Commonwealth Magistrates' and Judges' Association
Annual Conference

“Is Your Latimer House in Order?”
Radisson Blu Waterfront Hotel
Jersey, Channel Islands

23-26 September 2013

Conference Report
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The 2013 CMJA Annual Conference was held from the 23-26 September 2014 at the Radisson Blu Waterfront Hotel in St Helier, Jersey. We wish to acknowledge the generosity of the Government of Jersey, the Law Society of Jersey, and the Local Organising Committee, headed by Sir Michael Birt, the Bailiff of Jersey, and especially Debbie le Mottee, Rebecca Traisnel, and Katie Ridley.

The Conference organised by the CMJA was open to all Commonwealth judicial officers and others interested in the administration of justice in the courts of the Commonwealth. Over 230 delegates and accompanying guests from 34 Commonwealth jurisdictions participated in the meeting. I am very grateful for the support of the Director of Programmes, Shamin Qureshi, the Hon. Treasurer, Patrick Latham, and our Executive and Admin Officers Temi Akinwotu and Ratha Lehall in the preparation for the conference.

The CMJA is also grateful to all those who have contributed in the past to the Dorothy Winton Travel Bursary, set up in honour of the CMJA’s first Secretary General and which funded one participant.

The programme consisted of Keynote Speeches, given by two leading judicial officers; the Bailiff of Jersey and Justice Leon Theron from South Africa, and Panel Sessions on a wide range of diverse issues. These were complemented by a number of Breakout Sessions and Specialist Sessions, which focussed on specific issues. This report contains the texts of the Keynote Speeches as well the panel papers received to date and summaries of some of the discussions held.

Dr Karen Brewer
Secretary General
La Moye Primary School Choir performed at the Opening Ceremony of the conference. These are the lyrics to the three songs they performed to the delegates:

As One
We’ve got to get on together,
Think of each other,
Look at ways to help us get along.
If we can learn how to listen,
Where there’s division,
We can live as one.

We’ve got to trust one another,
Stand with each other,
Fix our eyes on all that’s right not wrong.
If we can learn to be sorry,
Love everybody,
We can live as one.

Island home

Ours is an Island home
Firm on rock and strong by sea
Loyal and proud in history,
Our thankful hearts are
Raised to God for Jersey.

The beauty of our land
Long inspires both eye and mind.
Ours the privilege to guard its shore
So help we God that
Jersey might by grace endure.

Beautiful Jersey

Beautiful Jersey, gem of the sea,
Ever my heart turns in longing to thee;
Bright are the mem'ries you waken for me,
Beautiful Jersey, gem of the sea.
KEYNOTE SPEECHES
Is your Latimer House in Order?

By Sir Michael Birt, Bailiff of Jersey

INTRODUCTION

The title of this Conference is “Is your (Latimer) House in Order?” In other words, how are we doing in relation to putting the principles of Latimer House into practice? Although it is very familiar, we must, I think, when considering this question, begin my reminding ourselves what we mean by the shorthand expression “Latimer House”.

Back in June 1998, representatives of four Commonwealth organisations (including the CMJA) gathered at Latimer House in England. The purpose was to draft some guidelines on best practice in relations between the three branches of government, the legislature, the executive and the judiciary. The product of the meeting was the document which is known as the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence, to which I shall refer as the Guidelines.

The Guidelines were considered by various bodies within the Commonwealth and were subject to some amendment; some would say dilution. Eventually, they were adopted by heads of government at Abuja in 2003 and described as the “Commonwealth (Latimer House) Principles on the three branches of government”. I shall refer to these as the Principles.

In 2005, the Plan of Action for Africa was adopted in Nairobi and in 2008 the Edinburgh Plan of Action was developed and endorsed.

However, it is of course not enough just to adopt principles. They have to be translated into action. As Lord Hope - who has contributed so much to the CMJA and whom I am delighted to see is here today - put it in his speech to the Colloquium on the Latimer House Principles in Edinburgh in 2008:-

“\textit{It would have been all too easy to rest there. Much has, after all, been achieved. The documents that have been produced have been widely circulated. In legal circles the words ‘The Latimer House Principles’ have now become very well known, and there was a general understanding of what they and the Commonwealth Principles stand for. But to do nothing would have been a great mistake. It would have risked complacency – that great enemy of fairness and justice. Mere words, after all, are no more than words. It is action that counts. What really matters is the putting of the principles into practice. So the other, and much more important, reason why we are here is to review where we have got to in their implementation and to plan for the future.”}

And that surely is an important purpose of this conference. We need to remind ourselves of the various elements which make up the Principles and then see how we are doing in the implementation of those Principles. Because, for the individual, it is what happens on the ground that matters. It does not help the individual citizen in dispute with his government, that the government in question is a signatory to a declaration of high sounding principles. What matters to him is whether the judge or magistrate is impartial, free of political or improper influences and competent. What matters on the ground is whether the court operates with reasonable efficiency so that everyone who should be there is there at the appointed hour. What matters is whether there is confidence that the magistrate or judge has not taken a bribe; what matters to the magistrate is whether he or she has been paid, whether the rates of pay and working conditions are reasonable and appropriate to the magistracy; and whether there is appropriate security for magistrates and judges. What ultimately matters is whether the government in fact obeys the orders of judges and magistrates.

HISTORICAL INFLUENCES AND POSITION OF BAILIFF

Of course, the Principles must always be considered in the light of the structure and history of the particular jurisdiction. For example, the history of the Channel Islands explains some of our current structures. In 933, the Islands were annexed to the Duchy of Normandy by William Longsword. We were therefore part of Normandy in 1066 when William the Conqueror, then Duke of Normandy, assumed the English throne following his victory at the Battle of Hastings. For the next 150 years, Normandy, the Channel Islands and England were all subject to the same King, who was also the Duke of Normandy.

However, in 1204, King John lost continental Normandy when his forces were defeated by the French King. At that stage the Channel Islands were faced with a choice. Should they remain with Normandy, which was now to be part of France or should they remain with the English King? They elected to stay with the English King, even though Jersey is only 15 miles or so from the Normandy coast whereas it is about 100 miles from England. In return for their loyalty, King John ordered that the Islands could continue to be governed by their own laws and have a separate administration from that of England. That is the origin of our domestic autonomy, which has remained to this day.
The Islands are described as Dependencies of the Crown; but there is a contrary argument. We like to point out to our friends from the United Kingdom that we were on the winning side in 1066; there is therefore a perfectly respectable argument that, given that we were on the winning side and that the Channel Islands are the only part of what was Normandy which is still linked to the British Crown, logic suggests that England is really a dependency of ours rather than the other way around! However, I have to say that this argument does not seem to find much favour in the corridors of power in London!

It is our history which explains the position of Bailiff, which might be thought to infringe the idea of the separation of powers, in that he is Chief Justice and is also Speaker of the States, our legislature. I should therefore say something about the office of Bailiff. Following the separation from continental Normandy in 1204, a document known as the Constitutions of King John directed Islanders to elect their twelve best men to serve as lay judges to sit with the Bailiff in the Royal Court. They became known as Jurats. Originally, the Royal Court was not merely a law enforcing body, but also a law making body. Over the course of the 13th and 14th centuries, the practice developed of consulting with the Rectors and Constables (Mayors) of the twelve parishes over changes to the law. By the end of the 15th century, the process of consultation had formalised and created a parliamentary assembly of the three estates, namely the Jurats, the Rectors and the Constables. The Bailiff, who continued to preside over the Royal Court, also presided over the new parliamentary assembly known as the States of Jersey.

Of course there have since then been many changes and the Jurats and the Rectors have been removed from the States, which is now composed only of elected Senators and Deputies as well as the Constables. However, the Bailiff remains as Speaker.

The issue as to whether this was compatible with the need for an independent and impartial court was raised before the European Court of Human Rights in 1998 in relation to the Bailiff of Guernsey in the case of McConnell v United Kingdom. The situation in that case was that the Bailiff had presided in the States over a debate adopting certain planning policies and had then presided some time later as judge in a planning appeal which was affected by those policies. The European Court declined to endorse any theoretical constitutional concepts such as the doctrine of separation of powers and did not accept that the Bailiff’s multiple roles of himself gave rise to any difficulty. But it held that the fact that he had presided over the debate on planning policies and had then heard an appeal directly related to those policies meant that the Royal Court did not have the requisite objective appearance of impartiality. I should add that the Bailiff of Guernsey appears to have had somewhat more functions than the Bailiff of Jersey and in particular had a casting vote in the States.

In practice, the dual role of the Bailiff does not cause undue difficulty. The Bailiff’s role in the States is extremely limited. He has no vote and is not responsible for what goes on the Order Paper. Furthermore, the comparatively small size of the Assembly – there are 51 members - means that every member who wishes to speak in a debate can do so; so there is no question of the Bailiff being able to influence a debate by deciding whom to call. He simply calls members in the order in which they wish to speak. He is in effect simply a neutral chairman of the Assembly, ensuring that the debate is conducted in accordance with the rules of procedure. He is not therefore in any way associated with any decision which the States may make, whether as to legislation or policy. In these circumstances there is not usually any difficulty in his presiding in court. However, it is ultimately it is entirely a matter for the States whether they wish the Bailiff – who is appointed by the Crown - to continue as their Speaker or whether they would prefer to have an elected Speaker.

**JUDICIAL INDEPENDENCE**

The Principles and the Guidelines deal with a number of areas but I would like to concentrate first on judicial independence. As the Principles say:-

“An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.”

And this is obvious is it not? It is no good legislatures conferring rights upon their citizens and passing fine sounding laws if such laws cannot be enforced. If the rule of law is to have any meaning at all, a citizen must be able to get before a court which will approach the matter independently and impartially. This can only be done if judges are protected against intimidation or victimisation if they give decisions which do not please the government of the day.

When we talk of independence of the judiciary, I fear that sometimes we tend to focus on the judiciary of the higher courts. But of course the issue is just as important in relation to magistrates, who preside in the lower courts. In terms of volume, it is magistrates who in most jurisdictions deal with the vast majority of cases. That is why it is so important that, at its meeting in the Turks and Caicos in 2009, the General Assembly of the CMJA passed a resolution as follows:-

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

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1. (2000) 30 EHRR 289
Following that resolution, the CMJA set up a task force which produced a report on the status of magistrates in the Commonwealth which was published in February of this year. At a meeting of Commonwealth law ministers in July 2011 in Sydney, law ministers committed themselves to:

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

The suggested Guidelines are those which are annexed to the report and I commend the report and the suggested guidelines to members, as they contain much interesting material. For example, the report suggests that in many jurisdictions there is inadequate protection for magistrates. Paragraph 1 reads:

“In most jurisdictions the process for the appointment and removal of judges of the higher courts is mentioned in the Constitution of the jurisdiction in question. Otherwise it is mentioned in statutes. In contrast, in the majority of Commonwealth jurisdictions, the legislative safeguards of the independence of magistrates are minimal if they exist at all.”

It goes on to say that in a number of jurisdictions, magistrates are still considered as civil servants and their mode of appointment, disciplinary procedures and grounds for removal reflect this situation. The report points out that in some countries, the Executive has control over the housing, welfare and security of magistrates and has used this control to exercise pressure on magistrates to comply with government policy. The report ends by recommending this:

“In order to ensure the right to a fair trial, the judiciary as a whole should be and be seen to be independent and Member Associations and Heads of the Judiciary have a duty to ensure that judicial officers at all levels are able to ensure the right to a fair trial, which is the right of all citizens.”

What is clear therefore, is that we all need to look not only at the senior judiciary but also at the magistracy when assessing how we are doing in relation to the Latimer House Principles and therefore whether our Latimer House is in order.

In accordance with the suggestion that I have made earlier in this speech that we must all look at our own jurisdictions to see how we are doing, I propose briefly to consider how Jersey is doing. It is of course always difficult to be objective about one’s own performance but I think it is important that one tries, so far as possible, to stand back and see where improvement can be made and where one is not complying fully with the Principles. In the time available, I propose therefore to take a few headings which emerge from the Principles and tell you briefly how I think we are faring in Jersey.

APPOINTMENT AND REMOVAL

Appointment

The Guidelines were fairly specific in saying that there should be “an appropriate independent process” in place for judicial appointments and that where no independent system already existed, there should be a judicial services commission. That was somewhat diluted in the Principles which state simply that judicial appointment should be made on the basis of clearly defined criteria and by a publically declared process so as to ensure equality of opportunity, appointment on merit and that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.

So how does Jersey do in this respect? Appointments to higher judicial office, that is to the Jersey Court of Appeal and to the offices of Bailiff and Deputy Bailiff are made by the Crown, that is by the Queen acting on the advice of the UK Lord Chancellor. However, he in turn acts upon advice from Jersey. In relation to the Courts of Appeal of Jersey and Guernsey, those with the requisite experience are circulated and invited to apply. The process of consultation is then undertaken and a recommendation is made by the Bailiffs of Jersey and Guernsey. We have been extremely fortunate over the years that some of the most distinguished lawyers of England, Scotland and Northern Ireland have been willing to serve in our Court of Appeal; ultimate appeal lies to the Judicial Committee of the Privy Council. In relation to the Bailiff and Deputy Bailiff, an appointments panel is constituted, presided over by the outgoing Bailiff, which consults with the Jurats, with senior members of the legal profession and with senior members of the States, because the Bailiff and Deputy Bailiff are respectively Speaker and Deputy Speaker of the States. Once that process of consultation had been completed, the Bailiff will report to the Lieutenant Governor and in turn to the Lord Chancellor with a recommendation.

As to the magistrates, they are appointed by the Bailiff, who establishes an appointments panel, which advertises for applicants, interviews them and then makes a recommendation to the Bailiff.

So far as appointments are concerned, I believe that the appointments process is broadly satisfactory; in particular appointments are not made by or under the influence of the Executive.
REMOVAL

This is a vital aspect for the preservation of the independence of the judiciary. If a judge can be removed or demoted at the mere whim of the executive or the legislature, there will be enormous pressure on the judge to reach decisions which are favourable to the executive or the legislature. The Principles recognise this in stating at Section IV “Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties”.

But there is a balance to be struck. Judges must ultimately be accountable and there must be an adequate process for removing judges who are guilty of misconduct or are no longer fit to continue in office. Confidence in the judiciary can easily be lost if the process to remove judges is so difficult that it becomes practically impossible, no matter how compelling the case for removal is. So Section VII(b) of the Principles states:-

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

There must therefore be a procedure for removing judges which, on the one hand, protects them against removal simply because they have given decisions which do not please the government of the day, but on the other hand, allows for removal where misbehaviour or incapacity is shown. Returning again to the Principles they state:-

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

So how does Jersey fare in complying with the Principles? The judges of the Court of Appeal and the Bailiff and Deputy Bailiff all hold office during good behaviour. Accordingly there is protection in that they can only be removed by the Crown for incapacity or misbehaviour. Thus there is ample protection against dismissal simply for reaching unpopular decisions. Similarly, our magistrates can only be removed by Her Majesty in Council. Although no specific grounds are referred to for the exercise of this power, there has in practice never been any difficulty.

However, there is nothing which deals with the procedure for dealing with complaints against the judiciary which might lead to removal or other disciplinary measures. In practice, what happens is that we seek to replicate the procedure for judicial discipline which has been established in the United Kingdom. So, if a complaint is of sufficient gravity, the Bailiff is likely to invite a judge from outside Jersey to investigate the matter in a manner which complies with the rules of natural justice before making a recommendation to the Bailiff as to whether any disciplinary measures are required. The Bailiff would then presumably make a recommendation to the Crown via the Lord Chancellor. However, it is not ideal that there are no published procedures and my own view is that it would be preferable to introduce some. So, reverting to my initial question, subject to what I am about to say, I think that Jersey’s procedures for the appointment and removal of judges are broadly satisfactory, balancing the need for security of tenure (leading to appropriate independence) with judicial accountability, although, as I have said, I think we would benefit by introducing published procedures for dealing with disciplinary matters.

However, the position is not ideal in respect of two categories of member of the junior judiciary. Most of our matrimonial matters (subject to appeal to the Royal Court) are dealt with by two Registrars. Similarly, we have a Master of the Royal Court who fulfils similar functions to Masters of the English High Court, namely he is the procedural judge who rules on interlocutory matters. Both the Registrars and the Master do not have any specific protection as members of the judiciary. They are counted as members of the Judicial Greffe, which is the Court Service. Although there is a statute, which makes it clear that members of the Judicial Greffe cannot be given directions any Minister or by the Head of the Civil Service and that they can only be dismissed with the agreement of the Greffier (who is the Clerk to the Court and appointed by the Bailiff), they are not given the same level of protection as other members of the professional judiciary. Again, this is something which might benefit from examination, although there has never been a problem in practice.

The final category of judge which we have in Jersey is the Jurat. A Jurat is a type of judge which is, I think, peculiar to the Channel Islands. The Royal Court consists of the Bailiff and Deputy Bailiff as professional judges together with twelve Jurats. The Jurats are distinguished citizens (usually non-lawyers – although we have one retired lawyer at present) who are elected by an Electoral Assembly consisting of members of the States and all the lawyers. They serve in an honorary capacity, but it is an important role. They are the judges of fact, whereas the Bailiff or presiding judge is the judge of law. So it is the Jurats who decide whether to believe the plaintiff or the defendant in a civil case and it is the Jurats who will determine sentence in a criminal case. Indeed in some criminal cases they will also determine guilt or innocence. It is therefore an extremely important role. I have to say that I am a strong supporter of the system. I feel that a court comprising of a professional judge and two intelligent non-lawyers is as good a tribunal as any, in that it brings contrasting skills which
increases the chances of reaching the right conclusion. It ensures that the Court does not adopt an unduly legalistic or technical approach (because of the non-lawyer involvement) but also ensures, through the presence of the presiding judge, that appropriate disciplines and legal principles are followed. The appointment of Jurats does involve the legislature as they are members of the Electoral College but, as they are greatly outnumbered by the lawyers, I do not think that there is a practical problem. As to security of tenure, they can only be removed by the Crown on the petition of the Royal Court and there is therefore appropriate security of tenure. But again there is no published procedure for considering disciplinary complaints against them.

INDEPENDENCE AND IMPARTIALITY

The countries of the Commonwealth vary enormously in size and population with countries such as Canada, South Africa, Nigeria at one end and jurisdictions such as Jersey and Guernsey and other small jurisdictions at the other. The Guidelines, being somewhat more prescriptive than the Principles, recognised that strict adherence to the Guidelines would not always be possible for small jurisdictions. Thus the introduction said:-

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

The Principles do not contain any such statement but it is inevitable that the size of a jurisdiction will have some impact on the structures which can be put in place. The particular area where the size of a jurisdiction can pose difficulties is in the provision of a court which is perceived as being independent and impartial. The first panel session on Wednesday will be dealing with this topic in more detail and I look forward to that discussion. Nevertheless I would like to touch upon it briefly now.

Obviously a court must, as a matter of fact, be impartial i.e. there must be no actual bias on the part of any member of the court. But, as we all know, the law goes much further than that – justice must not only be done, it must manifestly and undoubtedly be seen to be done.

In our jurisprudence, the test is that laid down by Lord Hope in the leading case of Porter v Magill2 where he said the test was “whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

Inevitably, in a small jurisdiction, there is a much greater risk that, if the judge has been brought up in the jurisdiction concerned, he will have a wide range of friends and acquaintances whose interests may be litigated before the local courts. The judge must find a balance. Clearly, if the relationship with the litigant is too close, he must disqualify himself. But equally, he should not be over sensitive. There may well be occasions in a small jurisdiction where it is necessary for a judge to hear a case which, in a larger country could be assigned elsewhere. Indeed there are likely to be some litigants who will have such a profile in the community that it would be impossible to find a court that did not know the litigant.

In this connection, it may be of interest to mention a very recent case in our Court of Appeal. This was the case of Pitman v The Jersey Evening Post.3 The plaintiffs in that case were two members of the States. An advertisement was placed by a firm of estate agents in the Jersey Evening Post, which is the local newspaper. The advertisement was a full page cartoon wishing all the estate agent’s clients a Merry Christmas. The cartoon consisted of a dozen or so sketches depicting well-known Jersey personalities. One of the sketches depicted the two plaintiffs and was accompanied by a quotation which read “4x the salary darling”. The Plaintiffs brought proceedings for libel against the newspaper and the estate agent on the ground that the cartoon implied that they had sought election to the States in order to increase their income. The case was heard before a retired English High Court judge, who was a specialist in defamation proceedings, together with two Jurats. The plaintiff’s claim was dismissed.

After the case was heard, the plaintiffs discovered that one of the Jurats who had heard the case was friendly with a retired Jurat, to the extent that they had each visited the others house for dinner on one or two occasions. They had also sat together as Jurats during the period of the retired Jurat’s term of office. The retired Jurat was a non-executive director of the company which, amongst other interests, owned the company which published the newspaper. However, the retired Jurat had no shareholding in either the holding company or the newspaper company, nor was she a director of the newspaper company. She therefore had no financial interest in the outcome of the proceedings.

The plaintiffs sought leave to appeal out of time on the ground that this was a case of apparent bias because of the connection between one of the Jurats who heard the case and the retired Jurat as a director of the company which owned the company which published the newspaper. They contended that the Jurat should not have sat and that they had been denied a fair trial by an impartial tribunal.

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2 [2002] 2 AC 357 at [103]
3 [2013] JCA 149
Beloff JA, sitting as a single judge of the Court of Appeal, refused leave to appeal out of time. In relation to the merits of the suggestion of apparent bias he had this to say at paragraph 9:-

“In the Bailiwick the chances that persons (Jurat, jurors or judges) may have encountered someone involved in proceedings before them will be greater than in other larger territories ...”

“This reality may require .... adaptation in application of the general principle...”

However, he then applied Lord Hope’s test and held that he could not see how a reasonable and fair minded observer, informed of the facts, could conclude that there was any real possibility that the Jurat who was a member of the Court would have been biased in favour of the defendants even if aware of so diluted a connection between the retired Jurat and the defendant newspaper.

In summary, the requirement to provide an independent and impartial court is absolute but, in so far as issues of apparent bias are concerned, it will sometimes be necessary to at any rate have regard to the small size of the jurisdiction.

ACCESS TO JUSTICE

Although it found no place in the Principles, the Guidelines state at paragraph 6 of Section 1 “People should have easy and unhindered access to courts, particularly to enforce their fundamental rights.”

The difficulty experienced by many jurisdictions is how to ensure that those who are not wealthy can have access to the courts whilst at the same time ensuring that it does not become an undue burden on government expenditure. Certainly the United Kingdom at present is undergoing considerable reforms to its legal aid scheme because the government says that it is too expensive; but there are many who are extremely concerned at the effect that this will have on the ability of litigants to obtain legal representation. I suspect the need to retain access to justice whilst not placing an undue burden on the public purse is something which many countries are having to wrestle with. In this connection, I thought it might be of interest to describe briefly the Jersey Legal Aid Scheme, as it is fairly unusual.

The oath undertaken by Advocates states that they will represent undefended persons. For over a century, this has been taken to mean that they are obliged to represent those who cannot afford to employ a lawyer. The system has developed so that every lawyer of less than 15 years seniority is obliged to undertake the representation of persons who cannot afford their own lawyer. The cases are allocated under the authority of the Bâtonnier, who is head of the Bar. What this means is that a person who cannot afford his or her own lawyer attends upon the Legal Aid Office and is allocated to a particular advocate. That advocate, or another advocate on his behalf, must then represent the litigant. There are financial limits as to when a person is eligible for legal aid although the Bâtonnier has discretion to award legal aid outside these limits and often does so when a person is finding difficulty in obtaining legal representation, perhaps because of the smallness of the jurisdiction. The lawyer who is acting on legal aid in most cases acts for no remuneration. He is entitled to be reimbursed by the state for any disbursements he incurs and, if the litigant has income above a certain amount, he can recover a proportion of his fees from the litigant. Nevertheless the practical result is that in most criminal cases and many civil cases, the lawyer acts for no remuneration. The Island has a long tradition of honorary service in a number of fields and this is where lawyers have played their part in that tradition. The upshot is that the cost of legal aid is essentially borne by the legal profession rather than by the state. There are occasionally discussions as to whether this continues to be appropriate and a further review is to take place shortly. But, in my experience, it works reasonably well and does not, as a matter of generality, impose undue strain on the lawyers because of the substantial income they are able to earn from other activities.

PUBLIC JUSTICE

It is important for confidence in the administration of justice that court proceedings should be in public so far as possible and that decisions of higher courts should be accessible to the public. Thus the Principles say at Section IV:-

“Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public. Superior court decisions should be published and accessible to the public and be given in a timely manner.”

Immediately following this Conference of the CMJA, Jersey will be hosting the Law via the Internet Conference, as part of the Free Access to Law Movement. We have long been convinced of the importance of the free provision of information about law. The Jersey Law website enables you to look at all of our statutes and to see virtually all the judgments of the Royal Court. We have for some time even published judgments about cases concerning children, matrimonial finances and so forth, but these have been anonymised so as to protect the identity of the parties. In my opinion, there is a strong public interest in the public being able to see what the courts are doing in these sensitive fields. Take, for example, the area of public law cases, where children are said to be at risk of significant harm and the question arises as to whether they should be taken into the care of the Minister for Health and Social Services, rather than left in the care of their parents. This is an
incredibly difficult and important area. If children are removed from the care of their parents too easily, this is a tragedy for
the whole family and likely to be extremely damaging to the children. If, on the other hand, children are not removed when
they should be, they will suffer significant harm which may blight the rest of their lives or, in some cases, suffer something
even worse, as some of the cases in the UK have shown. It is important that the public should be able to see what the courts
are doing in this area. Are they intervening too much or too little? If the decisions are not published, there can be no way of
judging this. There has been concern in England and Wales for some time that justice in the Family courts is perceived as
being secret justice and I note that the new President of the Family Division has recently announced that they will be
publishing many more of their decisions. In this respect, at least, Jersey has been ahead of the UK and, as I say, the decisions
of the Royal Court in this difficult area are available for the public to consider.

SUMMARY

I hope that what I have said has not been too parochial. As I said at the beginning, it seems to me that the importance of
conferences such as this is to reinforce the Principles and the Guidelines and to force us to consider whether our own
jurisdiction is adhering to them. I much look forward to the conference. I repeat my welcome to you all and I look forward to
the interesting programme which Sham has put together for us.
PANELS AND SESSION PAPERS
It is a great privilege to be invited to address again a CMJA conference on the subject of the Latimer House process, having done so in Toronto in 2006 and Cape Town in 2008. As Sir Philip Bailhache remarked when he addressed you in Kuala Lumpur in 2011, the subject has become a hardy perennial amongst topics discussed at CMJA Conferences. The December 2011 number of the Commonwealth Judicial Journal contains Sir Philip’s Kuala Lumpur address on the implementation of the Latimer House Principles (LHP) and an article by The Hon Chief Justice Lehohla of Lesotho on the subject of threats to judicial independence. Of course I cannot match the experience and wisdom of such distinguished judges on this subject, but I can offer some observations as one who has been involved closely with Latimer House from the beginning and who was a founding member of the LHWG which is made up of representatives of the four sponsoring organization (Commonwealth Lawyers Association, Commonwealth Legal Education Association, the CMJA and the Commonwealth Parliamentary Association, together with the Legal and Constitutional Affairs Division of the Commonwealth Secretariat).

This year marks the 15th anniversary of the original Latimer House colloquium and the 10th anniversary of the adoption of the LHP at the Abuja CHOGM. As the theme of this distinguished gathering implies, the time has come for some stocktaking and a frank examination of the progress or lack of it in the implementation of the principles over the last decade.

I must first deal with a situation which many consider marks a crisis in the existence of the modern Commonwealth and which goes to the heart of the Latimer House principles in the attempt which they represent to regulate proper relations between the three branches of government. As you will all be aware, the CHOGM is scheduled to take place in November of this year in Sri Lanka. You will also be aware of the controversial removal from office of the Chief Justice of Sri Lanka, Dr Shirani Bandaranayake. I am aware of the presence in this audience of distinguished judges from Sri Lanka. I do not wish to embarrass them but rather to support the independence of the Sri Lanka judiciary and indeed throughout the Commonwealth.

Many of you will be aware of the Resolution on the Rule of Law and Judicial Independence in Sri Lanka adopted by the CLA CMJA and CLEA at the Commonwealth Law Conference in Cape Town in April 2013.

In the light of the circumstances of the removal of the Chief Justice and other threats to the rule of law manifest in Sri Lanka, the Resolution called for a reconsideration of the location of the CHOGM in Sri Lanka. The Canadian Prime Minister has declined to attend, but most Commonwealth Governments appear to share the stance of the UK government that it is better to attend, make clear to the host government concern on rule of law issues and urge the Sri Lanka government to uphold Commonwealth values. You may feel that this has now become a political issue from which as judges you should stand aloof. However, the conduct of the government of Sri Lanka, as one of the founding members of the modern Commonwealth as a subscriber to the Declaration of London in 1949, threatens one of the fundamental principles of Latimer House, the independence of the judiciary. The importance of this bedrock of the rule of law has been affirmed in a number of declarations to which all Commonwealth governments have subscribed and which is the subject of frequent affirmation in the judgments of superior courts without the Commonwealth.

Judicial pronouncements are legion. Just to quote two recent examples: Dormah J observed recently in the Seychelles Court of Appeal (Ponoo v AG 2012):

The most important aspect of the separation of powers is the absolute independence of the judiciary.

Again Moseneke DCJ in the Constitutional Court of South Africa (the Justice Alliance Case):

The principles of the rule of law, the separation of powers and judicial independence, underscored by international law, are indispensable cornerstones of our constitutional democracy.

It was re-assuring that the importance of the LHP in this context was emphasised by Justice Rohini Marasinghe in her address on her elevation to the Supreme Court Bench of Sri Lanka on 15 May 2013 in the presence of the person purportedly
appointed to succeed Chief Justice Bandaranayake. Taking her theme as judicial independence, she noted that the LHP were vital to the maintenance of the rule of law and went on to emphasise the importance of judicial review of executive action. She criticized the appointment to the Supreme Court of officers of the Attorney General’s Department over career judges who had worked their way up the judicial ladder. She went on to cite the LHP on the relationship between the judiciary and the executive and the need to evoke a sense of respect on the part of the executive for the judiciary.

The Sri Lanka government claims that the removal of Dr Bandaranayake was done in accordance with the Constitution, which leaves the removal process in the hands of parliament. However, the opinion of the late, lamented Pius Langa, the former Chief Justice of South Africa, presents a different picture. In what I believe to be the accurate text of an opinion delivered at the request of the Secretary General of the Commonwealth, he concluded:

_I view the decision of the Government to ignore the rulings of the Supreme Court as unconstitutional and sowing the seeds of anarchy. This conduct is a direct violation of the Rule of Law and contravenes the Commonwealth Values and Principles as agreed by member states. It is also a serious violation of the doctrine of separation of powers enshrined in the constitution of Sri Lanka._

_It follows that all subsequent actions by Parliament and the President – the impeachment of the Chief Justice and her removal were unconstitutional and unlawful. It follows that the purported appointment of a new Chief Justice was also unconstitutional and unlawful since the incumbent Chief Justice had not been validly removed._

I am of course aware that the issue is still subject to appellate proceedings in Sri Lanka, but the government appears to maintain the view that the question of the removal and replacement is not a matter for the courts. In the course of his opinion, Judge Langa referred expressly to the LHP as requiring member states to uphold the rule of law by protecting judicial independence and maintaining mutual respect and co-operation between the legislature and the judiciary,

I must say that as one of the original promoters of the LHP, it gives me great satisfaction to hear them quoted as an authority by such senior Commonwealth judges.

Sadly, the example of Sri Lanka is not alone. In recent years, there have been too many examples of the harassment of judges or their removal and replacement by processes of questionable legality. The articles by Sir Philip Bailhache and CJ Lehohla give examples of these. You are about to hear the testimony of the Chief Justice of Papua New Guinea. So the question arises, how are we to put our Latimer Houses to be put in Order? What is to be done to procure respect for the Principles and in particular the safeguarding of the independence of the judiciary?

At the political and institutional level of the Commonwealth, it is hard to be optimistic. The proposal for an independent oversight body, the Commissioner for the Rule of Law, proposed by the Eminent Persons Group appointed by Heads of Government, has been kicked into very long grass. The much vaunted Commonwealth Charter, signed with due ceremony by Queen Elizabeth as Head of the Commonwealth, is essentially an aspirational document. It restates the fundamental principles but provides for no mechanisms for ensuring compliance. The Commonwealth Ministerial Action Group (CMAG) continues to interpret its remit narrowly. Significant indeed was the reaction of Senior Officials of Commonwealth Law Ministers (SOLM) to a report laid before them by LHWG which drew attention to specific concerns regarding particular Commonwealth countries. SOLM declined to forward the report to ministers but instead referred it for ‘correction’ by governments. The reception accorded to your Secretary General when she presented the report reflected the nervousness of governments when exposed to the concerns voiced by members of the partner organizations. Officials took the strongest exception to what they interpreted as criticisms of governments by ‘civil society,. The conclusion must be that the ‘club of governments’ seems to cherish their sovereign right to disregard the principles of Commonwealth membership when their interests dictate.

Some of you may recall that in my address to the Cape Town Conference in 2008 I referred to the recently adopted Edinburgh Plan of Action (EPoA) for the implementation of the LHP. Subsequently senior officials of law ministers declined to endorse the EPoA for consideration by Law Ministers so ownership of this document remains exclusively with the partner organizations (CLA, CLEA, CMJA and CPA). This means that the mandate of the partner organizations contained in the EPoA to establish a standing committee to gather reports on the implementation of LHP for CMAG was not endorsed, nor the idea that governments should report on implementation to CHOGM; a similar fate befell the proposed mandate of the Commonwealth Secretariat to provide regular reports to law ministers and senior officials.

So, in the face of official obstruction, what can we, the lawyers of the Commonwealth, whether practitioners, judges or academicians, do to keep our Latimer Houses in order? I wish to emphasise three steps that we can take:

(1) Our Associations through the LHWG can continue to monitor examples of good and bad practice and to report them to senior officials, law ministers, the Secretary General, CMAG and other appropriate quarters. We can give appropriate publicity to examples of failure of compliance through our own independent channels as we have done in the case of Sri Lanka. In this sense the LHWG performs the function of the Standing Committee referred to in the EPoA.
(We are of course aware that it is particularly important that good practice as well as poor practice is acknowledged. One may have some sympathy for governments who feel that their attempts to respect the rule of law are not always sufficiently acknowledged.)

(2) We can promote legislative and other measures to enshrine the principles securely in the domestic law of commonwealth states. A good example of this is the ‘model clause’ drafted by a joint committee of CLA, CLEA and CMJA and just approved by your Council on judicial appointments commissions. This seeks to plug a number of loopholes in the appointment process, e.g. by requiring the JAC to meet to fill vacancies within a specified time frame. The model clause also provides for the membership of the JAC: a controversial issue particularly regarding the balance between judicial and lay members: our model provides for 5 judiciary including magistrate, 2 practising lawyers, a teacher of law and 5 lay members. You will note that we exclude express provision for politicians. The ambitious goal might be to draft a series of model clauses dealing with all aspects of the functioning of the judiciary in conformity with LHP, in particular to deal with discipline and removal from office – you will recall the government argument in the Sri Lanka case that the constitution leaves the removal of judges to a political process.

(3) We can provide the adequate training of the judiciary and other members of the other institutions of government on the principles. The Latimer House Toolkit which we are designing on behalf of the Commonwealth Secretariat provides a framework for training programmes for all the relevant stakeholders. The Toolkit provides a step by step analysis of each of the Principles and exercises to illustrate their application. Mutual understanding of the problems of other branches of government is important. It is no good for judges, for example, to demand large increases in remuneration if the government’s treasury is empty!

In conclusion, I must emphasise that lawyers of every description must take personal responsibility for upholding the LHP. I refer as I did in my address to CLC Cape Town to the words of Sir Shridath Ramphal to the Hong Kong CLC 30 years ago. We must be more than ‘keeper of the seals’. Despite the frustrations of dealing with governments’ reluctance to put their Latimer Houses in order, it is comforting that as is shown by numerous references by our judges, speaking both judicially and extra-judicially, to the LHP that they have become enshrined in the jurisprudence of the Commonwealth. In that we are entitled to take some pride.
Latimer House Working Group: Towards an Integrated Approach to Judicial Education in the Commonwealth

By His Hon. Chief Justice Salamo Injia, Chief Justice of Papua New Guinea

Part IV of the Commonwealth Latimer House Principles of Government, recognises that an:

“independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice”.

Achieving the objectives of this principle demands excellence in judicial decision-making. Whilst independence in judicial decision-making by judicial officers remains an absolute, the quality of justice dispensed by judicial officers is dependent on the competency of judicial officers and the level of support provided to judicial officers by the court service staff. For this reason, an integrated approach in delivering professional development program for both judicial officers and non-judicial support staff, in a structured manner, is essential to achieving excellence.

Many judiciaries in the Commonwealth have been running education programs under ad hoc arrangements. However judiciaries including PNG have been slowly moving towards developing structured judicial education programs. I will share some of our experiences in that journey.

PNG Judiciary has been in the business of running judicial education programs for some 15 years. It has remained largely ad hoc until recently when it moved towards a more structured program. This happened with the establishment of a Center for Judicial Excellence under a MOU signed in 2010 between the Secretary for Justice, the Chief Justice and the Chief Magistrate. PngCJE is jointly run by the higher and lower judiciaries through a Board supported by a Secretariat and Faculty of Trainers. PngCJE launched its first Business Plan on 12 September 2013. The Business Plan consolidates achievements of the past, strengthens those of the present and sets a vision for achieving judicial excellence in the future.

The establishment of the PngCJE and its Business Plan have come about against a back-drop of a judicial profession that is deeply rooted in tradition, a culture of self-perfection and removed from public scrutiny. With notions of judicial independence deeply entrenched in the traditions of the judicial system, the work of the judges is to some extent cloaked in mystery and this has led to the evolution of certain myths that stand in the way of achieving judicial excellence. Judiciaries of the nations of the Commonwealth have struggled to overcome these myths in order to bring about judicial excellence that meets the demands of the modern times, whereby the court’s customers and stakeholders expect judicial services of a high standard that is delivered alongside corporate principles.

Today, whilst it is accepted in the Commonwealth that judicial education is an integral part of judicial work, the approach adopted by different countries of the Commonwealth is varied, influenced by the extent to which those myths are handled. I discuss six of those myths and offer examples of how the PNG judiciary have or is the process of overcoming them.

(1) Judges cannot be taught how to do their job. Judicial officers believe this and resist judicial training, because we see it as unnecessary and an intrusion on our judicial independence. In reality new judicial officers need induction or training; the experienced need on-going judicial education and training. Many judiciaries of the Commonwealth have recognised this need and embraced judicial education as an integral part of their judicial work. In Papua New Guinea, this was achieved before the turn of the 21st century.

(2) Judicial education should be commensurate with different levels of judicial officers. If there is going to be any education to be imparted to judicial officers, it must be offered separately to judicial officers of different courts. This has seen judicial education programs delivered separately for magistrates, judges and even judges of different courts separated. This myth ignores the fact that judges and magistrates are after-all judicial officers and judicial education programs on important topics of common concern can be delivered together. Examples include judgement writing, stress management, judging in the social context of law and use of technology and Courts. Judges and magistrates in Papua New Guinea have in the early 21st century attended programs in judgement writing together that led to increased production of judgement by judges and magistrates.

(3) Judicial education is for judicial officers only. This myth resulted in non-judicial staff being excluded from training programs. This myth also excluded from training other officers in the wider law and justice sector that were involved in the judicial process, directly or indirectly. In reality, delivery of judicial services is a collective effort by many from within and outside the judiciary and they must also receive appropriate training. In Papua New Guinea, PngCJE
Business Plan allows for judges, magistrates, lawyers, mediators, police officers, correctional officers and anyone involved in the court process to receive appropriate training.

(4) Judicial education is delivered by Judicial Officers. This myth excludes other non-judicial officers from within and outside the judiciary who can offer appropriate education for judicial officers in areas of work that require external assistance in developing judicial case disposition skills, for instance in technical areas such as skills in dealing with medical evidence and use of technology in court case management. In reality, judicial officers need the support of expertise in different aspects of our work to teach us to reach excellence. Increasingly, Commonwealth Judicial education programs are recognising the importance of non-judicial trainers in specific areas of training. In Papua New Guinea, PngCJE Business Plan provides for a Faculty of Trainers comprised largely of judicial officers who hold prescribed qualifications. The plan also extends the class of trainers to external trainers who do not possess prescribed train the trainer (TOT) qualifications.

(5) Only judicial officers know their training needs and can identify those needs internally. In reality, judicial officers need the input made by Court’s stakeholders and customers to assess the performance of judicial officers and identify appropriate training needs. A key stakeholder is the government whose interest is represented by Department of Justice or the Attorney General. In Papua New Guinea, that need is addressed through the establishment of PngCJE in three ways. First, the MOU entered into in 2010 which allowed the government to be a party to the MOU. Secondly, the composition of the board of PngCJE reflects this integrated approach to achieving excellence. The Secretary for Justice, President of the PNG Law Society, Dean of the Faculty of Law of the University of PNG Law School and the Director of the Post Graduate Legal Training Institute are amongst the members of the board of PngCJE. Thirdly, the PngCJE Business Plan allows for wide consultation with the Court’s customers including for instance information on training needs obtained through Court User Forums, visits to jails and from public complaints.

(6) Judicial education cannot be formally structured and delivered periodically; judicial education is needs-based, must remain optional and run under ad hoc arrangements. Judicial education arrangements in most countries of Commonwealth remain largely ad hoc. However many countries have moved towards achieving certainty in delivery programs in a structured manner, with an established judicial committee driving programs, supported by a Secretariat and Faculty of Trainers, and programs run under a fixed curriculum. In Papua New Guinea, programs for core topics have been identified and locked in for a 5 year period.

The establishment of PngCJE and the promulgation its Business Plan epitomised what judicial officers in PNG (Judges and Magistrates) believe are essentials of a Center for judicial excellence. Those include the following:

(1) The establishment of a PngCJE is a collective effort by two key players in the delivery of judicial services – the Judiciary and the executive arms of government. Judicial education must embrace public policy concerns expressed through the executive government. MOU signed by the Secretary for Justice and Attorney General’s Department and the heads of the lower and higher judiciary signifies that collective approach. Cooperation between the Judiciary and the government in judicial education in terms of articulating government policy concerns does not impinge on the doctrine of separation of powers.

(2) Promulgation of a Business Plan is the first step towards approaching judicial education in a structured way.

(3) PngCJE Business Plan begins with a foreword by the chairman of the Board, the Hon Deputy Chief Justice Gibbs Salika. The appointment of the second most senior member of the bench signifies the importance that the PNG Judiciary placed on judicial education.

(4) Establishes a board that runs the PngCJE. Its membership is comprised of a wide range of stakeholders including Department of Justice, the PNG University Law School, the Post Graduate Legal Training Institute and the Papua New Guinea Law Society.

(5) Introduces a framework for judicial excellence; reference is made to the national government’s policy framework on judicial education and the Commonwealth Latimer House Principles, Part IV.

(6) Spells out the underlying core values for achieving judicial excellence through judicial education.

(7) Identifies the methods to be employed in delivering judicial education and training programs including e-learning.

(8) Identifies relevant recipients of judicial training. Based on principles of a integrated approach, the PngCJE offers training programs on important topics of common interest for all judicial officers of all the four tiers of court (Supreme Court, National Court, District Courts and Village Courts), lawyers from the public and private bar involved in the court process, Mediators, Police and Correctional Officers involved in the Court process.
(9) Prescribes minimum standards to be observed in determining the frequency and number of training programs for different category of recipients of training.

(10) Establishes a faculty of trainers that hold special TOT certifications from recognised judicial education institutions and colleges situated in countries of the Commonwealth. It also allows for the involvement of external trainers with special skill and experience in specific areas of training.

(11) An organisational structure that caters for a clear line of control and coordination of its activities.

(12) A curriculum that runs for 5 years with programs for core topics pencilled in; topics that are identified through appropriate forums that allow wide consultation with the court’s stakeholders and customer, and

(13) Provides for networking and cooperation with regional and international bodies, in order to ensure international and Commonwealth standards in judicial education are maintained.

The establishment of PngCJE and its Business Plan represents an integrated and holistic approach to judicial education. In order to ensure that the Business Plan accords with Commonwealth values and standards in judicial education, the PNG Judiciary has consulted with its international partners from the Commonwealth including the Commonwealth Secretariat, CJEI through its Director, Judge Sandra Oxner (who visited us and made a valuable contribution to its structure and content), the National Judicial College of Australia, the National Judicial College of UK and the Judicial Institute of New Zealand.

Implementation of the Business Plan, in particular, its 5 year curriculum remains the most difficult of the challenges. The PNG Judiciary remains optimistic that with full implementation, excellence in judicial decision-making can be achieved.
Over three decades ago I represented a journalist who was seeking to challenge the decision of the Horsham Magistrates to prohibit the reporting of committal proceedings in which the defendants were charged with offences in connection with the export or attempted export of arms and ammunition.

I was leading Andrew Nicol, junior counsel, now Mr Justice Nicol, and was instructed by Harriet Harman, now Deputy Leader of the Labour Party. My main opponent was Simon Brown, later Lord Simon Brown and a recently retired member of the Supreme Court.

The Court of Appeal, presided over by Lord Denning, Master of the Rolls, roundly rejected my submissions that powers under the Contempt of Court Act 1981, only recently brought into force, could not extend the powers which magistrates already enjoyed to restrict reporting committal proceedings under the more limited provisions of the Magistrates Court Act 1980.

Lord Justice Shaw said that “To describe the former section as providing a complete and exhaustive code governing the question of publication of committal proceedings is, with all respect to Mr Beloff’s forensic prowess, talking in the air”. So you may rely on high judicial authority to ignore anything I say to you this afternoon.

In that case also Lord Denning gave a major – but not the first nor certainly the last – endorsement of what he called “two of our most fundamental principles. One is open justice. The other is freedom of the press. It is of the first importance that justice should be done openly in public; that anyone who wishes should be entitled to come into the court and hear and see what takes place and that any newspaper should be entitled to publish a fair and accurate report of the proceedings without fear of a libel action or proceedings for contempt of court”.

But it is precisely because the perceived imperatives of justice and freedom of expression are not always coincident, that journalists and judges make indeed uncomfortable bedfellows. The default position in the legal system of England and Wales is – as it is in Jersey and Guernsey - that course should be open to public and press alike. But the press-sometimes called the Fourth Estate - a cliché adopted as the title of one of his best selling novels by Jeffrey Archer - in which I appear with my own name as an advocate – no doubt to give in the words of Gilbert. Sullivan’s librettist, “… verisimilitude to an otherwise bald and unconvincing narrative”. It is at page 379 - if you are interested - which you are not.

The Press, to return to my theme -has a special role - to act as the public’s scrutineer against potential judicial misbehaviour, and by seeing that justice is done to ensure that it is actually done. Lord Neuberger in the Judicial Studies Board’s, annual lecture in 2011 said about open justice “Public scrutiny of the Courts is an essential means by which we ensure that judges do justice according to law and thereby secure public confidence in the Courts and the law’. But those members of the public who attend Court proceedings, usually with some special interest in their outcome, rarely pass through the courtroom doors so to familiarise themselves, as constitutional geeks or nerds with the workings of the judicial organ of government, and hardly ever if there is something better on television. In any event those spectators see only what they see and hear only what they hear. The Press in its reporting conveys the relevant information to a far larger audience. In Lord Nicholls succinct sentence in Reynolds v Times Newspaper “the Press discharges vital functions as a bloodhound as well as a watchdog”.

Of course important, indeed vital, as that role is the press’s real interest is in enhancing circulation by what they call good copy-stories of sex and scandal and the exposure of the feet of clay of the high and the mighty, as revealed in the course of legal proceedings. Some judges are tolerant of what others may see as moderate hypocrisy. In Grobelaar v Times Newspapers Simon Brown LJ overruled an injunction in a libel action by saying realistically, if only after repeating the familiar canine metaphor, ‘ investigative journalism is not conducted with a view to bringing miscreants to justice, but rather so as to sell newspaper’ but, nonetheless suggesting that ‘instead of the press being deterred from publishing these exposes by the need to prove justification, they should be protected by the defence of qualified privilege’.

It was a source of rueful regret to me that after more than 15 years in silk in which I had had the good fortune to be involved in several cases which established important principles of law at the highest level - not always alas to my clients’ advantage - I only achieved what pop artist Andy Warhol said was every human’s heritage my 15 minutes of fame, when in 1996 I represented soap actress Gillian Taylforth in a libel action against the Sun in which the crucial factual issue was whether it...
was possible, given the location of the vehicle’s gear box, to give oral sex in the front seat of a Range Rover. I never did study the sales figures for the car in the wake of that much reported trial.

Given the commitment to open justice it is surprising how many examples remain of where the doors can be closed or partly closed to the press. Hoffman LJ in R v Central Independent TV said “There are in the law reports many impressive and emphatic statements about the importance of the freedom of speech and the press. But they are often followed by a paragraph which begins with the word, nevertheless…”.

Judges - at any rate some Judges are themselves are becoming more liberal. Sir James Munby, the new President of the family Division earlier this month refused to prohibit footage of social services staff from the Staffordshire County Council taking a man’s newborn child into care being broadcast on the internet, while maintaining the anonymity of the baby itself. He said clearly obiter “We must have the humility to recognize that public debate and the jealous vigilance of an informed media have an important role to play in exposing past miscarriages of justice and in preventing possible future miscarriages of justice”. But some Judges are not all Judges. Mr Justice Eady, for long the senior judges in charge of the jury list, was repeatedly and unfairly pilloried of the basis of his award of damages to Max Mosley, then the CEO of the FIA for press ventilation of his participation in private spanking sessions.

Closed proceedings where national security is at stake exclude not only the public and the press but even one of the parties and their lawyers, a situation mitigated only in part by the use of special advocates to comment as best they can on the closed material in the interests of the persons concerned.

There are now at least six statutory provisions which vouch for the procedure since it - as the Supreme Court held, in the Al Rawi case is alien to the common law although not in principle inconsistent with Article 6 of the ECHR, which allows with all the usual preconditions, for the potential exclusion of the press (and public) for trials in a variety of interests, moral, public order, national security, interest of juveniles, protection of privacy, and the interests of justice itself. Indeed the rationale for the departure from open justice was far earlier epitomized by Lord Haldane LC in the classic case of Scott v Scott when he referred to a “yet more fundamental principle that the chief object of the courts of justice must be to secure that justice is done”. A recent example in this very jurisdiction involved private consideration by the Court of Appeal, over which I presided, of material where the allegation was of attempted jury tampering in a high profile criminal trial.

The fundamental principle is not itself open to challenge; but its application may well be. A relative newcomer to the remedies given by the Courts, and one whose life span has proved somewhat transient, is the so-called super injunction in which a defendant, usually the press, is prevented from publishing confidential information, but in addition prevented from reporting even that such an injunction has been sought.

Confidential information used to be for the most part a synonym for commercial secrets. In modern times it has become a euphemism for sexual misconduct. The super injunction was a remedy seemingly fashioned for highly paid-some might even say overpaid-in modern footballers. I once asked in a convivial moment at a party a solicitor who specialised in reputation management for sportsmen how many members of the then England football team had obtained this form of relief; and he told me - with, I suspect, only minor exaggeration - 7 out of 11. This may itself explain the inconsistent form of our national squad over recent years. The paradox is that the journalists themselves usually know the name of the protected party from a miscellany of sources. Their irritation stems from an inability to share it with the wider world.

The press of course are vigilant to protect their interests or where judges exercising a discretion under statute make or are asked to make orders which require particular proceedings or part of them to be in camera. I recall a particularly ambitious attempt by Ernest Saunders, one of the Guinness 4, who tried to have the entirety of the criminal trial at Southwark Crown Court barred to the press. Even the fact that he was represented by the silver tongued Dick Ferguson, and the serious media were represented by me did not persuade Mr Justice Henry to deprive the press of a story that in the event created many weeks of headlines. More recently the Guardian persuaded the Supreme Court to lift the cloak of anonymity on persons whose were challenging their designation as suspected terrorists – the late Lord Rodger opening his judgement by quoting what he described as the provocative opening words of Counsel for the Guardian “your first term docket reads like an alphabet soup”.

The press too are vigilant to lobby against further encroachments on their freedom of information. National and regional editors claimed a degree of credit for the fact that the new Coroners rules effective from July provided for inquests to be held in public except where national security or in the case of pre inquest hearings, judicial proceedings were put at risk. And already editorialists have deplored the Government’s plan to include in a reform of libel law provisions for allowing judges to refuse the press their costs against an unsuccessful claimant and plans in the draft deregulation bill to end the need for written statements given in criminal proceedings to be read out in Court.

Contempt of court is a particularly fraught area because the judges are properly concerned to ensure that trials are fair. The death also earlier this month of Sir David Frost, who spectacularly survived an early assessment that he had risen without trace, was famous not only for his interview with ex-President Nixon - a project of his mature years - but for his cross-
examination of the insurance fraudster Emil Savundra which excited the trenchant dictum of Lord Justice Salmon “Trial by television will not be tolerated in this country”. In the USA by contrast the first amendment and its guarantee of freedom of expression trumps virtually all other interests. When marooned in a Caribbean hotel during a period of what I call warm weather advocacy, I marvelling at the daily coverage of criminal trials of exotic murders beamed in from American channels in which the day’s evidence is analysed from both prosecution and defence perspective by pundits from law schools or law firms -broadcasts presumably as available to jurors as they were to the viewing public.

The conservative side in the debate over whether court proceedings should be televised bases its opposition on the fear that witnesses may be intimidated by the realization that their testimony is being broadcast even on invisible cameras and - dare I say it - that there are advocates who will give full vent to their suppressed thespian tendencies by playing to the gallery, and hoping, if briefs ever dry up, to an invitation to appear on Strictly Come Dancing, Big Brother, or even Britain’s Got Talent. -a show which proves the falsity of its own title. I should add that the Supreme Court has its own channel without conspicuous impact, for better or for worse, on counsels performance, or, alas, on overall viewing figures; and the Court of Appeal in England-but not, I think in Jersey, will soon partially open its doors to the TV cameras.

Mercifully the offence of scandalising the judiciary - criticizing judges in such a way as to bring the administration of justice into disrepute - can now be preserved in a draw marked ‘obsolescent’ even though Peter Hain, youthful protester turned middle aged cabinet minister, found himself threatened with proceedings when in a passage in his memoirs, - a book allegedly remaindered even before it was published , he criticized the then Mr Justice Girvan for his handling of a judicial review challenging the appointment of a policeman’s widow as interim victims commissioner in Northern Ireland. Although leave was given, the proceedings were compromised; and the offence itself promptly abolished by statute in Northern Ireland. The Law Commission has recommended that the provinces example is followed on the mainland. That particular point of friction between judge and journalist has therefore been assuaged. And the judiciary must tolerate with such fortitude as it can muster that traditional tabloid headline when some part time assistant district judge is charged with forgetful failure to pay his annual TV licence “Top Judge in financial scandal”.

But another area in which there remains scope for collision is in the substantive law which affects the press. Here, in broad overview, the last decade or so has seen on the one hand libel law liberalised in the press favour by development in particular of so called Reynolds privilege, extending the defence of qualified privilege in libel to responsible journalism on matters of public interest even where the facts on which the libel was based can be shown to be inaccurate - and on the other hand the development of a recognisable law of privacy. It might have been said before the creation of the Supreme Court - the law lords giveth and the law lords taketh away.

Above the whole issue looms the shadow of Leveson; set up of course, not by the judiciary but by the executive to investigate the ethics, and practices, of the press, but predictably and may be necessarily presided over by a senior Judge, whose recommendations, yet to be implemented in full or modified form, suggested to some organs of the press a concerted attack upon freedom of expression by subordination to, however indirectly, governmental regulation. The revelation in the Daily Mail that female junior counsel to the inquiry had holidayed in the Greek island of Santorini together with one of the male counsel representing a newspaper interest with a view, as she put it, to exploring the possibility of a future relationship - an explanation which makes some demands on the reader’s credulity - was only the most exotic of the media’s counter-attacks.

In concluding I will not display bias by say judges are necessary but the press is merely desirable. Both are required in a functioning democracy and the friction between them may be more a sign of democracy’s health than of any ailment. Judges and journalists are indeed uncomfortable bedfellows; and like bedfellows the world over will enjoy turbulent, but also torpid, times.
The effect of the current economic climate on conditions of service of judicial officers

The Effect of the Current Economic Climate on Conditions of Service

By Deputy Bailiff Richard McMahon QC, Deputy Bailiff of Guernsey

INTRODUCTION

Phrases such as “austerity measures”, “fundamental spending reviews” or simply “budget cuts” have become commonplace during the lengthy current global economic downturn. The question I will attempt to address is how such responses by governments to the financial positions in which they find themselves can legitimately impact on the terms and conditions of judicial service.

LATIMER HOUSE PRINCIPLES/GUIDELINES AND OTHER INTERNATIONAL STANDARDS

The basic proposition of the Principles is that adequate resources need to be provided to the judicial system to operate effectively without any undue constraints which may hamper the independence sought. In this context, the Latimer House Guidelines expressly state that “Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary” – not just “desirable” but “essential”. In terms of process, “As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.” Endnote 5 acknowledges, however, that “a shortfall in anticipated national income might lead to budgetary constraints”.

At para. 53 of its Report on the Independence of the Judicial System, the Venice Commission (the European Commission for Democracy Through Law) warned that “Even in times of crisis, the proper functioning and the independence of the Judiciary must not be endangered”.

These recognised international standards show that political and administrator decision-makers are strongly advised to proceed with caution or risk upsetting the carefully balanced constitutional relationships within a jurisdiction. There can, however, be no suggestion that the judiciary is somehow immune from adverse changes to their terms and conditions – indeed, as Chief Justice Lamer warned in the Supreme Court of Canada in Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island [1997] 3 SCR 3 (the PEI Reference case) (at para. 196), “Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times”.

THE PEI REFERENCE CASE

That Canadian decision is significant because it established clearly a number of applicable principles, which are particularly relevant in an economic downturn. Pay cuts ranging from 3.8 to 7.5% were to be introduced as part of the government’s general scheme to eliminate deficits. The Court held (at para. 133) that “as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class”, although a freeze or change requires “prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation”.

The Court also recognised (at para. 135) that “... any reductions to judicial remuneration, including de facto reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation as is witnessed in many countries.”

The Court decided that, in order to preserve judicial independence, an independent, effective and objective commission should be interposed “between the judiciary and the other branches of government. The constitutional function of this body

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[is] to depoliticize the process of determining changes or freezes to judicial remuneration” (para. 166). That body is the Judicial Compensation and Benefits Commission. In its 2012 Report (at para. 16), the Commission noted that “... judges cannot negotiate their remuneration, and they are precluded from seeking alternative employment or business opportunities outside of their judicial duties”, which is precisely why some independent body needs to be interposed.

ARBITRARY REDUCTIONS

The full panoply of accepted international instruments on judicial terms and conditions was highlighted for us in the Bailiwick of Guernsey in the recent judgment of the Administrative Court of England and Wales in R (Barclay) v Secretary of State for Justice and Lord Chancellor [2013] EWHC 1183 (Admin). That case considered whether section 6(4) of the Reform (Sark) Law, 2008, as amended in 2010 2, gave untrammelled power to the Chief Pleas, the body that forms the legislature and executive in Sark, in respect of the remuneration of the Seneschal, being the Island’s principal judge, although that office-holder is not usually a legally-qualified person.

The Court concentrated on “whether there is an objective perception of the risk of pressure on the Seneschal by reason of the possibility of the Chief Pleas arbitrarily reducing his remuneration” (at [89]). Although the case turned on an objective assessment of the structure created, the Court also referred to Lord Reed’s observation in Starrs v Procurator Fiscal (2000) 8 BHRC 1, 44 that “The adequacy of judicial independence cannot appropriately be tested on the assumption that the Executive will always behave with restraint”. The Court noted that the power conferred on the Chief Pleas was unfettered and contained no checks and balances, unlike the provision it replaced, which required Lieutenant Governor approval 3, and concluded that “an objective observer would see the Seneschal as vulnerable to pressure from the members of the Chief Pleas”. It gave as an example of such pressure a case “where the Seneschal had to make a decision which the law appeared to require but which the majority of the community strenuously opposed” (at [94]). At the end of its judgment, the Court offered the simple remedial option of reinstating the role of the Lieutenant-Governor in the process of determining those other terms and conditions for Sark’s judiciary (at [98]).

GUERNSEY

This is an area where Guernsey has arguably not got its Latimer House particularly well in order.

Unlike the UK’s Constitutional Reform Act 2005 4, there is no statutory framework relating to the offices of Bailiff and Deputy Bailiff conferring any form of clear protection or setting out the terms and conditions attaching thereto. Instead, there is a rather loose arrangement under which the government department responsible for the allocation of public resources is obliged to make “provision of resources for the offices of Crown appointees and for the function of the Royal Court”. That department (the Treasury and Resources Department) is also responsible for “reviewing the remuneration attaching to the posts of Bailiff, Deputy Bailiff and Judges of the Royal Court and of the Magistrate’s Court ... and submitting to the Policy Council for sanction any adjustments which, in its opinion, are necessary”. The Policy Council, comprising the Chief Minister and the Minister (or an alternative representative) of each of the 10 departments of government, which also fulfils the role as employer of States’ staff (including civil servants), acting no doubt with the benefit of advice from civil servants, is then responsible for sanctioning those recommendations in respect of salaries The Policy Council also makes recommendations in respect of the Public Servants’ Pension Scheme, of which the Judiciary are members, albeit in a special class with distinct contributions and benefits.

In terms of salary, the practice in recent years has been to adopt direct linkage to the salaries paid in other jurisdictions. In this way, the position might just be defensible, if it were challenged, but might be criticised because it fails to take into account any particular domestic circumstances. The pension arrangements are, in any event, distinct.

Even though Guernsey has fortunately not experienced as extreme an economic downturn as many other places, the remuneration packages of the judiciary have lately been the subject of executive scrutiny. In particular, in 2011 the States of Guernsey announced a general review of the Public Servants’ Pension Scheme. This resulted in a proposal, announced in 2012, to switch the scheme prospectively from 2012, to switch the scheme prospectively from the present scheme to a career average re-valued earnings (CARE) scheme, whilst preserving entitlements accrued under the present scheme as at the date of the switch. The proposed scheme will involve increased contributions from members, would raise the retirement age from 65 to 67, will cap the salary in respect of.

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2 By the Reform (Sark) (Amendment) (No. 2) Law, 2010. Section 6(4) of the 2008 Law, as amended, provides: “The other terms and conditions of the office of Seneschal [ie, not those relating to the term of office], including the payment of remuneration out of public funds, shall be determined by the Chief Pleas upon the recommendation of the General Purposes and Advisory Committee in consultation with the Finance and Commerce Committee”

3 Section 6(3) of the 2008 Law as originally enacted provided that “The Seneschal shall be paid such remuneration out of public funds as may from time to time be approved by the Lieutenant Governor”.

4 Section 3(1) provides that government Ministers and “all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary” and section 3(6)(b) specifically directs that the Lord Chancellor must have regard to “the need for the judiciary to have the support necessary to enable them to exercise their functions”.

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which pension accrual occurs, and so is paid, to a specified civil service grade significantly below that of current judicial pay levels, and will cap the percentage annual increase of pensions in payment.

Quite what the proposals in respect of judicial pensions will be remains a mystery! The emergence of the Administrative Court’s decision in the Sark case was potentially timely because it appears to have taken the wind out of what might otherwise have been quite an aggressive political stance.

PENSION REFORMS MORE GENERALLY

Others will know better than I do what changes are being proposed or implemented elsewhere. For anyone still going through the process of pension reform, there are some useful Australian materials. An article by Professor Brian Opeskin (published in Federal Law Review, Vol. 39, pp. 33-70, 20116), albeit written in the context of future demographic changes impacting on cost, but arguably equally relevant to changes based on a country’s financial position, serves as a reminder that “…the objective of any reconsideration of policy is not simply to make judges cheaper. … Judicial office must continue to be attractive to the most meritorious [lawyers], nearly all of whom have lucrative alternatives in the legal profession. A pension is not a gratuity; it is ‘simply part of the price’ of making judicial office attractive [see Burke Shartel, ‘Pensions for Judges’ (1928) 27 Michigan Law Review 134, 150]. … The challenge is to design a system of judicial remuneration that is cost-effective and sustainable in the long-term, without eviscerating the benefits paid to judges.” He also emphasised that, when considering what may be perceived as adverse changes, it is important carefully to factor in that the judiciary’s “status and morale or self-esteem must be sufficiently high” so “that they enjoy community respect and feel able to resist pressure from any quarter”.

Referring to the proviso to Section 72 of the Australian Constitution6, which provides that remuneration shall not be diminished during a judge’s continuance in office, a July 2012 Position Paper7 from the Judicial Conference of Australia contains the following suggestions, which are likely to resonate strongly with all of us:

“Changes to pension arrangements should never be retrospective, both for constitutional and other reasons. However, if new arrangements are introduced, serving judges should have the option of participating in them should they choose to do so.

New arrangements should not be introduced otherwise than on the basis of recommendations made by a genuinely independent and properly resourced body.

Any changes to judicial person arrangements should accept that the pension constitutes an integral part of judicial remuneration. To consider changes to one element of judicial remuneration, in isolation from the total ‘package’, invites reduction of judicial remuneration with consequential adverse affects on the ability of courts to recruit qualified persons.

Any changes to pension arrangements should not result in diminution of the total remuneration of judges. Otherwise, difficulties would be created not only for recruitment of judges, but for courts whose members are differently remunerated for performing the same tasks.”

Further, the Position Paper helpfully highlights (at para. 14) that “A pension scheme promotes the reality and appearance of judicial independence by eliminating what might otherwise be seen to be a temptation for judges to tailor their approach to their post-retirement interests.” We simply cannot be seen to be deciding cases favourably towards any party with a view to lining our own nests through seeking commercial opportunities in retirement, however much that outcome is clearly the most appropriate one in the case!

CANADA – A COMMONWEALTH CASE STUDY

Canada offers a good example of how to conduct appropriate periodic general reviews8. These are undertaken by a suitably independent body (the Quadrennial Judicial Compensation and Benefits Commission, to which I have previously referred, all in accordance with a transparent legislative regime9.

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6 Which provides that federal judges shall receive "such remuneration as the Parliament may fix".
8 In the first Commission’s Report in 2000, the rationale was explained as follows: “To guard against the possibilities that government inaction might lead to a reduction of judges’ real salaries because of inflation, compensation commissions must convene at least every three to five years to ensure the adequacy of judges’ salaries and benefits over time”. Moreover, as recognised in Bodner v Alberta [2005] 2 SCR 286, para. 15: “The reports of previous commissions and their outcomes form part of the background and context that a new compensation commission should consider. A new commission may very well decide that, in the circumstances, its predecessors conducted a thorough review of judicial compensation and that, in the absence of demonstrated change, only minor adjustments are necessary.”
9 See section 100 of the Constitution Act, 1867, supplemented by section 26 of the 1985 Judges Act, as amended in 1998 following the PEI Reference case. The latter provision requires a Quadrennial Judicial Compensation and Benefits
The most recent Quadrennial Commission in 2012 was faced with a government submission advocating significant pay restraint arising in particular from the prevailing economic conditions, referring to section 26(a) of the 1985 Act. This arose, at least in part, because in 2009, judges had been exempted from the wage restraint measures applied generally to the public sector under the Expenditure Restraint Act. However, as noted at para. 61 of its Report:

"... the Government’s proposal, by its own admission, was expected to result in a reduction in individual judicial salaries in real terms. The Commission believes that the prevailing economic conditions in Canada and the current financial position of the Government are not such as to justify amendment of the Judges Act to save a relatively inconsequential amount of public funds [ie, a fraction of one percent of total federal expenditures]. The Commission believes that if the Government were to take this step in the current circumstances, there is a real risk that it would be perceived as a negative statement by the Government on the performance or value of the judiciary. This could have long-lasting detrimental effects not only on the attraction of the best candidates but also on the morale of the current judiciary, and its performance could suffer as a result. The Commission is not saying that the case for a reduction of judicial compensation in real terms can never be made out, but rather that the Government has not done so in the course of this process."

HONG KONG – A CASE STUDY FROM ELSEWHEREx

Following the November 2005 Report on the Study on the Appropriate Institutional Structure, Mechanism and Methodology for the Determination of Judicial Remuneration in Hong Kong 200510, the Standing Committee on Judicial Salaries and Conditions of Service has been taking into account the following basket of factors:

- the responsibility, working conditions and workload of judges vis-à-vis those of lawyers in private practice;
- recruitment and retention in the Judiciary;
- the retirement age and retirement benefits of Judges and Judicial Officers (JJOs);
- the benefits and allowances enjoyed by JJOs;
- prohibition against return to private practice in Hong Kong;
- public sector pay as a reference;
- private sector pay levels and trends;
- cost of living adjustments; and
- the general economic situation in Hong Kong.

Historically, judicial remuneration in Hong Kong had been linked to senior civil service salaries11. The 2005 Report further recommended that “benchmark studies should be conducted every three to five years to check whether the judicial pay is kept broadly in line with the movements of private sector earnings over time”. In its latest 2012 Annual Report12, the Committee also had regard to the following additional factors suggested by the Administration:

- overseas remuneration arrangements;
- unique features of judicial service – such as the security of tenure, the prestigious status and high esteem of judicial officers; and
- the budgetary situation of the Government – which is a relevant factor for consideration in adjusting civil service pay.

Applying this expanded basket of factors, the Standing Committee adopted as its recommendation for 2012-13 a pay increase of 3.66%.13 In doing do, it tracked developments, if any, in six overseas common law jurisdictions (Australia, Canada, New

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11 As explained at para. 3.28 of the 2012 Report: “De-linking judicial remuneration from that of the civil service would not only strengthen the perception of judicial independence, but would also provide the necessary safeguard and reassurance to JJOs. That conclusion had also taken into account certain aspects that render it inappropriate for a direct comparison between the Judiciary and the civil service, e.g. judges do not have the collective bargaining process on annual pay adjustment which the Administration has established with the civil service unions and staff associations.”
12 At http://www.jsscs.gov.hk/reports/en/jscs_12.pdf. In discharging its functions, the Committee states that it "has to ensure that judicial remuneration is sufficient to attract and retain talent in the Judiciary, in order to maintain an independent and effective judicial system which upholds the rule of law and commands confidence within and outside Hong Kong".
13 The Committee tracked developments, if any, on judicial remuneration in six overseas common law jurisdictions (Australia, Canada, New Zealand, Singapore, the UK and the US), noting that some continued to operate pay freezes and
Zealand, Singapore, the UK and the US), noting that some continued to operate pay freezes and deferral of pay adjustments and, for those granting rises, they were generally lower than in the previous year. Therefore, even in a comparative economic downturn, quite properly judicial remuneration was being kept in line with pay trend indicators across the board within a broadly comparable group.

LEGAL CHALLENGES

No doubt as a last resort, if the steps taken in respect of judicial terms and conditions are regarded as unacceptable, a legal challenge might need to be contemplated. The two examples to which I will refer both found the changes made to be unconstitutional.

Article 83 of Latvia’s Constitution provides that “Judges shall be independent and subject only to the law”. In December 2008, the Latvian parliament approved wage freezes for the country’s judiciary as part of the 2009 budget cuts designed to meet the terms of the EU- and IMF-led bailout agreement with international lenders. More than 100 judges challenged those budget cuts and the Constitutional Court ruled that “Because it violates the principle of the independent judiciary and disproportionately limits the financial security of judges, the challenged law violates Article 83”.

Earlier this year, the Supreme Court of New Jersey split 3:2 when ruling that the 2011 Pension and Health Care Benefits Act, which increased the contributions required from state employees, including judges, violated a constitutional ban on reducing judicial salaries, which was in similar terms to Section 72 of the Australian Constitution, to which I have referred. The majority opinion included the comment that “A court that cannot protect its own independence is not one that can be counted on to protect the fundamental rights of others in challenging times”. The minority, however, drew a distinction between salaries and fringe benefits and also took the view that a general law could not be criticised in this fashion and that the Act did not amount to political retribution singling out judges for unpopular decisions.

IRELAND

Closer to home, there has been the threat of legal challenge in the Republic of Ireland. Following a referendum in October 2011, Article 35.5 of the Constitution was swiftly amended. As originally enacted, it had prohibited the reduction of a judge’s pay whilst remaining in office. By virtue of the amendment, reductions could be made by law to the remuneration of persons belonging to classes of persons paid out of public money, where such a law states that those reductions are in the public interest. This change meant that proportionate reductions to the remuneration of judges could thereafter be made.

The Financial Emergency Measures in the Public Interest Act 2011 brought about reductions ranging from 24½% to nearly 31% for the Irish judiciary then in office. (It has to be acknowledged that other sweeping pay cuts were made right across Ireland’s public sector, so this was not an example of singling out the judiciary.) New judicial appointments from 2012 are being made at pay levels some 10% below those applying to judges whose pay was cut by this Act. Such a variable geometry in terms and conditions is, of course, far from ideal. These steps indicate that radical and far-reaching changes can potentially be made where the exceptional and dire economic situation facing the country warrants them. Ideally, however, there should be a proper level of engagement before imposing less beneficial terms and conditions on judicial officers so that the full consequences can be fully considered. The founding of the Association of Judges of Ireland on 18 November 2011 as a direct consequence of these constitutional and legislative changes, which includes amongst its aims the promotion of the independence of the judiciary, offers the platform for such engagement to take place.

CONCLUSIONS

Internationally recognised standards, including the Latimer House Guidelines, recognise the general need to protect judicial terms and conditions from adverse changes arising from what might otherwise be regarded as arbitrary political manipulation. However, it is also quite clear that the Judiciary are not absolutely immune from pay cuts or pension changes (and so not immune to other changes to terms and conditions that might be regarded as unwelcome being imposed). Even in jurisdictions with apparently robust constitutional protection, amendment is possible if the economic situation justifies this, so long as “across-the-board” changes are being proposed, thereby avoiding any suggestion of discriminatory treatment. Equally, if such an amendment route were not to be followed, there may be scope for challenging the changes proposed or made as being unconstitutional or otherwise as contrary to any domestic legal protection that could properly be invoked.
When change is proposed, the entirety of a judicial officer’s terms and conditions should be considered. As far as possible, the importance of honouring existing commitments made to incumbents should be stressed and careful consideration given to any future impact on recruiting to the bench. Proper process must be followed. Ideally, there should be independent input to avoid the risk of perception that economic crises facing governments result in political interference undermining public confidence in an independent judiciary. Assuming that proper process is followed and the entirety of the package appropriately reviewed, some readjustments within or to the overall package may be justified and so legitimate.

Provided such safeguards are put into place in each of our jurisdictions, I suggest we will have gone a long way towards getting our Latimer Houses in order.
The effect of the current economic climate on conditions of service of judicial officers

By Magistrate Nazeem Joemath, South Africa

The Republic of South Africa is a signatory to the Commonwealth principles (Latimer House) which provide a roadmap for democracy and good governance through their emphasis on the separation of powers, fostering mutual respect between the different branches of government, and facilitating accountability.

The Latimer house principles have two key goals, viz the adoption of the principles and the implementation thereof. Some countries like South Africa lag behind in the full implementation.

The constitution of the Republic of South Africa Act 108 of 1996 was adopted by the Constitutional Assembly on the 8th of May 1996. This established the constitution as the supreme law of RSA and dictates that any law or conduct inconsistent with it as invalid. The Constitution promotes the separation of powers as a foundation of a democracy and advocates the importance of a single independent judiciary.

Section 165(2) of Act 108 of 1996 stipulates that courts are independent and subject only to the constitution and the law which they must apply impartially and without fear, favour, or prejudice.

Section 165(4) of Act 108 of 1996 places an obligation on organs of the state that they must through legislative or other measures assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

Judicial independence can only be realised if the Judiciary can function independently and is not subjected to the strings of the purse of its support structure viz, the Department of Justice.

The global economic crisis has had a negative impact on South Africa. South Africa experienced a recession in December 2008 after 15 years of continuous economic growth. In March 2009, the South African economy started to shrink. It only started to recover in the third quarter of 2009. For three years (from 2008 to 2011), revenue collected was less than the revenue target. In 2007/08, revenue collected was R15.8 billion less than the target; in 2008/09, it was R16.9 billion less than the target; and in 2009/10 revenue collected was R60 billion less than the target. As a result of these shortfalls in revenue collection, less funding is available to the department to provide the services that are required.

The impact of the global economic crisis also affected commodity prices, such as crude oil. This has led to the inflation rate rising beyond the set target (between 3 and 6%). Higher inflation has the implication of increased costs to provide the services of the department and an increased level of unemployment in the country.

Current economic climate conditions negatively influence the conditions of service of judicial officers on three fronts:

1: Remuneration; 2: Tools of trade and 3: working conditions.

1 Remuneration:

- The remuneration of all Judicial officers is determined by the Independent Commission for the Remuneration of Public Office Bearers (ICRPOB) who has as its responsibility and constitutional duty to make remuneration recommendations in accordance with the prescripts of section 8 of Act 92 of 1997.
- The ICRPOB realised that it has become necessary to conduct a review of the remuneration structure for Judicial Officers which would reflect a single Judiciary.
- The Chief Justice was established as the judicial anchor as a result of the 2007 ICRPOB recommendations and the remuneration of judges was linked and adjusted accordingly.
- However this link was not implemented and/or extended to the Lower Court Judiciary due to financial constraints.
- JOASA 2013 submissions recommended that the ICRPOB should act on the 2008 findings and establish the link which exists from the anchor (Chief Justice) to the lowest Judge be continued to the lowest magistrate to give effect to our constitution and reflect a single Judiciary.
- A major concern is the unjustified differences in the elements of the total remuneration package between Magistrates and Judges which should be rectified as a matter of urgency.

2 TOOLS OF TRADE
The second review report of the Independent Commission of the Remuneration of Public office Bearers dated April 2008 clearly stipulates that tools of trade do not fall within the ambit of remuneration. The duty of the provision of tools of trade is that of the Department of Justice and Constitutional development.

The Minister of Justice in his adoption address of the current strategic plan 2013-2018 promised to prioritise service delivery in relation to providing accessible, efficient and quality administrative support to the courts. In the same vein he reminded us about the volatility of the South African economy and the impact of the global economic crises which led to budget cuts and an unfortunate delay in implementation of various projects. This statement acknowledged the first hurdle of accountability but the implementation thereof is still the biggest challenge.

Judicial officers are still to a large extent without basic tools of the trade which include:
- Laptops
- 3G cards
- Access to research resources
- Functional libraries
- Printers
- Printing paper
- Stationary
- IT support outside of office hours.

Laptops:
Presiding Officers are in Court all day and need to do research at home during evenings in the week or during weekends. A laptop without #3G connection is useless.

Going Green
Various court orders are on computer programs and without a printer or printing paper orders cannot be made.

3. **WORKING CONDITIONS**

1. **Office Accommodation:**

Infra structure and accommodation remains key problem areas which negatively affect judicial service conditions of presiding officers. In most cities accommodation may be adequate but this gradually becomes worse the further one ventures into rural areas. In certain instances presiding officers convert their offices into courts and in extreme circumstances they make use of police stations or temporary structures.

The budget cuts have resulted in the rationalisation or postponement of implementation projects in all areas of the department which include spending on security, which is necessary to protect and secure judicial officers as well as initiatives in support of our constitutional democracy, and capital expenditure to build and improve court infrastructure.

- Escalation of infrastructure costs above inflation, which means that the cash flow for building new courts is often insufficient, which results in postponements in the construction of envisaged courts.
- Balancing the need for additional courts with the maintenance and accessibility programmes of existing courts.
- Using the infrastructure budget for additional accommodation where necessary.

2. **Security of presiding inside the court building**

More than 80% of all court buildings were constructed before our independence and lack the security mechanisms to provide for the safety of presiding officers. In most instances presiding officers use the same passages as the public. During the last financial year, budget allocations catered for the court security upgrades which established perimeter and securing strategic passages.

The upgrades have been implemented in most cities and its once again the rural areas where implementation lags decades behind.

Clip from Dept of Justice in this regard” • The number of buildings and people that need protection has increased substantially in line with the increase in the demand for justice services. The department has also experienced various incidents relating to serious crime perpetrated against staff members or the public on its premises, such as intimidation, murder, the theft of state assets, the theft of case dockets and court records, escapes and robberies with aggravating circumstances. However, the budget for security has not increased at the same rate to meet all the demands”.

3. **Security of presiding officers outside court buildings**
During the past few months incidents of presiding officers being targets of criminal attacks have increased. The Department of justice upon notification of an attack on a presiding officer must immediately perform a risk assessment and establish a directive with regard to the attack. Incidents’ reported by JOASA over the past few months remain unattended.

4. Wellness programs

Presiding officers have no wellness programs

During 2012 a prisoner managed to gain possession of a knife and charged at the presiding officer. All the officers of the court including the court orderlies ran for cover and the magistrate miraculously managed to open the door leading to her office and locked herself inside. The prisoner was eventually apprehended and all the court officers were immediately placed on a wellness program. The presiding officer at whom the attack was directed had to go to her medical practitioner for assistance.

Steps that have to be taken to conform to the implementation of the Latimer house principles

The promulgation of the Constitution seventeenth Amendment Act affirms the Chief Justice as the Head of the Judiciary and confers upon him, the responsibility of developing and monitoring the implementation of norms and standards for exercising the judicial functions of all courts. This act also empowers the Chief Justice to exercise oversight over both lower court and high courts. The Office of the Chief Justice, which was proclaimed by the President in 2010 as a separate government department, was established to provide the Chief Justice with the necessary administrative capacity and strategic support to enable him to perform the new functions and powers contemplated in the Constitution seventeenth Amendment Act. These would include a separate budget for the office of the Chief Justice which in turn would free the judiciary from the strings of the purse of the Department of Justice.

To give credence to the Constitution of South Africa and the establishment of a single independent Judiciary the linkage of the Lower Court Judiciary to the salary of the Chief Justice should be done as a matter of urgency. The service conditions of the Lower Court Judiciary should reflect that of the High Court. The establishment of a Wellness programme within the office of the Chief Justice for all Judicial Officers. Working conditions of the Presiding Officers as well as accommodation and security should be under the control of the office of the Chief Justice.

Access to justice is a fundamental right and economic constraints can never be used as an excuse for the violation of that right. Court buildings must be built to make the courts more accessible to the public in rural areas. There is the old adage justice delayed is justice denied. Judicial officers are constrained in the performance of their functions by the inability to be provided with the necessary tools of trade, accommodation, security and adequate remuneration. Unfavourable economic conditions should not always be used as an excuse for the delay or denial of justice to the public at large.
Providing objectively independent courts in small jurisdictions

Providing objectively independent courts in small jurisdictions
By Deemster David Doyle, First Deemster and Clerk of the Rolls, Isle of Man

Manx Judicial Oath

“By this BOOK and by the Holy Contents thereof and by the wonderful Works that GOD hath miraculously wrought in Heaven above and in the Earth beneath in Six Days and Seven Nights; I do swear that I will without respect of favour or friendship, love or gain, consanguinity or affinity, envy or malice, execute the Laws of this Isle justly betwixt Our Sovereign LADY THE QUEEN and Her Subjects within this Isle, and betwixt Party and Party as indifferently as the Herring backbone doth lie in the midst of the Fish.”

That is the oath of a Deemster (a High Court Judge in the Isle of Man). The Isle of Man is an internally self-governing island in the middle of the Irish Sea of some 227 square miles of beautiful fertile land with a human population of 84,000. We are a British Crown Dependency. We are not part of the United Kingdom. We have our own Parliament (called Tynwald – the oldest continuous parliament in the world). We have our own legislative, our own executive, our own judiciary and our own legal system. The first written references to the word “Deemster” date back to the early 1400’s but the office of Deemster is probably much older dating back to the Norse Kingdom and the origins of Tynwald.

The Deemster’s oath is similar to judicial oaths taken worldwide with the reference to the herring backbone being a little different. The word indifferent, in the Manx judicial oath, is used in the Oxford English Dictionary historic sense of "not inclined to prefer one person or thing to another; unbiased, impartial, disinterested, fair, just, even-handed”.

OBJECTIVITY, IMPARTIALITY AND INDEPENDENCE

The topic I am speaking on was chosen for me by the conference organisers and I am grateful to them for thinking that I had a useful contribution to make on the topic.

I start with some general comments on objectivity, impartiality and independence which are important aspects of the judiciary. The very continuing existence of the rule of law depends on them.

Objectivity in a human context calls for special consideration.

Judges are human beings who like everyone else are the products of their upbringings, their education and their experiences of life.

We all carry with us on a daily basis in our own minds the subjective baggage of our experiences of life and our personal views. I doubt whether the courageous Chief Justice of Papua New Guinea (Salamo Injia) views politicians in exactly the same light as someone who has had his direct and unpleasant experience of them. I found his address moving and inspiring and I thank him for that. Despite the considerable pressures upon him he kept a “cool head” as every good judge should.

When arriving at decisions or evaluating issues judges need to be aware of their own personal influences and life experiences. Judges need to be conscious that their decisions may be influenced not just by the evidence, the law and the arguments presented to them but also by their life experiences. In South African terms, as powerfully put forward by Justice Leona Theron: “judges should interrogate their own prejudices and blind-spots.”

Let me refer, if I may, to a profound and insightful comment by Benjamin Cardozo who I met, on paper, when I started to study law at University many years ago now. Benjamin Cardozo in The Nature of the Judicial Process [1921] stated:

“We may try to see things as objectively as we please. Nonetheless, we can never see them with eyes except our own.”

We must all strive to castaway the personal baggage we possess and to act and be seen to act objectively and independently. We must all keep minds that are open to persuasion.
When dealing with public confidence in the courts' perception is, on occasions, just as important as the reality. Perhaps matters of perception are more pronounced in small, compact jurisdictions. How do small, compact jurisdictions convince the public, the politicians, court users, the media and others that we provide objectively independent courts?

**HOW DO YOU PROVIDE OBJECTIVELY INDEPENDENT COURTS IN SMALL JURISDICTIONS?**

Attention should be given, I respectively suggest, to seven factors.

1. **The judicial appointments process**

   Firstly, the judicial appointments process.

   The starting point would be to appoint the right people to the appropriate judicial positions and pay them a decent wage, provide them with adequate training and education to ensure, in the words quoted by Bridget Shaw, that we all go to bed each evening a little less stupid, provide them with sufficient administrative support and security of tenure. Some of these issues were touched upon in the thought provoking break out session on “Threats to the independence of the judiciary” chaired by Senior District Judge Howard Riddle on Monday.

   In respect of security of tenure Lord Phillips in *Hearing on the Report of the Chief Justice of Gibraltar* [2009] UKPC stated:

   “The independence of the judiciary requires that a judge should never be removed without good cause and that the question of removal be determined by an appropriate independent and impartial tribunal. The principle applies with particular force where the judge in question is a Chief Justice.”

   The appointments should be by open competition (advertised) and on merit taking into account the need for diversity and transformation as passionately and persuasively touched upon by Justice Theron. The appointment process should be transparent. The positions to be occupied should be described as should the person specification dealing with essential attributes, qualifications, experience, knowledge and skills and personal qualities such as integrity and independence, fairness and impartiality. The need for a diversified and flexible judiciary in a small jurisdiction should also be taken into account.

   In the Isle of Man we have open competitions for all our judicial positions including the Deemsters, Bailiffs and Deputy High Bailiffs, judicial offices and lay magistrates.

   In addition to the full time judiciary we also have a panel of about 30 part-time Deemsters made up of leading lawyers from the local community and also leading lawyers from off island who are frequently deputy judges from England who can assist us where necessary. There is an ability to grant temporary advocate’s licences to lawyers in the British Isles subject to the relevant statutory criteria being met.

   There should also be the ability within the judiciary of small jurisdictions, as indeed there is in the Isle of Man, to bring in “outsiders” if necessary remembering always however the wise words of Beverley McLachlin (now the Chief Justice of Canada) in “The Role of Judges in Modern Commonwealth Society” Vol 110 LQR 260 April 1994 “[Judges] must be in touch with the society in which they work, understanding its values and its tensions.” Detachment in judicial decision making is useful but so is knowledge of local values, local tensions and sensitivity to local concerns.

2. **A Judicial Code of Conduct and a transparent complaints process**

   Secondly, a Judicial Code of Conduct and a procedure which effectively and fairly deals with complaints against judicial officers including senior judges. Such Codes of Conduct and procedures should be publicly available and accessible free of charge including via the internet.

   In the Isle of Man we have a Judicial Code of Conduct based on the Bangalore Principles of Judicial Conduct and we have a procedure whereby complaints can be made against members of the judiciary and dealt with openly and transparently. Our Judicial Code of Conduct is based on the six Bangalore Principles of Judicial Conduct which are well recognised internationally and which are concerned with (1) judicial independence, (2) impartiality, (3) integrity, (4) propriety, (5) equality of treatment and (6) competence and diligence.

   Our Judicial Code of Conduct expressly requires members of the judiciary to uphold the integrity and independence of the judiciary and to perform their duties with competence, diligence and dedication.

   The Code requires members of the judiciary to carry out their duties according to their oaths, their terms and conditions of service and the dictates of their conscience objectively and without fear, favour or partiality and in keeping with the
laws and customs of the island. Judges are required to decide cases objectively and solely on their legal and factual merits.

(3) An effective appeal system

Thirdly, an effective appeal system.

In the Isle of Man we have an Appeal Division which, as its name suggests does exactly what it says on the tin, it deals with appeals. From the Appeal Division an appeal lies with leave to the Judicial Committee of the Privy Council which provides additional objectivity and independence. We are grateful to them for the services they provide to the Island.

(4) A robust law on recusals

Fourthly, it is also important to have a robust law on judicial recusals. This is of particular importance in small jurisdictions where judges are perhaps closer to the local community than might otherwise be the case in larger jurisdictions.

Our Judicial Code of Conduct, reflecting the position at common law, provides that members of the judiciary shall not sit in a case where they have a financial interest or where the circumstances are such that a fair minded observer, having considered the facts, would conclude that there was a real possibility that the judge was biased: in all other cases they are bound not to abstain from their duty to sit.

The Judicial Committee of the Privy Council in Grant v The Teachers Appeal Tribunal (7th December 2006) and Belize Bank Limited v AG [2011] UKPC 36 were mindful of the problems which face judges in small jurisdictions when dealing with recusal applications. Care, of course, should be taken to avoid “judge shopping”. Small jurisdictions need robust law on recusals which takes into account local circumstances.

It is worth looking at the judgments in Grant and Belize Bank Limited in a little more detail. They provide useful assistance to judges in small, compact jurisdictions. In Grant (an appeal from Jamaica) Lord Carswell delivered the judgment of the Lords of the Judicial Committee of the Privy Council (which also included Lord Bingham, Lord Rodger, Baroness Hale and Lord Mance):

“36. The final issue is that of the allegation of bias on the part of Cooke J in the Supreme Court. It may be said at once that no question has been raised of actual bias or of any pecuniary or proprietary interest on the part of the judge. The complaint was rather of what one might term apparent or perceived bias. This was based upon the proposition that because of his friendship with the family of the Chairman of the Board there was a real possibility that the fair-minded and informed observer would conclude that the judge was biased: see the discussion by Lord Hope of Craighead of the applicable principles in Porter v Magill [2001] UKHL 67, [2002] 2 AC 357, paras 99-103.

37. The Court of Appeal in the earlier case of Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 gave consideration to the circumstances in which a judge should recuse himself on the ground that bias of this type might be thought by the fair-minded and informed observer to exist. In paragraph 25 of his judgment Lord Bingham of Cornhill CJ pointed out that it would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias, as everything will depend on the facts, which will include the nature of the issue to be decided. He did, however, go on to point to some factors which were unlikely and others which were likely to give rise to a soundly based objection. Among the latter he enumerated personal friendship between the judge and any member of the public involved in the case, or if the judge were closely acquainted with any member of the public involved in the case.

38. It is necessary to bear in mind that these remarks of Lord Bingham were intended as guidelines for judges in other cases and not as a comprehensive definition of the circumstances in which bias might properly be thought to exist. The facts of each case are of prime importance, as he pointed out. Their Lordships are mindful of the problems which may face judges in a community of the size and type of Jamaica and other comparable common law jurisdictions. In such communities it is commonly found that many of the parties and witnesses who are concerned in cases in the courts are known, and not infrequently well known, to the judge assigned to sit. It is incumbent on the judge to apply a careful and sensitive judgment to the question whether he is a close enough friend of the person concerned to make it undesirable for him to sit on the case. If he errs on the side of caution by too much, he may make it impracticable for him to carry out his judicial duties as effectively as he should. If, on the other hand, he is not ready enough to recuse himself, however unbiased and impartial his approach may in fact be, he will leave himself open to the suggestion of bias and damage the reputation of the judiciary for independence and impartiality. In this connection it is relevant to take into account the issues in the proceedings. As Lord Bingham pointed out in the Locabail case, if the credibility of the judge’s friend or acquaintance is an issue to be decided by him, he should be readier to recuse himself.
39. If the judge and the Chairman of the Board had been close family friends who saw each other frequently, or if they had been regular golfing partners, it would no doubt be more much likely that the real possibility of bias could be thought to exist. As it is, the judge has stated to the Court of Appeal that there was no special relationship between the Chairman and his family and that he “may have encountered him no more than ten times over the last twenty years”. The issues in the appeal did not involve any assessment of the veracity or credibility of the Chairman’s evidence and the issues to be decided did not affect his personal position as distinct from that of the Board which he chaired. Their Lordships do not consider that such a degree of acquaintance in these circumstances would have caused the fair-minded and informed observer in Jamaica to conclude that there was a real possibility or danger of bias.”

In Locabail Lord Bingham (whose mother’s family were Manx) stated the following in the context of a jurisdiction the size of England and Wales:

“25. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger [now possibility] of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge’s social or educational or service or employment background or history, nor that of any member of the judge’s family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (see K.F.T.C.I.C. v Icori Estero S.p.A (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 8/91)). By contrast, a real danger [now possibility] of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person’s evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see Vakauta v Kelly (1989) 167 C.L.R. 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party of witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger [now possibility] of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.”

In the Belize Bank case (an appeal from the Court of Appeal of Belize) Lord Kerr delivered the judgment of the Judicial Committee of the Privy Council (which on this occasion included Lord Phillips, Lord Brown, Lord Dyson and Sir Patrick Coghlin). Lord Kerr stated:

“34. The leading authority on the issue of apparent bias in this jurisdiction is still Porter v Magill [2001] UKHL 67, [2002] 2 AC 357. The essential principle is best expressed by Lord Hope of Craighead in para 103 of his opinion where he said:

“The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

35. This formulation has been followed by the Judicial Committee of the Privy Council in, for instance, Attorney General of the Cayman Islands v Tibbetts [2010] UKPC 8 [2010] 3 A11 ER 95, at para 3 and Prince Jefri and others v The State of Brunei [2007] UKPC 62 at para 15.

36. The notional observer must be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision-maker would be biased. In considering how the notional observer would approach this task, one should recall Lord Steyn’s approval in Lawal v Northern Spirit Ltd [2003] UKHL 35, [2004] 1 A11 ER 187 of Kirby J’s comment in Johnson v Johnson (2000) 201 CLR 488 at 509 that “a reasonable member of the public is neither complacent not unduly sensitive or suspicious.”
37. On the question of the state of knowledge that the fair-minded observer should be presumed to have, Lord Hope said in *Gillies v Secretary of State for Work and Pensions (Scotland)* [2006] UKHL 2, [2006] 1 WLR 781 at para 17:

> "The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny."

38. Of course, one needs to be alert to the danger of transforming the observer from his essential condition of disinterested yet informed neutrality to that of someone who, by dint of his engagement in the system that has generated the challenge, has acquired something of an insider’s status. This theme was taken up by Baroness Hale of Richmond in *Gillies* when she said at para 39:

> "The 'fair-minded and informed observer’ is probably not an insider (i.e. another member of the same tribunal system). Otherwise she would run the risk of having the insider’s blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair-minded. She is, as Kirby J put it in *Johnson v Johnson* 201 CLR 488, para 53, ‘neither complacent nor unduly sensitive or suspicious’.”

39. It might be supposed that if the observer is provided with a surfeit of information, his or her detached status would be affected and the essential component of public confidence in the lack of bias in the decision-making progress would be imperilled. One can understand that it is necessary that the objectivity of the notional observer should not be compromised by being drawn too deeply into a familiarity with the procedures, if that would make him or her too ready to overlook an appearance of bias, but I do not consider that either Lord Hope or Lady Hale was suggesting that the amount of information available to the observer should necessarily be restricted to that which was instantly available to a member of the public. The phrase “capable of being known” from Lord Hope’s formulation holds the key, in my opinion.

This does not signify a need to restrict the material to that which is immediately in the public domain. It acknowledges that the observer must have such information as may be necessary for an informed member of the public without any particular, specialised knowledge or experience to make a dispassionate judgment. As Lord Bingham put it in the *Prince Jefri* case at para 16:

> "The requirement that the observer be informed means that he does not come to the matter as a stranger or complete outsider; he must be taken to have a reasonable working grasp of how things are usually done.”

Lord Dyson at paragraph 72 of his judgment in the *Belize Bank* case stated that:

> "Ultimately, it is a matter of impression and assessment whether the test of apparent bias is satisfied on the facts of any particular case... These are not easy cases.”

At paragraph 74 he added:

> "I would accept that the question whether there has been apparent bias raises a point of law which is a matter for the court to decide: see per Lord Mance in *Helow* at para 39. It is an aspect of procedural fairness which is always a matter for the court to decide. But it is a fact-sensitive issue of law and one on which (as evidenced by the fact that the Board is divided as to how this appeal should be decided) different judges within the same jurisdiction and (of particular importance in the present case) courts in different jurisdictions can hold different views.”

At paragraphs 75 and 76 Lord Dyson continued:

> "75. Lord Brown has quoted from the lecture given by Lord Rodger (the Sultan Azlan Shah Law Lecture 2010) entitled Bias and Conflicts of Interests – Challenges for Today’s Decision-makers. Lord Rodger says at p 21 in relation to apparent bias that the court should “adopt a course that can be expected to command the assent and respect of the general public”.

A little later, he continues:

> "Similarly, while decisions from other (foreign) jurisdictions may provide useful guidance, especially as to the test which is to be applied, a court has to apply that test against the background of the traditions, history and culture of its own society, which may affect the way that the public view such matters. In addition, what may be acceptable, or at least tolerable, in a small jurisdiction where substitute judges cannot readily be found, may be unacceptable in a larger jurisdiction where that problem does not arise.”

76. I agree with Lord Rodger’s salutary words. They are apposite in the present appeal. The issue is whether the fair-minded and informed Belizean would conclude that there was a real possibility that the Appeal Board would be biased. In determining this question, the Board should recognise that the judges of Belize are better equipped than we are to
assess how the fair-minded and informed Belizean would view matters, also bearing in mind that Belize is a small country with a small pool of persons who would be likely to satisfy the statutory criteria for appointment as lay members of the Appeal Board.”

Lord Brown at paragraph 113 of his judgment in the Belize Bank case stated:

“113. Lord Dyson suggests (at para 76) that “the Board should recognise that the judges of Belize are better equipped than we are to assess how the fair-minded and informed Belizean would view matters.” With the best will in the world, that seems to me to come close to urging an abnegation of this Board’s proper role in so politically fraught a case as this (ironically the very last Belizean appeal to come before us). I had always understood that role to carry with it the responsibility for ensuring, to the benefit of Belizeans themselves and of their standing in the wider international community, that the highest international standards of justice are maintained in that country. On the issue of apparent bias there can certainly be no stronger case for deference to the Belizean judges than the Strasbourg Court would afford our judges on a complaint originating in the UK. I do not believe that the Strasbourg Court would reject a challenge to the UK in a comparable case.”

Sir Michael Birt (the well regarded Bailiff/Chief Justice of Jersey) in his scene setting and helpful key-note address delivered on Monday made reference to a relatively recent and interesting judgment delivered by the Jersey Court of Appeal in Pitman v Jersey Evening Post Limited [2013] JCA 149. In that case Judge of Appeal Beloff stated:

“8. As to (iii) i.e. the merits of the grounds of Appeal I recognize how important it is that justice not only be done but be seen to be done; and that the appearance is nowadays as vital as the actuality of justice. Hence the fact by itself that a member of a court has by some appropriate formula sworn to administer justice impartially or is subject to a Code of Conduct indicating the circumstances for recusal (see in Jersey the Code of Conduct paragraph 15) or indeed has been appointed – as are Jurats – by an electoral college on the basis of his or her integrity and ability cannot be dispositive. The modern test is that set out by Lord Hope in Porter v Magill [2002] 2 AC 357 at (103) “whether a fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased.” It was applied in this jurisdiction in Syrett v Chief Minister [2011] JLR 343 and I shall follow it:

9. In the Bailiwick the chances that persons (Jurat, jurors or judges) may have encountered someone involved in proceedings before them will be greater than in other larger territories; see Drew v Attorney-General [1994] JLR 1 at para 33 cf, Barette v AG [2006] JCA 128 at paras 53-61. This reality may require, if not disapplication, at any rate adaptation in application of the general principle, but in any event I do not consider that the single fact that someone has served as a Jurat at the same time as someone involved in proceedings before him or her can by itself be a basis for recusal; otherwise it might on occasion be impossible to find anyone eligible to sit on a case where a Jurat was involved as a party or key witness, see Fordham Judicial Review 6th ed para 6.1.37 (apparent bias and function/necessity/reality) and the cases there cited. Nor indeed do the Applicants appear to rely merely upon the fact that both Jurat Le Breton and Jurat Le Brocq held that important office for overlapping periods, Jurat Le Brocq retiring in 2010. In a helpful letter addressed to me on 25th July 2013 the Applicants explained that objection made to the sitting of particular Jurats in advance of the hearing was based on matters other than, indeed over and above, their tenure of that office, and noted that other Jurats were putatively eligible to sit.”

(5)Adherence to the fundamental principle of open justice

Fifthly, adherence to the fundamental principle of open justice.

Confidence in the objectivity and independence of the judiciary will be increased if we conduct our work openly and give publicly available reasons for our decisions.

Derogations from open justice can only properly be made when, and to the extent that, they are strictly necessary in order to secure the proper administration of justice.

Lord Atkinson in Scott v Scott [1913] AC 417 stated:

“In public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.”

In Taylor and Neale in a judgment delivered on the 21st March 2012 the Manx Appeal Division referred to the “overriding requirement for open justice and transparency.”

Bayley J in Daubney v Cooper [1829] 109 ER 438 stated:
“... it is one of the essential qualities of a Court of Justice that its proceedings should be in public and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, - provided they do not interrupt the proceedings and provided there is no specific reason why they should be removed – have the right to be present for the purpose of hearing what is going on.”

Lord Judge C J in R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65 stated:

“38. Justice must be done between the parties. The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exception to the principle must be closely limited. In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspaper or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished.”

Lord Neuberger at paragraph 176 stated:

“... the central point [is] that the court should administer justice in public, which means that all parts of a judgment should be publicly available, unless there is a very powerful reason to the contrary. This principle is so important not merely because it helps to ensure that judges do not, and do not appear to, abuse their positions, but also because it enables information to become available to the public.”

The importance of the fundamental principle of open justice was recently reiterated by the Supreme Court of the United Kingdom in Bank Mellat v Her Majesty’s Treasury (No. 1) [2013] UKSC 38.

Another aspect of open justice which needs focusing upon is easily understood judgments, written insofar as is possible in plain and simple language. A point well made by Justice Christopher Blackman of the Court of Appeal of the Bahamas during one of our breakout sessions influenced no doubt by Lord Neuberger’s powerful first annual BAILII Lecture No Judgment – No Justice in November 2012 and Lady Justice Arden’s stimulating article Judgment Writing : Are Shorter Judgments Achievable? [2012] 128 LQR 516.

Judgments should be public documents easily accessible and easily understandable and kept as short as possible. They should be freely available on the internet as indeed they are in the Isle of Man. With some of the more complicated judgments, we also provide short judgment summaries for ease of reference. That idea was inspired by my youngest son Fergus who I was driving home from band practice one night a few years ago now. He noticed in the back of the car a draft 42 page judgment I had been working on that evening whilst he had been blowing his trumpet. With the youthful frankness of a 13 year old he commented “if you had any real intelligence Dad you’d reduce it to one side of A4”. I think he had a point.

(6) A free, responsible and enthusiastic media

Sixthly, and this is connected with open justice, a free, responsible and enthusiastic media which understands the need to fairly and accurately report court proceedings and legal affairs. This was helpfully touched upon by Michael Beloff and Cheryl Dorall (Commonwealth Journalists Association) in the illuminating and entertaining session on “Judges and Journalists – Uncomfortable Bedfellows”

As Jeremy Bentham put it all those years ago now:

“Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against impropriety”.

The media has a very important part to play in a modern democracy which respects the rule of law. The judiciary and court administration should do everything they legitimately can to assist the media in fulfilling their important role. Members of court administration should be specifically charged with liaising with representatives of the media to assist them in the provision of information which should properly be in the public domain and the accuracy of that information. Anything that can legitimately be done to assist the media in their difficult role and to ensure fair and accurate reporting of court proceedings and to maintain and enhance confidence in the administration of justice should be done. There should be constructive engagement between the judiciary and the media together with mutual respect for their separate roles in a modern democracy.

The media must also continue to recognise the need for responsible reporting and the very real damage that can be done if they act irresponsibly. Fortunately on the Isle of Man we have a generally responsible media and I am not aware of any personalised attacks on individual judges in the recent past. There should, of course, be healthy, open and constructive debate on the legal issues of the day but the media should play the ball rather than the individual.
The media in the Isle of Man provide prominent coverage of the criminal cases before the courts but do not seem to have the appetite or the resources to cover the significant civil litigation before the Manx courts. The media have an important role to play and have a significant influence on the perception of their audience. They need to appreciate the responsible role they have to play in small compact jurisdictions where their impact could be significant.

(7) The separation of powers and the promotion of the rule of law and democratic values

Seventhly, understanding and respect for the separation of powers between the legislature, the executive and the judiciary and the promotion of the rule of law and democratic values. I agree with the point made by other speakers during this excellent conference namely that judges have a real role to play in educating and informing others in respect of the importance of the separation of powers and judicial independence not for the personal benefit of individual judges but for the benefit of the society of which the judges are servants.

In *Hinds v The Queen* [1977] AC 195 the Judicial Committee of the Privy Council at pages 225-226 recognised that implicit in the constitution was “the basic principle of separation of legislative, executive and judicial powers.” This basic principle of the separation of powers and judicial independence could be reinforced in small jurisdictions by express legislative or constitutional provisions. For an example see in England section 3 of the Constitutional Reform Act 2005 (Act of Parliament) which places an express obligation on all Government Ministers and all those with responsibility for matters relating to the judiciary or otherwise to the administration of justice to uphold the continued independence of the judiciary. See also the Judiciary and Courts (Scotland) Act 2008.

The relationship between the judiciary and the legislative and executive branches of government should be one of mutual respect, each recognising the proper role of the others. Members of the judiciary should not normally enter the political arena. Members of the judiciary should always take care that their comments and conduct do not undermine or appear to undermine their institutional or individual independence. Except in areas which may have an adverse impact upon the rule of law including fundamental human rights, the separation of powers, the independence of the judiciary, access to justice and the adequate resourcing of the legal systems and the jurisdiction’s international obligation and reputation, members of the judiciary should always be reluctant to get involved in matters of political controversy or matters which may lead to political controversy.

But as Lord Neuberger has said: “7. Mutual respect also requires that the three branches should not intrude onto one another’s patch. This does not mean that the Judiciary should have no policy role… And the Judiciary has a limited right, indeed an obligation, to speak out on matters concerning the rule of law.” (*Judges and Policy: A Delicate Balance* 18th June 2013).

It is of particular importance in a small, compact jurisdiction that judicial independence and impartiality and the perception of the same is carefully safeguarded. Having said that, on occasion, it is appropriate for there to be a constructive dialogue between the various branches of government respecting always the different role of each branch. The Chief Justice should take great care in his comments and should not, of course, be seen as a source of legal advice. We all need to appreciate the importance of the separation of powers not only to the rule of law but also to the economic health of a jurisdiction.

Max Beloff in *An Historian in the Twentieth Century* at pages 35-36 stated:

“The separation of the judicial from the executive role of the monarch, which came early in medieval England, has been equally essential to the country’s ability to prosper. Only when the boundaries of the permitted are clear and no arbitrary act of the executive can alter them can people safely invest in agriculture, industry or commerce. As long as there exists the possibility of an arbitrary invasion of their rights and an absence of any court to which they can safely appeal for redress, no one is going to undertake the risks inherent in all enterprises... Until one has a legal system enabling property to be defined and protected and contracts to be made and honoured, whether between persons or between persons and the state, economic progress whether based on internal or external investment is not possible.”

Lord Neuberger on the 20th January 2012 in a paper delivered to the Chancery Bar Association conference in London entitled *Developing equity – a view from the Court of Appeal* stated at paragraph 5:

“A successful capitalist economy, as Adam Smith pointed out, depends on a trusted and effective legal system. This is particularly true of an economy with an emphasis on financial and associated services... The threat to the British economy if we cease to be pre-eminent in the commercial legal world is self-evident.”

Michael Todd QC Chairman Bar Council of England and Wales in a presentation delivered in Grand Court No. 1 Cayman Islands March 2012 (reported in the *Commonwealth Judicial Journal* Vol. 20 No. 1 June 2012) referred to essential investments in the justice system, court accommodation and judicial services. He added:
“If we want justice systems which are the envy of the world, which attract inward investment and instil confidence in those looking to do business in our respective jurisdictions, and which command respect, we must make that investment in access to justice, in the Rule of Law. A jurisdiction which does not exude its support for the Rule of Law, its investment in the equality and integrity of its judicial system, of its Judiciary, and of its legal practitioners, cannot, and will not, prosper.”
I concur.

SUMMARY

So in short summary I suggest that we provide objectively independent courts in small jurisdictions by focusing on seven factors:

(1) an open and transparent appointments process on merit taking into account the need for diversity and flexibility in small and compact jurisdictions together with a competent and well educated, adequately resourced judiciary with security of tenure, and judges being conscious of the fact that they are all the products of their life experiences;

(2) a Judicial Code of Conduct and a transparent complaints procedure;

(3) an effective appeal system;

(4) a robust law on recusal;

(5) adherence to the fundamental principle of open justice;

(6) a free, responsible and enthusiastic media; and

(7) the separation of powers and the promotion of the rule of law and democratic values.

These are, I respectfully suggest, the seven main factors which underpin objectively independent courts in small jurisdictions. Above all we must stay loyal to our judicial oaths and keep our integrity.
I wish you all well in achieving the provision and perception of objectively independent courts in your home jurisdictions.
Providing objectively independent courts in small jurisdictions

By Justice Ingrid Mangatal-Munroe, Puisne Judge of the Supreme Court of Judicature, Jamaica

The Commonwealth Latimer House Principles (“CLHP”) expressly highlight the importance of judicial independence. Judicial independence is a crucial element in the concept of the separation of powers of the three arms of government, the Judiciary being one, and the Executive and the legislature being the others. Indeed, to achieve the ideal of the separation of powers each arm of government, including the Judiciary, should operate responsibly and yet with restraint within its own constitutional sphere of power so as not to abuse or invade the constitutional sphere of operation allocated to the other institutions.

However, as stated by the Commonwealth Secretary General Mr. Kamalesh Sharma in the foreword to the CLHP on the Three Branches of Government:

“For all of us, from time immemorial, power has been difficult to separate, and thereby to control. All are complicit and in being so make ourselves dangerously vulnerable to poor governance, corruption and instability. ..... there is a continuing gulf between the rhetoric and the reality.”

It is further stated:

“It is recognised that the special circumstances of small and/or under-resourced jurisdictions may require adaptation of these guidelines.”

JAMAICA

Jamaica is a small island situate in the Caribbean Sea. It is the largest island of the Commonwealth Caribbean, and is about 146 miles long, and at its widest point about 52 miles wide. The population is approximately 2.8 Million. So by definition, Jamaica would seem to fall within the classification of a small jurisdiction. The aim of this presentation is to examine the guidelines and principles in light of the reality as it exists in the small jurisdiction of Jamaica. I will therefore scrutinize the conditions and circumstances through the prism of some traditional benchmarks of independence as discussed in the CLHP.

INDEPENDENCE IN CONTEXT

When we speak of independence of the Judiciary, the main issue is to ensure that there is no interference or improper attempts by the Executive to exert power over, or to usurp the proper functions of the Judiciary. However, the legislature may also attempt improper control over the Judiciary by passing laws that, for example, interfere with discretion/s which rightfully reside with the court. Additionally, it is important that judges also be independent of the influence or control of major private interests. Judges in Jamaica are required to take an oath prior to assuming office and must resolve and swear to dispense justice without fear or favour, affection or ill-will.

The Honourable Chief Justice of Jamaica, Mrs. Justice Zaila McCalla, Order of Jamaica, in her Welcome Message located on the website of Jamaica’s Supreme Court places the matter of judicial independence squarely on the front burner:

“A strong and independent Judiciary is at the core of democracy. It has been said that if you want to measure the level of freedom in any country, the first thing to be determined is whether the nation’s Judiciary is truly independent, from other branches of government and from all other influences of power, because ultimately a free society depends upon a Judiciary that is loyal only to the law. Our Judiciary is committed to performing their role skilfully and impartially.”

In general, Jamaica has been privileged to have a society that respects, and has inherited the tradition of respecting, the independence of the Judiciary. We have also over the years had an Executive that has been prepared to abide by judicial

2 Ibid, page 16.
3 I wish to express my gratitude to my colleague the Honourable Miss Justice Nicole Simmons, Puisne Judge of the Supreme Court of Jamaica, for making available to me for the purpose of this presentation, a draft paper prepared, and research conducted by her in relation to the topic of Judicial Independence. The draft was prepared for presentation at a previous conference, which a Jamaican representative unfortunately ended up unable to attend. Justice Simmons’ assistance and consultation have been invaluable and much appreciated.
4 www.supremecourt.gov.jm.
decisions and has not overtly sought to influence such decisions or the outcome of cases. We also do not have much occasion for significant or compulsory interaction between the Judiciary and the Executive. One hopes that these circumstances do not cause our country to assume that this will always remain the case. Nor should our society ignore the very important conditions and environment that are required to support and maintain this independence.

**INTERPLAY OF INDEPENDENCE OF JUDICIARY AND ANTI-CORRUPTION INITIATIVES**

It is fair to say that in Jamaica, like other small countries, there is a continual struggle to assert and protect the independence of the Judiciary. An additional reason that the independence of the Judiciary is a priority is because of the role that the Judiciary must play in addressing pervasive and growing problems of wide-spread corruption experienced in all types and sizes of jurisdictions. Arguably, the impact of corruption in smaller jurisdictions can be felt to a more substantial degree, and thus the role of an independent Judiciary assumes even greater prominence. The view has been expressed by one writer that:

“The Judiciary is the public institution that is mandated to provide essential checks on other institutions. A fair and efficient Judiciary is the key to anti-corruption initiatives.

But there are also practical considerations suggesting that initiatives to strengthen the integrity of the institutional framework should initially focus on the Judiciary. Because of its independence, the Judiciary typically holds a comparatively strong position inside the institutional framework.”

**PRACTICAL PROBLEMS THAT OCCUR AS A RESULT OF SMALL SIZE**

As Jamaica is a fairly small country, generally speaking, outside of the courtroom our judges come or are likely to come face to face with participants and users of the Court system with comparatively more frequency than their counterparts in larger jurisdictions. For example, when judges go on Circuit to conduct the business of the Supreme Court in the various Parishes across the island, they may have to stay at hotels or establishments in a Parish where they are not able to control or even to know who they may encounter at such places. Judges have had the experience of staying at hotels, only to see relatives of accused persons charged with serious crimes, such as murder, working as employees of these establishments. Additionally, when there is a visiting judge, prominent persons or entities who reside or are located in the area sometimes, and often with merely good intentions of extending hospitality, invite the judge to dine with them or to participate in other such social occasions and activities. We as judges are cognizant of the need for discretion and care in only accepting appropriate invitations and comporting ourselves in a manner that accords with the dignity of the office. Judges in small jurisdictions also have to take care to ensure that they are not seen socializing with persons connected to a party or litigant in a case before them since, no matter how unbiased and impartial the judge knows he or she is or can remain, every effort must be taken to avoid a reasonable apprehension of bias. We often have to remind ourselves that the job of a judge is indeed a lonely one and that perception is important!

On the other hand, whilst in a small jurisdiction there will be greater probability of litigants or persons involved in a case being known to the judge, at the same time the principle of necessity may dictate that the judge is the only one, or a scarce resource, and thus, depending on the degree of association, the judge may nevertheless be required to handle or preside over a particular matter. For example, we have a specialist Revenue Court established by Statute and requiring the judge to have certain qualifications. There was at a certain point in time one judge who had come from a prominent private firm before being appointed to the position as Revenue Court judge. Whilst, ideally where his former firm had revenue court matters those should have been capable of being handled by another judge, there was only one Revenue Court judge. Thus, the principle of necessity required that the judge hear the matters and not recuse himself. In any event, it must be remembered that we should start from the position that persons selected to perform as judicial officers should be of a calibre that promotes and manifests independence, fairness, even-handedness and impartiality.

**JUDICIAL CODE OF CONDUCT GUIDELINES**

The Jamaica Judicial Code of Conduct Guidelines are currently in draft form and are to be applicable to Judges of the Court of Appeal, Supreme Court, and Resident Magistrates. These Guidelines were prepared by members of a Committee appointed by the Chief Justice, consisting of Judges of the Court of Appeal, the Supreme Court, and a Resident Magistrate. The Guidelines have been circulated to the Judiciary and to the magistracy from in or about July 2012, and also to the General Legal Council and the Bar Association. The Guidelines expressly address the subject of Judicial Independence as the

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5 *Strengthening Judicial Integrity Against Corruption* */


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first major topic, right after stating their purpose, and they thereby give judicial independence the prominence it deserves. The important counterbalance of Judicial Accountability is also addressed in the Code.

JUDICIAL APPOINTMENTS

In Jamaica, and in a number of the other Caribbean territories, including Trinidad and Barbados, there is an appropriate independent process in place for judicial appointments to the higher Judiciary. In Jamaica, constitutionally, the Head of our Judiciary, the Chief Justice, and the Head of our Court of Appeal, the President, are appointed by the Governor-General on the recommendation of the Prime Minister, the Head of the Executive, after consultation with his or her counterpart, the Leader of the Opposition. In relation to our courts of record the Supreme Court, which enjoys unlimited criminal and civil jurisdiction, and the Court of Appeal, a statutorily created court of record, appointments of judges other than the Chief Justice and the President, are made by the Governor General, on the advice of an independent judicial services commission, established by the Constitution. Appeals from our Court of Appeal are to the United Kingdom based Privy Council and thus in Jamaica we have no control over appointments to that Court. However, that feature is generally considered to itself insulate the judges of our highest court from any local or political interference and would therefore fall to be placed on the positive side of the independence scales. The Judicial Services Commission is comprised of the Chief Justice, the President of the Court of Appeal, Chairman of the Public Services Commission, and three other members appointed by the Governor General acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition. One of those persons must be from among persons who hold or have held office in a Commonwealth country as a judge of a court having unlimited criminal or civil jurisdiction or of a court having jurisdiction in appeals from such a court. The other two are from a list of six persons submitted by the General Legal Council, none of whom must be an attorney-at-law in active practice. The General Legal Council is the entity that has oversight in relation to attorneys-at-law in Jamaica.

The judges of the Supreme Court and of the Court of Appeal are appointed and eligible to serve until the age of seventy years and there is security of tenure accorded to these positions. Such judges can only be removed for inability to discharge the functions of the office, whether arising from infirmity of the body or mind or any other cause, or for misbehaviour, and cannot be so removed except after a fairly involved process has been carried out. Security of tenure has been acknowledged as being the most effective way of securing judicial independence and this was given judicial recognition by the Judicial Committee of the Privy Council in *Hinds v. The Queen* Lord Diplock stated:11:

“The manifest intention of these provisions is that all those who hold any salaried judicial office in Jamaica shall be appointed on the recommendation of the Judicial Service Commission and that their independence from political pressure by Parliament or by the Executive in the exercise of their judicial functions shall be assured by granting to them such degree of security of tenure in their office as is justified by the importance of the jurisdiction that they exercise.”

ADVERTISING VACANCIES

Up to early 2008, vacancies in the Judiciary were not advertised in Jamaica. However, as of that time, there was a change of policy within the Judicial Services Commission. Thus, in keeping with international best practices, and with a view to selecting candidates as a result of processes of meritocracy and transparency, the decision was taken to have positions advertised. Advertising started with the positions of Resident Magistrates, and subsequently it has taken place in relation to vacancies and positions of judges of the Supreme Court and of the Court of Appeal. Standardized application forms were made available to applicants so that there would be uniformity in the application process as well as competitiveness and parity of opportunity. Objectively therefore, it would appear that appointments to the Judiciary can be made on the basis of all the best candidates making themselves available for selection. This ought to redound to the benefit of the public and help in assuring that judges with the necessary qualities of excellence, including independence are selected.

It is in relation to the Resident Magistrates that we in Jamaica have experienced the most controversy over tenure and related issues. Resident Magistrates are appointed by the Governor General, acting on the advice of the Judicial Services Commission. However, although Resident Magistrates are designated as judges in certain statutory instruments, they are not part of the Judiciary, and are still part of the civil service. They have no security of tenure. There is a view that since the requirements to become appointed a Resident Magistrate are lower than in the case of Supreme Court or Court of Appeal judges (in the case of a Resident Magistrate, the person must be an Attorney-at-Law qualified as such for at least 5 years, whereas for the Supreme Court and Court of Appeal, the person must be an attorney-at-law of at least 10 years standing).

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6 Sections 98(1) and 104(1) respectively of the Jamaica Constitution Order in Council 1962.
7 Ibid, Sections 98(2) and 104(2) respectively.
8 Ibid, section 110.
9 Sections 98(4) and 106(4) of the Jamaica (Constitution) Order in Council.
11 Ibid., at 219.
12 Section 112 of the Jamaica (Constitution) Order in Council, 1962.
13 Section 4(2) of the Judicature (Resident Magistrates) Act.
Resident Magistrates should not be given security of tenure. However, there are strong arguments for saying that anyone exercising the type of substantial judicial functions performed by our Magistrates, such as trial of fraud and other very serious white collar crimes, and conducting preliminary enquiries into serious major crimes such as murder and rape, should be accorded security of tenure so as to be able perform their role with true independence. These matters have been the subject of numerous representations by the Magistrates and are still under discussion.

**IMMUNITY FROM SUIT**

At common law, judges of the High Court enjoy immunity from civil liability in the discharge of their functions. This immunity is deemed to be necessary for preservation of judicial independence and extends to judicial acts whether or not performed within their jurisdiction. In addition it is immaterial whether such acts were done maliciously and without reasonable and probable cause. This is the situation as it obtains in Jamaica as indeed it does in other Commonwealth countries.

**FUNDING**

It is well known that adequate funding must be made available in order to enable the Judiciary to carry out their responsibilities to the highest standard of efficiency. It is not just that there must be sufficient support systems, staff, technology and equipment to enable the judges to perform at the highest possible standard.

**SALARIES AND EMOLUMENTS**

Judges must be paid salaries and benefits that enable them to perform effectively and those salaries must be maintained. Therefore review of the salaries must be earnestly and regularly performed. It is also desirable that the salaries be set or recommended by an independent body. It is particularly important that the allocation or withholding of salary and benefits of the Judiciary not be used as a tool to exercise improper control over the Judiciary. It is here that small jurisdictions like Jamaica where there are severe budget constraints face the greatest challenge in trying to ensure that judicial independence is not whittled away. It is also here that the Executive presents the greatest threat of being the institution that undermines or has the greatest potential to undermine independence.

The Jamaican Constitution provides that in relation to judges of the Supreme Court and the Court of Appeal, emoluments and terms and conditions, other than allowances that are not taken into account in computing pensions, shall not be altered to his (or her) disadvantage during his (or her) continuance in office. This is in contrast to the Trinidadian provision which makes no distinction between pensionable and non-pensionable allowances. It states as follows:

“the salary and allowances payable to the holder of any office to which subsection (1) and Subsection (3) to (11) apply or any office referred to in subsections (13) to (16) and his other terms of service shall not be altered to his disadvantage after his appointment…”

The salaries of Judges are set out in the Judiciary Act. The situation in Jamaica places judges in a most undesirable situation whereby some allowances may be reduced by the Executive. It is suggested that in order to foster true independence statutory protection should encompass all the terms and conditions relating to the Judiciary. Such a provision has been included in the Cayman Islands Constitution Order.

Whilst an independent commission does recommend pay increases for the judges of the Supreme Court and of the Court of Appeal in Jamaica, proper funding and remuneration have been recurring and chronic problems. Judges’ salaries have not kept pace with the steady march of inflation. Unfortunately, pay increases have occurred far too infrequently and have not for the most part been adequate to ensure that a judge’s emoluments and conditions and terms are not altered disadvantageously. Whilst one can understand that there are serious resource problems, it would appear that the significance of ensuring that judges are adequately compensated has not been properly understood and appreciated in our jurisdiction. Indeed, there have even been attempts to group judges with civil servants in terms of dealing with salary increases and wage negotiations carried out by certain bodies representing civil servants and other public servants. This is troubling and demands attention and vigilance by the Judiciary.

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14 Anderson v. Gorrie [1895] 1 Q.B 670
15 Sections 101 and 107 respectively.
16 Section 136 (6) of the Constitution of Trinidad & Tobago
17 Section 4(1) of the Judiciary Act.
18 Section 95 (5)
19 Pursuant to section 4A of the Judiciary Act.
By way of example, the last time that judges of the Supreme Court and the Court of Appeal received a salary increase was in or about April 2009. At that time, the value of the Jamaican dollar was approximately 89 Jamaican dollars in relation to 1 U.S. dollar, whereas the present rate of exchange is approximately 102 Jamaican dollars to 1 U.S. dollar. Our Consumer Price Index was 138.8 in April 2009 whereas the figure for July 2013 was 200.9. In 2009 the increase was a small one. In 2008 the Judiciary received a salary increase which had been overdue for many years. They received an approximately 50 percent increase in salary. It was plain that such a substantial increase was justifiable and became necessary because salary increases had not been done in a timely and regular manner. The Independent Commission Is reported as stating that the salaries previously paid to members of the Judiciary “were embarrassing.” At the present time, the Independent Commission, to which some new members were appointed, have made recommendations and these are under discussion. However, there have been inordinate delays in having the composition of the Independent Commission finalized and that is yet another way in which Judicial Independence can be made vulnerable. The Minister of Justice is by Statute required to table the report containing the recommendations of the Commission before the House of Representatives and the Senate. The Minister of Finance is empowered to take the recommendations of the Independent Commission into account and to amend the relevant sub-section of the Statute, subject to negative resolution of the House of Representatives, to increase the salaries specified.

There needs to be an appreciation that it is “not only governments that can undermine judicial independence. If any sector of society-political dons, drug cartels, the mafia, the media, big business, trade unions—is able to determine the results of judicial determinations, the rule of law will come to an end. It will not be certain and steady law that applies, but the arbitrary and partial will of a person, persons or group.” It follows that judges should also be properly remunerated to prevent or discourage those unscrupulous persons who may perceive the judges as being financially needy, from making efforts to influence judges or to interfere with the outcome of cases.

RESIDENT MAGISTRATES

Unlike the situation which prevails in relation to the Judges of the Supreme Court and of the Court of Appeal, there is no special independent commission set up or legislated for to deal with the salaries and benefits of Resident Magistrates. This has therefore resulted in an Association formed by the Resident Magistrates taking it upon itself to negotiate directly with the Executive in relation to the salaries and benefits of magistrates. There are many who opine that this is inappropriate.

It seems clear that these are areas where, notwithstanding the strait-jackets imposed by budgetary constraints, greater appreciation of the need to bolster the Judiciary’s independence by proper funding, support systems and remuneration must be addressed.

CONTROL OVER ADMINISTRATION, AUTONOMY AND ADMINISTRATIVE INDEPENDENCE

In the region some progress has been made in attaining this objective which was articulated in the CLHP. The Cayman Islands Constitution Order 2009, as well as the draft Constitution for Trinidad and Tobago, both contain provisions geared at attaining this objective. The Cayman provision reads as follows:

“The Legislature and the Cabinet shall uphold the rule of law and judicial independence, and shall ensure that adequate funds are provided to support the judicial administration in the Cayman Islands.”

Section 136(1) of the draft Constitution of the Republic of Trinidad & Tobago gives to the Chief Justice the responsibility for the administration and business of the Supreme Court.

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\[20\] See some of the economic indicators published by the Statistical Institute of Jamaica’s website at statinja.gov.jm/Trade-Econ-Statistics/CPI/CPI.aspx., and the website of the Bank of Jamaica’s Central Bank, at www.boj.org.jm respectively.


\[22\] Section 4A of the Judiciary Act.

\[23\] Section 4(2) of the Judiciary Act.

\[24\] Extracted from the speech of Mr. Justice David Batts, Q.C. Judge of the Supreme Court of Judicature of Jamaica, recently delivered at the Annual General Meeting of the Advocates Association in Jamaica. The speech will in its edited form appear in the next issue of the Jambar News, a publication of the Jamaican Bar Association under the title "Judicial Independence and the Rule of Law.”

\[25\] Section 107
In Jamaica, it has been accepted in principle that the Court should be administratively autonomous and steps have been taken to establish a special unit headed by the Chief Justice. In August 2009, Court Management Services (“CMS”) was formed to assist in, amongst other matters, securing greater autonomy to the Judiciary in relation to administration and budgetary issues concerning the courts and judges. CMS was established in keeping with the national priority of improving the justice system in Jamaica, and “Vision 2030”, the National Development Plan. The following information was taken from the CMS website:

“History of the Court Management Services

The Court Management Services was established to separate the administrative functions of the Judicial and the Executive arms of Government as stipulated by the Constitution of Jamaica. The recommendation to establish an independent Court services entity saw a collaborative energy between the Government of Jamaica through the Ministry of Justice and the Public Sector Modernisation Division (PSMD).

The CMS, which started in August 2009, serves as a means facilitating a more efficient operation of the Court system, thereby improving the justice system, through the restructuring of the administrative framework and the strengthening of judicial independence. The agency’s establishment is designed to enable the Judiciary and the Courts to have greater input in budgetary decisions and execution of activities surrounding the operations of the Courts.”

Also to be found on the CMS website is a Message from Chief Justice McCalla, in relation to the Strategic Business Plan of CMS, which is a five-year plan and is slated to cover the period 2012-2017. The learned Chief Justice states:

“The CMS has been established to provide administrative support to the Judiciary in carrying out its mandate of administering justice to the Jamaican people through the formal Court system....

The five strategic priorities which have been identified for the Courts are:
1. Developing a strong Judiciary and support work force.
2. Developing a sound court infrastructure.
3. Ensure fair and timely case resolution.
4. Strengthen the public trust and confidence in the adjudication process and
5. Operationalize the Court Management System.

The implementation of activities under these priorities will support the strengthening of judicial independence and will provide a more focused approach to the management of the wide range of administrative needs of all Courts across Jamaica.”

One of the matters that we could consider in Jamaica is whether the issue of making the Courts administratively autonomous should be bolstered by being expressly addressed by way of amendment to the Constitution.

The practical operation and management of CMS and the questions of whether or how far the entity is serving the purposes it was established to perform, are still a work-in-progress.

TRAINING

There is a healthy culture of judicial education in Jamaica. Quite a substantial portion of the judicial training that has taken place has occurred under the auspices of First World sponsored aid programmes, particularly the British and Canadian Governments. Whilst training has been of a high standard, it has not being organized in an ongoing and systematic way. In addition, training has not taken place under the control of a judicial body; nor has any curriculum been established. Judicial education has remained a portfolio responsibility under the Executive, through the Ministry of Justice and the Justice Training Institute. Judicial education and training needs to be specifically assigned as a responsibility of a judicial body, under the control of the Chief Justice or a body of judicial officers to whom she can delegate the responsibility. Since the present Chief Justice assumed office, she has implemented a formal orientation programme for new Judges and Magistrates. The Executive has also agreed in principle that judicial training should take place through an institution under the control of the Judiciary, and this course is being actively pursued by our Chief Justice.

SUBSTANTIVE MANIFESTATION OF JUDICIAL INDEPENDENCE

-JUDICIAL REVIEW

It has been said that best democratic principles demand that governmental action be open to review and scrutiny by the courts. The reason stated is that this is so as to ensure that decisions taken comply with the Constitution, with relevant
statutes and other law, including the law relating to the principles of natural justice. The courts must perform this role because it is fundamental to achieving good governance, preserving human rights, and maintaining the rule of law. Courts must perform this function robustly and competently, and in particular, in appropriate circumstances declare or decree the actions of the other arms of government, particularly the Executive, as unlawful, and provide appropriate remedies there for. Such action is a clear manifestation of the independence of the Judiciary. In Jamaica, it is the Supreme Court of Judicature of Jamaica that has the review duty at first instance and this area of administrative law is alive and well in Jamaica. Our Constitutional Court has also been vibrant and effective and has been fearless in striking down Laws that are found to be unconstitutional or in declaring infringements to the constitutional rights of citizens. However, one has to maintain constant vigilance because other stakeholders within and without the other branches of government may wittingly or unwittingly water down, frustrate, or even attempt to remove these important and awesome powers.

Indeed, in February 2011, the Chief Justice of Trinidad and Tobago, the Honourable Mr. Justice Ivor Archie, at the opening of the Law Term in the twin island republic, expressed grave concerns about proposed constitutional reform taking place and about certain provisions of a draft constitution that the Executive of that country had made available in the public domain. The learned Chief Justice expressed concern regarding the potential effect of proposed amendments on the power of judicial review. He also referred to clause 136 where it was proposed that the Chief Justice would be responsible for the general business and administration of Trinidad’s Supreme Court, but there was no mention of the magistracy. What was viewed as an even more fundamental problem was the fact that in a later sub-section it was stated that the Ministry of Justice would have control over such administrative matters relating to the Judiciary as may be prescribed, without expressly stating or providing guidance as to what matters, and in what manner or who would do the prescribing. Archie C.J. makes the observation that judicial independence is not achieved simply by writing provisions in a Constitution and highlighted the need for the Judiciary to have control over its administrative processes. He stated:

”...It would be a lot simpler to acknowledge explicitly in the Constitution the principle of independence of the Judiciary in its administrative and adjudicatory functions.... But it does not end there. Perhaps the most worrisome clause is clause 125, which gives Parliament the power to confer on any court any part of the jurisdiction and powers conferred on the High Court by the Constitution or any other law. It requires no special majority, nor does it require that the new court or courts enjoy the constitutional protections designed to ensure the independence of the Supreme Court.

Arguably, the most important power of the Supreme Court inherent in the separation of powers and recognised both at common law and by statute, is the power of the judicial review of Executive action. It is the only protection that citizens have against arbitrary or unlawful state action. In some instances, it is the backstop to the Service Commissions and will assume even more significance if the independence of the Service Commissions is weakened. If the draft constitution is adopted in its current form that power can be simply and unceremoniously stripped away.”

CONCLUSION

As is true of many other jurisdictions, the provision of an independent Judiciary is crucial to our nation’s development, contributes to the standard of living enjoyed by the populace and serves as a pillar in any construct aimed at preserving human rights. Small jurisdictions like Jamaica face a number of challenges, mainly budgetary and resource constraints. However, the Judiciary also has to be vigilant in ensuring that no usurpation of judicial power can be carried out by other branches of government or by any other source. Like justice itself, judicial independence must not only occur and exist in actuality, but it must also be seen to occur and be extant. We must ensure that the protections afforded by the Constitution and other legislation do not get lost in translation on the ground and by the implementation of administrative measures that offend against the CLHP.

In January 2013 eleven judges came together at the Commonwealth Secretariat’s offices at Marlborough House in London to discuss a proposal for the establishment of a clearing house for international judicial assistance and a framework for its operation.

This was in pursuance of a mandate given in July 2011 by Commonwealth Law Ministers at their meeting in Sydney to the Commonwealth Secretariat as follows:

“To mandate the Commonwealth Secretariat to establish or enable the establishment of an on-line ‘clearing house’ which would co-ordinate information as to what judicial development assistance programmes had been provided by Commonwealth countries to other countries, and would receive and assess applications for judicial development assistance and notify them to those member states which might have the capacity to respond to such requests, having regard to regional considerations.

That the Secretariat would develop a framework which Commonwealth countries could adopt with the aim of better co-ordination and targeting of international judicial development assistance, addressing the needs of recipient countries. The framework would ensure that assistance provided was based upon consistent standards of approach, enabled programmes to draw on previous experience, avoided duplication and had a rigorous approach to evaluation.”

This mandate was grounded upon a paper prepared for Law Ministers by Murray Kellam, a retired judge of the Supreme Court of Victoria, Australia.

Those attending the meeting – and you will see that the CMJA was well represented –
Murray Kellam (Australia)
Mrs Justice Norma Wade-Miller (Bermuda)
Justice Louise Blenman (Eastern Caribbean Court of Appeal)
Justice Winston Anderson (Caribbean Court of Appeal)
Justice Joseph Akamba (Supreme Court of Ghana)
Justice Charles Mkandawire (SADC Tribunal)
Mrs Justice Linda Dobbs (High Court of England and Wales)
Justice Bhoosun Domah (High Court of Mauritius)
Magistrate Regina Sagu, PNG Centre for Judicial Excellence
Justice John Vertes of Canada was represented by Tim Workman and Karen Brewer.
The discussions were led by His Honour Keith Hollis, past CMJA Director of Programmes.

At the conclusion of its one-and-a-half day meeting the working group made a number of recommendations.

RECOMMENDATIONS

i) The Secretariat should establish a clearing house for international judicial support. Such support shall extend to all judicial office holders, including magistrates and appellate judges and court staff under the direction of the Chief Judicial Officer or Head of the Judiciary as the case may be. Judicial support means the provision of support whether by way of judicial studies and education, administrative assistance or training or by way of temporary judicial appointment provided to the judiciary of a Commonwealth member country.

ii) The clearing house will be maintained by the Secretariat, initially, for a pilot period of 3 years.

iii) The clearing house should operate within the framework set out below.

iv) The clearing house and its framework shall be subject to an evaluation by or on behalf of the Secretariat at the end of the three year pilot period.

v) The Secretariat will publicise the existence of the clearing house, ensuring that all Commonwealth Heads of Judiciary, Judicial Training Institutes and Law Ministers are aware of its existence and function.
vi) The Commonwealth Law Ministers should ensure that the Secretariat has sufficient resources to establish and administer the clearing house and its framework.

THE FRAMEWORK

1. The Secretariat shall set up a database, accessible online, which should include:

   i) A list of present and future judicial training programmes from each Commonwealth country, including details of particular areas of expertise, judicial contact and contact details. Where possible, the list should include programmes on court administration requiring judicial involvement;
   
   ii) A list of training programmes for the previous two years;
   
   iii) A list of country to country training programmes, past, present and future and details of how the programmes were funded;
   
   iv) A list of those training institutes which have the capacity and expertise to do country to country training;
   
   v) A list of training institute members and/or a list of programme facilitators
   
   vi) A schedule of potential funders, their areas of interest and relevant programmes they have funded in the Commonwealth in the past five years;

2. The Secretariat shall be responsible for updating the database at regular intervals and no less than three times a year.

3. Access to the database

   The following procedure shall apply to requests for assistance made through the clearing house.

   i) The Secretariat shall make available online a “Request for judicial support” application form (see suggested draft attached)
   
   ii) On receipt of a request for judicial support, The Secretariat will first determine whether the request is one which it is able to take the lead on. If it is, then The Secretariat’s usual procedures will apply.
   
   iii) If the request is one which The Secretariat’s resources cannot accommodate, it will use its best endeavours, with the benefit of the clearing house, to place the applicant jurisdiction in touch with potential assistance

4. Nothing in this framework is to undermine the current valuable informal areas of contact and assistance between Judiciaries and organisations and agencies which provide judicial training within the Commonwealth.

These were compiled into a paper presented on 9 September 2013 to Senior Officials of Commonwealth Law Ministries. Broadly speaking Senior Officials approved the paper for submission to Commonwealth Law Ministers at their next meeting in May 2014 in Gaborone, Botswana. In particular, this is what Senior Officials resolved:

“Senior Officials sought further elaboration of possible resource implications for the Commonwealth Secretariat. The Meeting requested the Secretariat to seek ways to leverage relevant resources within the Commonwealth. The clearing-house would endeavour to match requests to possible donors or partners from which funding for programmes and attendance of participants might be sought. Subject to these comments, which would be taken into account in a revised paper, the Meeting agreed in principle to recommend that Law Ministers should accept the proposals, and should accordingly invite the Commonwealth Secretariat to establish the clearing-house for a three year pilot period, at the end of which its operation would be subject to a viability evaluation”.

Perhaps put more succinctly, what this means is that Senior Officials requested the Secretariat to provide further details of a budget required to operate the clearing house and to seek to obtain extra funds from member countries to do so.

Why did Senior Officials make these requests? The answer is because the Secretariat made it clear that the success of the clearing house would be dependent upon it being given resources by member states. The working group had this to say about resources:

“It is understood that Commonwealth Law Ministers will ensure that the Secretariat has sufficient resources to establish and administer the clearing house and its framework in accordance with its mandate. Implementation of the mandate will involve the application by the Commonwealth Secretariat of resources by the provision of a full time member of staff to establish, promote, and oversee the operation of the clearing house. “

A great deal of time and effort will be necessary if the clearing house is to be a success. It will be a full time job publicising
the existence of the clearing house, communicating with those offering judicial assistance, persuading them of the utility of
the clearing house and obtaining their agreement to share on the internet details of their judicial assistance programmes. It is
likely to require an equal amount of time to keep the information up to date. Currently the Legal and Constitutional Affairs
Division does not have the human resources to perform this task. Hence the Secretariat needs extra money from member
states to employ additional staff to be responsible for operating the clearing house.

How exactly would the clearing house work? The working group recommended:

“The framework is intended to complement and not replace the current valuable informal means of judicial co-operation.
The clearing house shall include provision for on-line requests for judicial support by way of a “notice board”, which shall
initially be considered by the Secretariat under its existing arrangements. If the request is one that the Secretariat cannot
accommodate it will use its best endeavours, with the benefit of the clearing house, to place the applicant jurisdiction in
touch with potential assistance”.

One has to be clear about what the clearing house and the framework can and can’t achieve.

1. The clearing house has the potential to be a very useful resource.
2. If it is reasonably comprehensive it could result in a greater awareness of what judicial assistance programmes are
available.
3. It would allow providers to promote their work.
4. It might mean less duplication of effort on the part of providers.

However, I think that one needs to aware that there are likely to be things which it cannot achieve:

1. First one needs to appreciate the distinction between donors and providers of judicial assistance programmes. Donors
such as AusAid, NZAid and DFID may well have plenty of money available for rule of law programmes. However,
each will have geographical areas of priority. None of them will provide assistance directly but will rely upon
implementing partners. For example, AusAid funds the Pacific Judicial Development Programme and DFID provides
judicial support in Sierra Leone through the British Council as its implementing agency. The rule of law budgets of
these donors is likely to be large indeed. For example, DFID funded one rule of law project in Nigeria in the sum of
£30m. Some donors may not be interested in bilateral assistance but prefer regional assistance. Donors are likely to have
ideas of their own as to how they would like to spend their money. They are unlikely to be interested in small scale
assistance. Therefore they may not necessarily be receptive, for example, to a request from a judiciary in a small
jurisdiction for assistance in training magistrates in criminal procedure. Therefore individual judiciaries requesting
assistance with very specific areas of assistance may well find that the donor agencies are not interested.

2. On the other hand there may well be providers of judicial assistance, for example, judicial education courses, but which
cannot provide funding to those judiciaries seeking assistance. One jurisdiction’s judicial education institute may be
able to offer places on courses to judges from another jurisdiction; however they may charge fees or travelling and
subsistence costs may have to borne by the visitors.

3. The Secretariat will not be able compel anyone to register details of assistance available. It will, as I have said before,
have to apply persuasion and be diligent in order to gather information about assistance available.

Bearing these limitations in mind, the clearing house and framework have the potential to advance judicial assistance.
However, it must be allowed to devalue the work which the Commonwealth Secretariat does in the field of judicial
assistance.

Currently through the Commonwealth Fund for Technical Cooperation (CFTC), the Commonwealth funds judicial
appointments in Lesotho, Seychelles, Sierra Leone, Swaziland, Vanuatu and is about to do so in Kiribati. In the very recent
past it has funded appointments in Belize and the Solomon Islands. Most of these jurisdictions are small Commonwealth
jurisdictions where recruiting local judges is a problem. The CFTC funds a judicial expert to organise judicial seminars for
magistrates in Namibia. It has funded judicial administration experts to work in Belize, Lesotho, Rwanda, Seychelles and
Swaziland. .

Judiciaries approach the Secretariat for a reason. They know that in spite of our very limited resources we will do our best to
respond favourably and to do so within a very short time frame, in most instances much quicker than any other organisation
with greater resources available to them.
They come to us because they know there will be an understanding of their problem. We can draw upon the expertise and experience of judicial officers from other jurisdictions who have experienced similar problems and who are willing to share their expertise and experience.

I would stress that judiciaries approach us rather than the other way round. They come to us asking for assistance with a particular issue and we see what we can do to assist. Guyana is one example: we were approached by the Chancellor to assist with the drafting of new civil procedure rules and we have funded an expert to do so.

In working with Commonwealth judiciaries the CMJA is our natural partner. I should like to mention our collaboration in assisting three jurisdictions.

**BELIZE**

The first country is Belize.

In March 2011 the Secretariat together with the CMJA undertook a needs assessment mission to Belize.

Belize is a small country in Central America. Politically it is part of the Caribbean. It has a size of 22,960km². It has a population of 333,200. It is an ethnically diverse country: the main population groups are: Kriols, Maya, Garinagu, Mestizos while smaller groups include Mennonite farmers and Chinese. Queen Elizabeth is the head of state. Dean Barrow is the prime minister. The economy is based upon oil production, agriculture and tourism.

The legal system in Belize faces many challenges. Serious crime – much of it drug and gang related - is a serious issue in the country.

The court structure will be recognised by many in this room. At the apex of the domestic court system is the Court of Appeal. A number of the Appeal Court judges are from outside the country and visit for the periodical sessions of the court. Until July 2010 appeals from the Court of Appeal lay to the Privy Council. Since then Belize has acceded to the appellate jurisdiction of the Caribbean Court of Appeal. Under the Court of Appeal is the Supreme Court which in many other jurisdictions would be familiar as the High Court. The Supreme Court is comprised of seven judges.

The Registrar is responsible for the administration of the Court of Appeal and the Supreme Court.

As in many jurisdictions the majority of criminal matters are dealt with in the magistrates’ court.

There are seventeen magistrates in Belize. However, only three magistrates are legally qualified. None of the magistrates is assisted by a court clerk.

Prosecutions are conducted in the magistrates’ court by police officers who have limited legal knowledge.

The magistrates’ court in Belize City is housed in a building inadequate for its needs. Court rooms are smaller than the average office. Witnesses, defendants and magistrates all sit in close proximity to each other with no real security measures in existence.

A further similarity with many other jurisdictions is the existence of customary courts – known in Belize as the Alcace courts. These have jurisdiction over civil disputes and petty criminal matters.

There are 180 members of the legal profession in the country, one-half of whom are in practice. However, only twenty practise in criminal law and there are only two lawyers at the Legal Aid Office to provide legal representation to indigent defendants. As a result it has become the norm that the vast majority of criminal defendants – including juvenile defendants – are unrepresented.

With so many challenges to the dispensation of justice in Belize, where could the Commonwealth begin to help?

At the end of our visit we concluded that the best we could do would be to support a seminar for all the magistrates at which they could discuss criminal law and procedure with a view to identifying those areas in most urgent need of reform.

In June 2011 we returned to Belize City for the seminar. We took with us District Judge Shamim Qureshi of England and Wales, Paul Norton a lay magistrate from England and Wales, Justice Ingrid Mangatal of Jamaica and Margaret Ramsay-Hale, then Resident Magistrate of the Cayman Islands.
We had a very rich discussion with the magistrates. An unrepresented defendant will always mean a protracted court hearing and the risk of a defendant not presenting her/his case to her/his best advantage, but the magistrates were very unsure of the extent to which was permissible for them to assist an unrepresented defendant.

It was also clear that there was much scope for reform of the law relating to criminal evidence. For example, Belize law does not allow for the admission of facts agreed between prosecution and defence or for the reading of agreed witness statements. The evidence of child witnesses still requires corroboration.

The magistrates had the benefit of hearing of experience from elsewhere. For example, in Jamaica the need for corroboration of the evidence of the complainant in sexual offence cases has been replaced by the trial judge having discretion to give a warning to the jury where appropriate\(^4\). Under English law the need for corroboration of the unsworn evidence of a child witness has been abolished\(^5\) and witnesses whatever their age at every stage in criminal proceedings are competent to give evidence\(^6\).

At the end of the seminar the magistrates produced a list of recommendations which included addressing these issues. One recommendation was that there should be an annual training seminar for magistrates.

Our seminar was the first ever opportunity Belizean magistrates had to discuss judicial issues not only with judicial officers from outside the country but from inside the country. It was also the first time that they had raised issues with judges of the Belize Supreme Court. This helped them understand better the reasoning the Supreme Court which hears appeals from the magistrates’ court.

The then Acting Chief Justice Sam Awich recognised the importance of these events by committing the judiciary to holding annual training events for magistrates.

We look forward to assisting with future seminars, but in the meantime having set the ball rolling others have stepped in to assist the judiciary. For example, ABA-ROLI has assisted the magistrates with a further training seminar. The recommendations have been taken up by the new Chief Justice of Belize and as I say the Secretariat looks forward to assisting in their implementation.

**CAMEROON**

Until World War I Germany was the colonial power in Cameroon. Thereafter the country was divided between Britain and France. The English and French speaking parts of Cameroon are a result of this division. The English speaking part of the country is in the west of the country.

Cameroon has been a member of the Commonwealth since 1995. It is also a member of Francophonie. This reflects the fact that there are both French and English speaking communities in Cameroon.

Cameroon is one of the Commonwealth countries with a civil law system. It is different from most Commonwealth jurisdictions in that all judges are employees of the Ministry of Justice and are under the direction of the Minister of Justice.

Judges are subject to rotation within the Ministry. They may work as a judge one day and work as a prosecutor the next. The following week they may be deployed to a role within the Ministry itself.

Nonetheless, the Cameroon Constitution includes provisions for independence of the judiciary. Article 37(2) provides:

> "The Judicial Power shall be independent of the executive and legislative powers. Magistrates of the bench shall, in the discharge of their duties, be governed only by the law and their conscience".

Further, Article 37(3) provides:

> "The President of the Republic shall guarantee the independence of the judiciary".

The Ministry of Justice has been working to develop a code of conduct for judges in Cameroon. This is consistent with the Latimer House Principles which provides that

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

\(^4\) *R v. Duncan and Ellis S.C.C.A. Nos. 147 and 148/2003*  
\(^5\) *Criminal Justice Act 1988, Section 34(2)*  
\(^6\) *Youth Justice and Criminal Evidence Act 1999, Section 53(1)*
We have been twice to Cameroon. In May 2011 in conjunction with the Ministry of Justice we organised a seminar for English speaking judges. We held the seminar in Bamenda, capital of the North West Region of Cameroon. This is an English speaking part of Cameroon. Bamenda is a six hour drive from the capital Yaounde – six hours that is if, like us, you have the luxury of your own bus; nine or ten hours is more usual if you’re travelling accompanied by goats and chickens on a public bus. The drive takes place on a good quality road, through villages and towns which, on the face of it, appear prosperous and through countryside which is verdant and fertile. As the road climbs a hill the trees seem to grow in height. Every village offers an opportunity to buy mangoes and bananas. The light is sharp and the heat forces you to walk slowly.

On this occasion our team included former Federal Chief Justice of Nigeria, Mohammadu Uwais, Justice Francis Korbieh of Ghana, Justice Mathias Epuli of Cameroon and Shamim Qureshi. We were especially honoured to have Mohammadu Uwais join us as he had been involved in the drafting of the Bangalore Principles and so brought with him much experience of the drafting of judicial codes of conduct.

However, the really interesting discussions took place when we broke up into groups to discuss the scenario questions. These questions – based on real life examples – tested judges by asking them to consider how they might act when, for example, they might be faced with a conflict of interest or with an issue which challenge deeply held personal or cultural beliefs.

Just over a year later in June 2012 we returned to Cameroon. This time we stayed in Yaoudé and met a group of 25 French speaking judges. The formula for the seminar was the same but on this occasion we were joined by CMJA member Regional Magistrate Delia Turner from Durban, South Africa.

Once again the group sessions proved most lively and provoked the most discussion. We were at pains to emphasise that there was not necessarily a “right” or “wrong” answer to the scenario questions, but that the point of questions was to encourage judges to recognise that there were issues which might require a judge to weigh up and decide what in the circumstances might be the right approach.

In both Bamenda and Yaoundé to their great credit judges spoke candidly and expressed a willingness to reflect upon their judicial conduct. The importance of this is not to be underestimated. It is unlikely that in the course of one or two seminars that we would have brought about a sea-change in behaviour, but we might have succeeded in causing judges to think for a moment and to consider whether in future they might behave differently.

In June this year we returned to Cameroon for a third seminar – this time for judges from the North and Extreme North Province of the country. Our experts were Justice Mohammadu Uwais of Nigeria, Justice Mathias Epuli of Cameroon, Sham Qureshi and Karen Brewer of the CMJA.

Our repeated visits to Cameroon serve to emphasise the fundamental importance of the principle of judicial independence and that work aimed at achieving is never done.

KIRIBATI

In November 2011 at the invitation of the Chief Justice, Sir John Muria Dr Karen Brewer and I undertook a needs assessment mission to Kiribati.

Kiribati is a collection of 32 atolls and one raised coral island. It covers 3.5 million km². The total population is 103,500. The main island is Tarawa. The most densely populated part of Tarawa is Betio. The spoken language is Gilbertese.

Prior to independence in 1979 from the United Kingdom the islands were the Gilbert islands, part of the Gilbert and Ellice Islands. The Ellice Islands are now known as Tuvalu.

In World War II Tarawa was occupied by the Japanese. In November 1943 it was the scene of a battle between United States armed forces and the occupying Japanese. Indeed some of the bunkers and armaments used by the Japanese are still in place on Tarawa.

Tarawa is unlike anywhere else I have been. The atoll is made of coral and is triangular. It surrounds a turquoise lake of seductive but deceptive beauty. It is deceptive because the water is highly contaminated by waste. On the other side of the “landmass” is the Pacific Ocean. In the immediate vicinity of Tarawa the sea is equally turquoise and just as much polluted. A single road runs the length of the atoll. It’s rather like driving between two seas. There are no taxis and you have to hire your own car to get about.

What of the legal system in Kiribati? Currently there is only one judge of the High Court – the Chief Justice himself.
However, throughout the islands there are 150 magistrates. On Tarawa there are nine magistrates, each of whom sit alone. On the outer islands, the magistrates sit in groups of threes or fives. Save for one magistrate who is obtaining a legal qualification, none of the magistrates is a lawyer. In the outer islands, magistrates will be recruited from retired civil servants. On Tarawa they tend to be recruited from the court clerks.

The magistrates’ first language is Gilbertese. They have limited English language skills. Therefore the fact that Kiribati legislation is published in English only and not translated into Gilbertese presents a problem.

There are thirty lawyers, twenty of whom are in practice. There is the Office of the People’s Lawyer which was established in the 1980s as part of the court. Its remit is to provide representation to indigent defendants.

Police officers are responsible for criminal prosecutions but they are not legally qualified. Domestic violence and gender based violence is prevalent in Kiribati. The Kiribati Family Health and Support study in December 2010 found that two out of three women between the ages of 15 and 49 had been the victims of sexual violence.

Dealing with the perpetrators of domestic violence in the court is limited by the existence of the apology system in Kiribati. This allows the perpetrator to offer an apology to the family elders of the victim. Often victims are persuaded by the family that an apology should be accepted.

In May this year we returned to Kiribati to hold a judicial seminar for the seven “single” magistrates on Tarawa and one magistrate from Kirimati (Christmas) Island. Our experts were Deputy Chief Magistrate Ray Rinaudo from Brisbane, Australia and Sham Qureshi. The seminar focused on criminal procedure and handling the unrepresented defendant in course.

CONCLUSION

I have selected these three “case studies” in order to give you some idea of the work we do in the judicial field. I don’t pretend that others are not doing similar work. Others will be doing work on a much grander scale and I commend them.

In conclusion I should like to discuss briefly the impact that these seminars have and what is their value.

I am conscious of these seminars may be open to the criticism that they are too short to be effective. In the development world understandably there is much pressure to show results for money spent. However, assisting judiciaries is, I think, in a different category to say, working in health. For example, it is easier to produce evidence of results for by example measuring the number of people treated in a health clinic. But where we working to strengthen the independence of judiciaries, how does one measure success? From time to time we might be able to find examples of it in judgments given or conduct in court, but neither of these would provide consistent sources of empirical evidence. For example, it would be pointless as a matter of course to ask judges to provide copies of their written judgments and on the basis of these draw any reliable conclusion as to whether they had acted without any conflict of interest. In most cases a judge acting in the face of a conflict of interest is unlikely to be disclosed in any judgment.

An independent judicial appointments commission is likely to be the best way of reducing government interference in judicial appointments, but is not necessarily a guarantee of judicial independence on the bench.

Probably the best test of whether a judiciary can be said to be independent would be to ask the ordinary citizen whether s/he had confidence that if s/he had to appear before the court that s/he would receive a fair hearing.

Building this level of confidence requires constant effort over a sustained period of time. Therefore I recognise that judicial independence is not going to be achieved after one or two seminars.

However, these seminars which the Commonwealth organises can and do make a valuable contribution to achieving judicial independence.

They are an opportunity for an exchange of ideas between judges of different jurisdictions. They do provide a forum for debate and discussion in an atmosphere of mutual respect. They are not the exclusive preserve of judges from developing jurisdictions but include judges from other developing jurisdictions who might not always have an opportunity to share their experience with others. Therefore these seminars are not about judges from developed jurisdictions telling others how to do things.

These seminars are also an opportunity for judges to show solidarity for each other, sometimes in difficult circumstances. I give Papua New Guinea as an example. In February 2012 in conjunction with the Chief Justice of Papua New Guinea, Sir Salamo Injia we organised a seminar on judicial independence. Mr Justice Carl Singh, Chancellor of the Judiciary of Guyana was our main speaker.

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At the time the government was seeking to suspend the Chief Justice on grounds of misconduct. Within two weeks of the seminar having taken place, the government caused the Chief Justice to be arrested on grounds of having perverted the course of justice.

Whilst our presence may not have stopped the Chief Justice being arrested, it was a strong statement of support for judicial independence in Papua New Guinea.

Throughout the crisis involving the Chief Justice the PNG judiciary maintained solidarity with him and it may be that our seminar contributed to this. I am pleased to say that following the PNG parliamentary elections in June/July 2012 the crisis was resolved with the charges against the Chief Justice being dropped and his being restored to office.

Therefore one can say with confidence that these seminars are effective and do produce results.