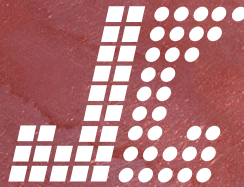




Judicial Commission of New South Wales



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From controversy to credibility: 20 years of the Judicial Commission of New South Wales¹

A brief history of the Commission

The Judicial Commission commenced operations in the old Chief Secretary's Building on the corner of Bridge and Macquarie Streets in October 1987.² The government's announcement in September 1986 that it intended to establish a judicial commission was highly controversial, generating heated exchanges in Parliament and between the Chief Justice of the Supreme Court, Sir Laurence Street, and the Attorney General, Terry Sheahan.³ Members of the judiciary and the legal profession, watching from the sidelines, opposed the plan or wondered whether it could work.⁴ Twenty years on, the Commission remains the only body in Australia for the public to raise concerns about the ability or behaviour of a judicial officer.⁵

Judicial independence from the executive government is a central value of the rule of law.⁶ As Chief Justice Gleeson CJ put it: “[t]he duty of a judge is to administer justice according to the law, without fear or favour, and without regard to the wishes or policy of the executive government.”⁷ When Premier Unsworth charged Attorney General Sheahan in 1986 to “do something” about a perceived crisis in public confidence in the judiciary,⁸ the Supreme Court judges initially saw the proposal as a direct attack on their independence and the separation of powers in New South Wales.⁹

Attorney General Sheahan's model for a judicial complaints mechanism emerged in the wake of public concern about the administration of justice generally.¹⁰ Two prominent members of the judiciary had been tried the preceding year with attempting to pervert the course of justice: High Court Justice Lionel Murphy and former Chief Magistrate Murray Farquhar.¹¹ Complaints of unjustified leniency in sentencing offenders had been made against a District Court judge.¹²



Chief Secretary's Building



The Honourable Sir Laurence Street AC, KCMG, QC was Chief Justice of New South Wales, 1974–1988 and the first President of the Judicial Commission.

Allegations of lengthy delays in delivering judgments, and inconsistent and lenient sentencing, are recorded in the *Hansard* and press reports of the day.¹³ New South Wales had no judicial education body and there was no single repository for sentencing statistics for State courts.¹⁴ The *Vinson* report claimed that there was systematic disparity in sentences imposed for drug offenders.¹⁵ On 23 September 1986, the Attorney General announced to Parliament that a judicial commission would be part of a package of reforms for the New South Wales justice system, including the establishment of a director of public prosecutions, an independent criminal court listing directorate and a courts division within the Attorney General's Department.¹⁶

The plan for the judicial commission had been circulated to the heads of jurisdiction only two weeks prior to this announcement.¹⁷ Attorney General Sheahan's proposed model was based on the Californian Commission on Judicial Performance,¹⁸ but in addition, the New South Wales body would combine a complaints function with facilities for judicial training and disseminating sentencing statistics. Sir Laurence Street describes the "instant and vigorous hostile reaction" from the Supreme Court judges¹⁹ because the original plan meant that the executive branch of government would have the power to discipline and remove judges found guilty of misconduct or unfit for office.²⁰ This was contrary to the method of removal for superior court judges which, since the *Act of Settlement* 1701, required an address of both Houses of Parliament.²¹ The Attorney General quickly capitulated to preserve Parliament's constitutional role in the dismissal process and the Judicial Officers Bill was introduced into Parliament on 24 September 1986.²²

Debate about the Judicial Officers Bill continued in an "immense blaze of publicity" in the media and in Parliament.²³ The Chief Justice, while agreeable to the need for judicial education and for sentencing information, saw that these were cosmetic elements, a "sugarcoating" on the plan's real purpose — to make the Judicial Commission a branch of the Attorney General's Department.²⁴ Sir Laurence Street issued a public statement, signed by 32 Supreme Court judges, condemning the "extraordinary haste" with which the Bill had been drafted and the lack of consultation.²⁵ The controversy raged for a few "heady weeks".²⁶ Judicial pressure on the government led to further legislative amendments,²⁷ ultimately resulting in the Judicial Commission becoming fully independent of the executive government.

When the Commission finally commenced operating as an independent statutory corporation, it had its own budget, was financed directly by Parliament, would report annually to Parliament, and directly employed its own staff. The membership of the Commission, as proposed in the original Bill, was the six heads of jurisdiction and two (now four) lay members appointed by the Governor as nominated by the Minister.²⁸ The Act provided that sentencing information²⁹ and judicial educational services³⁰ would be established.

Reflecting on the "most public and deep battle" he fought, Sir Laurence Street regards the establishment of the Commission as "a huge victory for the judiciary" and "a bastion of the independence of the courts".³¹ Former Attorney General Sheahan is also "immensely proud" of his role in forming the Commission, commenting that it was "the best thing for judges, although they didn't realise it at the time".³²

Chief Justice Gleeson comments that it is “a matter of history” that the New South Wales Judicial Commission exists as a unique combination of the complaints function and the educational and sentencing research roles.³³ This uniqueness also explains its success. His successor, Chief Justice Spigelman, has observed that the “fact that the same institution provides assistance to judges in a form and at a level of quality that has been universally regarded as exceptional, has had a lot to do with the acceptance by the judiciary of the complaints handling function by the Commission”.³⁴

The complaints function

Mr Justice McLelland predicted in 1990 that any complaint made to the Judicial Commission would harass and pressure judges and that the “official quality and institutional trappings of the complaints procedure will almost inevitably ensure that any complaint ... will assume a status and significance which it would not otherwise have possessed”.³⁵

Any person may complain to the Commission “about a matter that concerns or may concern the ability or behaviour of a judicial officer”.³⁶ Initial concern that a complainant who disliked “the colour of the judge’s eyes” could bring a damaging complaint has not been borne out.³⁷ During the 10 years of Chief Justice Gleeson’s presidency,³⁸ more than 92 per cent of complaints were summarily dismissed. This trend has continued throughout Chief Justice Spigelman’s presidency,³⁹ with the vast majority of complaints examined by the Commission being summarily dismissed on grounds that include that the complaint is frivolous, trivial, remote in time, or that other means of redress exist.⁴⁰

Complaints which are not summarily dismissed are either referred to the relevant head of jurisdiction⁴¹ or for examination by the Conduct Division,⁴² a panel made up of two judicial officers and one community representative nominated by Parliament.⁴³ The Conduct Division may determine its own procedures,⁴⁴ including whether the hearing takes place in public or private,⁴⁵ and it may request the judicial officer to undergo a specified medical or psychological examination.⁴⁶ If the judicial officer resigns, the panel must cease to hear the complaint.⁴⁷ The



The Honourable Justice Terry Sheahan AO, President of the Workers Compensation Commission, was Attorney General of New South Wales, 1984–1987.



The Honourable Murray Gleeson AC, Chief Justice of Australia, was Chief Justice of New South Wales and President of the Judicial Commission, 1988–1998, with Kate Lumley, Publishing Manager, Judicial Commission.

Conduct Division may dismiss a complaint,⁴⁸ or find a complaint wholly or partly substantiated.⁴⁹ It must then make a report and refer this either to the head of jurisdiction⁵⁰ or to the Governor if it considers that the matter justifies parliamentary consideration of the removal of the judicial officer for the conduct complained about.⁵¹ The Attorney General is then required to lay the report before both Houses of Parliament for parliamentary consideration in accordance with s 53 of the *Constitution Act 1902*.⁵² In the two decades of the Commission's operation, 14 Conduct Divisions have been constituted.⁵³ Only one judge, Justice Bruce of the Supreme Court, has addressed Parliament following a report of a Conduct Division to the Governor. Parliament voted not to remove Justice Bruce.⁵⁴

There is an "inevitable tension" between judicial independence and a mechanism for dealing with judicial misconduct⁵⁵ and this has manifested in a number of criticisms levelled at the Commission over the years.⁵⁶ In 2005, the Attorney General called for "a fresh look" at the Commission, and submissions were invited from the public and the Judicial Commission itself.⁵⁷ The Chief Justice of New South Wales and President of the Judicial Commission accepted the need for a comprehensive review of the Commission's operations, including its complaints function, and commended the government's consultative process as "exemplary".⁵⁸

In January 2007, the government issued a News Release announcing that it would legislate for community representation to a Conduct Division of the Judicial Commission.⁵⁹ Initially, few details about the proposed appointment process were provided. Chief Justice Spigelman, in his address to the opening of the Law Term dinner of the Law Society of New South Wales, expressed great concern about the lack of detail and the possibility that an appointment to a Conduct Division by the executive branch of government could be legislated for.⁶⁰ Following consultations, amendments to the *Judicial Officers Act* allowed for Parliamentary nomination of two persons of "high standing in the community" who would rotate as members of the Conduct Division.⁶¹ Parliamentary and not executive nomination of the community representative maintains the principle of judicial independence from the executive government.



The Honourable JJ Spigelman AC, Chief Justice of New South Wales, has been President of the Judicial Commission since 1998.



The Honourable Justice Peter McClellan is the Chief Judge at Common Law.



The Honourable Justice Reginald Blanch AM is the Chief Judge of the District Court and a Commission member.

Neither the Conduct Division nor a head of jurisdiction may formally sanction a judicial officer. Any allegation of judicial criminal conduct would be dealt with by the criminal justice system; allegations of corruption against judicial officers would be referred to the Independent Commission Against Corruption.⁶² The power to formally sanction a judicial officer fits uncomfortably with judicial independence. Chief Justice Gleeson observes that “there’s something very awkward about the concept of having a judicial officer exercising judicial authority who is known to have a black mark against him or her. This would compromise their ability to administer justice and to punish people”.⁶³ Accountability and independence must “work towards the same end”.⁶⁴ “What we have is a system that recognises the fact that judicial officers, unless they resign or are removed by Parliament, are going to exercise judicial power, and do so independently.”⁶⁵

The power to refer a complaint to a head of jurisdiction⁶⁶ is “one of the great advantages of the complaints mechanism” observes Justice McClellan. An appropriate complaint sent to the Commission members to assess its significance or otherwise allows the Chief Judge of the jurisdiction to “get back to the judge if there was a problem, knowing that he spoke with the authority gained by the fact that all of the heads of jurisdiction had looked at the problem”.⁶⁷ Justice Blanch, Chief Judge of the District Court, agrees that the vast majority of complaints classified as minor⁶⁸ and which have been referred to the head of jurisdiction have “enabled the head of jurisdiction to counsel and assist judges and magistrates in circumstances where otherwise the head of jurisdiction would not have been aware of a problem. I believe this type of counselling has also been of benefit to the judicial officers”.⁶⁹ Chief Justice Spigelman agrees that there is no need for a Chief Justice or Chief Judge to have formal disciplinary powers as there are alternative ways to make known the views of a head of jurisdiction.⁷⁰

An accountability body with no power to issue sanctions may also create false expectations in the public’s eye.⁷¹ In relation to “lesser matters that couldn’t possibly warrant Parliamentary consideration of removal, it’s very hard to explain to the public that, although a body like the Judicial Commission can receive such complaints, it can’t punish people if it finds the complaint made out”, comments Chief Justice Gleeson. However, “the availability of the complaints process has an important effect in taking the heat out of potential dissatisfaction that has arisen from time to time, usually caused by problems in relation to a small number of individual judicial officers”.⁷² Feedback received from the public via the complaints process also helps to develop the Commission’s education programmes.⁷³ In this way, the Commission provides a “form of accountability which involves responsiveness”.⁷⁴

Judicial officers regard the complaints function of the Commission as independent of the courts, notwithstanding that it is supervised by the judiciary.⁷⁵ Community representation⁷⁶ on the Judicial Commission is an important answer to any perception that the Commission is a case of “judges judging judges”.⁷⁷ Justice McClellan draws an important distinction between the Judicial Commission and the internal complaints process he administered when Chief Judge of the Land and Environment Court.⁷⁸ Complaints made against commissioners of that court are not subject to the *Judicial Officers Act* and, as Chief Judge, Justice McClellan was required to “receive, assess, investigate and follow up on the complaint, a much harder exercise to manage”.

“To achieve consistency in imposing sentences”

One of the Commission’s core functions is to assist the courts “to achieve consistency in imposing sentences”.⁷⁹ Chief Justice Spigelman has written that the “sentencing of convicted criminals is one of the most important tasks performed by the judiciary. Sentencing engages the interest, and sometimes the passion, of the public at large more than anything else judges do”.⁸⁰ David Hunt, former Chief Judge at Common Law, describes sentencing an offender as the “hardest task” confronting a judicial officer.⁸¹ Chief Justice Gleeson has said that public acceptance of sentencing decisions is the most important and the most difficult aspect of the administration



The Honourable David Hunt AO QC was the Chief Judge at Common Law, 1991–1998.



His Honour Deputy Chief Magistrate Paul Cloran is the Chair of the Local Courts Education Committee and a member of the Standing Advisory Committee on Judicial Education.

of justice to sustain.⁸² Consistency in imposing sentences aims for uniformity of approach,⁸³ so that like cases are “treated in like manner”.⁸⁴ As Justice Mason expressed it in *Lowe v The Queen*:⁸⁵

“... inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.”

How the Judicial Commission assists the courts is specified in the Act — by monitoring sentences and by disseminating information and reports on sentences imposed by the courts.⁸⁶ It is “a matter of common sense”, observes Chief Justice Gleeson and “the obvious legislative assumption” in the Act, that the provision of information about what the courts are doing generally will promote consistency.⁸⁷ While newly appointed and inexperienced judicial officers particularly benefit from access to sentencing information,⁸⁸ Justice McClellan comments that even “the most experienced are able to check their view against what is revealed by the trends in the Judicial Commission’s statistics”.⁸⁹ David Hunt says that he “would not have been able to decide cases without the sentencing information” from the Commission.⁹⁰

It is important to note that the provision of sentencing information in no way limits judicial discretion. “A judge is required to make up his or her mind about the individual sentence and cannot be dictated to by the statistics”.⁹¹ David Hunt explains that a sentence may be passed by a judge outside the range indicated by the Commission’s statistics provided that reasons are given and the matters taken into account are identified.⁹²

One of the Commission’s first tasks was to build the Sentencing Information System (SIS), a database “designed to reduce inconsistency”.⁹³ Developed in-house under the guidance of experienced judicial officers, the SIS was launched in 1990 by Chief Justice Gleeson. The system has been described by Lord Justice Auld as “probably the world leader in this field” and “one of the most sophisticated yet unobtrusive

systems of its kind in the world".⁹⁴ Its value is reflected in the fact that since 2000 its usage has doubled from an average of 22,500 enquiries per month⁹⁵ to a current average of 56,700 enquiries each month. Users include other government authorities and agencies including the Director of Public Prosecutions, the Public Defenders, the Legal Aid Commission, and the Sentencing Council. Prior to the introduction of the SIS, David Hunt reflects that "so many judges used to just take a stab at it and they would be wildly wrong; that's where the problems arose".⁹⁶

The SIS assists in the sentencing task by providing access to sentencing statistics in graphical form for all offences dealt with in the Supreme, District, Local and Children's Courts. It also contains a discrete set of statistics for sentences imposed before the introduction of the standard non-parole period legislation.⁹⁷ There is also a wealth of appellate information including a table of standard non-parole period sentencing appeals categorised by offence; summaries of decisions of the Court of Criminal Appeal; sentencing principles and commentary with hypertext links to the full-text of legislation and case law; access to the full text of decisions of the higher courts and State and Commonwealth legislation; a "Recent Law" component which provides concise notification of legal news covering all aspects of criminal law; a sentencing date calculator; and a Services Directory with links to contact information about services supporting the criminal justice system.

In August 2006, the Commission launched the latest version of the Judicial Information Research System (JIRS), of which the SIS is now a component. Mr Murali Sagi, the Commission's Information Management Director, describes JIRS as "a comprehensive entry point to a huge array of legal resources and services". He adds that "arguably, what separates JIRS from other providers is that the Commission places a strong emphasis on providing timely and practical information".⁹⁸ JIRS is a central repository of information for judicial officers working in any location throughout the State. JIRS is not restricted to sentencing information but also assists the research requirements of the other courts including the Industrial Relations Commission and the Land and Environment Court.

Print publications in the form of research monographs (a series which maps and analyses sentencing trends), the *Sentencing Bench Book* and *Criminal Trial Courts Bench Book* (which are also published online) assist in the conduct of trials, and the latter provides suggested jury directions. Deputy Chief Magistrate Paul Cloran describes the recently published *Sentencing Bench Book* as "an absolutely invaluable tool" to assist judicial officers in their most difficult task.⁹⁹ The monthly *Judicial Officers' Bulletin* summarises significant criminal decisions of the superior courts, and Justice McClellan describes the summaries as being of "immense value" in being a "quick reference point".¹⁰⁰

The Commission's research and sentencing programme is directed by Mr Hugh Donnelly¹⁰¹ who works with a team of researchers and a statistician. A key challenge for the team is to ensure that the currency of the sentencing statistics component of JIRS is maintained.

Hugh Donnelly observes that since the early 1990s there has been an increasing tendency for Parliament to legislate in the area of sentencing law. "Sentencing has become a more technical task and perhaps more prone to error as a result of the introduction in 2003 of the standard non-parole period provisions and the statutory list in s 21A of the *Crimes (Sentencing Procedure) Act 1999* of aggravating and mitigating factors. The decision in *Pearce v The Queen* has also resulted in significant litigation."¹⁰² The *Sentencing Bench Book* assists sentencing judges by identifying the most recent cases and possible sources of sentencing error.

By ensuring that judicial officers have access to the most recent sentencing information, and by making the *Sentencing Bench Book* available on the internet, the Commission contributes to the public acceptance of sentencing decisions. For example, in February 2007 the Judicial Commission published a monograph entitled *Full-time imprisonment in New South Wales and other jurisdictions*¹⁰³ which compared sentences in New South Wales to other Australian jurisdictions and overseas jurisdictions. Chief Justice Gleeson comments that "comparisons of that kind have



The Judicial Commission's Senior Executives are Mr Ernest Schmatt PSM (centre), Chief Executive; Ruth Windeler (second from left), Education Director; Hugh Donnelly, (far left) Director, Research and Sentencing; and Murali Sagi PSM, (far right) Director, Information Management and Corporate Services.

their own difficulties, but the information published in that document is interesting". The monograph reported that New South Wales has the fourth highest imprisonment rate in Australia — after the Northern Territory, Western Australia and Queensland; that its imprisonment rate is somewhat higher than the Australian average; and internationally the imprisonment rate in New South Wales is somewhat higher than equivalent common law countries. "That suggests to me that any criticism that the New South Wales criminal justice system is inappropriately lenient is misplaced."¹⁰⁴

Continuing judicial education

Summarising the Commission's first decade of operations, Chief Justice Gleeson wrote that the initial "hesitancy and scepticism" of the judiciary towards judicial education was soon "overtaken by widespread enthusiasm".¹⁰⁵ The Judicial Commission today is recognised as a "beacon of educational excellence, one which is recognised and admired throughout Australia as well as overseas".¹⁰⁶

That the Commission enjoys such credibility after two decades of operation can be attributed to its successful education programmes and to the fact that judicial officers consider their judicial independence has not been compromised. "If judges and magistrates are to maintain their independence, and the appearance of strict impartiality, then their judicial training and education cannot be controlled by those who do not share their independence. It certainly cannot be controlled by those of whom they are meant to be independent."¹⁰⁷

Sir Laurence Street's original vision was that the Judicial Commission would be the judiciary's "service arm", assisting the courts to promote judicial officers' professional development.¹⁰⁸ Today, each of the courts has an education committee comprised of judicial officers who work with a professional educator, Ms Ruth Windeler,¹⁰⁹ to develop the content of training programmes.¹¹⁰ A Standing Advisory Committee on Judicial Education, comprised of the chairpersons of the education committees, provides overall supervision.¹¹¹ The Commission has conducted about 34 judicial education programmes in the last year or around 1300 days of judicial education, "an impressive figure for voluntary programmes" observes Chief Executive Ernest Schmatt.¹¹² Chief Justice Gleeson comments that while "you can't compel people to be educated", judicial officers are "highly responsive to what is expected of them",¹¹³ an observation borne out by the high participation rates in the Commission's programmes.

Each court runs an annual conference, facilitated by the Commission, which features national and international speakers. Other professional development sessions cover judicial induction and orientation, changes in legislation, practice and procedure, judicial skills and social context issues. The Commission also assists with orientation sessions for new judges from around Australia which are conducted by the National Judicial College of Australia.

Deputy Chief Magistrate Paul Cloran, head of the education committee of the Local Court, agrees that the education programmes are an “extremely valuable resource” for judicial officers. He finds that the regional and metropolitan seminars, which involve peer to peer education, are among the most useful of the Commission’s programmes for magistrates.¹¹⁴

Education Director Ruth Windeler says it is gratifying how “judicial officers generously give their time to serve on committees and provide constructive feedback which shapes future training programmes”.¹¹⁵

Justice McClellan describes the judicial life as “monastic”: long hours spent in chambers researching and writing are punctuated by sitting on the Bench. There is little time for discussion with other judges or to exchange ideas. Publications such as the monthly *Judicial Officers’ Bulletin*, the biannual *Judicial Review* and monographs, are intellectually satisfying and an important means of promoting judicial dialogue. Judicial officers are made aware of fellow judicial officers’ views and stay informed with developments in the law. In this digital age, he comments that it is also good to “have something land on your desk”. Justice McClellan finds all of the Commission’s publications of value and reads “everything that comes past me”.¹¹⁶

Judicial officers are required to publish reasons for their decisions,¹¹⁷ and the judgment writing workshops conducted by Professor James Raymond, offered by the Commission since 2003, have promoted efficiency in this task. Effective communication of judgments in turn promotes “community confidence in the judiciary”.¹¹⁸

Publicly accessible information from the Commission also informs the legal profession and, observes Chief Justice Gleeson, “provides an important answer to misguided suggestions that there is something secretive about what judges and magistrates do”.¹¹⁹ In 2002, the Judicial Commission made available the *Criminal Trial Courts Bench Book* on its website. Subsequently, the *Equality Before the Law Bench Book* and the *Sentencing Bench Book* were made available online in 2006. A DVD addressing evidence given concurrently by experts has been well received by the legal profession.¹²⁰ Deputy Chief Magistrate Cloran, reflecting on the Commission’s education programmes, observes that “the public can have confidence in the Judicial Commission and the judiciary itself to a large extent because of the Commission’s work”.¹²¹

The Judicial Commission in the Asia-Pacific region

The Judicial Commission has, in recent years, assumed the role of a leading judicial education provider in the Asia-Pacific Region. This has arisen with the emergence of a much greater level of exchange between the judiciaries of nations and can be attributed to the economic imperatives of globalisation and the “institutional requirements for a successful market economy”.¹²² Justice McClellan considers that the Commission is “undoubtedly the world leader” in this area and its work has been of “immense value in assisting judiciaries outside New South Wales to develop their own judicial education programmes ... a contribution that is often forgotten but is of very great significance”.¹²³ Chief Executive Ernest Schmitt is often invited to countries in the region to make presentations about the Commission’s work and regularly hosts visits to Sydney from Asian-Pacific judges.

Some of the Commission’s significant partnerships include:

- the design and construction of the Queensland Sentencing Information Service in collaboration with the Queensland Department of Justice and Attorney General, launched on 27 March 2007
- the design and construction of the Commonwealth Sentencing Database in collaboration with the National Judicial College of Australia and the Commonwealth Director of Public Prosecutions
- an agreement to assist the Magisterial Service of Papua New Guinea to develop and deliver a continuing judicial education programme, signed on 28 August 2007
- the provision of technical assistance to the Indonesian Judicial Commission in April 2006
- executive representation on the Asia Pacific Judicial Educators Forum and membership of the Asia Pacific Judicial Reform Forum

- the China-Australia Human Rights Technical Co-operation programme in 2005. Conducted in conjunction with the Human Rights and Equal Opportunity Commission, a delegation of 10 judges and officials from the Supreme People's Republic of China attended a seminar at the Commission on sentencing options and community corrections programmes
- assistance in reviewing the first year of operation of the Cambodian Royal School for Judges and Prosecutors
- judicial training programmes for judges from the Supreme and High Courts of Indonesia.

The Chief Justice of New South Wales predicts that international judicial exchanges will continue to accelerate and promote the rule of law.¹²⁴ Chief Executive Ernest Schmitt agrees that the Judicial Commission is well-placed to provide and promote judicial training programmes in the region and this may become an important role for the Commission as it participates in the global community.¹²⁵

Conclusion

After two decades, the Judicial Commission's effective and highly regarded work "has resulted in the disappearance of any controversy"¹²⁶ surrounding its establishment. The Commission looks forward to maintaining its unique role in promoting high standards of judicial performance in New South Wales and sharing its accumulated experience with the judiciaries of other nations.

Endnotes

- 1 This article was written by Kate Lumley BA (Hons) LLB (Hons), Publishing Manager of the Judicial Commission of New South Wales. The interviewees for this article were the Hon Sir Laurence Street AC, KCMG, QC; the Hon Murray Gleeson AC, Chief Justice of Australia; the Hon JJ Spigelman AC, Chief Justice of NSW; the Hon Justice Terry Sheahan AO; the Hon David Hunt AO QC; the Hon Justice Peter McClellan; the Hon Justice Reginald Blanch AM; his Honour Deputy Chief Magistrate Paul Cloran; Ernest Schmitt PSM; Ruth Windeler; Hugh Donnelly and Murali Sagi PSM.
- 2 The *Judicial Officers Act* 1986 commenced on 19/12/86 and was amended on 1/5/87 to allow for the appointment of staff. The first Chief Executive was former District Court judge Barrie Thorley AM and his deputy was Mr Ernest Schmitt PSM Dip Law (BAB). Mr Schmitt is the current Chief Executive, appointed in 1989.
- 3 Sir Laurence Street AC, KCMG, QC was Chief Justice of the Supreme Court, 1974–1988. The Hon Justice Terry Sheahan AO, President of the Workers Compensation Commission, was the Attorney General of New South Wales, 1984–1987.
- 4 Interview with the Hon Justice McClellan, Chief Judge at Common Law, Supreme Court of NSW, Sydney, 28/8/07; J Dowd, *Hansard*, Legislative Assembly, 1/10/86, p 4318.
- 5 *Judicial Officers Act* 1986, s 15.
- 6 See for example, AM Gleeson, "Courts and the rule of law", available at <http://www.hcourt.gov.au/speeches/cj/cj_ruleoflaw.htm>, accessed 27/8/07.
- 7 AM Gleeson, "Performing the role of the judge" (1998) 10(8) *Judicial Officers' Bulletin* 57.
- 8 Interview with the Hon Justice Sheahan AO, Sydney, 31/07/07.
- 9 Interview with Sir Laurence Street AC, KCMG, QC, Sydney, 21/08/07.
- 10 See for example, G Peacocke, *Hansard*, Legislative Assembly, 1/10/86, p 4377; J Waterford, "Reputations of the actors diminished by disputes", *The Sydney Morning Herald*, 9/10/86.
- 11 Former Chief Magistrate Farquhar was convicted in 1985 and sentenced to four years' gaol for attempting to pervert the course of justice. High Court Justice Murphy was charged with two charges of attempting to pervert the course of justice and was acquitted of one charge in 1985 and the second charge at a retrial in April 1986.
- 12 T Vinson et al, "Accountability and the legal system: drug cases terminating in the District Court 1980–1982", Report to the Criminology Research Council, released 8/9/86.
- 13 See for example, *Hansard*, Legislative Assembly, 14/10/86, pp 4377–4636; J Waterford, "Reputations of the actors diminished by disputes", op cit n 10; P Clark, "How government and judiciary came into conflict", *The Sydney Morning Herald*, 19/9/86.
- 14 The Bureau of Crime Statistics and Research was then responsible for collecting sentencing statistics in the Local Court.
- 15 T Vinson et al, op cit n 12, quoted in G Griffith, "Judicial accountability", *Background Paper No 1/98*, NSW Parliamentary Research Service, 1998, p 21, n 100.
- 16 The Hon T Sheahan, Attorney General and Minister Assisting the Premier, *Hansard*, Legislative Assembly, 23/9/86, p 3735.
- 17 10–11 September 1986.
- 18 Established in 1960.
- 19 Sir Laurence Street, "Memorandum on the history of the Judicial Commission", 22/8/07.

- 20 In effect, that judges could be removed by the Governor-in-Council rather than by Parliament, the Hon T Sheahan, Attorney General, Second Reading Speech, Judicial Officers Bill, *Hansard*, Legislative Assembly, 1/10/86, p 3877.
- 21 *Constitution Act 1902* (NSW), s 53. See AM Gleeson "Judicial accountability" (1995) 2(2) *The Judicial Review* 117. Gleeson CJ notes at 123 that this method of removal did not apply consistently to colonial judges until the mid-nineteenth century.
- 22 Clause 41 of the Judicial Officers Bill, read in the Legislative Assembly on 24/9/86, authorised the removal of a judicial officer "on the address of both Houses of Parliament, following a report of the Conduct Division recommending removal".
- 23 Interview with Sir Laurence Street, op cit n 9.
- 24 Sir Laurence Street, "Memorandum on the history of the Judicial Commission", op cit n 19.
- 25 The Public Statement was delivered to the Attorney General and tabled and debated in the Legislative Assembly on 30/9/86.
- 26 Interview with Sir Laurence Street, op cit n 9.
- 27 The *Judicial Officers Act*, commencing on 19/12/86, was amended on 1/5/87 by the *Judicial Officers (Amendment) Act 1987* to, inter alia, establish the Commission as an independent statutory corporation.
- 28 Section 5 of the *Judicial Officers Act 1986* was amended by the *Judicial Officers Amendment Act 1998* Sch 1[2] which increased lay membership to four.
- 29 Section 8.
- 30 Section 9.
- 31 Interview with Sir Laurence Street, op cit n 9.
- 32 Interview with Sheahan J, op cit n 8.
- 33 Interview with the Hon AM Gleeson AC, Chief Justice of Australia, Sydney, 20/8/07.
- 34 JJ Spigelman, "Dealing with judicial misconduct" (2003) 6(3) *The Judicial Review* 241 at 248–249.
- 35 MH McLelland, "Disciplining Australian judges" (1990) 64 *ALJ* 388 at 390.
- 36 *Judicial Officers Act 1986*, s 15.
- 37 *Hansard*, Legislative Assembly, 1/10/86, p 4379.
- 38 The Hon AM Gleeson AC, Chief Justice of Australia, was Chief Justice of NSW and President of the Judicial Commission 1988–1998.
- 39 The Hon JJ Spigelman AC has been Chief Justice of NSW and President of the Judicial Commission since 1998.
- 40 *Judicial Officers Act 1986*, s 20. In 2005–2006, 66 out of 75 complaints were summarily dismissed.
- 41 Section 21(2).
- 42 Section 21(1).
- 43 *Judicial Officers Act 1986*, s 22. A community representative must be "a person of high standing in the community nominated by Parliament in accordance with Schedule 2A": s 22(2)(b). The inclusion of a community representative to the Conduct Division was effected by the *Judicial Officers Amendment Act 2007*, commenced on assent, 4/7/07, s 2 and Gazette No 90 of 2007, p 4486.
- 44 Section 25.
- 45 Section 24(2).
- 46 Section 34(1).
- 47 Section 32(1).
- 48 Section 26.
- 49 Section 28(1).
- 50 Section 28(2).
- 51 Section 29(1).
- 52 Section 29(3).
- 53 JJ Spigelman, "Judicial independence", (2007) 8(3) *The Judicial Review* 343 at 348.
- 54 *Hansard*, Legislative Council, 16/6/1998, pp 5862–5869. The Legislative Council voted 24–16 against the motion for his removal.
- 55 JJ Spigelman, "Dealing with judicial misconduct", op cit n 34 at 242; S Shetreet, "The limits of judicial accountability: a hard look at the *Judicial Officers Act 1986*" (1987) 10 *UNSWLJ* 4.
- 56 See for example, G Griffith, "Judicial accountability", op cit n 15, pp 25–28.
- 57 The review was announced by the Hon B Debus, Attorney General, *Hansard*, Legislative Assembly, 5/4/05, pp 14,981–14,982. As a result of the review, a number of amendments were effected by the *Judicial Officers Amendment Act 2006*, which commenced on assent, 9/6/06, Gazette No 75 of 9/6/06, p 3936 and 1/7/06, Gazette No 84 of 30/6/06, p 4785.
- 58 JJ Spigelman, "Judicial independence", op cit n 53 at 347.
- 59 News Release, 21/1/07; JJ Spigelman, "Judicial independence", op cit n 53 at 347–350.
- 60 *ibid*.
- 61 *Judicial Officers Act 1986*, s 22(2) and Sch 2A, cl 3, inserted by the *Judicial Officers Amendment Act 2007*, Sch 1[1] and [3], commenced on assent, 4/7/07.
- 62 AM Gleeson, "Judicial accountability", op cit n 21 at 129; JJ Spigelman, "Dealing with judicial misconduct", op cit n 34 at 243.
- 63 Interview with Gleeson CJ, op cit n 33.
- 64 AM Gleeson, "Judicial accountability", op cit n 21 at 121.
- 65 Interview with Gleeson CJ, op cit n 33.
- 66 *Judicial Officers Act 1986*, s 21(2).
- 67 Interview with McClellan CJ at CL, op cit n 4.
- 68 Under s 30(2), repealed by the *Judicial Officers Amendment Act 2007*.
- 69 Interview with the Hon Justice Blanch, Chief Judge of the District Court, Sydney, 23/8/07.
- 70 JJ Spigelman, "Dealing with judicial misconduct", op cit n 34 at 251.
- 71 AM Gleeson, "Public confidence in the judiciary" (2002) 76 *ALJ* 558 at 563.
- 72 Interview with Gleeson CJ, op cit n 33.
- 73 EJ Schmatt PSM, "The role and functions of the Judicial Commission of New South Wales", Judicial Conduct and Ethics Committee Conference, Dublin, Ireland, 6/5/2000, available at <http://www.judcom.nsw.gov.au/about_the_commission/dublin.php>, accessed 27/7/07.
- 74 See AM Gleeson, "Judicial accountability", op cit n 21 at 139–140.

- 75 Interview with McClellan CJ at CL, op cit n 4.
- 76 There are four Commission members appointed by the Governor. These members currently are Ms Margaret Hole AM, Dr Michael Dodson AM, Mr Alan Cameron AM and Dr Judith Cashmore.
- 77 P McClellan, "Judicial conduct: still a live issue, some thoughts on the paper by Professor Peter A Sallman", The Judicial Conference of Australia's Colloquium 2005, available at <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcclellan020905>, accessed 2/10/07.
- 78 From 25/8/03 until 1/9/05.
- 79 *Judicial Officers Act* 1986, s 8(1).
- 80 Foreword to *Sentencing Bench Book*, Judicial Commission of New South Wales, Sydney, 2006, p i.
- 81 The Hon David Hunt AO QC was a judge of the Supreme Court 1979–1998; Chief Judge at Common Law, 1991–1998; acting judge of appeal of the Supreme Court 2005–2006. Interview, Sydney, 21/08/07.
- 82 AM Gleeson AC, "Sentencing: the law's communication problem", speech to the Criminal Bar Association, 19 November 1993, extracted in *Sentencing Bench Book*, op cit n 80, p iii.
- 83 *Bashir Begum Bibi* (1980) 71 Cr App R 361 per Lord Lane CJ.
- 84 *Wong v The Queen* (2001) 207 CLR 584 per Gleeson CJ at [6].
- 85 (1984) 154 CLR 606 at 610–611.
- 86 *Judicial Officers Act* 1986, s 8.
- 87 Interview with Gleeson CJ, op cit n 33; *Wong v The Queen* (2001) 207 CLR 584 per Gleeson CJ at [7].
- 88 Interview with Gleeson CJ, op cit n 33.
- 89 Interview with McClellan CJ at CL, op cit n 4.
- 90 Interview with the Hon David Hunt, op cit n 81.
- 91 Interview with McClellan CJ at CL, op cit n 4.
- 92 Interview with the Hon David Hunt, op cit n 81. See also *R v Lawson* (1997) 98 A Crim R 463 at 465 per Hunt CJ at CL; and *R v AEM* [2002] NSWCCA 58 at [116]–[117]. On the question of the relationship between sentencing statistics and the range for a given offence, see Spigelman CJ in *R v Lao* [2003] NSWCCA 315 at [32] ff.
- 93 AM Gleeson, "A core value" (2007) 8(3) *The Judicial Review* 329 at 331.
- 94 The Rt Hon Lord Justice Auld, *Review of the criminal courts of England and Wales*, 2001, Ch 11, para 205, citing N Hutton, A Patterson, C Tata, Decision support for sentencing in a common law jurisdiction, Fifth International Conference on Artificial Intelligence and Law, ACM Press, Washington DC, 1995.
- 95 Judicial Commission of NSW, *Annual Report, 2000–2001*, p 17.
- 96 Interview with the Hon David Hunt, op cit n 81.
- 97 *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002.
- 98 Mr Murali Sagi PSM, BEng MBA (CSU) GradCertPSM (UWS) was appointed Director, Information Services in 2000. Interview with M Sagi, Sydney, 19/9/07.
- 99 Interview with Deputy Chief Magistrate Cloran, Sydney, 22/8/07.
- 100 Interview with McClellan CJ at CL, op cit n 4.
- 101 Mr Hugh Donnelly BA LL.M was appointed Director, Research and Sentencing in July 2007.
- 102 (1998) 194 CLR 610.
- 103 S Indyk and H Donnelly, Judicial Commission of NSW, Sydney, 2007.
- 104 Interview with Gleeson CJ, op cit n 33.
- 105 AM Gleeson "The future of judicial education" (1999) 11(1) *Judicial Officers' Bulletin* 1 at 2.
- 106 The Hon DH Hunt, "Judicial commission review: submission", Submission to the Attorney General, 16/6/05.
- 107 AM Gleeson, "The future of judicial education", op cit n 105, at 2.
- 108 Interview with Sir Laurence Street, op cit n 9.
- 109 Ms Ruth Windeler BSc has been the Commission's Education Director since May 1996.
- 110 See the Judicial Commission of NSW, *Annual Report 2005–2006*, pp 14, 78–82.
- 111 The Committee is the Hon Justice Ipp (Chair); the Hon Justice Schmidt; The Hon Mr Justice Lloyd; His Honour Judge Phegan; Deputy Chief Magistrate Cloran; and Ms R Windeler.
- 112 Interview with Mr Ernest Schmitt PSM, Chief Executive of the Judicial Commission, Sydney, 12/9/07.
- 113 Interview with Gleeson CJ, op cit n 33.
- 114 Interview with Cloran DCM, op cit n 99.
- 115 Interview with Ms Ruth Windeler, Education Director, Sydney, 5/9/07.
- 116 Interview with McClellan CJ at CL, op cit n 4.
- 117 *R v Thomson* (2000) 49 NSWLR 383 at 394.
- 118 D Lloyd, "How to develop effective judgment writing" (2007) 19(5) *Judicial Officers' Bulletin* 42.
- 119 Interview with Gleeson CJ, op cit n 33.
- 120 Judicial Commission of NSW and Australian Institute of Judicial Administration, *Concurrent evidence: new methods with experts*, Sydney, 2005.
- 121 Interview with Cloran DCM, op cit n 99.
- 122 JJ Spigelman, "Dealing with judicial misconduct", op cit n 34 at 244.
- 123 Interview with McClellan CJ at CL, op cit n 4.
- 124 JJ Spigelman, "Dealing with judicial misconduct", op cit n 34 at 245.
- 125 Interview with Ernest Schmitt, op cit n 112.
- 126 JJ Spigelman, "Dealing with judicial misconduct", op cit n 34 at 247.