization of the wellbeing of individuals and the community is an integral part of that objective. Unless courts do everything they can to maintain social harmony the independence of the judiciary will cease to be relevant to, or of value, to the community.

The Concept of Sustainable Justice and Judicial Accountability

It is important not to overlook the fact that courts play an important role in maintaining peace and harmony within our society. Professor Hazel Genn in the 2008 Hamlyn Lectures spoke about the role of the civil law and civil justice as a public good:

My starting point is that the machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, or enforcing legal rights and for protecting private and personal rights.

A similar view was expressed in the Productivity Commission Inquiry Report on *Access to Justice Arrangements*:

Well-functioning justice systems can also promote social order and facilitate social order and facilitate the peaceful resolution of disputes.

This view of the aim of the justice system is echoed by Dr Andrew Cannon when he says that “the primary purpose of courts is to maintain social harmony and holding people to account for wrongdoing is only a part of what is necessary to achieve this purpose”. The author points out the use of State power through the court system “to hold people accountable is not sufficient to ensure social harmony”. As the use of such power may “exacerbate conflict not resolve it”, in order to be “accepted and effective in their role courts must proceed with care and fairness and respect and uphold the individual rights of the citizen, at the same time as authorising the use of State power to hold them accountable for their wrongdoing”.

Dr Cannon proposes that “the principle of sustainability is a useful guiding aim to ensure that court systems perform their original and primary purpose of maintaining social harmony”. He advocates a “sustainable justice approach” resulting in a “sustainable justice system”.

The concept of sustainable justice, which is a powerful example of the growing example of the role of justice systems to improve the well-being of individuals and the

communities that justice systems serve, finds its most powerful expression in the Charter for Sustainable Justice.

The Charter for Sustainable Justice is a document co-produced by Alexander F De Savornin Lohman (former legal attorney, Rotterdam-Utrecht, the Netherlands) and Jaap Van Straalen (entrepreneur and editor, Amsterdam, the Netherlands) and written in close co-operation with Dr Andrew Cannon (Deputy Chief Magistrate in South Australia and Professor of law at Flinders University). The Charter is written as a brief, clear and sound basis for the sustainability movement describing basic principles of socially sustainable justice.

As stated in the Charter:

Sustainable justice is the approach to justice that aims to improve social harmony, wellbeing, the general feeling of safety within society, and furthers personal and societal development within a framework of human rights and principles securing legal uniformity and equality. In order to enable the justice system to intervene effectively, justice is vested with power and independence and acts in the pursuit of social sustainability of society and its members.

The Charter is a response to recent and growing criticisms that existing justice systems “do not appropriately and effectively meet societal needs”. It follows upon the heels of various justice innovations which have been aimed at serving values of social sustainability – like different forms of problem solving courts, restorative justice, intercultural justice, procedural justice and therapeutic jurisprudence.

The Charter makes it clear that the “main goal of Sustainable Justice is increasing the quality of life by improving the quality of relationships and social networks”. Values of social sustainability “complement judicial values and contribute to the effectiveness of the justice system”.

Sustainable justice views “conflicts and criminal acts as opportunities to restore and improve social harmony”.

It is also made clear in the Charter that “judicial power is given by society to the justice system on the assumption that that this is beneficial to society” and that “judicial officers using judicial power are societal change agents, who act as a catalyst for a better society”. The Charter acknowledges the very special position occupied by judicial officers:

Prestige, independence and the position as ultimate decision maker drapes judge with a kind of magic that enables them to accomplish outcomes that others cannot achieve.

Judicial officers are in “a key position to procure socially sustainable outcomes”.

The Charter points out that the “general principle of sustainable judging is to turn bad into good, contributing to social harmony and personal and societal development”. The Charter reflects the changing perspective of justice:

Social sustainability provides valuable guiding principles to justice systems encouraging them to gradual change so that they contribute to social harmony more effectively...

Justice systems based on principles of social sustainability are role models guiding people in the best way to manage conflicts and other challenges constructively without harming others.

A core responsibility of courts is to resolve conflicts in the exercise of their adjudicative independence. They must also do justice according to law. However, in exercising these functions courts must have “an eye for innovation and a proactive response to changes in society”. Courts need to bear in mind that their primary purpose is to maintain social harmony, and in order to be part of an effective and accountable judiciary they must respond to changing perspectives of justice. As the custodian of the principle of judicial independence, the judiciary must ensure that its independence works in the best interests of the community that it serves, and is obliged to administer justice in a constructive manner that produces socially sustainable outcomes.

Conclusion

The principle of judicial independence is the pivot upon which judicial accountability turns.

The independence of the judiciary places the judiciary in a unique and powerful position in modern society. Consistent with the democratic principle that no branch of government should have power without accountability, the judiciary should be held accountable for the ways in which it wields - in the exercise of its independence from the other two branches of government - the judicial power given to it by society. In the exercise of its independence, the judiciary has a societal obligation to:

- embrace the core court values (which include independence of decision-making);
- deliver quality justice in accordance with the rule of law;
- ensure that court proceedings are dealt with in an effective and efficient manner;
- provide such information relating to the administration and organisation of the courts as is necessary to ensure public confidence in the judiciary and the judicial system;
- engage the community to the extent that is necessary to uphold public confidence in the administration of justice and to enhance public respect for the institution of the judiciary;
- promote and enhance access to equal justice;
- do justice according to law in order to maximise the wellbeing of individuals and the community, and to the best of its ability to maintain social harmony by producing socially sustainable outcomes.

The judiciary should be held accountable to the public for meeting these obligations in the overall interest of ensuring that the independence of the judiciary as an institution continues to be of worth or value to the public.

A NOTE ON BLOGGING

His Honour Judge Keith Hollis, Honorary Life Member of the CMJA.

Abstract: *This note offers a short introduction to the plethora of blogs on legal affairs throughout the Commonwealth. Many of these blogs are of real interest and value. They can stimulate discussion and, on those occasions when the blog is reputable and informed, give the courts some guidance on the issues before them.*

Keywords: blogs – legal affairs – social media

The CJJ is always “up with the times” and as such has been taking an increasing interest in blogs on legal matters. It is believed that the important Miller litigation in the UK relating to the constitutional procedures that needed to be followed after the Brexit vote had its genesis in a blog by the UK Constitutional Law Association.

It may not be the first time that this has happened in a common law jurisdiction, but it is worth noting that the Court of Appeal in England and Wales recently referred to legal blogs in a judgement (Re B (a child) [2017] EWCA Civ 1579).

The President of the Family Division included the names of two legal blogs in his judgment. In a case where the Court found “*surprisingly little authority and no adequate guidance*” on the issue before them, they acknowledged that there were “*interesting discussions to be found*

on the blogosphere — for example, in the Suesspiciousminds and Pink Tape blogs; no doubt there are others — which merit careful consideration.”

There are by now countless blogs on legal affairs throughout the Commonwealth, many worthless, but many of real interest and value. They can stimulate discussion and, it now seems, on those occasions when the blog is reputable and informed, give the courts some guidance on the issues before them. Many too are of wider interest, and happily, they can often be very humorous.

It has to be for the interested reader to seek out the blogs that interest or suit him or her, and it is undoubtedly a time consuming process to do so. A judge with a backlog of reserved judgements should resist the temptation to embark on the process, but when work is up to date, and provided your internet connection is up to the strain the process will be rewarding.

For the beginner, start with the doyen of legal bloggers, the CMJA’s own former Executive Vice President, Sir Henry Brooke (sirhenrybrooke.me). His blog posts have the subtitle “Musings, Memories and Miscellanea”, but they are very much more than that. Try it and see!

DOROTHY WINTON TRAVEL BURSARIES FUND

WE NEED YOUR DONATIONS!

This fund was set up in the name of the first Secretary of the Association who died in October 2003. Dorothy’s time as the first Secretary of the Association was a very happy one and she was very concerned that justice (and support for justices) should be available to poor and rich nations alike.

The Fund have been used to assist participation from magistrates from Cameroon, Jamaica, Nauru, Malawi, Solomon Islands, South Africa and Uganda at the CMJA’s Conferences, and will be used to assist participation of judicial officers who would not otherwise have the opportunity to benefit from the training

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Uganda House, 58-59 Trafalgar Square
London WC2N 5DX, UK.

LAW REPORTS

BAR ASSOCIATION OF BELIZE V ATTORNEY GENERAL

15 February 2017

Caribbean Court of Justice [2017] 2 LRC 594

Nelson, Saunders, Wit, Hayton and Anderson JJCCJ

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In April 2010 ss 101 and 102 of the Constitution of Belize 1981^a were amended by ss 15 and 16 of the (Sixth Amendment) Act 2008 (No 13)^b ('the Sixth Amendment') by the addition of two provisos to the original sections in relation to the appointment and tenure of Justices of Appeal. By provisos (a) and (b) to s 101(1) of the Constitution, where an existing or future instrument of appointment of a Justice of Appeal did not specify a period of appointment, the judge's term of office should be one year from the date of commencement of the Sixth Amendment, or one year from the date of issue of the future instrument of appointment, at the expiration of which the office would become vacant. The intention behind the provisos was that appointment under instruments with no specified period of tenure should cease. Section 102(1) of the Constitution provided security of tenure to Justices of Appeal and s 6(7) required courts to be independent and impartial. The procedure for altering the Constitution set out in s 69 therein was fully complied with. Section 69(8) of the Constitution broadened the concept of amending to include 'a simple modification or an outright revocation with or without a replacement'. At the time the Sixth Amendment came into force there were four sitting Justices of Appeal: two Belizean judges, who had fixed terms of tenure, and two others who had been appointed some six years earlier by instruments of appointment with no fixed period. Pursuant to proviso (a) of s 15 of the Sixth Amendment, the term of office of those judges would come to an end a year after the provisions came into force. As a result one of the judges resigned and the other accepted a new fixed-term appointment. The Bar Association of Belize filed a constitutional motion challenging the Sixth Amendment in relation to the provisos to ss 101(1) and 102(1) on the grounds, *inter alia*, that they violated the rule of law, the principle of the separation of powers and the basic structure of the Constitution. The Association was concerned that the one-year appointments to the Court

of Appeal undermined the security of tenure of such judges, politicised appointments and re-appointments and eroded public confidence in the Court of Appeal as an independent and impartial court. It argued that the 'basic structure doctrine', which had its origins in India, applied in Belize. By that doctrine the National Assembly could not amend the Constitution if its effect was to dilute or destroy certain basic features of the Constitution, including the rule of law, the separation of powers and the independence of the judiciary. The Supreme Court of Belize allowed the Bar Association's motion, holding that the Sixth Amendment was unconstitutional. However, the Court of Appeal allowed the Attorney General's appeal. The Bar Association appealed to the Caribbean Court of Justice.

HELD: Appeal dismissed.

(1) Section 101(1) of the Constitution as amended by s 15 of the Sixth Amendment was not a removal provision. Further, the judges in issue had not, in fact, been removed from office since, during their shortened term, they still enjoyed the protection of s 102 of the Constitution and were only removable for cause or inability to discharge their functions. Further, the one-year term of office did not automatically entail a breach of s 6(7) of the Constitution, although re-appointment by the executive did lend fragility to judicial independence which arose from the fact that the executive was the appointing body. However, the executive's power to appoint and re-appoint the judiciary arose from the un-amended s 101(1) of the Constitution which was not challenged and did not emanate from the Sixth Amendment. Therefore, the Sixth Amendment, looked at in the abstract and without more, could not be declared unconstitutional because of the existence of an unchallenged power in the Constitution.

(2) While there might be agreement as to

the key facets of judicial independence, such as appointments, tenure, salaries, removal, there was no uniform standard and it was constantly evolving. A small country, such as Belize, had often staffed its Court of Appeal in part with non-resident judges of high quality. In that context, it was important to examine the historical facts relating to the Belize Court of Appeal, in which, since independence, short-term appointments to the bench had dominated. Most of the judges appointed had been non-resident Caribbean retired Justices of Appeal or members of the Inner Bar of a Caribbean country. In Belize, as in some other jurisdictions, the executive had sole responsibility for appointing members of the highest court and, without any specific evidence, the absence of a non-political independent Commission did not indicate a lack of judicial independence. Moreover, for reasons of population size and geography, some countries, such as Belize, had no alternative but to appoint judges to sit in the higher and appellate courts for a fixed term of years. There could be a shortage of candidates with the legal skills and experience required at that level and fixed-term appointments could be attractive to non-nationals who might accept a part-time travelling post of a limited period. For those reasons, and the fact that no concrete evidence suggesting any deficit of judicial independence in Belize had been adduced, it had to be concluded that a reasonable well-informed Belizean would not believe that the Justices of Appeal in Belize lacked security of tenure and were not independent or impartial.

(3) The 'basic structure doctrine' was not applicable in Belize. Even if the basic structure doctrine was part of the law of Belize, nothing in the Sixth Amendment purported to alter the Constitution in such a way as to limit or destroy any of the unwritten principles that represent the ethos of Belizean society. Essentially, the Sixth Amendment conferred no new power on the executive and altered nothing in the structure of the Constitution, since the power

to make short-term appointments to the Court of Appeal under s 101(1) always existed. Therefore, the basic structure doctrine did not fall to be applied in this case. Further, there was no explicit limitation on the National Assembly's power to amend in s 69 of the Constitution. Section 69(8) of the Constitution was extremely wide and broadened the concept of amending legislation to include a simple modification or an outright revocation with or without a replacement. Even if there were unwritten constitutional principles that limited the power of the National Assembly to amend the Constitution, the evidence in the instant case did not suggest any infringement of those principles.

Per curiam. Although the impugned Sixth Amendment legislation as such is not unconstitutional, one-year appointments under the Constitution, thus amended, could be in breach of the Constitution, in particular s 6(7). A further evolution of the concept of judicial independence is recommended so that Justices of Appeal have the same security of tenure as Supreme Court judges. It is desirable that the executive system of judicial appointments in respect of resident and non-resident judges be replaced by an independent appointing body, such as the Belize Judicial and Legal Services Commission, that deals with appointments to the Supreme Court bench. This independent Commission should appoint non-resident persons to the Court of Appeal until the normal retirement date or the extended retirement date of Supreme Court judges but would require non-resident judges to sit only as and when invited to sit by the President of the Court of Appeal. Where an appointee is over 75, the Commission would have a discretion to offer a shorter period of tenure. Short, renewable terms of appointment weaken the guarantee of judicial independence and therefore, the practice of one-year periods of tenure under s 101(1) should cease until the guidelines proposed are implemented.

19 April 2017

Botswana Court Of Appeal [2017] LRC 472

Lord Abernethy, Lesetedi, Gaogalelwe, Lord Hamilton and Brand JJA

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The Judicial Service Commission of Botswana selected the second appellant to fill a vacancy on the High Court Bench and recommended his appointment as a High Court judge to the President under s 96(2)^a of the Constitution, which provided that ‘judges of the High Court shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission’. The President rejected the recommendation without giving any reasons. The appellants, the Law Society of Botswana, and the second appellant, applied for judicial review of the President’s decision and declarations that the President was bound to follow and implement the advice of the Commission on the appointment of High Court judges. The appellants also sought a declaration that the Commission’s interviews of candidates for the judiciary and the outcome of its deliberations should be made public. In the High Court the application was dismissed on the grounds that the advice of the Commission was not binding on the President and he was entitled to refuse to follow the Commission’s advice. The appellants appealed to the Court of Appeal, contending that the President’s power under s 96(2) was merely a formal power, that he was bound to act ‘in accordance with’ the recommendation or advice of the Commission and that the proceedings of the Bechuanaland Independence Conference 1966 leading to the independence of Botswana showed that the Chief Justice was to be appointed by the President exercising his sole discretion but that judges of the High Court other than the Chief Justice were to be appointed by the Judicial Service Commission with the President being formally responsible. The respondents, the President and the Attorney-General, contended that the appointment of judges was a residual prerogative power vested in the President as head of state and that it gave him a non-justiciable discretion to refuse to appoint a candidate recommended by the Commission, on substantive grounds or because of high policy considerations such as security and socio-political factors. The respondents further contended, relying on s 47 of the Constitution,

that the Commission merely advised the President and in the event that he declined to act on the Commission’s recommendation he was not obliged to provide reasons for doing so. Section 47(1) of the Constitution vested executive power of Botswana in the President and s 47(2) provided that in the exercise of his functions ‘the President shall, unless it is otherwise provided, act in his or her own deliberate judgment and shall not be obliged to follow the advice tendered by any other person or authority’. In regard to the transparency or otherwise of the Commission’s proceedings the Commission relied on its power under s 103(5)^b of the Constitution to regulate its own procedure.

HELD: (By a majority) Appeal allowed in part.

(1) The Constitution was a living and organic instrument which was to be interpreted broadly and generously in a way which reflected the mores and norms and ideas, values and standards of society current at the time when it fell to be applied. The Court had to consider not only the terms and wording of the particular provision being interpreted but also its context in the rest of the Constitution, and ought not to be content with merely applying a literal interpretation of the provision in isolation. Moreover (Lesetedi and Brand JJA dissenting), it was legitimate and helpful in interpreting s 96(2) of the Constitution to have regard to travaux préparatoires, in the form of the proceedings of the Bechuanaland Independence Conference 1966 held prior to the emergence of the independent state of Botswana since (per Lord Abernethy JA) those proceedings showed that, consistently with the concept of the separation of powers, the judiciary should be independent and impartial and the executive ought to have no part in appointments to the Bench.

(2) (By a majority) In constitutional law, including regarding the appointment of judges, the expression ‘acting in accordance with the

advice of' had a settled meaning that the person advised had to follow the advice given and act upon it. The President's role in the appointment of High Court judges was, and remained, purely formal and he was bound in the matter of appointment of an individual as a judge of the High Court to act in accordance with the advice given to him by the Judicial Service Commission. As the head of the Executive, the President could put forward information and express concerns to the Commission on the choice of a High Court judge either through the Attorney-General (who was a member of the Commission) or, possibly, otherwise in exceptional circumstances where issues of national security arose, but the decision on appointment was, in the end, a matter for the Commission alone and when the Commission had evaluated the suitability of candidates for appointment to the Bench the President had no discretion to reject the decision of the Commission. If he did so his decision was subject to judicial review on the ground of illegality. Accordingly, the President had acted unconstitutionally in declining to appoint the second appellant to the office of a judge of the High Court and on that issue the appeal would be allowed.

(3) Whether or not the Judicial Service Commission conducted its business by interviewing candidates in the open or making public the outcome of its deliberations on the appointment of judges was a matter for the Commission exercising its power under s 103(5) of the Constitution to regulate its own procedure. The principle of transparency was neither set out as a requirement as to the manner in which the Commission conducted its business nor was there any other provision in the Constitution or in the Judicial Services Act making that a requirement. In those circumstances the Court had no right, in the absence of any law empowering it to do so, to intervene and regulate the Commission's procedure. Moreover, the appellants were unable to point to any legal wrong they had suffered and the relief sought was too vague and lacked the necessary precision for judicial adjudication. The appeal on the issue of transparency would therefore be dismissed.

Per Lesetedi and Brand JJA (dissenting in part). It was not desirable to travel back in time to have regard to the proceedings

of the pre-independence conference held in 1966 because to do so was inconsistent with considering and interpreting the Constitution as a living document to reflect the current mores and values of society, and failed to reflect the values of the times and the mischief, if any, which a provision was intended to remedy. Moreover, the views of those taking part in the conference became more faint and irrelevant with the passage of time, whereas the Constitution itself was not a static document but an organic instrument which moved with the times and evolved for the better good of the society within the limits of its language.

Per Gaongalelwe JA (dissenting). There was no universally accepted meaning attributed to the phrase 'acting in accordance with the advice of' and if the framers of the Constitution had intended to make the advice of the Judicial Service Commission binding on the President, s 96(2) would have expressed that unequivocally by inserting the word 'binding', so that the section required the President to act 'In accordance with the binding advice of the Judicial Service Commission'. Alternatively, the section could have conferred absolute power on the Commission to appoint judges by stating that 'Judges shall be appointed by the Judicial Services Commission'. As it stood, s 96(2) simply meant that the President was not to appoint a person who had not been recommended by the Commission.



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