THE LIMITS OF JUDICIAL ACCOUNTABILITY: A HARD LOOK AT THE JUDICIAL OFFICERS ACT 1986

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I. INTRODUCTION

There is an ongoing tension between two very central values in the administration of justice: judicial independence and judicial accountability. Judges must be independent, but at the same time they must be accountable. This tension is resolved by each society in light of its circumstances and value judgments. The purpose of this paper is to examine how the legislature of New South Wales has resolved this conflict between the competing values of judicial accountability and judicial independence in the Judicial Officers Act 1986.

On September 12 1986 the then Attorney-General of New South Wales, Mr Terry Sheahan, announced that the State Cabinet had approved the first stage in his planned overhaul of the justice system in New South Wales.

The major aspects of the plan included the establishment of the Judicial Commission of New South Wales, the establishment of a Justice Information System, the appointment of a Director of Public Prosecutions, the creation of an independent Criminal Listing Directorate of New South Wales, the establishment of a Courts Division within the Attorney-General's Department and legislation giving the Supreme Court and District Court the responsibility for registry functions formerly exercised by the Clerk of the Peace.

The Judicial Officers Act was introduced after a period which had been marked by a number of incidents of inquiries into the conduct of judges in New South Wales, including the case of the late Justice Murphy.

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This paper will focus on an examination of the reforms relating to the judiciary. Some of these reforms were introduced in the Judicial Officers Act 1986. Others, apparently, do not require legislation for their effective implementation.

II. THE REFORMS

The Judicial Officers Act[1] was assented to by the New South Wales Parliament on November 18 1986, less than two months after the Bill was first introduced. The reform introduced by the Act concerned the method of judicial accountability, which was to be applied uniformly to all tiers of the judiciary in New South Wales.

Section 5 of the Act establishes a Judicial Commission, to be composed of eight members,[2] six of whom are to be official members. These members are, the Chief Justice of the Supreme Court, the President of the Industrial Commission, the Chief Judge of the Land and Environment Court, the Chief Judge of the District Court, the Chief Judge of the Compensation Court and the Chief Magistrate.[3] The remaining two members of the Commission are to be appointed by the Governor, on the nomination of the Minister.[4] Of these appointed members, one should be a practising lawyer nominated after consultation by the Minister with the President of the New South Wales Bar Association and the President of the Law Society of New South Wales, and the second should be a person who, "in the opinion of the Minister, has high standing in the community".[5]

The functions of the Commission are laid down in Part 4 of the Act. In order to assist courts in achieving consistency in imposing sentences, the Commission may monitor or assist in monitoring sentences imposed by the courts, and disseminate information and reports on sentences imposed by the courts.[6] The Commission has an educative function in that it has the power to organise and supervise a scheme to ensure the continuing education and training of judicial officers.[7] It also receives complaints about matters concerning or possibly concerning the ability or behaviour of judicial officers,[8] and may deal with these complaints only insofar as authorised under s. 15 of the Act. The Commission appoints the members of the

1 Judicial Officers Act 1986 (N.S.W.) (henceforth, "the Act").
2 s. 5(3).
3 ss 5(3)(a), 5(4).
4 s. 5(3)(b).
5 s. 5(5).
6 s. 8(1).
7 s. 9(1).
8 s. 15(1).

Conduct Division,[9] and is vested with power to formulate guidelines to assist the Conduct Division in the exercise of its functions, and to monitor generally the activities of the Conduct Division.[10] The Conduct Division, however, is not obliged to act in conformity with the guidelines of the Commission.[11] The Commission may advise the Minister on appropriate matters, and may liaise with persons or organisations in connection with any of its functions.[12] The Conduct Division established under the Act is to be composed of three members,[13] all of whom must be judicial officers, although one may be a retired judicial officer.[14]

The draftsmen of the legislation are to be commended for their work. The Act reflects an intensive study of the problems of judicial training, sentencing issues, and the problem of judicial accountability. However, the models selected to be implemented by legislation are not free from weaknesses and deficiencies.

An analysis of the Judicial Officers Act reveals a tendency to increase unduly the executive centralised control over certain aspects of judicial administration. Likewise, the Act introduces hierarchical patterns into the judiciary by subjecting judges to supervisory powers of the heads of the judiciary with the result of curtailing judicial independence.

III. PUBLIC EXPECTATIONS AND FUNDAMENTAL VALUES

Before going into a more detailed examination of the reforms it is noteworthy to outline briefly the expectations of the public from the justice system, and to mention the fundamental values underlying the administration of justice.

The public legitimately expects the judiciary to perform its judicial function efficiently and effectively, to base its decision on advanced knowledge, and to conduct itself properly with an unquestioned integrity. In the field of criminal justice judges are expected to maintain a measure of consistency in sentencing to avoid the adverse effects on the justice system which are caused by disparity in sentencing.

As the Canadian judge Mr Justice Ridell commented in a case during the early years of this century,[15] "[j]udges are the servants, not the masters of the people."[16] No institution can operate without being answerable to society. The judiciary must also be accountable, as judicial independence

9 s. 22(1).
10 s. 10(1).
11 s. 10(3).
12 s. 11.
13 s. 13(3).
14 s. 22(2).
15 *David Actylene Gas Co.* v. *Morrison* (1915) 34 OLR 155; 23 DLR 871.
16 *Id.*, 34 OLR 155, 158; 23 DLR 871, 873.

cannot be maintained without judicial accountability for failures, errors or misconduct.[17]

Judicial accountability is, therefore, an important value to be maintained. However, its procedures and standards should not be formulated so as to exceed the boundaries of judicial independence. The task of balancing between judicial accountability and judicial independence is a difficult one. As shall be seen below, I am inclined to the view that the proposed reforms have not maintained that delicate balance.

Judicial independence has a number of aspects which should be expressly mentioned.[18] The independence of the individual judge refers to his personal independence (that is, his personal security of tenure and terms of service), as well as to his substantive independence (that is, in the discharge of his official function). In addition to the independence of the individual judge there is also the collective independence of the judiciary as a whole. This aspect is sometimes referred to as the corporate or institutional independence of the judiciary.[19]

Another significant aspect of judicial independence is the internal independence of the judge, which refers to his independence vis-a-vis his judicial superiors and colleagues. This aspect of judicial independence has not attracted sufficient attention. Nevertheless, the modern concept of judicial independence, as expressed in recent legal literature, judicial decisions[20] and international standards,[21] does recognise collective judicial independence and internal judicial independence.

There are other fundamental values underlying the administration of justice. These include the value of the quality of adjudication and fairness of the judicial process, the value of efficiency of the court system and judicial proceedings, the value of accessibility of the justice system and the value of maintaining public confidence in the courts and the judiciary.[22]

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17 See further, M. Cappelletti, "Who Watches the Watchmen?" (1983) 31 *Am J Comp L* 1; Hearings before the United States Senate Judiciary Committee, Subcommittee on Judicial Machinery and Constitution, 96th Congress, 1st session, May-June 1979; S. Shetreet, "Judicial Accountability: A Comparative Analysis of the Models and the Recent Trends" (1986) 11 *I Legal Prac* 38.

18 See generally, S. Shetreet, "Judicial Independence. New Conceptual Dimensions and Contemporary Challenges" in S. Shetreet (ed.), *Judicial Independence: the Contemporary Debate* (1985) 590-681

19 In the Canadian Supreme Court Case of *Valente* v. *Her Majesty the Queen* [1985] 2 SCR 673, institutional independence was restrictively defined as "judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function" (*Id.*, 712). This would include judicial control over matters such as assignment of judges, court sittings, court lists and allocation of court rooms, but would not include involvement in the financial aspects of court administration, the preparation of budgets and allocation of expenditure, or recruitment, classification, promotion, renumeration and supervision of court personnel.

20 *Ibid.; Chandler* v. *Judicial Council* 398 US 74.

21 International Bar Association Code of Minimum Standards of Judicial Independence (adopted 22 October 1982 in New Delhi, India) ss 2, 47; Montreal Declaration of the Independence of Justice (adopted 10 June 1983 at Montreal, Canada) Article 3.03. See also Mr Justice L.J. King, "Minimum Standards of Judicial Independence" (1984) 58 *ALJ* 340.

22 Shetreet, note 18 *supra*, 592; S. Shetreet, "The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts" (1979) 13 *UBC L Rev* 52.

IV. ASSESSMENT OF THE REFORMS: IN GENERAL

The aim of the reform was to promote accountability and efficiency, by introducing improvements into the existing mechanism of judicial accountability. It was designed to make more effective the administrative machinery available to the justice system, both in terms of the executive role in overseeing and supervision,[23] as well as in terms of the administrative tools being placed in the hands of the Judicial Commission.[24]

The values of accountability and efficiency were emphasized, with the expectation that they would enhance public confidence in the judiciary. Against the background of several cases of criminal proceedings being taken against judges in New South Wales[25] it is difficult to deny that public perceptions are relevant considerations in shaping judicial reforms.

If efficiency and accountability are served, judicial independence in its various aspects is adversely affected by the Judicial Officers Act. Before looking at the potential risks to judicial independence, it is proposed to comment briefly on the social and public climate in which the reforms were introduced.

The criminal proceedings against judges in New South Wales, as well as the Parliamentary proceedings against the late High Court Justice, Mr Justice Murphy, of New South Wales, have created a much greater sensitivity of the public and the branches of government towards criticism of judges and judicial practices. The timing of the introduction of reform of the justice system immediately upon the publication of the Vinson Study, which was a statistical report on sentencing, even though it has been doubted somewhat by the then Attorney-General, has led to the undesirable impression that the Government shares the critical judgment of the Vinson Study in general, and the unfavourable assessment of individual judges in particular. This opinion may be supported clearly by the words of Judge Williams on September 15 1986, when he referred, in his announcement of resignation from the District Court of New South Wales, to the Government's introduction of the Judicial Officers Bill, which he termed "the most ill-conceived piece of legislation imaginable, and one which if put into effect would assuredly destroy the independence of the Bench".

In this regard it is important to emphasize that it would be unfortunate if legislative and administrative reforms which are to be applicable for decades, are coloured by heightened emotions as a result of certain cases which by coincidence accumulated within a period of two or three years.

23 The Court Division is part of the Attorney-General's Department in New South Wales.

24 Sentencing data and judicial education are placed in the hands of the Judicial Commission under ss 8 and 9 of the Act.

25 Two of whom were acquitted and one convicted.

V. SPECIFIC CONCERNS RAISED BY THE REFORM

The text of the Judicial Officers Act was altered on several points before it was finally enacted as law. For example, there was a change in the composition of the Conduct Division.[26] The judges were to be nominated by the Judicial Commission, instead of an ex officio composition of heads of the jurisdictions, as originally proposed. The provision for a formal reprimand of judges was removed from the final Act. The duty of the Judicial Commission to advise the Minister upon his request was also removed from the final Act.

The Act also contained provisions which were absent in the preliminary drafts. For example, it added the provision that there had to be a legal practitioner and a layman[27] appointed to the Commission. It also added the provision, that where the Conduct Division decided that a serious complaint was substantiated, it could form an opinion that the matter justified parliamentary consideration of whether to remove the judge complained about from office.[28]

Nevertheless, despite these changes, the present Act and the proposed administrative reforms are open to criticism on a number of grounds. It unduly increases the centralized executive control over judicial administration and introduces hierarchical patterns into the judiciary which tend to result in the chilling of substantive judicial independence. These objectionable aspects of the Act shall now be elaborated.

VI. UNDUE INCREASE IN CENTRALISED EXECUTIVE CONTROL OVER JUDICIAL ADMINISTRATION

1. Court Division and Information System

The decision to establish a Court Division within the Attorney-General's Department was made with the intention that the Division would meet all the logical requirements of the courts and assess priorities, determine needs, provide effective personnel training and generally provide court services on a more centralised and unified basis.[29]

The effect of this change will be to increase the executive supervision over central court administration. This will be the situation, if such a change is not coupled with the introduction of some form of judicial participation in the central responsibility, embodied in express legislation.[30]

Under the High Court of Australia Act (Cth) of 1979, it was provided that the High Court shall administer its own affairs. The administrative personnel

26 s. 22(1).
27 s. 5(5).
28 s. 28.
29 Press Release, Department of the Attorney-General, (N.S.W.), 12 Sep. 1986.
30 See G.J. Moloney (ed.), Australian Institute of Judicial Administration, Seminar on Constitutional and Administrative Responsibilities for the Administration of Justice: *The Partnership of Judiciary and Executive* (10-11 August 1985); Shetreet, note 18 *supra,* 644-654.

are responsible to the judges even in non-judicial administrative matters.[31] This model, however, is not completely suitable for the State courts. Generally the Chief Justice of the court is responsible for court administration at the court level in all the jurisdictions. The administrative personnel of the court are responsible to a Chief Administrative Officer, sometimes known as the Registrar.

The advanced information system provided for under s. 8 of the Judicial Officers Act is intended to provide judges and magistrates with statistical information on sentencing in the criminal courts. The aim is eventually to integrate this information with the computer system of the Attorney-General's Department. In my opinion the development of this advanced information system will make more effective the centralised executive control of judicial administration.

2. Criminal Listing Directorate

The Directorate will take over the court function of listing cases, which was previously carried out by the Solicitor for Public Prosecutions. This body will execute all the administrative work related to the listing. It is objectionable that the listing of criminal cases is vested in an executive agency outside of the court. Case listing is a judicial matter and must be completely within judicial control without executive participation. According to international standards the executive should not have control over judicial functions.[32] Similarly, in the case of *Valente* v. *The Queen* [33] in the Canadian Supreme Court, institutional independence was declared to be "judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function".[34] This would include such matters as the court list.

VII. INTRODUCING HIERARCHICAL PATTERNS INTO THE JUDICIARY: CHILLING INTERNAL JUDICIAL INDEPENDENCE

The reforms introduced regarding judicial accountability are to be commended in that they shield the judges from executive interference, except for the provision allowing the Minister to refer any matter relating to a judicial officer to the Judicial Commission,[35] and the selection of the appointed members of the Commission.[36] Both of these matters are not objectionable under accepted standards of judicial independence. The International Bar Association Code of Minimum Standards of Judicial

31 G.J. Moloney (ed.), *id.*, 101-104.
32 International Bar Association Code of Minimum Standards of Judicial Independence s. 8; Universal Declaration on the Independence of Justice, Article 2.07(b), see note 21 *supra*.
33 Note 19 *supra*.
34 *Id.*, 712 *per* Le Dain J.
35 s. 16.
36 s. 5.

Independence, adopted in 1982, stipulates in s. 4 that the executive may participate in the discipline of judges, "only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters".[37] The Universal Declaration on the Independence of Justice[38] merely provides that complaints against judges "shall be processed expeditiously and fairly under appropriate practice",[39] without expressly forbidding executive involvement in this area.

A major problem in the Judicial Officers Act concerns the granting of disciplinary powers to the administrative heads of the judiciary collectively and individually.[40] The result is the introduction of hierarchical patterns into the judiciary, which in turn have the result of chilling judicial independence.[41] These hierarchical patterns may even bring about attempts by judges to influence other judges' decisions, or give rise to latent pressures on the judges which may result in subservience to judicial superiors. Hierarchical patterns are usual in the civil service, a typically hierarchical organisation, but are objectionable in the context of the judiciary whose members must enjoy internal independence vis-a-vis their colleagues and judicial superiors.

Both the International Bar Association Standards and the Universal Declaration on the Independence of Justice recognize this issue and emphasize the importance of internal judicial independence.[42]

There are a number of elements in the Judicial Officers Act which tend to introduce hierarchical patterns by granting powers to administrative heads of jurisdiction.

1. Composition of the Judicial Commission

According to s. 5 of the Judicial Officers Act 1986 the six heads of the judiciary are members ex officio of the Judicial Commission. They form a dominant majority.

Alternatives to this situation which are not detrimental to internal judicial independence could be the selection to the Commission of other judges, not necessarily those holding the office of heads of courts; or, a decrease in the number of judges and the appointment of additional lawyers and community representatives.

In many American States the composition of the Judicial Commission is not dominated by Chief Judges. This is true, for example in the case of California, Illinois and New York. In these States, judges who are not necessarily heads of jurisdictions serve on the judicial commissions.

In Illinois the Judicial Commission consists of five judges, with power to remove, discipline or retire a judge for misconduct or disability. In 1970 a

37 s. 4(a) note 21 *supra*.
38 *Id.*, ss 2, 47.
39 *Id.*, Article 2.32.
40 ss 5, 10.
41 Note 18 *supra*.
42 International Bar Association Code of Minimum Standards of Judicial Independence s.47; Universal Declaration on the Independence of Justice, Article 2.07(b), see note 21 *supra*.

nine-member Inquiry Board was created with authority to receive and investigate complaints and on a reasonable basis to charge a judge with misconduct or disability and prosecute the charges before the Commission.[43] On the board are two judges, three lawyers, and four lay citizens.

The New York Court on the Judiciary was created in 1947. It is composed of six members, namely the Chief Judge and Senior Associate Judge of the Court of Appeals, and one judge from the Appellate Division in each of the four State court administration areas.[44]

The California Commission is composed of five judges appointed by the Supreme Court, two lawyers appointed by the State Bar, and two lay citizens appointed by the governor upon the approval of the Senate.[45]

2. Immediate Contact and Disciplinary Power

In New South Wales the Chief Judge is a member of the disciplinary body for judges, the Judicial Commission, as well as having direct day-to-day contact with the judges and administrative responsibilities in his capacity as administrative head of the court.

This position should be contrasted with the more favourable situation prevailing in Canada. Since 1971 a Judicial Council has existed with authority to supervise judicial conduct and to improve the quality of judicial service.[46] The Council was established under sections 39 to 43 of the Judges Act.[47] The Council consists of all Chief Justices and Associate Chief Justices of the superior court with its chairman being the Chief Justice of Canada. The Council, however, is a federal body, and there is no immediate contact between the members of the Judicial Council and the judges in the day to-day performance of judicial office.

3. Head of Court Having Suspension Power

Under the Judicial Officers Act the head of the court is vested with power to handle minor complaints against judges which are referred to him/her by the Judicial Commission where the Judicial Commission feels that the complaint does not warrant the attention of the Conduct Division.[48] The head of the relevant jurisdiction also has the power of suspension of any judge who has been the subject of a disciplinary investigation or after a criminal charge has been filed against him.[49]

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43 Illinois Constitution, Article VI 15(1970). See further W.T. Braithwaite, *Who Judges the Judges? A Study of Procedures for Removal and Retirement* (1971).

44 Braithwaite, *id*, 56-80.

45 *Id*, 87.

46 The Canadian Bar Association Committee Report, *The Independence of the Judiciary in Canada* (1985) 40-42; G.L. Gall, *The Canadian Legal System* (2nd ed. 1983) 185-188.

47 1970-71-72 (Can.), c.55, s.11 amended by 1974-75-76 (Can.) c.48, s. 17, and by 1976-77 (Can.), c.25, s. 15.

48 s. 21(2).

49 ss 40, 43.

It is preferable, in my opinion, that the power of suspension should be placed in the Chief Justice of the Supreme Court, or collectively in the Supreme Court.

4. Consumer Oriented Model Preferred

Some scholars have criticised exclusive judicial mechanisms of accountability for judges, and have supported consumer-oriented models of judicial accountability placing the responsibility of judicial accountability in a mixed body.

Professor Cappelletti refers to three different models of judicial responsibility.[50] There is the repressive or dependency model, characterised by the dependency of the judiciary, which is placed in a position of subservience vis-a-vis the executive and parliament.

This may be because of political forms of judicial responsibility, or disciplinary forms of responsibility.

The second model is in total contrast to the first model, and is known as the corporative-autonomous or separateness model. It represents the extreme position of independence, by making the judiciary a completely separate body, insulated from government and society.

The third model is the responsive or consumer-oriented model. In the words of Cappelletti,

> [i]t combines political and societal responsibility with a reasonable degree of legal responsibility, without, however, either subordinating the judges to the political branches, to political parties, and to other societal organizations, or exposing them to the vexatious suits of irritated litigants.[51]

This latter model is the model which best balances the values of independence and accountability.

In this context it should be mentioned that in Canada, under s. 40 of the Judges Act, the Judicial Inquiry Committee may include a practising lawyer. However, this is not the case under the New South Wales Judicial Officers Act, which Commission is a judicial body, although a retired judge may also be nominated to sit on a panel of the Conduct Division.[52]

VIII. CHILLING SUBSTANTIVE JUDICIAL INDEPENDENCE

1. Monitoring Sentencing

I have already referred to the hierarchical patterns emanating from personal controls by heads of jurisdictions over judges in their courts, which have the result of chilling judicial independence. However, the overall scheme as provided for in the Judicial Officers Act, gives the Judicial Commission responsibility for the function of monitoring sentencing patterns.[53] This is a mechanism which, if not properly controlled and

50 Cappelletti, note 17 *supra*, 53.
51 *Id.*, 61.
52 s. 22(2).
53 s. 8.

regulated may affect the substantive judicial independence of judges. There is a tension here between promoting consistency of sentencing and assuring individualised justice.

It is my view that the legislative provisions should also state the reservation that monitoring should be exercised in such a manner so as not to compromise the value of individualised justice in every case.

In this regard, it is important to handle sentencing data with care. As with judicial statistics, so with sentencing data they have a dynamic force of their own. They may create undue pressure on judges to place greater emphasis on efficiency and productivity, which in turn may lead to the approach of measuring judicial performance in terms of production units. This is regrettable and affects the quality of justice in the courts. In addition, if sensitive judicial statistics are made public they may expose the judges to undue public criticism based on the misconceived criteria of production units.

Statistics on the sentencing practices of individual judges should therefore be kept confidential, and be made available only to the Chief Justice or Chief Judge and the judge himself. Decisions to publish sentencing data must take into account the importance of the openness of public institutions and their public accountability, and the need to avoid excessive productivity pressures on the individual judge and misconceived and unwarranted attacks on the courts. The public does have a right, subject to certain qualifications, to know the sentencing patterns of the courts, and sentencing data generally should be a matter of public record. Nevertheless, a proper balance must be found between the right of the public to know and the right of the public to justice which may be adversely affected if the force of statistics and possible resulting pressures on judges are disregarded.[54]

2. Incompetence as a Ground for Removal

Section 15 of the Judicial Officers Act deals with complaints against judicial officers. It allows any person to complain to the Commission "about a matter that concerns or may concern the ability or behaviour of a judicial officer".[55] The original draft of the Act contained the words "integrity" and "incompetence" for "behaviour" and "ability". Nevertheless, despite this change in wording, there remains a basis for claiming that incompetence is a ground for removing a judge under the Act.

There is much to be said against incompetence as a ground for removal of judges from judicial office. Justice Michael Kirby emphasized in his Boyer Lectures, given on Australian radio and later published in a book,[56] that the ordinary system for handling complaints will accommodate inter alia, "the

54 See Shetreet, "The Limits of Expeditious Justice" in *Expeditious Justice* (papers of the Canadian Institute for the Administration of Justice) (1979) 47 for a discussion on the effects of judicial statistics in general.

55 s. 15(1).

56 Justice Michael Kirby, *The Judges* Boyer Lectures (1983).

preservation of judicial independence including even the protection of original and unorthodox judges".[57]

It is difficult to protect nonconformist judges in a system which provides for incompetence as a ground for judicial removal.

Even though mistakes in judicial appointments are inevitable, this seems to be the price which society has to pay for maintaining the independence of judges. As it would be difficult to draw the line were judges to be removed for incompetence, this standard could be used as a pretext for removing from office judges who were perfectly competent, but for some reason or another do not enjoy the support of those who control the machinery of removal, whoever they may be. The price for tolerating incompetent judges on the Bench should be borne by society in order to protect the competent judges against abuse of power.[58]

The Justice Subcommittee Report on the Judiciary in the United Kingdom[59] also expressed the view that incompetence should not be a ground for removal from office:

> [t]he line here between the mildly eccentric and the wrong-headed would be hard to draw; any decision as to incompetence would necessarily appear relatively subjective, in contrast to the apparent objectivity of say, a medical certificate. Moreover, the evidence would come, necessarily, from the judge's handling of actual cases ...[60]

3. *The General Risks of Readily Available Complaint Procedures*

There are risks associated with the establishment of judicial disciplinary procedures such as the procedure provided for in the new Judicial Officers Act. There is a fear that they will be used to punish judges for unpopular judicial decisions. As Wheeler and Levin note in their study on Judicial Discipline and Removal in the United States,[61] related to and yet distinct from this point, is the concern that the easy availability of such procedures and the risk that they will be put to such purposes will chill the independence of the judges.

Levin and Wheeler express concern that at the very least, judges may be more circumspect and indirect in what they say in opinions, even though the actual decisions may be unaffected.[62]

IX. FINAL WORDS: BEWARE OF UNBALANCED REFORMS

The reform was introduced in the wake of the controversy surrounding certain judges, in particular Judge Foord of the District Court of New South Wales and Justice Murphy of the High Court of Australia. Inquiries

57 *Id.*, 54.
58 Special Report of the Parliamentary Commission of Inquiry, 19 August 1986; for Canadian examples of removal of judges on grounds of behaviour, see Gall, note 46 *supra*, 185-192.
59 *The Judiciary*, report of the Justice sub-committee (Chairman: Peter Webster Q.C., 1972).
60 *Id.*, paras 112, 59.
61 F.J.C. Staff Paper, R.R. Wheeler and A.L. Levin, *Judicial Discipline and Removal in the United States* (1979) 59.
62 *Ibid.*

were instituted to investigate the behaviour of both judges. The Special Report of the Parliamentary Commission of Inquiry looking into the behaviour of Justice Murphy held the view that misbehaviour included any conduct outside the exercise of a judge's judicial function showing him to be unfit to occupy office.[63]

Legislatures, as expected, have been affected by the social climate created by inquiries into the conduct of certain judges. But a proper balance between fundamental values such as judicial independence and judicial accountability must be maintained even in the face of controversial cases. It is my judgment that the New South Wales Judicial Officers Act 1986 gives greater weight to accountability and efficiency. The result is that judicial independence has been adversely affected as outlined in the paper.

In conclusion I wish to stress the importance of a balanced and cautious resolution of the conflict between public accountability and judicial independence.

The judiciary as an institution and individuals in Australia and elsewhere have in recent years been subjected to increased public criticism and popular pressures. This increasing public pressure on judges creates continuous tension between judicial independence and impartiality and public accountability of judges in a democracy. Excessive popular pressure on judges, like too facile procedures and too malleable standards for judicial removal and discipline, might have a chilling effect on judicial independence. The tension between public accountability and judicial independence should be resolved by a careful exercise of judgment in order that the proper balance between these very important values be maintained.

63 Note 58 *supra*.