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JUDICIAL COMMISSION OF NEW SOUTH
WALES

LOCAL COURT OF NEW SOUTH WALES

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3 JULY 2015

AMORA HOTEL SYDNEY

NEW GLOBAL DEVELOPMENTS ON JUDICIAL
INTEGRITY

The Hon. Michael Kirby AC CMG

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INTRODUCTION

The purpose of this paper is to provide background notes for a contribution to the Local Court Conference 2015.

As a Judge and as President of the Court of Appeal of New South Wales, I had a number of matters requiring judicial determination that concerned various forms of departure from the rules of integrity required of members of the local legal profession.¹ The same was true during my service on the High Court of Australia.² However, my chief engagement with the broad principles governing judicial integrity, viewed in an international context, arose from a number of associations I have had with civil society organisations:

* As a Commissioner, later President, of the International Commission of Jurists in Geneva (1983 – 1988). That body has

* Justice of the High Court of Australia (1996-2009); Member of the Eminent Persons Group on the Future of the Commonwealth (2010-11).

¹ See eg *S & M Motor Repairs Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1988) 12 NSWLR 358; *Galea v Galea* (1990) 19 NSWLR 263.

² *Ebnor v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Johnson v Johnson* (2000) 201 CLR 488.

created the Centre for the Independence of Judges and Lawyers. It has also published a regular report *Attacks on Judges*. The ICJ played an important part, in past, in developing and collecting the principles for the international standards governing judicial integrity.³

- * As a member of the Judicial Integrity Group and as the Group's rapporteur during the drafting of the *Bangalore Principles on Judicial Integrity*.⁴

- * As a member of the International Advisory Board of Transparency International (TI). This is an international civil society organisation, established in Berlin, Germany. It conducts investigations and surveys on levels of corruption in countries throughout the world. It has an Australian Chapter that looks at issues of official corruption in Australia. At present, TI is examining proposals for the preparation for new international treaty law addressed to issues of corruption, specifically judicial corruption. TI publishes regular reports on investigations, into judicial corruption worldwide; and

- * In March 2015, the newly elected President of the International Bar Association (IBA), Mr David Rivkin, a New York lawyer, announced his support for a new initiative to mark his presidency. This initiative is addressed to particular problems faced by the legal profession in cases of actual or suspected judicial corruption. A

³ International Commission of Jurists, Centre for the Independence of Judges and Lawyers, *CIJL Bulletin* (No. 25-26), 1990, Special Issue: *The Independence of Judges and Lawyers: A Compilation of International Standards* (Geneva, 1990).

⁴ United Nations Office on Drugs and Crime, Commentary on the *Bangalore Principles of Judicial Conduct*, UNODC, Vienna, September 2007.

meeting of interested experts was convened by the IBA in London related to this initiative. On 17 March 2015, Mr Rivkin convened a new consultation. This was held in the Attorney-General's chambers in Singapore. I was invited to participate in the consultation as was Justice Martin Daubney, a Judge of the Supreme Court of Queensland. During the course of the consultation in Singapore, various participants made suggestions concerning the ways in which the new initiative could be advanced, without repeating work earlier undertaken by other bodies, including those above. The consultation was based upon Chatham House Rules. At the close of the consultation, I prepared a schedule setting out a number of the suggestions and recommendations made by the participants in the Singapore meeting. Although this schedule is confidential, it can, I believe, be shared with the participants in the Local Court Conference in Sydney. By reference to the suggestions and comments, I will report to the conference on the new initiatives in our region addressed to the problem of judicial corruption.

INDIVIDUAL AND SYSTEMATIC CORRUPTION

In my youth, Lord Denning, much beloved by contemporary law students, commonly told a story designed to illustrate the high and unquestioned integrity of the British judge. When, in a case, a witness referred to a judge taking a "bribe" from a litigant, the court reporter reproduced the word as taking a "bride". The reporter could contemplate, apparently, a judicial lapse with a bride; but not with a bribe.

Unfortunately, in many countries of Australia's region, the taking of bribes from litigants is far from uncommon. To the extent that judges are seriously underpaid in many countries, they are exposed to the temptation of bribes and other corrupt acts in ways that judicial officers in Australia are not. To the extent that the institutions of law reform and of the executive and legislature fail to update and modernise the law, they effectively expose judicial officers to a temptation of corruption. Sometimes corrupt acts are designed to get around highly oppressive laws. But when they affect judicial officers, they tend to undermine the integrity of particular judicial officers and the system and public confidence in the judicial branch. In South Africa before Nelson Mandela's constitution was adopted, many citizens (including no doubt Nelson Mandela himself) breached provisions of the South African Pass laws designed to uphold legal edifice of the apartheid state. In retrospect, who can criticise those in the South Africa of that time who navigated the oppressive laws by small acts of official corruption and by sometimes turning a blind eye?

Likewise, when I was growing up in Australia, even adult private, consensual sexual activity by homosexuals was criminalised.⁵ To the extent that, in those days, gay venues existed, almost certainly they were the result of money passing hands to 'corrupt' policemen. Although the judiciary was not directly involved in the corruption, the system of criminal justice was undermined by cynicism and illegality. Yet who can today criticise those who catered for the oppressed LGBT minority of those times?

⁵ *Crimes Act 1900 (NSW) s 79* ("Unnatural Offences).

As it happened, the Singapore Court of Appeal had, a few months before the meeting in Singapore, rejected a challenge to the constitutional validity of the Singapore laws criminalising homosexual acts.⁶ The Singapore's Prime Minister and other leaders have repeatedly stated (and it appears to be the case) that "very few prosecutions" are brought under the law. However, whilst the law remains in place, it subjects members of the community to harassment, blackmail and them and others to temptation to corruption.

Dealing with corruption (including judicial corruption) requires more than the detection and prosecution of officials and the increase in punishments of those convicted. An effective strategy for tackling corruption (including judicial corruption) requires effective institutions for reform of the law; creation of independent bodies to investigate allegations of corrupt acts; and education of officials and citizens.

ANNEXURE A

Attached is a report by the author on suggestions and proposals made during the meeting in Singapore of the Consultative Group summoned by the President of the International Bar Association (Mr David Rivkin) to examine aspects of judicial integrity and corruption.

⁶ *Singapore Penal Code*, s 377A. Decision of the Singapore Court of Appeal *Tan Eng Hong, Lim Meng Suang/Kenneth Chee Mun Leon*, unreported, 24 October 2014.