Karen Grau

CONSTRUCTIVE APPROACHES TO JUDICIAL INDEPENDENCE AND ACCOUNTABILITY: TO ERR IS HUMAN - UNLESS YOU'RE A JUDGE?

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ABSTRACT

Judicial independence is a pillar of New Zealand's constitution, and is further recognised as a fundamental human right. In order to protect this independence it must be very difficult to remove a judge from office. In common with all state institutions however, the judiciary is coming under increasing scrutiny from the public who are concerned about a perceived lack of accountability. This is especially so after an episode of judicial misconduct occurs. Although this lack of accountability may be more apparent than real, the public are largely ignorant or misinformed about the constitutional role of the judges, and the various mechanisms that ensure judges are answerable for their behaviour, both on and off the bench. This has the potential to lead to a dangerous loss of public confidence in the judiciary.

This paper suggests that, with the current interest in the establishment of a judicial commission in New Zealand, the time is ripe for the judiciary to develop new techniques of accountability that are consistent with judicial independence and that will enhance the public's respect for the judiciary. Radical overhaul is unnecessary. Modest changes, together with improved communication between the judiciary and the public, will suffice.

The Canadian Judicial Council has developed the practice of expressing disapproval of a judge's conduct where the behaviour that is the subject of a complaint is more than minor but does not warrant a recommendation of removal from office. This practice has been effective in Canada over the last decade and is an example worthy of following in New Zealand.

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I INTRODUCTION

Judicial independence requires that judges be accountable only to the law and to their conscience. Mistakes in law can be corrected on appeal. Decisions can be criticised in the media and in the academic literature. A quiet word in the ear of a judge who has treated litigants and others with less than desirable tact, or who has been tardy in delivering judgment, has always been employed by the judiciary as an effective method of reining in the errant judge. The judiciary must decide cases "without fear or favour, affection or ill will,"[1] and therefore must not seek popularity. They must, at the same time however, ensure continuing public confidence in the Courts. This is because, as Justice Felix Frankfurter colourfully explained, "[t]he Court's authority, consisting of neither the purse nor the sword, rests ultimately on substantial public confidence in its moral sanction."[2]

If a judge behaves very badly he or she may be removed from office following an address of Parliament. However, there is no formal method of addressing misconduct that falls beneath the appropriately very high threshold required for removal but that is more than minor. Instead the responses may include uninformed and constitutionally suspect governmental comment,[3] high levels of media coverage, and institutional silence from the judiciary. The net result is to leave the community with the feeling that the judge has just "got away with it," while remaining ignorant of the constitutional reasons why this appears to be so. The recent case of High Court Justice Robert Fisher's use of the Internet to access pornography highlighted the issues surrounding the accountability of judges and appropriate responses to judicial misconduct.

This aim of this paper is to suggest a modest and principled improvement to the system of judicial accountability to deal with such "intermediate" level misconduct. Improvement is necessary because the notion of accountability from public officeholders is increasingly important. Gone are the days of unquestioning

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[1] Oaths and Declarations Act 1957, s18.
[2] Cited in Stephen Parker *Courts and the Public* (Australian Institute of Judicial Administration Inc, Victoria, 1996) 16.
[3] See, for example, "Cabinet to Discuss Sex-site Judge" (18 February 2002) *The New Zealand Herald* Auckland 1.

deference to those in positions of authority such as doctors and judges. This should be seen as a positive, since public confidence based on understanding must be preferable. But such sentiments are problematic as regards the judiciary because accountability may conflict with the fundamental pillar of the constitution that is judicial independence. This notion of independence may even necessitate overriding public discomfort with some examples of misbehaviour that the public sees judges "getting away with."

Although judicial independence and accountability are not ultimately reconcilable, it is preferable, and indeed necessary, to stop using the two concepts as "argumentative incantations,"[4] so that public confidence in the judiciary may be improved whilst the balance of power between the three branches of government is protected. At present, because there is no avenue to address legitimate concerns about some types of judicial behaviour, political comment is more likely, even if it is unconstitutional. This can be seen as an ad hoc attempt to fill the gap. There may be times when it is appropriate for the executive to comment on the judiciary, where the issue is a matter of legitimate public concern. On the other hand, any executive comment on the judiciary has the potential to undermine independence and, as importantly, public confidence in the legal system, which is essential to uphold its legitimacy.

This paper will examine the principles of judicial independence and accountability, and the importance of maintaining public confidence in the judiciary. It will then examine options for improving responses to judicial misconduct. The Ministry of Justice is currently proposing, as part of a Judicial Matters Bill, the statutory establishment of a Judicial Commission based on the New South Wales Commission.[5] A New Zealand Commission would comprise the heads of courts and members of the public, and would consider all complaints about all judicial officers. The paper will examine the New South Wales Commission's complaints process and that of the Canadian Judicial Council. It will advocate adopting the practice of the Canadian Judicial Council, who may issue an expression of disapproval of a judge's

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[4] A M Gleeson *Foreword* in Helen Cunningham (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, Sydney, 1997) xi.
[5] "Proposed Judicial Matters Bill" *Law Talk* 585 (1 July 2002) 6.

conduct after investigation of a complaint. This is a better model for New Zealand because it preserves judicial independence whilst ensuring that complainants' concerns are taken seriously. New Zealand can take advantage of the Canadian experience where, over the last decade, this practice has gone from being seen as some sort of judicial treason to part of the mainstream of judicial discipline.

The establishment of a Judicial Commission in New Zealand could be an excellent opportunity for the judiciary to take the lead in creating a more credible system of accountability and ending the "judicial lockjaw"[6] that surrounds misconduct. Expressions of disapproval, together with the formulation of ethical standards for judges, and improved communication with the public, are achievable steps the judiciary could take through a Judicial Commission. Such steps could go a long way towards enhancing public confidence in the judiciary and preventing interference from the political branches of government. If the judiciary can themselves deal appropriately with misconduct, there is no need for outside interference, and there should therefore be no change to the convention proscribing executive comment on the judiciary.

Judicial misbehaviour is rare in New Zealand. This should be a source of pride and comfort, but not a reason to retain the status quo, which is rather uncertain, and does nothing to address public ignorance and misinformation about the judiciary. At the same time however, it is sensible to heed the warning of former Chief Justice Sir Thomas Eichelbaum who has said that, although systems which had served well in the past may no longer suffice, "knee-jerk reactions to aberrant events affecting the judiciary should be avoided."[7]

II JUDICIAL INDEPENDENCE

The New Zealand system of government is said to be "built on two complementary and lawfully unalterable principles: the operation of a democratic

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[6] Frances Kahn Zemans "The Accountable Judge: Guardian of Judicial Independence" (1999) 72 S Cal L Rev 625, 636.
[7] Rt Hon Sir Thomas Eichelbaum " The Inaugural Neil Williamson Memorial Lecture: Judicial Independence Revisited" (1997) 6 Canta L Rev 421, 435.

legislature and the operation of independent courts."[8] The Universal Declaration of Human Rights affirms the fundamental nature of judicial independence. Article 10 states that; "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."[9]Other international documents and the New Zealand Bill of Rights Act 1990 reinforce the importance of a judiciary free from political or other influence or interference.[10]

A *Individual Independence*

1 *Security of Tenure*

The Act of Settlement 1700 established the principle of judicial independence in England where judges had previously held office at the Crown's pleasure. They could now only be removed in limited circumstances. In New Zealand today the Constitution Act 1986 protects this independence in much the same manner. Section 23 states:

> A Judge of the High Court shall not be removed from office except by the Sovereign or the Governor-General, acting upon an address of the House of Representatives, which address may be moved only on the grounds of that Judge's misbehaviour or of the Judge's incapacity to discharge the functions of that Judge's office.

Section 24 provides that judges' salaries cannot be reduced during their term of office. These are similar to provisions that were included in the Judicature Act 1908, the Supreme Court Act 1882, the Supreme Court Judges Act 1858, and the New Zealand Constitution Act 1853 as enacted by the United Kingdom Parliament.

The Constitution Act is concerned with the independence of individual judges from the Executive. In other words the government for the time being should not be able to influence judicial decisions by political pressure. Judges can only be removed

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[8] Sir Robin Cooke "Fundamentals" [1988] NZLJ 158, 164.
[9] Universal Declaration of Human Rights (1948) GA Res 271A (III), 3(1) UN GAOR Resolutions 71, UN Doc A/810 (1948).
[10] New Zealand Bill of Rights Act 1990, s 25(a); International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 14; *Latimer House Guidelines for the Commonwealth* <http://www.cpahq.org/guidelines/index.htm> (last accessed 22 September 2002).

for incapacity or misbehaviour, and this further requires agreement of both the executive and legislative branches. It has never happened in New Zealand. The protection afforded to judicial salaries ensures freedom from financial pressure. The Constitution Act protection against removal only applies to High Court and Court of Appeal judges. The Governor-General may remove District Court judges on the advice of the Minister of Justice. This advice would be tendered on the grounds of inability or misbehaviour.[11] Joseph notes that most District Court judges would rather resign than face dismissal, and that resignation is rare, but has occurred, reputedly under veiled threat of the Minister.[12]

An extension to the Constitution Act was proposed in 1999 to bring the removal of other judges in line with the removal process for High Court and Court of Appeal judges.[13] This proposal has since lapsed,[14] but has resurfaced in the Judicial Matters Bill being developed by the Ministry of Justice.[15] One consequence of this proposal is that the removal process is far more likely to be used given the large increase in the number of judges subject to removal following an address of Parliament. Because Parliament has the responsibility for making the removal decision it is vital that a clear process be established.

2 *Convention*

Convention supplements the legal protections. Politics plays no part in the appointment process.[16] Ministers and public servants do not criticise judicial decisions

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[11] District Courts Act 1947, s7.
[12] Philip Joseph "Constitutional Law" [1998] NZ Law Rev 198.
[13] Constitution Amendment Bill 1999, no 274-2.
[14] See Vernon Small "Judges to Go Under the Spotlight" (3 September 2002) *New Zealand Herald*, Auckland, 1.
[15] See "Proposed Judicial Matters Bill" (1 July 2002) 585 *Law Talk* 6.
[16] Sir Geoffrey Palmer "Judicial Selection and Accountability: Can the New Zealand System Survive?" in B D Gray and R B McClintock (eds) *Courts and Policy: Checking the Balance* (Wellington, Brookers, 1995) 11, 44. But see Andrew P Stockley "Judicial Independence: The New Zealand Experience" (1997) 3 Aust J Legal Hist 145, 147-149, who notes that this was not the case in nineteenth century New Zealand where "patronage rather than legal experience was determinative of Britain's appointments to colonial judgeships." However, from 1935 onwards, Stockley notes that successive governments have avoided making political appointments. He also notes that the same can be said of Britain since 1914, but not of Australia or Canada. There have been Government ministers appointed to the Australian High Court, and political patronage among the lower levels of the Canadian judiciary.

or reflect adversely on the impartiality, personal views, or ability of a judge.[17] The Standing Orders of the House of Representatives impose restrictions on members of Parliament who must not "use offensive words against the House or against any member of the judiciary," or refer to any matter awaiting, or under adjudication, in any court.[18] In return judges do not publicly comment on political or contentious issues.

Convention is not always followed. A graphic example of a breach of the convention proscribing executive criticism of the judiciary was seen in 1995, when Cabinet Minister John Banks claimed on talk-back radio that most District Court Judges were, "second-rate lawyers," who could not make a living in private practice, and had little to offer the judicial system.[19] The Chief District Court Judge complained to the Attorney-General and Minister of Justice, asking, "if the conventions about comments between the judiciary and the government are to be ignored in this way, then what hope have our democratic institutions?" Banks apologised, but shortly after criticised another District Court Judge over a sentencing decision. This time the Chief Justice personally complained to the Prime Minister, and the Attorney-General condemned the comments as "unacceptable."[20] More recently, the current Minister of Justice has criticised Judges for not understanding a new Sentencing Act in a manner described as "constitutionally improper."[21]

Notwithstanding such lapses, convention remains an important constitutional safeguard against encroachment by one branch of government on another's territory. As the Court of Appeal has said: [22]

> New Zealand's constitutional arrangements are based on conventions that delimit the respective roles of the legislature, the executive, and the Courts. The legitimacy of each institution depends to no small extent on the respect it pays to these conventions

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[17] *Cabinet Manual* <http://www.dpmc.govt.nz/cabinet/manual/2a.html#2.115> (last accessed 9 September 2002) paras 2.115-2.118.
[18] *Standing Orders of the House of Representatives* (House of Representatives, Wellington, New Zealand, 1999) Standing Orders 112 and 114.
[19] "Talkback Lands Banks in Strife" *The Press* Christchurch 19 May 1995.
[20] "Talkback Lands Banks in Strife" *The Press* Christchurch 19 May 1995.
[21] Jonathan Milne "Judges Getting it Wrong says Goff" (3 August 2002) *Dominion Post* Wellington 2.
[22] *Shaw v Commissioner of Inland Revenue* (19 April 1999) Court of Appeal CA 218/97 para 16.

and to the other branches of government.

Thus conventions guard the constitutional divide between the branches of government and the rule of law itself.

3 *Internal Independence*

Members of the judiciary must also enjoy independence vis-à-vis their colleagues and judicial superiors.[23] This is a facet of independence that is not often discussed, but is important to note in order to understand why no formal disciplinary mechanisms have developed within the judiciary itself. If judges are not free from the influence of other members of the judiciary it is said that the possibility exists of a judge giving decisions, not solely from his or her determination of the law, but influenced by the effects of the decision on his or her career.[24]

The establishment of various courts of specialist jurisdiction has brought with it a corresponding increase in senior judges or heads of courts. This must have the result of increasing hierarchical patterns in the judiciary. It is said that this development has the potential to, at worst, bring about attempts by judges to influence other judges' decisions, or at least give rise to "latent pressures on the judges which may result in subservience to judicial superiors."[25] Palmer has said that the appointment of principal judges for particular parts of the District Court has got out of hand because too many centres of authority and administration are undesirable.[26] They may however be a necessary consequence of specialisation and increasing workloads, making it necessary for each court to control its own procedure for assigning lists and dealing with administrative matters, which may also include discipline.

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[23] Hon T David Marshall *Judicial Conduct and Accountability* (Carswell, Ontario, 1995) 89.
[24] Marshall, above, 89.
[25] Shimon Shetreet "The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986" (1987) 10 UNSWLJ 4, 11.
[26] Sir Geoffrey Palmer "Judicial Selection and Accountability: Can the New Zealand System Survive?" in B D Gray and R B McClintock (eds) *Courts and Policy: Checking the Balance* (Wellington, Brookers, 1995) 11, 40.

B Institutional Independence

The Supreme Court of Canada has recognised that judicial independence is not only concerned with the individual independence of the judge, as seen in the protections against removal and reduction of salary. It is also "the institutional independence of the court of tribunal over which he or she presides."[27] This means that judges, and not the executive or the legislature, should administer matters having a direct bearing on the exercise of the judicial role. Otherwise a danger exists of the executive exerting improper influence through control of resources and allocation of services to the judiciary. In New Zealand this facet of independence has been said to be the area in which judicial independence "has been at its most fictional,"[28] since the government funds the judicial system, owns the buildings, and holds the administration supporting the judiciary accountable.

After some judicial criticism of this situation and a government review, the Department for Courts was established in 1995.[29] It is based on the separate executive department model rather than the autonomous department model. That is, the Department's sole function is the administration of the courts, and is responsible to the Minister for Courts rather than to the judiciary. This represents a shift away from complete governmental control, as it is "administration by executive department, with regular judicial consultation."[30] However, it is not judicial governance, and therefore institutional independence has still not been fully achieved.

C How Far Does Judicial Independence Reach?

The concepts of independence and impartiality are said to be fundamental to the capacity of courts to do justice and to maintain public confidence in the administration of justice.[31] Independence is a necessary condition of impartiality,

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[27] *Valente v R* [1985] 2 SCR 673, 687 Le Dain J.
[28] Rt Hon Sir Thomas Eichelbaum " The Inaugural Neil Williamson Memorial Lecture: Judicial Independence Revisited" (1997) 6 Canta L Rev 421, 423.
[29] See, for example, Eichelbaum "Judicial Independence - Fact or Fiction? [1993] NZLJ 90; Tompkins "The Independence of the Judiciary" [1994] NZLJ 285.
[30] Rt Hon Sir Thomas Eichelbaum " The Inaugural Neil Williamson Memorial Lecture: Judicial Independence Revisited" (1997) 6 Canta L Rev 421, 423.
[31] *Valente v R* [1985] 2 SCR 673, 685 Le Dain J.

which is the crucial precondition for a justice system where, in the criminal context and increasingly in the civil context,[32] the judge alone stands between the individual citizen and the Executive.

It is, however, a misconception that judicial independence means the judges have a free rein. It is not widely understood by the public that judicial independence exists for the benefit of the community.[33] As Miller puts it:[34]

> It is important to remember that the underlying purpose of judicial independence is to protect against executive intimidation and consequent loss of public confidence, not to safeguard judges from incompetence or mistakes. It does not exist to benefit judges personally.

Thus independence is concerned only with freedom from improper influences on judicial decision-making. Of course there are many proper influences on judges that are crucial to the exercise of their role. These include substantive rules of law and of procedure, the judge's own values and norms, the values and norms of the Judiciary as an institution, and of the society in which the judge serves. It can never be desirable that judges be independent to the point where they may disregard values, attitudes or practices of the judiciary and of the community.

III JUDICIAL ACCOUNTABILITY

Accountability sits uneasily with the concept of independence. As Keith says, "Judges as a group are not elected and not representative and are not responsible in the constitutional sense."[35] This does not mean the judiciary is untouchable, although their position can be seen as somewhat odd in a democratic political system. The Oxford English Dictionary defines accountability as "liability to give account of, and answer for, discharge of duties or conduct."[36] Although judges are not politically accountable, or legally accountable, except in the most serious cases of abuse, it can

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[32] For example the growth of tribunals such as the Commerce Commission.
[33] Rt Hon Sir Thomas Eichelbaum " The Inaugural Neil Williamson Memorial Lecture: Judicial Independence Revisited" (1997) 6 Canta L Rev 421, 422.
[34] Raymond Miller(ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 68-70.
[35] K J Keith "A Judicial Commission? Some Comments on the Independence of the Judiciary" [1983] NZLJ 239, 240.

rightly be seen that judges are accountable in the sense that they must be responsive to the community.[37]

A The Principle of Open Justice

Judges are generally required to give reasons for their decisions. This is not an invariable rule, but the Court of Appeal has recently said that reasons are desirable as an important part of the principle of open justice, to provide for the possibility of review by a higher court, and as providing "discipline for the Judge which is the best protection against wrong or arbitrary decisions and inconsistent delivery of justice."[38] Furthermore the Court strongly suggested that the imposition of a general rule requiring judges to give reasons might not be too far off.[39] Judicial reasons are of course open to scrutiny and criticism by the public, academics, and the legal profession, enabling the legitimacy of the decision to be measured. This "publicity," as Bentham said, "…is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial."[40]

The role of the media in keeping judges accountable should not be underestimated. It is only the media that constantly and publicly criticises judges. As Shetreet has pointed out, the media also convey to the courts the sense of the community on matters pending before them. This public reaction can affect either consciously or unconsciously the decision of the court.[41] It is, sadly however, a fact of life that the everyday work of the courts is just not news, unless it is coverage of high profile criminal cases. In contrast, any, even minor, slip by a judge, is likely to prove newsworthy. Judges do not want to be criticised in the media and this threat hangs over them always. Because judges traditionally have not responded to criticism, they are prevented from defending themselves when the actors from other branches of

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[36] *Oxford English Dictionary* (2ed, 1998, Clarendon Press, Oxford) 87.
[37] R L Young "Judicial Independence and Accountability in New Zealand" (1998) 45 DEC Fed Law, 40, 42.
[38] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 547, 565-567 (CA).
[39] *Lewis v Wilson & Horton Ltd*, above, 567.
[40] Jeremy Bentham *Benthamiana, or Select Extracts from the Works of Jeremy Bentham* (1843) 115.
[41] See Shimon Shetreet *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (North Holland Publishing Co, New York, 1976) 179-185.

government are not. The law of contempt, in the form of "scandalising the court," once restrained attacks against judges, and was justified as an answer to this judicial reticence.[42] Contempt of court has largely disappeared however, as freedom of speech has increased.[43] There are signs that the judiciary may not be as reticent in future. Recently, a judge who was the subject of extreme criticism from a radio talk-back host successfully used defamation proceedings in response.[44]

B Appeals

The existence of the appeal process recognises that judges can and do make mistakes. It provides a mechanism for correcting judicial error and for ensuring adherence to legal norms. Although technically an appeal reaches only the decision, the judge's behaviour may also be publicly criticised. In 1995 the Court of Appeal ordered new trials in two cases where the approach to the trial by the judge was described as unacceptably suggesting, "some shift away from the New Zealand tradition of a fair trial, in the direction of a more active semi-prosecutorial participation by the judge."[45] The Court further stated that, "the stress for those involved may mean a human cost exceeding the wastage of state resources."[46] Although couched in judicial understatement, it is difficult to understand this as anything other than a public rebuke of the judge's conduct.

C Informal Discipline

Judges are also subject to informal discipline by their head of court or by the Chief Justice. Chief Judges have no formal authority over judges of their court, and although the Chief Justice is the head of the judiciary, she is not the employer or superior of the other judges. Instead, her constitutional position is described as that of "first among equals."[47] A former Chief Justice has said, "[w]e can draw the subject

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[42] Shetreet, above, 185-186.
[43] Hon Michael Kirby "Attacks on Judges - A Universal Phenomenon" (1998) 72 ALJ 599, 603.
[44] Tom Cardy "Judge Wins Payout in Radio Slander" (19 August 2002) *Dominion Post* A3.
[45] See Robert Mannion "Appeal Court says Justice must be Seen to be Done" *The Dominion* Wellington (11 September 1995) 11.
[46] Mannion, above, 11.
[47] Rt Hon Sir Thomas Eichelbaum " The Inaugural Neil Williamson Memorial Lecture: Judicial Independence Revisited" (1997) 6 Canta L Rev 421, 431.

matter of the complaint to the Judge's notice, counsel the Judge, or administer some form of private or (rarely) public rebuke."[48] Shetreet's study of the English judiciary found that, in some situations, pressure might be quietly put on a judge to resign. The judge may resign on the grounds of "ill health" at a later time after the incident that gave rise to the pressure.[49] This informal discipline is generally seen as being effective in practice. Sankar notes that professional independence is a facet of judicial independence, which is often ignored, but critical to understanding why judges resist some approaches to judicial control while accepting others. In other words judges will respond better to discipline imposed from within the profession than that which is imposed by outside bureaucratic controls. On this analysis any system of disciplining the judiciary has a greater chance of success if the judges are, as a group, heavily involved in the formulation and carrying out of the process. Since the judiciary can be described as "a tribe with only chiefs,"[50] it is said that they respond better to persuasion than to formal processes.[51]

However the public is suspicious of professional organisations disciplining their own. Informal judicial discipline has limited visibility, and is therefore beyond public scrutiny. Critics assert that a self-protective "guild mentality" takes over when a member of a professional group is accused of an infraction.[52] Proponents note however, that informal discipline is administered regularly and effectively, being a common-sense approach to maintaining both judicial independence and accountability.[53] This makes perfect sense as the misconduct of one judge has the potential to reflect badly on the judiciary as a whole. Ellis sums up both sides of the argument by stating that, "[j]udges are by inclination and training able to manage their own affairs. However, they must be seen to do so."[54]

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[48] Eichelbaum, above, 431.

[49] Shimon Shetreet *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (1976, North Holland, New York) 253-254.

[50] Clifford Wallace " Judicial Administration in a System of Independents: A Tribe With Only Chiefs" (1978) BYUL Rev 39.

[51] Sambhav N Sankar "Disciplining the Professional Judge" (2000) 88 Cal L Rev 1233, 1239.

[52] Anthony D'Amato "Self-Regulation of Judicial Misconduct Could be Mis-Regulation" (1990) 89 Mich L Rev 609.

[53] Charles Gardner Geyh "Informal Methods of Judicial Discipline" (1993) 142 U Pa L Rev 243, 246; Harry T Edwards " Regulating Judicial Misconduct and Divining "Good Behaviour" for Federal Judges" (1989) 87 Mich L Rev 765, 779-780.

[54] A A T Ellis QC "Do We Need a Judicial Commission?" [1983] NZLJ 206, 210.

D Judicial Complaints Process

The *Judicial Complaints Process* was established by the Attorney-General and the Chief Justice in 1999, and has formalised procedures for making complaints against judges' conduct.[55] This is not a statutory procedure, but merely sets out the existing convention that the head of bench informally disciplines judges, with the addition of a lay observer to act in the public interest.

Complaints are referred to the relevant head of bench who determines whether the complaint has substance. The lay observer may review any decision not to proceed with a complaint. If a complaint proceeds, the head of court will refer it to the judge in question, consider the response, make further enquiries if appropriate, and determine how to deal with the matter appropriately. Seeking an apology from the judge to the complainant, or assisting the judge to avoid a reoccurrence of the conduct under complaint are possibilities.[56] If a complaint was considered serious enough to possibly warrant removal, it would be referred to the Attorney-General who would convene a panel of retired judges to investigate the complaint fully. Depending on the findings of the panel, the Attorney-General would initiate the removal process.[57]

Recent statistics, over a twelve month period, state that there were no complaints against Court of Appeal Judges, four against High Court Judges and 24 against District Court Judges. One High Court Judge was counselled about body language. One District Court Judge apologised to a litigant, while another complaint involving delay was resolved by being brought to the attention of the judge. The others were dismissed, generally because they were complaints about the outcome of a case where an appeal was more appropriate.[58]

Critics of judicial complaints systems complain that the easy availability of such procedures will result in an increase of people, especially disgruntled litigants,

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[55] *Judicial Complaints Process* <http://www.courts.govt.nz/publications/judicial_complaints.pdf> (last accessed 8 July 2002).
[56] *Judicial Complaints Process,* above, 5.
[57] *Judicial Complaints Process,* above, 9.
[58] *Report of the New Zealand Judiciary 1999* <http://www.courts.govt.nz/publications/Judiciary-report1999.pdf> (last accessed 8 July 2002).

who may wish to "roll up for a shot" at the judge.[59] This, they say, will have the effect of chilling judicial independence, as judges tailor their decisions to avoid complaint. With respect, this concern is overstated. The statistics show a low number of complaints, most of which are appropriately and immediately dismissed. Many people would have complained anyway, but now have a formal procedure to follow. This formality may reassure complainants that their concerns have at least been taken seriously, even if the complaint has been dismissed. Others, who may not have previously complained, but may have been left feeling frustrated, now have a possible action to pursue. Declining to set up a mechanism to deal with complaints, merely because people might be tempted to use it, is an unattractive proposition in a modern democracy.

The *Judicial Complaints Process* has been criticised as being a "loose arrangement,"[60] but it has provided a clearer and more transparent process for dealing with complaints about judges' behaviour, with the addition of an impartial review by the lay observer. It has however, only been regarded as an interim measure until other legislation was enacted.[61] The recognition that more formal processes are needed to deal with complaints is a positive first step in building a more credible system of accountability which will best meet the needs of both the public and the judiciary.

E Should Judges be More Accountable?

The perception that greater judicial accountability is required has gathered momentum as the belief that the law was a set of truths to be revealed no longer holds.[62] The business of judging has become more overtly political.[63] Judges openly admit that they make value judgments and make law.[64] In 1995 Palmer said:[65]

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[59] Hon Justice Thomas AM *Judicial Ethics in Australia* (The Law Book Co Ltd, Sydney, 1988) 89.
[60] P Schnauer (5 May 1999) NZPD 16375.
[61] Anthony Hubbard "Judgement Day" (24 February 2002) *Sunday Star Times* 3.
[62] Lord Reid "The Judge as Lawmaker" [1972] The Journal of Public Teachers of Law, 22.
[63] For example the growth in Treaty of Waitangi and Bill of Rights jurisprudence.
[64] See, for example, Sir Ivor Richardson " The Role of Judges as Policy Makers" (1985) 15 VUWLR 46; E W Thomas "A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy" (1993, VUW Monograph No 5).
[65] Sir Geoffrey Palmer "Judicial Selection and Accountability: Can the New Zealand System Survive?" in B D Gray and R B McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) 11, 55.

> How far the public will go in tolerating increased judicial independence without increased accountability is an interesting point. At present, Judges are more popular than politicians, but this may not remain so. The more power the Judges have, the more likely their exercise of it will be called into question.

In 2002 it can probably be said that judges are no longer more popular than politicians. This year we have a relatively popular government, and a judiciary under attack in the media fairly regularly for sentencing decisions,[66] along with occasional episodes of judicial misbehaviour that make the public question the accountability and exercise of judicial power. We also have the spectre of an even more powerful tier of the judiciary looming large on the constitutional horizon, when a Supreme Court is established as New Zealand's final court, and appeals to the Privy Council are abolished. This will further increase the political importance of judicial lawmaking. It is likely to bring increasing calls for greater judicial accountability, which judges may have to accept as a consequence of their increasingly public role. Because of the pervasive influence of the media, the large number of people affected by judicial decisions, and greater public scrutiny of all state institutions generally, the judiciary must also accept the responsibility of explaining what it is that the judiciary actually does.

IV PUBLIC CONFIDENCE

Public confidence is an essential concomitant of both judicial independence and accountability. As a former Australian High Court Judge noted, "what ultimately protects the independence of the judiciary is a community consensus that independence is a quality worth preserving."[67] But the community is not likely to protect what it does not understand. Explanations of the importance of judicial independence do not strike the same chord with the public as calls for increased accountability. Political criticism of judges can damage public confidence and undermine judicial independence.[68] Sadly, Hon Michael Kirby, who has written

[66] See, for example, Jonathan Milne "Judges Getting it Wrong says Goff" (3 August 2002) *Dominion Post* Wellington, 2.
[67] Sir Ninian Stevens "Judicial Independence-A Fragile Bastion" (1982) 13 MULR 334, 339.
[68] See Hon Justice Michael Kirby "Attacks on Judges-A Universal Phenomenon" (1998) 72 ALJ 599.

extensively on this issue,[69] was himself the subject of an allegation by a senator, who using parliamentary privilege, asserted that the judge had used an official Commonwealth car to pick up underage boys in Sydney's gay prostitute area. The evidence tendered was a logbook, which quickly proved to be a forgery. The senator, whose anti-homosexual views were well known, apologised and lost his cabinet post, but retained his senate job.[70] Unfortunately for the judge, he is as likely to be remembered for these allegations as he is for the undisputed contribution he has made to the Australian legal system.

As discussed above, it is difficult for judges to respond to such attacks, although a solid foundation of community confidence in the judiciary could go a long way towards lessening their impact. This requires the judiciary to be proactive and work towards building public confidence. As the Chief Justice of South Australia explains, he:[71]

> ...consider[s] that it is unrealistic today to say that public confidence will be maintained if the judiciary simply performs its judicial function properly and conducts itself appropriately. I believe that if we acknowledge that public understanding of the institution underpins public support, we should equally accept that it is our role to promote that public understanding.

Consistently with these sentiments, there are a number of developments pointing towards judicial recognition of the need for greater responsiveness towards the community.

A Talking to the Community

United States Supreme Court Justice Ginsberg has said that in carrying out their functions, judges participate in a dialogue with the other organs of government

[69] See, for example, Hon Justice Michael Kirby "Attacks on Judges - A Universal Phenomenon" (1998) 72 ALJ 599; "Of Judicial Independence" (1986) 60 Law Institute Journal 930; "Judicial Independence in Australia Reaches a Moment of Truth" (1990) UNSWLJ 187.
[70] Greg Ansley "State Censures Howard and Heffernan for Kirby Affair"(20 March 2002) *The New Zealand Herald* Auckland 3.
[71] Hon John Doyle "The Well-Tuned Cymbal" in Helen Cunningham (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, Sydney, 1997) 39, 41.

and with the people.[72] If this is so, then judges have a duty to ensure the dialogue is effective.

1 Judgments

Judgments are the principal method by which judges communicate. Published reasons for decisions are essential for the maintenance of an open system of justice. Unfortunately these reasons are often technical or obscure. Moreover they are not readily accessible to the non-lawyer member of the public. Kirby admits that by failing to provide user-friendly and public-friendly summaries, the judiciary are possibly bringing on "some of the confusion which they criticise so readily in others."[73] The Family Court has addressed this problem by establishing an informative and easy to use website that contains summaries of selected cases.[74] In general however, neither judgments nor summaries are readily available to the public in New Zealand. Some Court of Appeal judgments may be obtained via the Internet,[75] but decisions of other courts are only, in reality, readily accessible to those who are legally trained.

2 Extra-Judicial Speech

Judges are not prohibited from speaking outside the courtroom. It is asserted however, that although some Judges do speak about their role, their conversations have a random quality and rarely become part of a genuine public conversation.[76] Instead, as Levison says, they serve as "yet one more means by which "insiders" gain information (or sheer gossip) that is kept from the public at large."[77] This is undesirable. Judges should be seeking a wider audience than those politely listening

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[72] See Sanford Levinson "A Dialogue with the People, or a Juricentric View of the World? Why the Supreme Court Should be Televised When it Announces its Opinions" <http://writ.findlaw.com/commentary/20020723_levinson.html> (last accessed 27 July 2002).
[73] Hon Justice Michael Kirby "Attacks on Judges-A Universal Phenomenon" (1998) 72 ALJ 599, 606.
[74] Family Court of New Zealand <http://www.courts.govt.nz/family/ > (last accessed 28 September 2002).
[75] Australasian Legal Information Institute <http://www.austlii.edu.au/nz/cases/NZCA/ > (last accessed 9 September 2002); Brookers Court of Appeal Judgments <http://www.brookers.co.nz/legal/judgments/ (last accessed 9 September 2002).
[76] Levinson, above, 3.
[77] Levinson, above, 3.

to speeches at law society functions and academic institutions. There are some signs that this is occurring. It is no longer unusual to hear judges being interviewed on the radio or quoted in newspapers in regard to current issues in the justice system such as youth crime or trial delays. This practice is to be commended and encouraged as it gives the community an opportunity to gain first-hand and accurate information about the issues in question.

3 *Annual Report of the Judiciary*

Since 1995 the Chief Justice has produced a public annual report. The report provides information about the structure and composition of the courts and judicial organisation and workloads that is not readily available elsewhere.[78] It is said to be, "based on the acceptance of contemporary expectations of information about the work undertaken by public institutions,"[79] and is also seen as providing "an opportunity for heads of court to speak out on controversial matters occurring in the year under review."[80] The *Annual Report* is an example of a user-friendly and public-friendly method by which information about the judiciary can be disseminated.

4 *Judicial Communications Advisor*

The judiciary employs a judicial communications advisor who reports directly to the heads of courts and is responsible for assisting the media to accurately report judicial and legal matters. This is another positive means by which the judiciary can ensure that court decisions are accurately reported, and mistakes, either legal or factual, can be corrected. Accurate media commentary about the law and its personnel allow for a better-informed public. This in turn allows for criticism to be made on an informed basis. Kirby warns however, that there are dangers for the judiciary "in playing the media's game", as the two institutions will always have different purposes. Courts should not be endeavouring to cultivate public or political favour and moreover lack the experience and resources of the political branches of

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[78] *Report of the New Zealand Judiciary 1999* <http://www.courts.govt.nz/publications/Judiciary-report1999.pdf> (last accessed 8 July 2002).
[79] *Report of the New Zealand Judiciary 1999*, above, 2.
[80] Rt Hon Sir Thomas Eichelbaum " The Inaugural Neil Williamson Memorial Lecture: Judicial Independence Revisited" (1997) 6 Canta L Rev 421, 426.

government.[81] Notwithstanding these limitations, and the fact that the judicial communications advisor is not, and should not, be seen to be a "spin doctor," the judiciary is making a contribution to public understanding and acceptance of the justice system by ensuring accurate coverage of courts' activities.

B Judicial Appointments

The system of judicial appointments has become more transparent in recent years. Consultation with a variety of organisations about appointees' suitability, and expressions of interest from people interested in seeking appointment, are now an accepted part of a system that had previously appeared to be shrouded in secrecy. This visibility is also said to include the attributes seen as desirable in judges, and how the final selection is made.[82] A more open process improves the likelihood of diversity on the bench. Diversity is vital to ensure continuing public confidence. While a fully representative judiciary may not be possible, there is likely to be greater acceptance of the legal system by the public if the people making the decisions reflect the community they serve. Additionally, diversity brings more perspectives, which leads to more ways of seeing things and therefore more open-mindedness. This has the capacity to improve decision-making in today's more complex society.

The appointment of judges is a crucial factor in ensuring a high quality judiciary and is a topic in itself. In the context of this paper it suffices to state the obvious; that is the more successful the selection process is, the less likely judges are to later provide a cause for complaint. However it must be borne in mind that even the most rigorous appointment process will not ensure a judiciary whose members never behave inappropriately. This is the difference between the real judge and the ideal judge, and is described in this way:[83]

> One of the burdens of being a judge is that one is expected to rise above mere mortal status and dispense justice with an objectivity that borders on the divine. Independent from the pressures of everyday life and free of political influences, the judge is to

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[81] Hon Justice Michael Kirby "Attacks on Judges-A Universal Phenomenon" (1998) 72 ALJ 599, 606.
[82] Judge R L Young "Judicial Independence and Accountability in New Zealand" (1998) 45 DEC Fed Law 40, 44.
[83] A W MacKay "Judicial Ethics: Exploring Misconduct and Accountability for Judges" (1995) <http://www.dal.ca/~cjei/mackay.html> (last accessed 9 September 2002).

> resolve difficult legal disputes with the wisdom of a Solomon. This is the idealized version of the judge and is at best something to aspire to. It tends to obscure the human dimensions of the practical task of judging.

The human judge is the one who is appointed to office. Public and political recognition of this fact is helpful in determining appropriate responses to issues of misconduct when they arise.

C Judicial Education

The Institute of Judicial Studies was established in 1998 by a memorandum of understanding between the Chief Justice, the Chief District Court Judge and the Department for Courts who provide funding and support services. The purpose of the Institute is to provide professional development, promote judicial excellence, and foster an awareness of judicial administration, developments in the law, and social and community issues.[84] Education programmes and publications are aimed at enhancing judicial work, and have included judicial orientation,[85] mentoring, and cultural education such as Marae visits and Te Reo seminars. Judges are said to have enthusiastically embraced these professional development opportunities with continuing judicial education now being seen as "an accepted part of the landscape of judicial activity."[86]

Efforts by judges to educate themselves should improve the quality of decisions and behaviour, and will impact positively on public confidence when the judiciary can be seen to be cognisant of, for example, gender and cultural issues. The Institute is an excellent example of a method by which the judiciary can improve the standard of their work whilst maintaining independence from other branches of government. Historically judges were resistant to "training" as being destructive of their individual independence, but the Institute shows that this need not be the case. The Institute also shows informal judicial discipline in action in the form of peer

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[84] Institute of Judicial Studies *Annual Report 2000-2001*<http://www.courts.govt.nz/publications/ijs annualreport01.pdf> 4 (last accessed 25 September 2002).

[85] The Judicial Orientation Programme is conducted annually and includes sessions on judicial conduct, social context issues, courtroom management, judgment writing, sentencing, and bail.

[86] Institute of Judicial Studies *Annual Report*, above, 2.

pressure. As a now accepted part of the judicial role, it would presumably be difficult for an individual judge to refuse to participate.

D *Is There Room for Improvement?*

Public misinformation and ignorance about the judiciary remains a problem. While the measures discussed above have gone some way towards improving the community's knowledge of, and confidence in the judiciary, there is still room for improvement in New Zealand. It is often said that we have a high quality judiciary, but if this is so then the public needs to hear more about it, instead of hearing only about things that go wrong. The average member of the public cannot be expected to appreciate the subtleties of constitutional conventions that prevent parliamentarians criticising the judiciary.[87] Nor could they be expected to understand that a private rebuke from the Chief Justice and a promise by a misbehaving judge never to do it again is appropriate and effective discipline. For example, it is difficult for the public to appreciate the difference between the consequences for the average person of using a work computer to view pornography, and the consequences for a judge. The fact that a judge is not an employee of the government is not likely to provide a satisfactory explanation.

Kirby considers that the community's lack of understanding of the judicial role:[88]

> …may not be curable in mature adults. The remedy should start in the schools and through the media. It should not be confined to law faculties and learned institutes. Let it be a goal of the coming millennium that we re-teach the lessons of our constitutions and engender an informed appreciation of the judges and of their vital importance for the peaceful government of us all.

The Canadian Judicial Council has embraced this proposition, by recognising that

[87] In an interview last year former Chief District Court Judge Young expressed frustration with the public for "misapprehending almost everything about the system." See Rosemary McLeod "Judgment Days" (18 March 2001) *Sunday Star Times* Wellington C1.

[88] Hon Justice Michael Kirby "Attacks on Judges-A Universal Phenomenon" (1998) 72 ALJ 599, 607-608.

judges have a responsibility to explain what they do and how courts operate. A committee examined the judicial role in public information, and encouraged judges to undertake educational initiatives at all levels of the education system, address audiences representative of their communities and engage the media constructively about the reporting of justice issues. This was said to be consistent with the Council's *Ethical Principles for Judges*,[89] which encourage judges to actively support the principle of judicial independence by taking part in activities that will foster public understanding and accessibility of the law and legal processes. The Council cites the examples of Nova Scotia and Manitoba where judges and lawyers give speeches in secondary schools, classes are invited to attend trials, and teachers' kits on basic principles of the justice system have been introduced for primary schools.[90]

The New Zealand judiciary would do well to emulate these achievements. One-off efforts in New Zealand have been highly successful, such as a recent television documentary featuring a day in the life of a Family Court judge. However, a more concerted and continuing strategy would be required for any public education programme to be truly effective. Of course a considerable amount of time and resources would be required. Time is a major problem given a limited number of judges and ever-increasing workloads. Adequate funding would have to be found.

A timely opportunity for the judiciary to reach out to the public presents itself with the seemingly inevitable establishment of a Judicial Commission in New Zealand, an objective of which is said to be the promotion of public confidence.[91] This concept of reaching out cannot however, be confined to comfortable subject matter such as the operation of the justice system. Uncomfortable subjects, including judicial misconduct, must also be broached.

V IMPROVING RESPONSES TO JUDICIAL MISCONDUCT

Judicial appointments, accountability and administration are topical subjects. The establishment of a Judicial Commission has been proposed, and the Attorney-

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[89] Canadian Judicial Council *Ethical Principles for Judges* < http://www.cjc-ccm.gc.ca/english/ethic/e.pdf> (last accessed 22 September 2002).

[90] Canadian Judicial Council *Annual Report 1999-2000*, above, 26.

General has also commissioned an independent review on how judges are appointed, removed and managed.[92] This heightened scrutiny of the judiciary, by the public and politicians, is an inevitable development for a modern democracy that places a high value on the principle of open government. It is consistent with developments in similar jurisdictions, such as Australia and Canada. It may also in part be a consequence of a recent highly publicised episode of judicial misconduct.[93]

Because the transgressing judge is happily rare in New Zealand, the preliminary question that arises is whether there is in fact any need to improve the system of judicial accountability at all. Any attempt to prescribe formal procedures for dealing with judicial misconduct has the potential to pose an unacceptable threat to judicial independence. All misconduct below the threshold for removal is currently dealt with informally, and privately. The informal methods of discipline in current usage, such as the appeals system and criticism in the media, may be said to be as effective as it is possible to get, because it must be recognised that there are limits beyond which any system cannot go without compromising independence.[94]

However, judges today inhabit a different judicial landscape from that of their predecessors. It is arguable moreover, that part or perhaps all of the reason for the examples of judicial misconduct that have been seen in recent years, is that some judges are taking longer than others to recognise this fact, or in other words, to "get it." The process of "getting it" is an evolutionary one. There can be no instant solution. The new generation of judges who are being appointed now may be expected to have already "got it" vis-à-vis what modern society expects of their behaviour, both on and off the bench. Other judges who began their careers in different times may or may not take longer to "get it," but may also be expected to, and sooner rather than later, with the assistance of judicial education programmes.

Furthermore, all judges are of course human, and therefore make mistakes. Recognition and acceptance of this fact is growing. Informed commentators praised the recent admission by Justice Salmon that he made an error in applying the new

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[91] "Proposed Judicial Matters Bill" *Law Talk* 585 (1 July 2002).
[92] Vernon Small "Judges to go Under Spotlight" (3 September 2002) *New Zealand Herald* Auckland 1.
[93] The case of High Court Justice Fisher is discussed later in the paper.

sentencing legislation.[95] Instead of diminishing public confidence, this has the potential to increase it. The public can become better informed about what is involved in being a judge, such as making sense of difficult legislation.

Because continuing public confidence in the judiciary may now require a greater degree of accountability, thought should be given to addressing judicial misbehaviour that is more than minor, but below the very high threshold required for removal. Such behaviour will be rare, but when it occurs it has the potential to undermine the respect that the public has for the legal system. In the eyes of the community such judges are not accountable. They might quietly resign for ill health or other reasons, or they may not. In either case the impression of secrecy is given. The sole "death penalty"[96] sanction of removal has an appropriately very high threshold, so that it will only be used in exceptional circumstances.

A The Ministry of Justice Proposal: New South Wales Commission Model

The Ministry of Justice is proposing to develop a Judicial Matters Bill that includes the establishment of a Judicial Commission based on the New South Wales Judicial Commission.[97] The proposed Commission would be established by statute, comprise the heads of courts and members of the public, and consider complaints about all judicial officers. In appropriate cases it would report to the Attorney-General that Parliament consider the removal of a judge.

1 Statutory Background

The New South Wales Judicial Commission was established by statute in 1987,[98] as a result of allegations that a particular District Court Judge was noticeably lenient when sentencing offenders who were represented by a particular lawyer.[99] The

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[94] Sambhav N Sankar, "Disciplining the Professional Judge" (2000) 88 Cal L Rev 1233, 1237.
[95] Catherine Masters "I got it Wrong says Judge in Hammer Case" (5 August 2002) *New Zealand Herald* Auckland 1.
[96] Ed Ratushny "Speaking as Judges: How Far Can They Go?" (1999-2000) 11 Nat J Const Law 293, 311.
[97] See "Proposed Judicial Matters Bill" *Law Talk* 585 (1 July 2002) 6.
[98] Judicial Officers Act 1986 (NSW).
[99] Judicial Commission of New South Wales<http://www.judcom.nsw.gov.au/AnnRep99/history.shtml> (last accessed 10 September 2002).

Commission is independent of the executive,[100]and is responsible for judicial education, sentencing information, and the examination of complaints against judges. The Commission comprises six official members who are heads of benches, and four appointed members, one of whom is a legal practitioner, and three who are laypersons.[101]

2 Complaints Procedure

Any person may complain about a judge. The complaint must be in writing, and be verified by statutory declaration.[102] The Commission informs the judge concerned and conducts a preliminary investigation, after which it will either summarily dismiss the complaint,[103] classify the complaint as minor, or classify the complaint as serious.[104] A serious complaint is one, which if substantiated, could justify parliamentary consideration of removal from office. It must be referred to the Conduct Division, which comprises three judicial officers or two judicial officers and a retired judicial officer.[105] All other undismissed complaints are classified as "minor" and are referred to either the appropriate head of bench or to the Conduct Division.

The Conduct Division investigates the complaint and may convene a hearing in connection with the investigation. The hearing of minor complaints is conducted privately while serious complaints are heard in public, although discretion exists to conduct private proceedings in relation to a serious complaint.[106] The Conduct Division is statutorily obliged to report its findings. In the case of minor complaints a report is made to the Commission. The outcome of a successful minor complaint will be counselling of the judge by his or her head of bench, or "administrative arrangements within his or her court that are designed to avoid a recurrence of a problem."[107] Where the complaint is classified as serious, a report, setting out its conclusions, is made to the Governor. If the complaint is wholly or partially

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[100] Judicial Officers (Amendment) Act 1987(NSW).
[101] Judicial Officers Act 1986 (NSW), s5.
[102] Judicial Officers Act 1986 (NSW), s17(2).
[103] For example if it is a matter more properly dealt with by appeal, or is trivial or vexatious.
[104] Judicial Officers Act 1986 (NSW), s19.
[105] Judicial Officers Act 1986 (NSW), s21-22.
[106] Judicial Officers Act 1986 (NSW), s 24.
[107] New South Wales Judicial Commission *Annual Report 2001* <http://www.judcom.nsw.gov.au/AnnRep01/AR2001.pdf> 18-19. (last accessed 19 August 2002).

substantiated, and the Conduct Division believes that the matter may justify parliamentary consideration of the removal of the judge, the report is laid before both Houses of Parliament.

3 *Why This is an Unsuitable Model for New Zealand*

In relation to complaints, the Commission's function is only to investigate. It has no power to discipline a judge. Shetreet notes that the provision for a formal reprimand of judges was removed from the final Act.[108] The Commission admits that the statutory distinction between complaints about matters that could justify parliamentary consideration of removal, and all other complaints, can give rise to misunderstandings. This is said to be because complainants will often regard the matter as serious even if the complaint could not be considered as justifying parliamentary consideration of removal of a judge.[109]

With respect, this classification fails to provide any answer to complaints about behaviour that may in fact be far from minor, and therefore of legitimate concern, but may still not justify removal from office. This is a classification that any New Zealand Commission would do well to avoid. It trivialises what may be a complainant's valid cause for concern and therefore does not have the appearance of taking valid complaints seriously where the conduct in question would not warrant removal but is clearly inappropriate or improper.

New Zealand already has a *Judicial Complaints Process* that does, more informally, most of what the New South Wales Commission does with regard to complaints. A Commission would further formalise the complaints process and make it more visible and transparent, but would not in substance add to what is already in place. While the process that could lead ultimately to removal is clearly set out, this will be an extremely rare situation. The majority of complaints would be dismissed as being minor, and with the complainants being informed only that, although their concern was justified, the judge would not be removed. It is difficult to see how this

[108] See Shimon Shetreet "The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986" (1987) 10 NNSWLJ 4, 9.
[109] Judicial Commission of New South Wales *Annual Report 2001*, above, 19.

would enhance public confidence. Such a procedure may even have the effect of diminishing public respect in the judiciary, as the community may perceive a group of judges merely letting other judges off. Clipping the wings of an institution in this way ensures it will have only a limited role, and could be criticised as being mere window dressing.

B The Canadian Judicial Council and "Expressions of Disapproval:" A Better Model for New Zealand

1 Statutory Background

The Canadian Judicial Council (the Council) was established in 1971 by amendments to the Judges Act.[110] It consists of the chief justices and associate chief justices, chief judges and associate chief judges of all courts whose members are appointed by the federal government.[111]

The statutory objects of the Council are to "promote efficiency and uniformity, and to improve the quality of judicial service in superior courts and in the Tax Court of Canada."[112] The Council's work involves the continuing education of judges, developing consensus among Council members on issues involving the administration of justice, making recommendations on judicial salaries and benefits, and handling complaints against federally appointed judges.[113] The Judges Act and Council By-laws set up a procedure that may end in a recommendation from the Council to the Minister of Justice that a judge be removed from office.[114] As in New Zealand actual removal would be accomplished by an address of Parliament. The Council's role is to investigate complaints or allegations as a preliminary stage before removal upon an address of Parliament.

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[110] 1985 RS CJ 1.
[111] This makes for a total membership of 39. The number of federally appointed judges was 1029 as of January 2002. See the Canadian Judicial Council <http:// www.cjc-ccm.gc.ca/english/about_cjc.htm> (last accessed 20 July 2002).
[112] Judges Act RS 1985 CJ 1, s60(1).
[113] Federally appointed judges are those of the equivalent of the High Court and Court of Appeal of the provinces, and the judges of the Tax Court of Canada, Federal Court of Canada, and Supreme Court of Canada.
[114] Judges Act 1985 RS CJ 1, s 65(2).

There are two ways in which the inquiry process may be initiated. The Council must undertake a formal inquiry into a judge's conduct if requested to do so by the Minister of Justice of Canada or by a provincial Attorney-General.[115] Otherwise the Council has a discretion to investigate any complaint or allegation made in respect of a federally appointed judge.[116] This, in practice, is the usual route, as most complaints come from members of the public.

The early stages of the process are governed by the Council By-Laws.[117] Every complaint received by the Council is referred to the Executive Director.[118]Complaints must be in writing and refer to the conduct of a judge subject to the Act.[119] Council members are also required to, in effect, initiate a complaint themselves in situations where they believe the conduct of a judge may require the attention of the council.[120] The Executive Director sends a copy of the complaint to the Chairperson of the Judicial Conduct Committee for review.[121] The Chairperson reviews each complaint and decides if any further action is required. The judge and the judge's chief justice may be asked for their comments, or the Chairperson may make further inquiries.[122] The Chairperson may then close the file and advise the complainant with an appropriate reply if the matter is trivial, vexatious or without substance,[123] or if the conduct of the judge is inappropriate or improper but the matter is not serious enough to warrant removal.[124] If the judge recognises that his or her conduct is inappropriate or improper, the Chairperson who closes the file may express disapproval of the judge's conduct.[125]

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[115] Judges Act RS 1985 CJ 1, s 63(1).
[116] Judges Act RS 1985 CJ 1, s 63(2).
[117] Canadian Judicial Council By-Laws <http://www.cjc-ccm.gc.ca/english/bylaws.htm> (last accessed 2 September 2002). Section 61(3) of the Judges Act authorises the Council to make by-laws in respect of the conduct of inquiries.
[118] Canadian Judicial Council By-Laws, s 45.
[119] Canadian Judicial Council By-Laws, s 43.
[120] Canadian Judicial Council By-Laws, s 44(1).
[121] Canadian Judicial Council By-Laws, s 45.
[122] Canadian Judicial Council By-Laws, ss 47-48.
[123] Canadian Judicial Council By-Laws, s 50(1)(a). The Council notes that by far the largest proportion of complaints are without foundation and are dealt with in this way.
[124] Canadian Judicial Council By-Laws, s 50(1)(b).
[125]Canadian Judicial Council By-Laws, s 50(2).

If the Chairperson does not close the file, it is referred to a Panel of up to five members of the Council for further review. The Panel would comprise of Chief Justices of courts other than that of the judge who is the subject of the complaint.[126] The Panel may close the file on the same basis as the Chairperson, although they may express disapproval of the judge's conduct, whether or not the judge has acknowledged its impropriety.[127] Otherwise they may recommend to the Council that a formal inquiry be undertaken pursuant to section 63(2) of the Judges Act.[128] The Council then considers the Panel's report and any written submissions received by the judge. It may decide that no formal inquiry should be undertaken because the matter is not serious enough to warrant removal. The Council would then advise the complainant and the judge, including an expression of disapproval of the judge's conduct if the circumstances required.[129] Or the Council may decide that an investigation be held because the matter is serious enough to warrant removal.[130]The Inquiry Committee reports its findings to the Council, including its opinion on whether the Council should recommend removal of the judge from office. Finally the Council is required to review the report of the Inquiry Committee and report its conclusions to the Minister of Justice under section 65 of the Judges Act.[131]

3 *"Expressions of Disapproval"*

As in New Zealand and New South Wales, the only legal sanction for misconduct by a superior court judge in Canada is removal from office following an address of Parliament. Notwithstanding that the plain words of the Judges Act do not give the Council any disciplinary powers, the Council has said that it, "accepts a duty to explain its thinking. In this context there may be an expression of disapproval or criticism of the behaviour that prompted the complaint."[132] This practice has been recognised in the Council By-Laws since 1998. It has been justified in a legal opinion to the Council which draws a distinction between a reprimand being a formal sanction

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[126] Canadian Judicial Council By-Laws, ss53-54.
[127] Canadian Judicial Council By-Laws, s55(1)(a).
[128] Canadian Judicial Council By-Laws, s 59.
[129] Canadian Judicial Council By-Laws, s 59(a).
[130] Canadian Judicial Council By-Laws, s 59(b).
[131] Canadian Judicial Council By-Laws, s 71.
[132] Canadian Judicial Council *Annual Report 1992-1993* <http://www.cjc-ccm.gc.ca/english/annual_reports.htm> 10.

requiring statutory authority, and an expression of disapproval which is a characterisation of the judges conduct conveyed to the judge and to the complainant.[133] In other words, after a Panel has investigated a complaint and concluded that the judge's behaviour was inappropriate, it reports its finding to the judge and to the complainant.

The statutory objects of the Council support this practice, as does the public interest in having complaints taken seriously. This is because, as Russell has pointed out:[134]

> Society is inadequately protected from judicial misconduct if the removal process is the only way of sanctioning judges…If a judiciary is to be reasonably accountable to the public it serves, there must be ways and means of responding to complaints other than the "death penalty" of removal.

Furthermore, as Friedland's study of the Canadian Judiciary noted, "[i]n most cases, the matter will have already been public and the failure to comment publicly on the conduct would create even more undesirable adverse comment about the judiciary."[135] Thus expressions of disapproval are a pragmatic approach to the issue of judicial misconduct. Otherwise, as Ratushny says, "complainants with justified (but not of "death penalty" magnitude) concerns would simply have to be informed that removal was not warranted."[136] This seems to be precisely the problem with the new South Wales approach.

It can be noted however, that the words of the New South Wales Act do not rule out the ability of their Judicial Commission to express disapproval of a judge's conduct that has been the subject of a complaint. Section 27 instructs the

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[133] See Martin L Friedland *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council, Ottowa, 1995) 95, citing D M Goldie "Legal Opinion for the Judicial Conduct Committee" (23 March 1990) and *Letter of John J Robinette to Associate Chief Justice MacKinnon* (27 April 1982) printed in "Case Report: *Report and Record of the Committee of Investigation into the Conduct of the Hon Mr Justice Berger and Resolution of the Canadian Judicial Council*" [1983] 28 McGill LJ 379, 434-436.

[134] P H Russell *The Judiciary in Canada: The Third Branch of Government* (McGraw-Hill Ryerson Ltd, Toronto, 1987) 3-4.

[135] Friedland, above, 139.

[136] Ed Ratushny "Speaking as Judges: How Far Can They Go?" (1999-2000) Nat J Const Law 293, 311.

Commission, in regard to substantiated minor complaints, to either inform the judicial officer involved or to decide that no action need be taken.[137] If the New South Wales Commission accepted a duty to explain its reasoning in the way the Canadian Judicial Council has, it could presumably characterise the judge's conduct as unacceptable, even though it did not warrant consideration of removal from office.

Whether an expression of disapproval is characterised as a reprimand or as an explanation of Council reasoning, it must operate as a serious sanction in a profession where reputation and respect are highly valued. Accordingly the Council uses this power in a circumspect manner. The By-Laws have been drafted in a manner that restricts their use. At the initial stages of the complaints procedure the Chairperson of the Judicial Conduct Committee may only express disapproval if the judge recognises that his or her conduct is inappropriate or improper. Otherwise the expression of disapproval must come from a Panel consisting of three or five members. As Ratushny explains there will have been a number of meetings, a review of the complaint and the response of the judge and his or her chief judge, together with the results of any further inquiries that were undertaken.[138] Friedland, who inspected the Council's complaints files, confirmed this careful approach, stating that the use of such public criticisms is "never taken lightly."[139]

The Canadian Judicial Council has expressed its disapproval of judges' conduct sparingly and, for the most part, effectively over the past twenty years. The following examples illustrate the evolution of this mechanism from the "growing pains" of the Berger affair to a recent case that shows an expression of disapproval as a constructive approach to judicial discipline.

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[137] Judicial Officers Act 1986 (NSW), s27.
[138] Ratushny, above, 314.

(a) Justice Berger

In 1982, after a complaint from a judge, the Council strongly criticised Supreme Court of British Columbia Justice Berger for his outspoken comments regarding the omission of Aboriginal rights protection, and a veto for Quebec in the Constitutional Agreement reached in 1981.[140]

By today's standards, this response, though short of removal, was indeed harsh, and probably wrong. Justice Berger was commenting on a broad social issue that today would probably be seen as crucial. Given his extensive track record on Aboriginal rights, his public statement did not reveal anything that was not already known about his views. Furthermore Justice Berger did not accept that the Council had any jurisdiction to reprimand him. He resigned a year later.

The Berger affair provides a valuable lesson in the pitfalls of an intermediate sanction beneath removal from office. If the subject of the complaint does not accept that he or she has transgressed, and in this case, even the jurisdiction of the disciplinary body to issue a reprimand, then the whole process becomes damaging for the judiciary. In this case the Judicial Council appeared to have been pressured into applying the formal investigative machinery by the Prime Minister of the time who was highly critical of the judge's comments and expressed the hope that the judiciary would "do something about it."[141] Therefore, the problem with the Berger case was not so much that the Council criticised a judge, but that the criticism of this judge at this time was inappropriate, especially in the context of the significant constitutional change that was occurring in Canada.

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[139] Martin L Friedland *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council, Ottowa, 1995) 139.
[140] Case Report *Report and Record of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger and Resolution of the Canadian Judicial Council* [1983] 28 McGill LJ 378.
[141] See Friedland, above, 98-102.

(b) The Donald Marshall Jr Reference

The Marshall controversy arose from comments made by the Nova Scotia Court of Appeal in a judgment quashing the murder conviction of Donald Marshall Jr who had spent over 10 years in prison for a crime he did not commit. In essence the court blamed him for being the author of his own misfortune. A Royal Commission appointed to investigate the wrongful conviction was highly critical of the performance of the Court and the wording of its judgment in acquitting Marshall. One result of this criticism was a complaint to the Canadian Judicial Council and the formation of an Inquiry Committee, which unofficially reprimanded the Appeal Court judges, but did not call for their removal from the bench.[142]

The Inquiry Committee report is an important precedent in the jurisprudence of the Council. It established the test for removal, applied it to judicial speech in reasons for judgment, and strongly expressed disapproval of conduct in circumstances where it was improper but did not warrant removal. Reactions were mixed. Some said that it was no more than "wrist slapping," and that the Inquiry Committee must have highly offended the judges who were criticised, and would be seen as traitors in the world of judicial etiquette.[143] Others said this was bold criticism that contributed to instilling public confidence in the judiciary.[144] MacKay, who has written extensively on this subject, saw a great improvement in the way the Council had conducted the inquiry, by holding public hearings, delegation to a committee that included two non-judicial members and the establishment of a fair process for all.[145] The reaction of Donald Marshall Jr himself is most telling. He had, through counsel, taken the position that he did not want the Council to recommend removal of the judges from office, provided they could be censured. He also commented publicly after the report

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142 *Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia* (Canadian Judicial Council, August 1990).
143 M E Turpel, "The Judged and the Judging: Locating Innocence in a Fallen Legal World" (1991) 40 UNBLJ 281, 286.
144 AW MacKay "Judicial Free Speech and Accountability: Should Judges Be Seen and Not Heard?" (1993) 3 Nat J Const Law 159, 204-205.
145 MacKay, above, 206-207.

was released, stating that he was pleased with the harsh criticism the judges received.[146]

(c) Justice Barakett

It is said that, "if the [Marshall] Report was a treacherous aberration in the judicial world in 1990, it has certainly established an approach for dealing with judicial conduct by the Canadian Judicial Council that must now be accepted as 'mainstream'."[147] The recent expression of disapproval of Superior Court of Quebec Justice Barakett's conduct illustrates this proposition nicely.

Justice Barakett was the subject of a complaint over comments he made in the course of custody proceedings that were derogatory to Aboriginal culture.[148] The Panel found his conduct, while improper, was not serious enough to warrant removal. Material to this decision was the expression of remorse from the judge, including a public letter of apology in which he said he recognised that his comments had been disparaging and apologised for the hurt they caused.[149] His willingness to enrol in training courses to improve his understanding of aboriginal culture, and the finding that the comments did not affect the outcome of the case in which they were made were also factors considered by the Council. The Council said there was no evidence of malice and therefore the public could be expected to have confidence "that you have learned from this experience…"[150]

The Panel's letter to the judge pointed out that the conduct proceedings were at a remedial rather than punitive stage. Therefore if it could be demonstrated to the complainant that the complaint was addressed, if the judge was capable of learning from his or her misconduct and avoiding it in future, and if the public can maintain

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[146] Ed Ratushny "Speaking as Judges: How Far Can They Go?" (1999-2000) Nat J Const Law 293, 336.

[147] Ratushny, above, 334-335.

[148] Canadian Judicial Council Media Releases "Panel Disapproves of Conduct of Mr Justice Barakett" (26 July 2002) <http://www.cjc-ccm.gc.ca/english/news_releases/2002_07_26.htm> (last accessed 20 September 2002).

[149] *Letter of Hon Mr F G Barakett to Canadian Judicial Council* Canadian Judicial Council (3 July 2002)<http:// www.cjc-ccm.gc.ca/english/news_releases/2002_07_26%20attach1%20attach.htm> (last accessed 20 September 2002).

[150] *Letter of Canadian Judicial Council to Hon Mr F G Barakett* (24 July 2002) Canadian Judicial Council <http://www. cjc-ccm.gc.ca/english/news_releases/2002_07_26%20attach1.htm> (last accessed 20 September 2002).

confidence that complaints about judicial conduct are taken seriously, then the removal of a judge may be neither necessary nor desirable. Because of publicity surrounding the complainants' letters to the Council, the Council authorised public release of its letter to the judge.

While this complaint was under consideration by the Panel, the Council received a second complaint about the judge involving comments he had made in another custody hearing. The Vice-Chairperson of the Judicial Conduct Committee dealt with this complaint by expressing disapproval of the judge's comments in a separate letter to the judge, which the Council also made public.[151]

5 *Do "Expressions of Disapproval" Undermine Judicial Independence?*

The Council admits that the complaints process "inevitably risks exposing judges to unjust accusations and unwarranted public questioning of their character."[152] This is particularly so when the complaint is made public but is later found to be unjustified, since the finding will inevitably not receive the publicity that the original accusation did, and judges cannot refute such accusations publicly. However the Council says this merely "underscores the importance of providing a process that respects judicial independence but is also fair and equitable."[153] This is to be achieved by giving complainants an opportunity to have their concerns reviewed, while assuring a prompt and fair resolution for the subject of the complaint. The complaint can only be made public by the complainant. In such a case the council will generally issue a news release when closing the file.[154]

Because expressions of disapproval have developed from within the judiciary and do not involve the other branches of government, the loss of overall judicial independence is minimised. There is however, a loss of judges' internal independence resulting from this disciplinary mechanism, as individual judges are subject to their

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[151] *Letter of Canadian Judicial Council to Hon Mr F G Barakett* (24 July 2002) Canadian Judicial Council <http://www. cjc-ccm.gc.ca/english/news_releases/2002_07_26%20attach2.htm> (last accessed 20 September 2002).

[152] Canadian Judicial Council *Annual Report 2000-2001*<http://www.cjc-ccm.gc.ca/english/annual_reports/2000-2001_E.pdf> (last accessed 20 September 2002) 10.

[153] Canadian Judicial Council *Annual Report 2000-2001*, above, 10.

[154] Canadian Judicial Council *Annual Report 2000-2001*, above, 10.

conduct being criticised by other judges. But since judicial independence exists to ensure public confidence in a legal system that requires voluntary compliance with decisions, this modest loss of independence by the individual judge is a fair sacrifice to make, if public confidence in the judiciary as a whole is enhanced. The acceptance of expressions of disapproval by the Judiciary in Canada may be owed to the fact that they have evolved from the Judiciary, rather than being imposed by statute, as well as the restrained manner in which they have generally been used.

It is beyond question that it is desirable to have an appeal system to correct legal error. It is equally important to have processes of accountability that may deter or expose the judge who makes rude, insensitive, racist or sexist remarks, or who engages in conduct off the bench that may threaten the legitimacy of the judiciary as a whole. Arguments have been made that Judicial Commissions and complaints procedures are undesirable because they introduce hierarchical patterns into the judiciary.[155] Such arguments fail to recognise that the judiciary is intensely hierarchical by its very nature. The judiciary operates on the basis that judges will respect the judgements of their peers, adhere to precedent and accept orders from superior courts. This is very important to the maintenance of a fair justice system, since other branches of government cannot review a judge's decision in a case. As Sankar puts it, "The popularly imagined independent judge is slavishly deferent to his superiors because the judicial monopoly on legal decision making presupposes his hierarchical behaviour."[156]

In any case the benefits of having an expression of disapproval as part of the system of judicial accountability outweigh a small loss of individual judicial independence. The public is reassured that troubling judicial behaviour is taken seriously, and the response of a Judicial Commission provides guidance for future situations. This may have the ability to lessen suspicion and scrutiny of the judiciary from the public and from the other branches of government since there is less to be suspicious of when it is known in advance what sort of behaviour is unacceptable and how it will be dealt with. Therefore greater judicial accountability may lead to greater

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[155] Shimon Shetreet "The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986" (1987) 10 UNSWLJ 4, 11.
[156] Sambhav N Sankar "Disciplining the Professional Judge" (2000) 88 Cal L Rev 1233, 1240.

judicial independence, which benefits not only the judiciary, but also the community and the rule of law itself.

The remedial rather than punitive function of an expression of disapproval ensures that the judge can learn from the mistake and reduce the likelihood of recurrence of the behaviour that was the subject of the complaint. As the case of Justice Barakett showed, the fact that he acknowledged the inappropriateness of his conduct and apologised had a bearing on the outcome. In other words he "got it." This is in contrast to the position taken by the judges in the Marshall case who felt their comments were completely justified. The fact that they did not "get it" is said to be part of the reason that the council so strongly disapproved of the conduct. If they had acknowledged their insensitivity and expressed regret, Ratushny says it is doubtful that removal would have even been considered, and the expression of disapproval might have been less severe.[157]

C Expressing Disapproval of New Zealand Judges

With the high likelihood of the establishment of a Judicial Commission in New Zealand in the near future, expressions of disapproval could be incorporated into the complaints system that will be a part of a Commission's function. Thought would need to be given to the composition of a complaints committee. There is no reason why it must be comprised solely or predominantly of chief judges as in Canada. In this respect the New South Wales Commission is the preferable model as members include laypersons and can include retired judges. The addition of non-judicial members is very important for public confidence and is already part of the present complaints system. Lessening the numbers of chief judges involved in the complaints process is also desirable to meet concerns that undesirable hierarchical patterns will be introduced into the judiciary.[158]Friedland suggested, in the Canadian context, that it would be desirable to involve puisne judges, in order to give them a greater stake in

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[157] Ed Ratushny "Speaking as Judges: How Far Can They Go?" (1999-2000) Nat J Const Law 293, 338.

[158]See Shimon Shetreet "The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986" (1987) 10 UNSWLJ 4; and Hon Mr Justice M H McLelland "Disciplining Australian Judges" (1990) 64 ALJ 388.

the discipline process, and to ensure it is not solely the chief justices who are making the decisions.[159]

An important question arises as to whether expressions of disapproval should be formally provided for by legislation, or whether the Canadian approach should be taken, whereby a Judicial Commission would establish the practice pursuant to bylaws, the making of which is authorised by the empowering Act. The beauty of the Canadian approach is that it is pragmatic. There is no need for argument about the constitutionality or not of reprimanding judges. Instead of being a procedure foisted on the judiciary by other branches of government, it is a natural result of a complaints procedure in which an investigation takes place and the reasons are stated. This sort of pragmatism fits neatly with New Zealand constitutional practice. Moreover, judges may be more likely to accept the existence of expressions of disapproval, as the reasoning of a judicial commission who has investigated a complaint, than they would a formal reprimand imposed by statute.[160]

Three examples of judicial misconduct in New Zealand within the last ten years illustrate how the practice of expressing disapproval of a judge's conduct could have provided a better response to these situations, both from the point of view of the community and of the judiciary.

1 Judge Beattie

District Court Judge Martin Beattie was one of two judges who were charged with intent to defraud in respect of travel expense claims. The other judge pleaded guilty and resigned. Judge Beattie pleaded not guilty and successfully defended the charges. When the judge wished to resume judicial work the Minister of Justice sought the opinion of the Solicitor-General on whether he could commence

[159] Martin L Friedland *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council, Ottowa, 1995) 138.
[160] See Shetreet, above, 9, where he notes that the provision for a formal reprimand of judges was removed from the final Judicial Officers Act 1986 (NSW).

proceedings for the judge's removal under section 7 of the District Courts Act on the grounds of misbehaviour.[161]

The Solicitor-General determined that "misbehaviour" was, "conduct that is so morally wrong and improper that it demonstrates a judge lacks the integrity to continue to exercise judicial office."[162] A broader interpretation was rejected because of the constitutional requirement that the power of removal be limited so as to protect the judiciary from executive interference. Accordingly a mere failure to be above suspicion was not enough. The Solicitor-General rejected a test of public confidence in the administration of justice as a benchmark of judicial misconduct. The end result was that, in the Solicitor-General's opinion, the Minister could not recommend removal, as the statutory grounds were not made out given the previous criminal acquittal.

This finding was criticised. Joseph said that, "the power to remove a judge is necessary for preserving public confidence in the administration of justice and this need offsets the value of judicial independence."[163] While this is true, a public confidence test without more too closely ties removal to current public opinion. Additionally the public may be too easily offended by any judicial misconduct at all, especially if the full facts and constitutional issues involved are not known or understood. The Canadian test for removal as established by the Marshall Inquiry Committee is a test of public confidence but with a very high threshold. The question to be asked is:[164]

> Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?

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[161] J J McGrath *Opinion to the Minister of Justice, Hon Doug Graham, on whether Proceedings might be Instituted under S7 of the District Courts Act 1947 to Remove Judge Beattie from the Bench,* 1 September 1997 cited in Philip Joseph "Constitutional Law" [1998] NZ Law Rev 198, 200.
[162] McGrath, above, para 4.
[163] Philip Joseph "Constitutional Law" [1998] NZ Law Rev 198, 200.
[164] *Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia* (Canadian Judicial Council, August 1990) 27.

Even this test of public confidence may not have been satisfied here. Although the judge's behaviour could be said to have been destructive of the concept of judicial integrity, it could not necessarily also be said to have been destructive of impartiality and independence.

Accepting the Solicitor-General's finding that the Minister could not recommend removal, it would have then been an ideal case for a public expression of disapproval of the judge's conduct from an appropriate body. The Judge acted improperly. He had admitted as much, but said he had acted honestly in the genuine, if mistaken, belief that he was entitled to make the overnight allowance claims. The jury must have had a reasonable doubt that there was dishonest intent, and their finding must be respected. But the fact remained that the judge made overnight travel claims when he stayed at home. At the very least this behaviour raises questions of ethics. A public expression of disapproval of the judge's behaviour would have assured the community that the judiciary did not approve of such behaviour. Coupled with an explanation of why judges must be very difficult to remove from office, it would also have served a valuable educative purpose.

In reality it seems that informal discipline took over, as the Chief District Court Judge, by a "coincidental"[165] amendment to the District Courts Act, was empowered to direct in which jurisdiction a judge should sit. Judge Beattie was, arguably, relegated to the Accident Compensation Review bench and has never sat in open court again. It was also rumoured that his brother and sister judges shunned him. But this does not represent a principled approach to matters of judicial accountability, being instead an ad hoc method of ensuring what must have been thought by the judiciary to be the just and desirable outcome. The public was merely left to speculate as to whether Judge Beattie's fate was the Judiciary's idea of punishment.

2 *Justice Morris*

Justice Morris caused a public outcry when, during the course of summing up in a rape trial, he said that, "…if every man throughout history had stopped the first

[165] R L Young "Judicial Independence and Accountability in New Zealand" 45-DEC Fed Law 40, 46.

time a woman said no, the world would be a far less exciting place."[166] While it was pointed out that the statement is less egregious when understood in the context of the particular trial, it nevertheless remains clearly unacceptable. The Chief Justice unusually, and publicly, commented that the judge's remarks were inappropriate. He later said, "the public is entitled to expect the highest standards from judges, and this kind of event is damaging to confidence in the judiciary."[167]

This is, in effect, an expression of disapproval in practice in New Zealand. A public censure by the Chief Justice informs the community that the judiciary does not approve of such behaviour. This appropriate response would have been further strengthened had it come from an official body such as a Judicial Commission. Additionally, since an expression of disapproval serves a remedial function, a response from the transgressing judge would have reassured the public that such behaviour would not be repeated.

3 Justice Fisher

When, earlier this year, the Prime Minister said that High Court Justice Robert Fisher's use of the Internet to access pornography raised issues of personal judgment and the monitoring of judges behaviour, she was undoubtedly correct.[168] She was also undoubtedly breaching the constitutional convention that politicians do not pass comment on the judiciary. Six years previously, when Justice Morris made his now infamous remarks, the Minister of Justice had declined to comment for this very reason. The convention is, as Joseph puts it, "codified"[169] in the *Cabinet Manual*, which states that: [170]

> Ministers should not express any views that are likely to be publicised where they could be regarded as reflecting adversely on the impartiality, personal views or ability of any judge.

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[166] Wendy Murdoch "Judiciary Deals With Controversy" (3 July 1996) *Evening Post* Wellington 1.
[167] Murdoch, above, 1.
[168] See, for example, "Cabinet to Discuss Sex-Site Judge" (18 February 2002) *The New Zealand Herald* Auckland 3.
[169] Philip Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 303.
[170] *Cabinet Manual* (Cabinet Office, Department of the Prime Minister and Cabinet, Wellington, 2001) para 2.115.

As some media commentators pointed out, the correct response from the Prime Minister would have been a statement to the effect that, since the Chief Justice had dealt with the matter as she saw fit, it would be improper to comment further.[171]

The Chief Justice had dealt with the matter more than a year previously by reprimanding the judge. Fisher J is understood to have acknowledged his actions were inappropriate, and apologised, with an undertaking not to engage in such behaviour in future. When the incident came to light the government sought a Crown Law Office opinion on whether or not the judge could be removed. After the report concluded there was nothing illegal in Fisher J's actions, the government stepped back from the affair. Although there were some calls for his resignation, from the public and from politicians, the judge did not resign.

This is precisely the type of situation where an expression of disapproval of the judge's conduct by an independent judicial body would have been appropriate and desirable. While informal discipline was meted out to the judge in private, a more formal censure would have assured the public that the judiciary expects higher standards of its members than the standard of the judge's conduct on this occasion. It may also have discouraged damaging political comment, as there would have been little for politicians to usefully add. The public would have had the opportunity of learning why the judge could not and should not be removed, while being assured that although he had transgressed, he could properly continue in his judicial role, since he had had the opportunity of learning from his mistake.

D Judicial Code of Conduct

The imposition of a sanction other than removal makes the formulation of an express standard of conduct essential. Judges who may face a variety of penalties deserve to know the types of behaviour that could result in sanctions. Codes of Conduct provide this type of information. They act as a guide about what is and is not acceptable behaviour. If judges engage in improper behaviour, they cannot claim to be

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[171] Editorial: Political Action on Judge Disturbing (19 February 2002) *The New Zealand Herald* Auckland 2.

unaware their behaviour is inappropriate if the standards are expressly set out in a code. Thus a code of conduct is a mechanism for preventing unacceptable behaviour, since it may be more difficult in an increasingly complex society for the individual judge to identify and define the standard of behaviour to which he or she should adhere. Thomas indicates that one of the challenges that judicial ethics faces is the lack of a forum for discussion: [172]

> In the absence of known criteria, one tends to approach questions of conduct from a personal standpoint. Perhaps judges hesitate to discuss this topic because discussion may invite scrutiny of the judge's own conduct, values and taste; and there is grave danger of treading on the sensitivity of other judges.

Judges, especially in smaller centres, may work in relative isolation and thus lack the opportunity to regularly communicate with their peers. This prevents the exchange of experience, information and guidance. Unwritten conventions that may have governed in the past may not be as easy for the more diverse and numerous judges of today to access. The development and implementation of a judicial code of conduct could provide an opportunity for discussion within the judiciary, without individual judges feeling they are under attack.

A judicial code of conduct also provides a standard against which to assess judicial behaviour. The public benefits from gaining an understanding of the high ethical standards to which a judge is held. Educating the community about the role of judges and making judges accountable for their conduct are enhanced as vital aspects of maintaining public respect for the judiciary. By following ethical guidelines a judge's behaviour is more likely to accord with what the public expect of a judge. This can only increase public confidence. Having standards by which to measure judicial behaviour shows the public whether or not the judges are achieving these standards.

The argument can be made that codes of conduct interfere with judicial independence. A more constructive view is that the judiciary itself most appropriately formulates a code of conduct, and it is not a legislative document imposed on them. It

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[172] Hon Justice Thomas AM *Judicial Ethics in Australia* (The Law Book Co Ltd, Sydney, 1988) 5.

has been suggested that "guidelines" may be a better description than "code," which has prescriptive connotations.[173]

Whether the term code or guidelines or principles is used, the establishment of a judicial code of conduct must be seen as inevitable. A United Nations draft international code has been formulated by a high level judicial group drawing on codes that have already been adopted in many parts of the world.[174] This has been done in the hope that it will "stimulate those countries that have not yet adopted such an approach."[175] The international code is expected to be highly influential, although it may take a decade or more before the process of consideration by various jurisdictions is completed and the final code is recommended to the United Nations.[176]

Formulation of a code of conduct would be a natural activity for the proposed Judicial Commission in New Zealand. Canada again provides a worthy example for the New Zealand judiciary to follow. The Canadian Judicial Council published *Ethical Principles for Judges* in 1998.[177] Furthermore the Council agreed at the same time to the establishment of an Advisory Committee to offer advice to judges seeking assistance in applying the *Principles* to specific problems. Therefore the *Principles* not only offer general guidance to judges, but also a mechanism that may prevent judicial misconduct by steering judges away from potentially controversial situations.

E Changing the Convention

This paper has advocated criticism of judicial misconduct by the judiciary. But is there any role for the other branches of government? The public expects leadership from their elected representatives when matters of public concern such as the integrity of the judiciary arise. Furthermore it seems odd if an example of judicial misconduct is in the public arena, and the media may comment, but the elected representatives may not. It has been noted above that sometimes the convention proscribing executive

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[173] Hon John Doyle "Judicial Standards" Contemporary Constraints on Judges - The Australian Experience" (2001) 75 ALJ 96, 104.
[174] See Hon Justice Michael Kirby " A Global Approach to Judicial Independence and Integrity" (2001) 21 UQLJ 147, 150-159.
[175] Kirby, above, 149.
[176] Kirby, above, 148.
[177] Canadian Judicial Council *Ethical Principles for Judges* < http://www.cjc-ccm.gc.ca/english/ethic/

comment on the judiciary is ignored, with the result that public confidence in the judiciary may be damaged. There may also be times when the convention is ignored but no real damage is caused. There is a difference between abuse and criticism. No one would argue that politicians are unable to comment generally on matters involving the judiciary; therefore it may fairly be argued that the convention as presently understood may be too wide.[178]

The convention relating to the need for Ministers to respect judicial integrity and independence is one of a number of conventions that "find their way" into the *Cabinet Manual* mainly because they are not written out elsewhere, besides constitutional textbooks.[179] In the same way as the 2001 *Cabinet Manual* recognised and declared the new form of the convention relating to collective responsibility after the Labour-Alliance coalition agreement included an "agree to disagree" process,[180] it could recognise a change in the convention relating to Ministerial comment on the judiciary. A change could allow Ministers to comment on matters of public concern that relate to the judiciary, including judicial misconduct. This is precisely what the Prime Minister did in relation to Justice Fisher, and it could be suggested that if the Executive does not consider itself bound by this convention, then it may have already changed.

Although superficially there appears to be nothing wrong with changing this convention, comment about the judicial branch from the political branches remains problematic. This is, to a large extent, because such comment is likely to be made in time for the evening news instead of being made once all the facts are ascertained. The Fisher case clearly illustrates the problems. For example, as soon as Justice Fisher's activities became public, Ministerial comments about the judge were quickly made. And as the media reported, "not to be outdone, the Opposition …called for Justice Fisher's suspension…"[181] Then utter silence followed after a report concluded

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e.pdf> (last accessed 22 September 2002).

178 See Andrew P Stockley "Judicial Independence: The New Zealand Experience" (1997) 3 Aust J Legal Hist 145, 168-169.

179 Elizabeth Mcleay "What is the Constitutional Status of the New Zealand Cabinet Office Manual?" (1999) 10 Public Law Rev 11, 12.

180 See Duncan Ferrier *Collective Responsibility and the Cabinet Manual: New Zealand "Recognises and Declares" a Change* (LLM Research Paper, Victoria University of Wellington, 2001).

181 Tracy Watkins "Three More Judges in Net Sex Scandal" (19 February 2002) *The Dominion* Wellington 1.

that the judge's behaviour would not warrant removal from office. This is confusing for the public. It further damages public confidence in the judiciary, as the public has heard criticism of a judge's behaviour from the political branches of government, silence from the judiciary, and no action that appears to have been taken in relation to the misconduct.

As this case shows, once a comment emanates from the government, the opposition also feels the need to speak out. This has the potential to become an unedifying spectacle in the MMP environment, if the many opposition parties, all of which are seeking to differentiate themselves from the government and from each other, add their opinions. Likewise at election time, when the law and order debate inevitably rears its head, the judiciary becomes an easy target for politicians keen to increase their share of media coverage.

If the Executive feels the need to speak out about judges, because it is an issue of public importance that judges are not being held accountable for inappropriate behaviour, then the solution is to improve the system of judicial accountability and not to relax the convention. Adverse comments about an individual judge have the potential to undermine that judge's ability to continue in office and have a detrimental effect on the judiciary as a whole. Because judicial independence from the other branches of government is such a fundamental principle of New Zealand's constitution and of the rule of law itself, it is a principle that should not be eroded.

VI CONCLUSION

> We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfil this standard of public expectation and, at the same time, accept so many constraints.[182]

It is probably a sign of the rarity of judicial misconduct that no formal process exists to deal with it. However, Justice Fisher is unlikely to be the last judge whose conduct is publicly called into question, and a principled approach to issues of judicial misconduct is preferable to letting practice develop in an ad hoc fashion during a crisis.

The ultimate goal of both independence and accountability is to advance impartial justice and increase public confidence in the capacity of judges to do so. Friedland believes that accountability can enhance the public's respect for independence.[183] Recognition of this proposition makes it desirable for judges to establish a code of conduct and a body that may investigate complaints and state its findings. These are modest steps which are consistent with judicial independence but may go some way towards enhancing accountability and with it community respect for the judiciary.

The mere process of consultation and discussion involved in the establishment of a more credible complaints system and a code of conduct serves a valuable function in that it brings the constitutional issues into the open. This educative function is valuable for judges who inhabit a different judicial landscape to that of their predecessors; for politicians who may be unaware of the constitutional consequences of their perhaps hasty or ill-considered words; and for the public who may gain a greater appreciation of the place of the judiciary in our constitutional arrangements.

Perhaps, most importantly, the judiciary can only benefit from improvements to the system of judicial accountability. Besides the judges gaining a valuable guide to future conduct, the existence of a known process, and the process itself, could serve to bolster judicial independence by reducing scrutiny and suspicion from the other branches of government and from the public. The price to be paid is a modest loss of individual independence, sacrificed for the greater good of the judiciary as a whole. In other words, more accountable judges ensure a more independent judiciary.

A judicial mechanism for dealing with intermediate level misconduct leaves no reason to relax the convention prohibiting executive comment of the judiciary. Even though there is a case for executive comment to be made on judicial misconduct, as it is a matter of public interest, the independence of the judiciary is a principle that should not be eroded. Public confidence can be enhanced by a judicial

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[182] Gerald Gall *The Canadian Legal System* (4ed, Carswell, Ontario, 1995) 314.
[183] Martin L Friedland *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council, Ottowa, 1995) xiii.

rebuke from a judicial commission. There is then nothing for the government of the day to usefully add. It is three hundred years since the judges won their independence from the Crown. The visible maintenance of high standards by the judiciary is the key to maintaining this independence for the future

Civic education needs to be seriously addressed for the purpose of enhancing public confidence in the judiciary. There is a need to encourage the public to value judicial independence. This means being informed and understanding what it is that the judiciary, the least visible branch of government, does, and what its relationship is with the other branches of government.

A modern realistic conception of a judge should be that of women and men who are human. Real understanding of the choices involved in decision-making is preferable to unrealistic expectations of an idealised objective judge dispensing justice with the wisdom of Solomon. Human judges bring their attendant strengths and weaknesses with them to the bench. Occasionally some will err. But to acknowledge mistakes and learn from them is also human.

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