224 A

INTERNATIONAL BAR ASSOCIATION

PROJECT ON MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE

AUSTRALIAN RESPONSE

The Hon. Mr. Justice M.D. Kirby
Australian Rapporteur

February 1981

INTERNATIONAL BAR ASSOCIATION

PROJECT ON MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE

INTERNATIONAL BAR ASSOCIATION

PROJECT ON MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE

AUSTRALIAN RESPONSE

The Hon. Mr. Justice M.D. Kirby *
Australian Rapporteur

A. JUDGES AND THE EXECUTIVE

a. Judicial Administration at the Court Level

(1) The Chief Justice of the Court is ultimately responsible for court administration at the court level in all Australian jurisdictions.

(2)

(3) The Chief Justice is responsible for the judges, including rostering of duties, vacations, hours of hearings and the like.

(4) The administrative personnel of the Court are responsible in each jurisdiction to a Chief Administrative Officer, in some Courts known as the Registrar. The Registrar is responsible to the Chief Justice for all matters pertaining to the business of the Court. The administrative personnel are government employees and the Registrar is therefore responsible to the executive government with respect to terms and conditions of employment, financial accounting and other non-judicial matters. The exception to this system is the High Court of Australia where the administrative personnel are responsible, even in non-judicial administrative matters, to the judges in whom is vested by law the responsibility for the administration of the Court.

(5) The Chief Justice is responsible for case allocation and case assignment.

(6) The Chief Administrative officer, often known as the Registrar, is responsible for preparing the budget of the Court.

(7) In all Courts except the High Court of Australia, buildings and facilities are the responsibility of the appropriate department of government.

(8) The Chief Justice is responsible for contacts with the appropriate Minister.

(9) Generally speaking responsibility for contacts with the prosecution would be with the judge who is for the time-being in charge of the Criminal business of the Court.

(10) Generally speaking the Chief Justice is responsible for contacts with the organized bar.

(11) The Chief Administrative officer in each Court is responsible for statistics.

(12) There is a pre-determined plan for the division of work among judges and the assignment of cases, but it is flexible and may be changed easily.

(13) The Chief Justice is in charge of case assignment.

(13a) Except in respect of the terms and conditions of employment of administrative personnel and financial accountability, executive control of the above matters is considered incompatible with judicial independence.

b. Judicial Administration at the Central Level

(14) —

(15) Judicial appointments are the responsibility of the executive government. Consultation by the Law Minister is entirely discretionary except in the case of appointments to the High Court of Australia. As to these appointments the National government is required to consult with the State governments, although the final decision remains with the National government.

(16) Movements of judges are the responsibility of the Chief Justice of a Court.

(17) Temporary judges can only be appointed to act in the place of an incapacitated judge or of one who is on leave. Such appointments are made in the same way as permanent judges.

(18) Permission to engage in activities outside judicial work must by convention be obtained from the Chief Justice of the Court to which he belongs.

(19) The question of disciplinary action is dealt with under a later heading.

(20) Central Court statistics are prepared by the government department responsible for the supply of services to the Courts (Department of Justice or its equivalent).

(21) Central preparation of Court budgets is the responsibility of the government department responsible for the supply of services to the Courts (Department of Justice or its equivalent).

(22) In most jurisdictions the Courts budget is an identifiable part of the budget of the Department of Justice. In the High Court of Australia, it is a lump sum figure for the expenditure of which the judges are responsible.

(23) Court budgets are approved in the ordinary procedure.

(24) Court budgets form part of the executive budget and are approved in the same way as other budgets.

(25) The services to Federal Courts are financed by the Federal (or National) government. The services to State Courts are financed by the respective States.

(26) The Minister of Justice or his equivalent is responsible for administrative personnel but in all matters pertaining to the business of the Court they are responsible to the Chief Justice. Court buildings are the responsibility of the Minister and department responsible for public buildings. The exception again is the High Court of Australia which is solely responsible for its own administrative personnel and buildings.

(27) Australia is a federation. State courts exercise federal jurisdiction under the Australian Constitution, where this jurisdiction is conferred on them by laws of the Federal (Commonwealth) Parliament. However, there are certain courts, established by the Federal Parliament, for which the Commonwealth is responsible, namely the High Court of Australia (the Federal Supreme Court), the Federal Court of Australia (now incorporating the Federal Bankruptcy Court), the Family Court of Australia, the supreme courts of the Territories other than the Northern Territory Supreme Court, and the magistrates' courts (including the children's courts) of the Territories other than of the Northern Territory. Responsibility for administration of the above courts, other than the High Court of Australia, is that of the judges and, in matters of finance and administration, the Commonwealth Attorney-General's Department. In the case of the High Court of Australia, recent legislation has conferred upon the judges a greater measure of autonomy in the expenditure of an appropriation made in parliament for the administration of the court. High Court of Australia Act, 1979. Normally, federal and state courts sit in different court buildings and there is no relationship between their respective administrations. However, in Sydney, a major new court complex was developed in the 1970s to house both Commonwealth and state courts. Consequential arrangements had to be made for joint facilities, including a joint courts library. This joint courts building is functioning well.

(28) At the federal level and in some of the states, machinery has been established for the regular, automatic review of judicial salaries. The salaries of Commonwealth judges, including Justices of the High Court of Australia, are determined by the Remuneration Tribunal pursuant to the Remuneration and Allowances Act 1973 (Cwlth) (Part IV) and the Remuneration Tribunal Act 1973 (Cwlth). The Chairman of the Tribunal is a State Judge, Sir Walter Campbell, a Judge of the Supreme Court of Queensland. The Tribunal is required to furnish to the Minister a copy of every determination made by it. The Minister is obliged to cause copy of the determination to be laid before each House of the Parliament. If either House within 15 sittings days passes a resolution disapproving of the determination, it shall not come in to operation or, if already in operation, will terminate from the day on which the resolution was passed (section 7, Remuneration Tribunal Act 1973). The Tribunal invites oral and written submissions and will, if requested, conduct an oral hearing. Among criteria considered is the Consumer Price Index. In the state sphere, there are

similar tribunals. In New South Wales the tribunal is the Parliamentary Remunerations Tribunal, whose Chairman is a retired Supreme Court judge. Whilst the consumer price index is among criteria considered by the Remuneration Tribunal I note that in its 1980 Review the following appears:

'24. We do not consider it desirable that the remuneration of members of the Federal judiciary (which includes presidential members of the Conciliation and Arbitration Commission) should move automatically with national wage case adjustments, or be seen to so move'.

The allusion to the Conciliation and Arbitration Commission would appear to be because it is the Commission itself which sets the National Wage adjustments. Hence there is the risk of it appearing that the Commission may have some direct influence upon the salaries of its members. The same can, of course, be said about the various State Tribunals such as the South Australian Industrial Commission.

(29) Section 72(iii) of the Australian Constitution provides that the justices of the High Court and of the other courts created by the Parliament ... 'shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office'. In 1931 the Prime Minister requested the justices of the High Court of Australia to agree to accept a reduction in their salaries because of the economic situation at the time. The justices refused, although they made separate individual arrangements. See J. Bennett, Keystone of the Federal Arch (History of the High Court of Australia), Canberra, A.G.P.S., 1980, 46.

The Act of Settlement of 1701 (G.B.) promised to English judges a security of tenure which had sometimes been denied them during the 17th century. However, colonial judges appear to have held their offices during pleasure, in the absence of special statutory protection. Terrell v. Secretary of State for the Colonies [1953] 2 QB 482. To clarify the position of the judges, at least of the supreme courts, legislation has been enacted providing security of tenure for state supreme court judges. The relevant legislation is:

New South Wales: Supreme Court and Circuit Courts Act 1900, s.10
Queensland: Supreme Court Act 1867, s.9
South Australia: Constitution Act 1934, ss.74, 75 .
Tasmania: Supreme Court (Judges' Independence) Act 1857, s.1
Victoria: Constitution Act 1855, s.38
Western Australia: Supreme Court Act 1935, s.9

There is a discussion of this issue in Z. Cowen and D. Derham, 'The Independence of Judges' (1953) 26 Aust Law Jl 462, 464. Both by constitutional provisions, specific legislation and deeply ingrained traditions, there is an established and accepted principle of judicial independence. This includes respect for the continuance of salaries, their non-diminution and, more relevant in times of inflation, their regular review and increase.

(30) No. The provision of machinery for the increase of judicial salaries has circumvented this. The machinery is both routine and regular (as above) and ad hoc and special. A recent committee report recommended substantial increases in the remuneration of judges of the Supreme Court of Victoria, and this was accepted by the State Government with the endorsement of the State Opposition.

(31) If the question is addressed to formal powers of discipline over judges, except in respect of any initiatives which the minister (typically the attorney-general) would have as a member of the Executive Council on an address from both Houses of Parliament praying for the removal of a judge 'on the ground of proved misbehaviour or incapacity' (see Australian Constitution, s.72(ii)), the Minister has no 'formal powers' 'over judges'. Australian parliaments, federal and state, follow the Westminster system. Ministers, as members of parliament, would participate in such an 'address'. However, the doctrine of the separation of powers preserves respect for the independence of the judicial arm of government and restricts to the above formal steps, ministerial involvement in discipline of judges. The attorney-general has an important responsibility for the appointment of judges, recommending them to the Cabinet, both in the Commonwealth and state spheres, for approval and thereafter participating in the formal appointment by the Executive Council, Commonwealth and state. Once appointed, however, the doctrine of the separation of powers, constitutional and statutory provisions and strongly entrenched traditions limit the function of the ministers and control their relationship with the judiciary.

(32) It is not clear what the 'matters mentioned above' include. There are moves in Australia to confer upon the judges of the superior courts greater power over the expenditure of funds incidental to the running of their courts. These moves have borne fruit in the passage of the High Court of Australia Act 1978 by the Commonwealth Parliament. They envisage a one-line appropriation, with power of the courts (subject to the scrutiny of parliamentary committees) to expend

monies as determined by the judges, in practice on the advice of court administrators. These moves are not without their critics, some contending that judges are neither fitted by training nor inclination for the complex business of modern court administration. There is no present controversy in Australia concerning judicial independence in the wide sense, it being generally acknowledged in all arms of government, in the media and in the community at large, that the independence of the judiciary from interference by the executive arm, is vital for the rule of law, and integral to the federal state. A recurring controversy is the extent to which judges should take part in executive functions, such as Royal Commissions of Inquiry, law reform commissions, legal aid commissions and other executive appointments. Views differ on this subject from jurisdiction to jurisdiction, some judges and public commentators expressing the fear that too much judicial involvement in executive functions will diminish the independence of the judiciary and make it susceptible to executive pressure and public identification of judges with broad policy questions.

(33) No. Pardon is rare in Australia. Provision is made in some jurisdictions for anterior consideration of advice to the Executive Council by the Supreme Court. A greater source of complaint is the exercising by parole boards of their functions to permit the early release of prisoners despite substantial 'head sentences' imposed by the judges. The discrepancy between judicially imposed criminal sentences and the administratively determined parole release has caused calls to be made for significant reform of parole in Australia. A review of the literature is found in Australian Law Reform Commission, Sentencing of Federal Offenders (ALRC 15) (Interim), 1980, Chapter 9.

(34) Cases of overt pressure by the Executive Government upon the judiciary are rare in Australia. No recent instance springs readily to mind. From time to time ministers and members of parliament make public statements, sometimes in parliament, critical of a particular decision of the courts. More rarely, in advance of decisions, statements are made, designed to influence the decision of the courts. The latter are generally circumscribed by the law of contempt and by respect for the independence of the judiciary. More important may be pressure of an indirect kind. The failure to appoint an adequate number of judges to cope with court business, or to authorise adequate expenditure or personnel for court functions, provides an illustration of indirect Executive

pressure on judges. Some members of the Australian judiciary and commentators regard the appointment of judges for Executive functions as a form of Executive pressure, in the sense that it provides diversity of functions and opportunities for the exercise of wider and differing responsibilities. The Commonwealth Government has appointed judges to purely Executive activities, including one to an ambassadorial function, another to head the Australian Security and Intelligence Organisation, another to head the Commonwealth Grants Commission and so on. Other judges and some commentators regard the award of honours to serving judges as an unacceptable form of Executive pressure. However, it must be emphasised that pressure of the kind mentioned is indirect and cautious rather than overt and obvious. See below, para (66).

B. JUDGES AND THE LEGISLATURE

(34a) In Australia, it is exceptionally rare for legislation retrospectively to over-rule a court decision in a particular case. It is not at all rare for legislation to over-ride the effect of a decision prospectively as it applies in other cases. Where legislation is introduced to overcome a particular decision, and that decision is itself the subject of appeal, it is traditional that the legislation preserve (often in explicit terms) the case of litigation pending. In one recent case involving the possible questioning of a state minister concerning Cabinet documents and communications internal to the State Executive, legislation was enacted to prohibit the courts having access to such material. This legislation was enacted to overcome a recent decision of the High Court of Australia in Sankey v. Whitlam (1978) 53 ALJR 11, where the Court held that the ultimate responsibility for deciding whether a claim of Crown privilege could succeed even in the case of Cabinet documents rested with the courts, after balancing the competing public interest at stake and examining the documents. Amendments to the Evidence Act of New South Wales were designed to restore what had been thought to be the position prior to that decision. It generated both criticism and justification in the media and academic journals. It affected current litigation involving officers of the NSW Government and, possibly, ministers. Normally, however, reversal by legislation of specific court decisions is limited to the effect of those decisions upon other cases, including pending cases, only.

(35) See (34a).

(36) See (34a). Such is the respect for judicial independence and for the decisions of the superior courts in Australia that any government deciding to reverse a specific decision would have to face widespread public and academic controversy. Even in the case mentioned in (34a), there was widespread public debate and academic criticism (as well as some justification). It is understood that the NSW Government intends to repeal the provisions, presumably in part as a result of the criticism that followed them.

(37) In the Commonwealth's sphere the spirit of the Constitution has been observed, and federal courts, even when held to be constitutionally invalid, have not been formally abolished, so long as any members of the courts remain alive. Thus, when in 1956 the High Court of Australia and the Privy Council determined that the former Commonwealth Court of Conciliation and Arbitration was invalidly created (because it purported to exercise both judicial and arbitral powers) the course was adopted of creating new bodies: splitting the Court into the Commonwealth Industrial Court and the Commonwealth Conciliation & Arbitration Commission. However, former members of the old (invalid) Court retained their commissions. They were appointed to one or other of the new bodies. Provisions in the Conciliation and Arbitration Act 1904 referring to the old Court were not repealed. In the more recent creation of the Federal Court of Australia, all members of the old Commonwealth Industrial Court (later renamed Australian Industrial Court) were given fresh commissions in the Federal Court of Australia, save for two judges of the Industrial Court. One of these judges later retired. Another still holds his commission in the Australian Industrial Court. Legislation providing for that Court has not been repealed. The Judge continues to draw his salary as a Judge of the Australian Industrial Court. He continues to have officers, personal staff and the other traditional benefits of judicial office, although he has virtually no judicial work. Recent media comment was critical of the judge, basically for not retiring when the work of his court expired. The Attorney-General and the Shadow Attorney-General suggested explicitly that he should consider retiring. However, he stated that he would 'uphold the Constitution' and not retire (The Age (Melbourne), 18 October 1980, p.5).

(38) The Constitution of the Commonwealth of Australia provides in s.72 as follows:

The Justices of the High Court and of the other courts created by the Parliament —

(i) shall be appointed by the Governor-General in Council;

(ii) shall not be removed except by the Governor-General in Council on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.

There are similar provisions in respect of state supreme court judges. Since federation, the provision has not been used. Some commentators have suggested that the restructuring of courts as above has amounted to a de facto circumvention of the constitutional provision. On the other hand, the provision has been respected in the case of tribunals which, though not courts, fulfil court-like functions.

(39) In the Federal Constitution, there is a limited guarantee of trial by jury (s.80). There is also a prohibition of conferring judicial power of the Commonwealth upon bodies which are not federal courts. There are limits upon the subject matters which could be conferred upon federal courts created by the Federal Parliament. Special courts have been created relevant to those powers, e.g. the Family Court of Australia. There are of course specialist jurisdictions existing in most States and Territories of the Commonwealth vested with such jurisdiction as conferred by relevant legislation e.g. Industrial Courts and Commissions; Workers Compensation Commissions, Mining Courts. etc.

(40) The Standing Orders of the Parliaments of Australia typically restrain scandalous or like comment in the parliament concerning judges and such comments will be ruled out of order by the Speaker or President. Furthermore, the sub-judice rule which is enforced in parliament usually prevents or severely restricts discussion upon cases which are currently before the courts. It has recently been suggested that parliamentary application of the rule in Australia goes beyond that which is required. See Mr. Justice D. Hunt, 'Why No First Amendment?' (1980) 54 Aust Law Jl 459, 463. Notwithstanding these Standing Orders, criticisms of the judiciary in parliament are not unknown in Australia. Criticism of the role of the former Chief Justice of Australian in advising the Governor-General concerning the dissolution of the Commonwealth Parliament has recurred in Opposition speeches made in the Parliament over the past six years. Criticism of particular judges, particular courts or the judiciary generally, arises from time to time, but typically in connection with issues rather than personalities. Generally speaking, there is an ample measure of respect in the parliament for the judiciary and its members and this respect is upheld by the presiding officers.

(41) As (40). Criticism of the former Chief Justice of Australia, by successive leaders and members of the Australian Labor Party, followed his decision to tender advice to the Governor-General immediately prior to the dissolution of the Commonwealth Parliament in November 1975. This criticism has been frequent, bitter and widely published, both in Parliament and outside. However, there is probably a distinction in the public mind between the conduct of the Chief Justice as a judicial officer and his conduct in tendering advice to the Chief Executive. The latter may be characterised as an executive and not a judicial function, and indeed this was the complaint of some critics. It should be said that the advice was tendered by the former Chief Justice on the invitation of the Governor-General. Apart from such extraordinary cases, criticism of the judges is generally confined to criticism of particular decisions, especially in the criminal justice area. Typical instances include criticism of levels of sentencing, generally as inadequate or inconsistent. Criticisms of this order are not infrequent.

(42) See (41).

(43) Judicial suggestions for law reform are frequent, although different judges take different views on this. Some confine themselves to 'lawyers' law' issues. Others are prepared to make recommendations of a more sweeping character involving broad social issues. Others take the view that they should simply implement what the common law or parliament has provided and should not comment upon the rightness or wrongness of the law: leaving that to elected representatives. Recently, an innovation has been adopted in Australia by which the Australian Law Reform Commission collects judicial, academic and other suggestions for reform of Commonwealth laws, or laws of general application for the Territories. These suggestions are included in the Annual Report of the Commission tabled in the Commonwealth Parliament. The first relevant collection of this kind was Appendix A in the Annual Report of the Commission 1980 (ALRC 17). The Commission's stated aim in listing the judicial suggestions was to provide a vehicle for conveying them in a readily available form to Parliament, and encourage the judiciary in the utility of making such suggestions, without diminishing their independence from the Executive and legislative branches of government.

(44) This does happen, but it is rare in view of the fact that the courts in Australia have not developed the jurisdiction to give Advisory Opinions, and generally confine themselves strictly to determining the legal and factual issues for trial before them. However, occasionally, a case will be adjourned to permit the Executive Government to consider the implications of a matter that may not have been identified prior to the hearing. It is doubtful that this course would be adopted, without the concurrence or acquiescence of representatives of the Executive in court.

(45) Criticism of the judiciary in the parliament, the press and elsewhere is not regarded a a serious threat to judicial independence. Usually such criticism is expressed with statements of general approbation for the work of the courts. Often is is put forward in constructive spirit. From time to time judges feel bound to point out, either in judgments or extra-curially, that judges and the courts are not well placed to answer criticism or to engage in social controversy. Nevertheless, the spirit of independence of the judiciary in Australia is sufficiently assured and the judiciary itself sufficiently robust, to accept criticism in parliament and elsewhere. There are no present moves to strengthen the position of the judiciary against such criticism. On the contrary, proposals have been made for the reform of the law of contempt to liberalise further the ability lawfully to comment upon matters that may end up before the courts. Special caution is, however, needed to protect the fairness of criminal trials from excessive and damaging coverage in the media. See Attorney-General (NSW) v. Willesee & Ors, [1980] 2 NSWLR 143.

C. TERMS AND NATURE OF JUDICIAL APPOINTMENTS

(46) The Australian Constitution, as interpreted by the High Court of Australia, required appointments to federal courts, including the High Court, to be for life. All Commonwealth judicial appointments until 1977 were, accordingly, for a life term. Even in the case of Commonwealth courts replaced by subsequent courts, the life tenure of previous appointees has been respected. When, by referendum in 1977, the Australian Constitution was amended to provide for limiting the term of federal judges (Constitution Alteration (Retirement of Judges) 1977), it was expressly provided that the amendment would not apply to judges already appointed. Thenceforth, federal judges in Australia were appointed, in the case of the High Court of Australia, to the age of 70 years and in other cases, to such age as the Parliament determines. The Parliament has

determined the age of 70 years for judges of the Federal Court of Australia and 65 for judges of the Family Court of Australia. In the states, the position is that each state now provides, by legislation, for the tenure of judges. In each case appointment is to the age of 70 years, except that in Victoria, judges are appointed to the age of 72. The judiciary of district and county courts hold office in the same way as judges of the supreme courts of the states. Magistrates typically hold office until the age of 65 years.

(47) This is not currently provided for. In some cases there are statutory provisions for judges to conclude determination of matters currently before them at the time they attain retirement age, e.g. section 12(2) Industrial Conciliation and Arbitration Act 1972, 1975 (South Australia).

(48) It is possible to appoint acting judges in the state sphere and it is not unusual to have acting judges, particularly of the supreme court, generally to clear backlogs in court lists and often over the long vacation. A requirement of life tenure for judges of federal courts inhibited the appointment of acting federal judges. This requirement is now removed by the constitutional provisions but no acting judges of federal courts have been appointed. Judges and magistrates of Territory courts are not under the same constitutional requirements as to tenure. But in practice the position is the same as in the states. Special magistrates, i.e. judicial officers of the lower courts appointed for a limited period, have been appointed in the Territories. In some States, specific provisions are made. For example, Commissions may be issued to practitioners of the Supreme Court of South Australia of at least seven years standing upon the recommendations of the judges of the Court to hold circuit sessions of the Court (Supreme Court Act 1935-1975 Section 53 (S.A.)). This has been the practice lately in South Australia.

(49) This is not currently provided for in the case of the highest court of Australia, the High Court of Australia, nor is it possible in the case of federal courts. Within federal courts, however, arrangements are made. Thus in the Federal Court of Australia, Full Court, provision is made that in Territory appeals, one member of the Court shall be a judge of the supreme court of the Territory in question. However, that judge holds a commission both as a Judge of the Federal Court and of the Territory Supreme Court, so that, in the case of appeal, he is sitting exercising his capacity as a Judge of the Federal Court. In the case of the Family Court of Australia, provision is made for a chief judge,

senior judges and judges. Judges are normally engaged in trial work but they are assigned a certain number of cases in the Full Court of the Family Court of Australia. In the State of New South Wales, a separate, special Court of Appeal is established within the Supreme Court. Judges of the Court of Appeal must have special commissions for that purpose. Acting judges of appeal have been appointed from time to time from the ranks of the Supreme Court judges. In all other states the appeal court is constituted from among judges of the supreme court, usually according to seniority of service. Occasionally, judges of the intermediate (district or county) court are appointed as acting judges of the supreme court. In this capacity they may become judges of the state appeal court, but this is rare. In other States, where there is no special court of appeal as in New South Wales, acting judges of the Supreme Court from time to time sit on appeals in that jurisdiction. This would seem to be dependent upon the roster or like arrangements for the conduct of the court's business.

(50) No.

(51) In the case of the High Court of Australia, the number of justices is fixed by the Parliament, currently at seven. There is no constitutional limit to the number of judges who may be appointed to the Federal Court of Australia or the Family Court of Australia. See Australian Constitution, s.79. The actual number of members of the higher courts is determined by Parliament and, in default of a parliamentary limitation, is determined by the Executive Government in the number of appointments it makes.

(52) This has not been done. Until recently the constitutional requirement (as interpreted) for life tenure would have made this difficult or impossible. Part-time magistrates have been appointed. Occasionally a judge will serve part-time in one judicial capacity and part-time in another or in an executive function (e.g. chairmanship of a legal aid commission or law reform commission). However, appointment of a person specifically as a part-time judge has not occurred in Australia and is unlikely to occur. See (48) as to circuit commissions. In South Australia, for example, State practitioners and more commonly retired magistrates, are from time to time appointed to some Magisterial Jurisdictions on a part-time basis.

(53) The arrangements in Australia as described in response to questions (46) to (52) are considered acceptable. There was an overwhelming popular vote in favour of permitting Parliament to enact legislation for the compulsory retirement of judges at a given age. It is not considered that this is incompatible with judicial independence and having been long accepted in the state sphere, it was readily accepted in the federal sphere as well. The limitation on acting appointments and the rarity of part-time appointments is considered to contribute to judicial independence.

(54) Political considerations do affect the appointment of the judiciary. In some cases political affiliation has been said to facilitate appointment. In other cases, broad sympathy with the social attitudes of the Executive Government of the day has been a requirement or at least an advantage. It is no more possible for judges than for other people to be completely without political and social convictions. Scaleograms used to analyse the voting tendencies of judges suggest the consistency of judicial attitudes to issues having a social or economic content. See A.R. Blackshield, Quantitative Analysis : The High Court of Australia 1964-1969 in (1972) 3 Lawasia 1. Nevertheless, the strongly entrenched traditions of independence from the Executive support the removal of judges, once appointed, from party political involvement or too close an association with members of the current Government Opposition. Furthermore, once appointed, there is virtually nothing which the Executive can do, in practice, to control the judge in his day-to-day work, except by securing the enactment of legislation, publicly scrutinised in Parliament. Any attempt improperly to remind him of his previous 'associations' would be denounced, if disclosed, and would create a public scandal. Accordingly, the Executive Government can only endeavour to secure the appointment of persons thought to be of appropriate professional and intellectual talents and sympathies. Once appointed, the opportunities of the party politicians to influence the judge are distinctly circumscribed, both by law and tradition. The attitude of different governments and different attorneys-general to party political sympathy varies from time to time and jurisdiction to jurisdiction. In particular, when a government has been in office for very many years, it may have exhausted the list of those lawyers to whom it was felt patronage was owed. In such circumstances, a more politically neutral approach to appointments may come in to play. Furthermore, governments of a conservative political persuasion find it easier to have a broad choice within the legal profession than governments of a reformist persuasion: the legal profession in Australia being tending to be politically conservative. With very few

exceptions, a minimal requirement of high intellectual ability, earned professional respect and suitable professional experience are observed before persons are appointed to judicial office, particularly in the superior courts. The existence of general political or social sympathy is usually regarded as an advantage, though not always a requirement, for the appointee. In the case of the High Court of Australia, which has to determine constitutional and more clearly political issues, the political background and attitudes of the appointees is often a matter of public debate. A large number of the justices of the High Court of Australia have themselves been involved in party politics at earlier times of their careers.

D. JUDICIAL REMOVAL AND DISCIPLINE

(55) In the case of the superior courts, provision is made for removal on an address by the Parliament. Removal is effected by the Governor-in-Council or the Governor-General in the federal Executive Council, as the case may be. See above. The procedure has not been used in Australia this century. In practice, it may be anticipated that the procedures would be initiated by the Law Minister, the Attorney-General. There does not appear to be any intermediate disciplinary authority short of removal (or 'amoval' as it is sometimes called). Judicial circumspection is generally a question of custom, tradition and usage. It is rarely breached in Australia. However, certain extra-curial statements made by a Presidential Member of the Australian Conciliation and Arbitration Commission, in which he questioned at a public dinner and in a public speech the decision of an Appeal Bench reviewing a controversial order made by him, led to much public discussion. In the result, the Deputy President (who enjoys a judicial title and judicial status) was removed from a panel of first instance judges and confined to appellate work in a Bench of three. His workload was thereby severely reduced. He, and certain supporters, then publicly criticised this reassignment of duties. Some public comments suggested it was an illicit form of discipline. However, the case had many extraordinary features and is quite atypical.

(56) The Tribunal is permanent, namely the two Houses of Parliament, or in the case of the State of Queensland, a unicameral legislature, the Parliament.

(57) The grounds in the Australian Constitution for the removal of federal judges is 'proved misbehaviour or incapacity'. Insofar as 'incompetence' constitutes 'incapacity' and this is proved, and the procedural steps required under s.72 of the Constitution are followed, a federal judge could be removed for incompetence. The position in the states in respect of superior courts is similar. In respect of magistrates, in most states they may be removed by the act of the attorney-general, although the traditions of judicial independence, even in respect of the lower judiciary, have restrained the unlimited use of this power. What normally happens is that a judicial officer who is not performing to standards, may be assigned very little or no work by the head of his court, is given sick leave or, in the case of magistrates, assigned to purely administrative functions. Cases do arise from time to time where judges become feeble, addicted to alcohol or otherwise incapable of performing their judicial duties. In such cases, it is generally left to the chief justice or chief judge to endeavour to persuade the judge to take sick leave or to retire. Normally these procedures have proved adequate to cope with difficulties of this kind, without the need for special machinery. In the last few years there have been calls for a more routine procedure, after American models, to provide for the handling of complaints against judges and for a less extraordinary machinery for their retirement or removal. However, these calls have not yet become a strong political movement, and the need is so rare that it is unlikely to result in legislation in the foreseeable future.

(58) Only the constitutional provisions mentioned above. Judges are, of course, subject to the general law of the land and liable to its process both criminal and civil, the latter with the exception of statutory protection in respect of curial statements and the like.

E. THE PRESS, THE JUDICIARY AND THE COURTS

(59) To some extent decisions of the courts are reported in the press, although reportage varies both in subject, detail and competence. There is a heavy bias, particularly in afternoon newspapers, upon reportage of criminal court decisions and sentences. Decisions in civil cases are rarely reported, unless they have some element of the bizarre or unless known personalities are involved. Decisions of the highest court, the High Court of Australia, are being better reported since that Court moved to Canberra, where a permanent High Court press may develop. Editorials on High Court decisions have increased markedly

in 1980. A Conference on the Media and the Criminal Justice System in Australia was held in Canberra, June 1980. See note [1980] 4 Crim LJ 198. Decisions of courts and tribunals are reported in law reports and legal journals.

(60) See above. Criticism of judicial decisions is frequent and sometimes very pointed. Two recent decisions of the High Court of Australia attracted strong press criticism:

* A decision upholding a tax avoidance scheme led to very severe criticism, including in the financial press, of the High Court's alleged tendency to uphold tax avoidance schemes 'however fantastic'. This criticism in turn led to political pressure for the introduction of remedial legislation. This legislation has now been promised by the Federal Treasurer. See 'Tax Avoidance Reform' [1980] Reform 107; Commissioner of Taxation v. Westraders Pty Ltd, (1980) 30 ALR 353.

* A decision of the High Court providing that intoxication, even self-induced, may permit a defendant to escape criminal liability for want of the requisite intent led to severe criticism in the press concerning the perceived dangers to the community resulting from the general application of the Court's principle. See The Queen v. O'Connor, (1980) 74 ALJR 349.

There are many other instances. As to criticism of judges, see above for the criticism of the former Chief Justice of Australia in connection with his advice to the Governor-General in 1975.

(61) Citation of academic legal writing has increased in Australia over the past decade, particularly in the High Court of Australia where at least three of the justices frequently refer to law journal and law review articles in developing their reasoning. However, this is atypical rather than typical and the judiciary and the profession in Australia are not highly responsive to law writings of this kind. Reported decisions of previously decided cases of the court or other courts are constantly employed in view of the common law principle of 'stare decisis'.

(62) Most Australian academics adopt deferential language in the criticism of court decisions. Within the past five years, partly as a result of the development of new law schools in Australia which have a stronger social bias in their curricula, criticism of the judiciary has become more pointed, direct and less deferential.

(63) Typically, in Australia, court trials, whether civil or criminal, are not open to T.V. Occasionally, a court or tribunal will permit a ceremonial session to be televised or a special announcement or decision to be televised in brief form. However, this is exceptional. The ceremonial first session of the High Court of Australia in Canberra was not televised, despite the requests to permit this. Generally, courts from the highest superior courts to the magistrates' courts do not permit photography or television. As a consequence, sketch drawings of court participants appear in newspapers. Trials themselves are open to those members of the public who attend. Very few courts are closed e.g. the Family Court of Australia and children's courts. In some states, courts dealing with women first offenders may be closed, on application.

(64) There is a sub-judice rule and the law of contempt has been enforced against newspapers and other media reporting material pending a trial, especially a criminal trial, where the public disclosure in advance of the trial would be bound to affect the fairness of it.

(65) The reporting by the press and comments by the media, academics and others do not, either in their number, manner, detail or (usually) language, reflect upon the independence of the judges or significantly diminish public perceptions of that independence in Australia.

F. STANDARDS OF CONDUCT

(66) In particular cases, provisions relating to disqualification appear in specific legislation. Thus, for example, the New South Wales Local Government Act provides that the mere fact that a judge is a member of a municipality does not disqualify him from hearing a case involving that municipality. Notwithstanding this position, judges do disqualify themselves in such cases out of a feeling of nicety. Normally, the common law and perceived obligations of judicial independence restrain judges from taking part in cases in which they may have an interest. In the case of the High Court of Australia, justices declined to disqualify themselves on the grounds that members of their family had shares in banks, the subject of litigation. See Bank of New South Wales v. The Commonwealth (1948) 76 CLR 1 as explained in The Queen v. The Industrial Court and Mt. Isa Mines Ltd [1966] Qd.R 245 at 279. Similarly, a public controversy arose in 1980 concerning an allegation that the former Chief Justice of Australia, through a family company, had a pecuniary interest in

litigation before him. This allegation caused the Chief Justice to convey a statement on the matter to the Prime Minister, denying any such interest as would require his self-disqualification. That statement was tabled in the Parliament and criticised there and in the press. There is a discussion of relevant Australian cases in the article by Mr. Justice F.C. Hutley, 'Bias and Suspicion of Bias' in [1980] 4 Crim LJ 200.

(67) Attitudes to extra-judicial activities vary from one jurisdiction to another in Australia. In some jurisdictions, including Victoria, the judiciary declines to take part in such executive bodies as Royal Commissions of Inquiry, law reform commissions and the like, on the ground that the judicial function is limited to the determination of controversies between the government and citizens or citizens and citizens. This view has support amongst individual judges in other jurisdictions, although in some states there is a well developed tradition of judges taking part in such bodies. As to requests by the Executive to the High Court of Australia, see Bennett, op cit, 44. As to other superior courts in Australia, see Sir Murray McInerney, 'The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities' (1978) 52 Aust Law Jl 540; Mr. Justice X. Connor, 'The Use of Judges in Non-Judicial Roles' (1978) 52 Aust Law Jl 482; Mr. Justice F.G. Brennan, 'Limits on the Use of Judges' (1978) 9 Fed Law Rev 1. In Australia, the doctrine of the separation of powers has taken the form of strictly separating the federal judiciary from other arms of government. But this has not prevented the appointment of Sir John Latham, whilst remaining Chief Justice of the High Court, to the post of Envoy Extraordinary and Minister Plenipotentiary to Japan from 1940 to 1941. See (1941) 64 Commonwealth Law Reports iv. Nor did it prevent Sir Owen Dixon, whilst remaining a Justice of the High Court, from accepting the post of Minister in Washington from 1942 to 1944. See (1942) 65 CLR iv; (1944) 69 CLR iv. In 1950, Sir Owen Dixon also acted as United Nations Mediator in Kashmir. See (1950) 80 CLR iv. Judges of the Federal Court and of the Family Court have also accepted Executive appointments, including Director-General of the Australian Security Intelligence Organisation, Ambassador at Large on Nuclear Energy and Chairman of the Royal Commission on Human Relationships. A distinction must be drawn between extra-judicial activities which are incidental to Crown service and those which have a personal and/or commercial character. Judges join clubs, both social and sporting, various associations and the like. However, they are not members of political, trade union or associated organisations, nor do they accept directorships of companies or activity in

commercial life beyond, in some cases, shareholding. Some judges even dispose, on appointment, of all shareholdings against the possibility of conflict of interests.

(68) See (67).

(69) While serving as judges, judges will not be involved in a private law practice. Differing views are held concerning the writing of books. Books of fiction are typically written under pseudonyms. Books on legal subjects are sometimes published by judges, particularly if an earlier edition was written whilst they were at the Bar. Some judges hold the view that they ought not to write or publish such books under their name, once appointed, lest the book attract an apparent authority which it ought not to have. Judges can be appointed as arbitrators under Arbitration Acts. But they are not, while serving as judges, available as private arbitrators, except pursuant to legislative authority.

(70) Public activities of the serving judiciary are limited, generally, to functions traditionally compatible with judicial office. As stated above, attitudes vary as to the definition of this compatibility. Universal is the view that judges should not be involved in party political or contentious economic public activities, commercial activities or activities that could lead to conflicts of interest or public criticism of the Bench.

(71) As above. Judges do not accept directorships of companies or commercial partnerships. They may have private shareholdings, partnerships in farms or the like, although some judges also regard this as incompatible with judicial office. A recent inquiry by a committee chaired by the Chief Judge of the Federal Court of Australia, Sir Nigel Bowen, delivered a report on Private Interest and Public Duty. It contained observations concerning the judiciary, whilst not recommending the establishment of a registry of interests.

(72) Various traditions limit social contact by judges. They do not typically attend social functions of a political, commercial/business or like character. Most judges in Australia will not, after appointment, visit public hotels, although rules of this kind are changing with the growing number and diversity of the judiciary and changing social mores.

(73) Upon appointment, judges in Australia are expected to resign membership of political parties, and thereafter to take no part in the affairs of such parties. Some judges, after appointment, have kept social contact with former friends in political life. So long as this is carried out discreetly, it is not considered significant.

(74) The doctrine of the separation of powers and the traditions of the independence of the judiciary prevent judges, during service, being members of the legislature. Many judges have served in the legislature before appointment. Some, on resignation from the Bench, have been elected to parliament (e.g. Dr. H.V. Evatt, who was successively Justice of the High Court of Australia, Federal Minister, Leader of the Federal Opposition and Chief Justice of New South Wales).

(75) Upon appointment, judges may not take part in local politics or become members of municipal councils, although in a private capacity they may make representations to politicians and local councils concerning matters of personal concern.

(76) During tenure, judges in Australia do not hold positions in political parties nor do they have any formal relationship with organisations associated with political parties such as trade unions or confederations of industry. They may attend conventions organised by trade unions etc. (e.g. industrial relations conferences), but not party political functions.

(77) During tenure, judges may not be ministers in the government in Australia.

(78) It is rare for judges to write articles in newspapers or letters to the editor, although it does happen from time to time, particularly the latter. Some judges fulfilling executive functions e.g. Chairman of the Legal Aid Commission, Chairman of the Law Reform Commission etc. more readily engage in such activities but not in a judicial capacity.

(79) It is rare for judges to give interviews to the media. So far as is known, it has never occurred in Australia in relation to a particular case on which the judge has sat curially. However, judges from the High Court of Australia down have given interviews to the media about general legal topics. Two justices of the High Court of Australia, including the Chief Justice, have given a speech and answered questions at the National Press Club. Another justice has given a

television interview concerning a speech made extra-curially to a conference of magistrates. Supreme court judges in their capacities as chancellor of a university, head of a law reform commission or otherwise have given media interviews. Invariably, however, this has related to extra-curial statements of a general character and not to their activities as judges. In particular, it has become more common for judges engaged in law reform bodies to give interviews to the media incidental to the processes of public consultation.

(80) There is no formal association for judges in Australia. There is an Australia Stipendiary Magistrates' Association. The supreme court judges have an annual summer conference at which papers are read and discussed. Judges of the district and county courts also have a regular conference. However, these are confined to matters of legal, professional or intellectual concerns and are held in private.

(81) Lobbying, if any, is informal and discreet and not in public, except that occasionally, judges will give speeches in which lack of facilities or services are referred to.

* The Australian response has been prepared by the Honourable Mr. Justice M.D. Kirby, Chairman of the Australian Law Reform Commission and Deputy President of the Australian Conciliation and Arbitration Commission. In preparing the response, Mr. Justice Kirby had the assistance of the Honourable Mr. Justice L.J. King, Chief Justice of South Australia and His Honour Judge D.K. Haese, Deputy President of the Industrial Court of South Australia.