Print Page Close Window

Judicial Conduct: Still A Live Issue, Some Thoughts On The Paper By Professor Peter A Sallman

THE JUDICIAL CONFERENCE OF AUSTRALIA'S COLLOQUIUM 2005

2-4 SEPTEMBER 2005

The Hon Justice Peter McClellan
Chief Judge at Common Law
Supreme Court of New South Wales

JUDICIAL CONDUCT: STILL A LIVE ISSUE, SOME THOUGHTS ON THE PAPER BY PROFESSOR PETER A SALLMAN

As Professor Sallman acknowledges in his paper the subject of judicial conduct has been discussed extensively in many places. The Professor's reticence about adding to the available written material is only exceeded by my reticence about commenting on his paper.

Professor Sallman provides a comprehensive account of the important literature on the subject and the various complaints models which have been adopted. He has also identified the essential elements of the complaints mechanism managed by the Judicial Commission in New South Wales pursuant to the *Judicial Officers Act* 1986. He also writes of the changes which have taken place and are proposed in Victoria. Is there any more to be said? Perhaps a little.

For the last two years I have been the Chief Judge of the Land and Environment Court in New South Wales. In that role I have had responsibility for the management of the court and, as a head of jurisdiction, have been a member of the New South Wales Judicial Commission.

The Land and Environment Court is a statutory court presently comprised of seven judges and ten commissioners. The judges, being judicial officers, are subject to the *Judicial Officers Act* 1986. However, the Commissioners are not judicial officers, and are not subject to the provisions of the Act. There is no formal means of dealing with complaints in relation to their conduct or capacity to perform their work. Accordingly, I have had the unique opportunity, as the head of a court, to see the Judicial Commission in operation in relation to judges, identify its benefits and contrast them with the situation of members of a court, albeit exercising "quasi judicial" functions, where no formal complaint structure exists.

Of particular interest may be the understanding I have gained from discussion with the Chief Executive of the Commission that over the 19 years of its operation the changes in the number and, more particularly, the nature of complaints suggests that the Judicial Commission's complaint processes have been significant in influencing the quality of judicial conduct. In relative terms the number of complaints has been reducing and the nature of them indicates an increased sensitivity by judicial officers of the need to maintain the confidence of litigants in the court process.

In his paper Professor Sallman refers to the Victorian review which he conducted. His recommendations did not include the creation of a New South Wales-type Commission in Victoria. Rather the Victorian proposal involves a new standing investigative arrangement for "removal type cases" with lower order complaints being dealt with internally by the individual court or tribunal. A reading of the Professor's report suggests that in coming to this conclusion he was significantly influenced by what appears to have been vocal opposition by the Victorian judges to a NSW-type complaint mechanism where all complaints are considered by the Judicial Commission. My experience suggests that the opposition is unwarranted and overlooks the benefits which the NSW process provides.

Judicial officers undertake their tasks in public. As anyone who has sat for any period in private will be aware, and I have done so in corruption investigations, public hearings do influence the conduct of all involved in the process. However, beyond the discipline which the public hearing process naturally

imposes, the fact that the New South Wales legislation allows for a complaint about the conduct of a judicial officer to be made to a body external to the Court, comprised of the Heads of Jurisdiction and a number of lay persons, provides a further and significant discipline. No one welcomes a complaint about their behaviour, especially if made to a "peer" group with a capacity to investigate and determine whether the behaviour falls outside accepted norms. Although the New South Wales Act, in my opinion, for good reason, provides that the Commission cannot make a positive finding critical of the judicial officer, a decision not to dismiss, but refer the matter to the Head of Jurisdiction, is self evidently a serious matter.

It is important to recognise the significance of maintaining public confidence in any complaint process. The development of consumer interest groups, a product of an increasingly well educated and sophisticated society cannot be ignored. Any complaint body will be criticised and its outcomes less acceptable unless it is able to be informed about and reflect appropriate community expectations in its decisions. If the process of investigation and the resolution of complaints are not generally accepted public confidence in the judiciary will be diminished. If that happens the currently accepted conventions which provide for an independent judiciary will come under challenge. To my mind the involvement of non-judicial members (there are four) as members of the New South Wales Commission plays a significant part in maintaining public confidence in the complaint handling process. It is not just "judges judging judges" but a process which, rather than excluding the public, ensures that their representatives participate fully in it.

When the New South Wales Judicial Commission receives complaints about the conduct of judicial officers, it must conduct a preliminary examination of the complaint. Following that examination the Commission must either summarily dismiss the complaint, classify it as minor or classify it as serious (s 19). Section 20 provides the criteria pursuant to which a complaint must be dismissed. If not dismissed s 21(1) provides that the complaint must be referred to a Conduct Division. However, importantly, s 21(2) provides a discretion in the Commission to refer a minor complaint to the relevant Head of Jurisdiction, if the Commission believes that the complaint does not warrant the attention of a Conduct Division.

The overwhelming majority of complaints are either dismissed or if not dismissed, are classified as minor and referred to the Head of Jurisdiction. Complaints which are dismissed commonly consist of the expression of a grievance by an unsuccessful litigant about the "quality" of the decision. Many others, although initiated by a genuine concern about the conduct of a judicial officer, simply do not reveal any element which justifies the complaint. Where a complaint is not dismissed, but classified as minor, and referred to the Head of Jurisdiction it will be commonly found that a judicial officer has in some way departed from the standard of conduct which the Commission believes was appropriate in the circumstances of the particular case.

The structure of the Commission is important. As I have indicated because it is comprised of the heads of jurisdiction and four lay members, any complaint made to it is reviewed by a body comprised of both judicial officers and others drawn from the community. Each complaint is considered by the Commission in full session. Although another person, usually a retired judicial officer, may be engaged to assist in investigating a complaint the Commission does not delegate any decision making function to an individual member or a committee of members. Accordingly, the standard of conduct by which a complaint is determined by the Commission has been moulded over time with input from both judicial and non-judicial members. Apart from these standards being applied in individual cases and, where required, communicated to the relevant judicial officer, they are spoken of and considered as part of the education programs of the Commission. [1] Through these means consistent standards of appropriate conduct and a better understanding of them have been developed and communicated to the judiciary. Without providing particulars, my experience has been that the lay input is significant in developing these standards.

The Commission process also provides particular benefits to an individual court, not the least being the maintenance of the judicial officer's confidence in their head of jurisdiction. I speak from actual experience. Because the Commissioners of the Land and Environment Court are not judicial officers a complaint about their conduct comes to me as the head of the Court. There is nowhere else for it to go. I must both investigate the complaint to determine whether there is a problem, and, if there is, counsel the Commissioner and respond to the complainant. The nature of the Court's business involves many community problems where people often have only a portion of the available information or, because of their strong attachment to a position, generally in opposition to a proposal, are incapable of seeing the whole picture. The hearing process, encouraged by the relevant legislation, very often involves discussion between a Commissioner with the parties and witnesses on site. Although not a formal court process, no transcript is taken, it nevertheless becomes information

which the Commissioners use to inform themselves. On occasions, there have been in excess of 100 people on site which gives rise to peculiar management issues for the Commissioner and can lead to significant misunderstandings.

It is not uncommon for me to receive complaints about the conduct of a Commissioner during the course of a hearing as well as after it has been completed. The complaints generally come from disappointed objectors to a proposal. On rare occasions I have concluded that a complaint has been justified. In reaching that view I have, of course, had to apply my own judgment as to the appropriate conduct of the Commissioner without the benefit of the conduct being reviewed by any of my colleagues and without lay input. In the overwhelming number of cases I have concluded that the complaint is not justified. In those cases I am acutely aware that the complainant is likely to view my conclusion as biased, being influenced by my relationship with the Commissioner and a concern that the complaint is about a member of the court for which I am responsible. I rarely find out whether my decision is accepted by the complainant because generally, but not always, complainants are too polite to engage in “further correspondence.” However, my experience leads me to believe that problems of perception are real and not imagined. As the community’s expectation that every instrument of government will be accountable matures I believe that, at some point, every judicial complaint system will have to acknowledge that there are problems with exclusively internal complaint mechanisms and deal with them by adopting an approach similar to that in New South Wales.

It seems to me that there are other potential problems with an “in house” complaints system, although I hasten to add that none have arisen during my two year stay. I am sure there will be an occasion when the head of jurisdiction finds a complaint to have sufficient foundation to justify counselling the Commissioner, but the Commissioner has a different view. In those circumstances the Commissioner will no doubt believe that the judgment which has been made is that of one person and that others may have a different view and furthermore a collegiate view may differ from that of the Head of Jurisdiction. These differences could, and I believe inevitably will, create difficulties in the future relationship between the Chief Judge and a Commissioner for which trust and cooperation are essential. These problems are less likely to materialise if the judgment made is that of a collegiate body expressing a general view as to the appropriate standards of conduct. Far better to minimise the potential for conflict between a Chief Judge and a member of the court than provide a system which has the potential to encourage it.

There have been cases where complaint has been made by a party about the conduct of a Commissioner during the course of proceedings which, for appropriate reasons, have been adjourned for a period of weeks with the expectation that the hearing will continue on the adjourned occasion. This commonly arises where the evidence indicates that the current form of a project may not be appropriate but by amending the plans the identified problems can be satisfactorily resolved. These complaints generally take the form of asking that the Chief Judge to review the hearing process and, commonly, call for it to be terminated and the Chief Judge take over the hearing.

Whatever be the substance of the complaint the remedy which the complainant seeks is obviously inappropriate. However, this does not mean that there is not a problem in the conduct of the Commissioner. Out of a concern that communication of the complaint may influence the outcome of the case, the view I have adopted is that the complaint should not be mentioned to the Commissioner until their decision has been made. No doubt in many cases the complainant intends to influence the Commissioner. In the Land and Environment Court if the complaint, and some fall into this category, could constitute a denial of procedural fairness there will be a right of appeal from the decision of the Commissioner to a judge of the Court. This puts the Chief Judge in the position of not only speaking with the Commissioner about his or her conduct after the matter has concluded and responding to the complainant, but, as a consequence, excludes the Chief Judge from sitting on the appeal. The inherent conflicts in the Chief Judge’s role are obvious.

I appreciate that, because of its structure with commissioners and judges, some of the potential problems in the Land and Environment Court are peculiar to that court. However, I would think it most unlikely that the chief magistrate or chief judge of the District Court in NSW would welcome a change in our system to reflect the proposed Victorian model. Their role as “first among equals” is not compromised when a decision as to the appropriateness of the conduct of a member of their court has been made by a collegiate body external to the court. There is a real risk that their role will be compromised if they are required to investigate and determine the complaint, respond to the complainant and counsel the judicial officer.

Some of you will be aware that the operation of the Judicial Commission is presently being reviewed by the New South Wales Attorney General. A number of issues have been raised for consideration.

One of the more significant of those issues was revealed by the Judge Dodd matter – the judge who was alleged to have slept in some trials.

As I have indicated the Commission operates by referring every complaint, unless from a person previously declared to be vexatious, to a retired judicial officer for investigation, report and recommendation. Statements may be taken and written transcripts or tapes of the hearing reviewed. The Commission meets each month and collectively considers the report which will have been read by each member before the meeting. Further advice may be sought from the Head of the Court, of which the judicial officer complained about is a member, and a decision made as to whether the complaint should be further investigated, dismissed or classified and referred to the Head of Jurisdiction or a Conduct Division. The report received is detailed and the process of consideration thorough. Difficult issues are debated, sometimes at length.

Although the Commission operates in this comprehensive fashion it is apparent that because the process has not been publicly explained some degree of mistrust exists which has been highlighted by the media when reporting the Dodd matter. It will be obvious that the business of the Commission cannot be done in public but there is a need to provide information as to how it operates. This can best be achieved by making public its procedure in the form of “guidelines.”

The lesson from our experience is that the press will no longer allow complaint handling processes to be the exclusive domain of the judges. The process must be understood by the public and accepted as appropriate if the standing of the judiciary is to be maintained. I notice that this lesson has been learnt in Victoria where complaints protocols for the various courts have been adopted and published.

The structure of the judicial complaints process in NSW ensures that there can be no influence from the Executive Government in the complaints assessment and determination process. Although the Attorney may lodge a complaint, and from time to time has done so, the complaint is investigated and resolved by the Commission without the Attorney having any further role. If the complaint is classified as “serious” and it is necessary to refer it to a Conduct Division, the Commission appoints the members of the Division (s 22). The Attorney has no role in that process.

In my opinion, if, as I understand the Victorian model contemplates, [2] the Attorney has the function of determining which matters should be investigated by a Conduct Division and appointing the members of the Division, a significant boundary designed to ensure judicial independence has been crossed. The difficulty is obvious if the Attorney can decide which matters are to be investigated. Even if the Attorney is required to select the members of the inquiring committee from a group of serving or retired judges, the opportunity to influence the persons who comprise the body which must pass judgment upon the conduct of a judicial officer, at the very least, removes the appearance of independence.

It must be recognised that the initiation of a formal investigation, such as a Conduct Division, is a serious step and, as experience demonstrates in New South Wales, very often leads to the resignation of the judicial officer. [3] This is not surprising, perhaps even more so if the judicial officer is a person of competence and integrity and the Conduct Division process is likely to be public. Even the possibility that the initiation of the investigation could be influenced by political considerations seems to me to be unacceptable if judicial independence is to be maintained. Perhaps I do not fully appreciate the Victorian proposal. If I do, I am surprised it has not received more significant criticism.

One other important safe-guard of independence in the structure of the NSW process is that a judicial officer may only be removed after a report of a Conduct Division. By this means the process preceding the ultimate “political decision” of the Parliament, ie whether a judicial officer should be removed, is separated from the Executive thereby avoiding any opportunity for political considerations to influence the process or the outcome of the inquiry. The complex mixture of legal and political issues in Justice Murphy’s case demonstrate the problem. When the solution is not complicated by constitutional questions and with apologies for any evident parochialism, the New South Wales system seems to me, with respect to Professor Sallman, to be far preferable to the model proposed in Victoria.

Professor Sallman acknowledges the significance of appropriate process when dealing with complaints about judicial misconduct in maintaining public confidence in the judiciary and thereby strengthening its capacity to perform as an independent arm of government. I agree. The reflex response of many people to the problem of ensuring compliance by individuals with accepted legislated or voluntary standards of conduct, is to provide a regulatory body with disciplinary powers. The convention of judicial independence, which includes independence of judges from each other, makes any form of regulation entirely inappropriate. However, this makes it more important to have in

place mechanisms to deal with complaints which are both understood by and generally acceptable to the community.

*****

ENDNOTES

1. It is significant that the NSW Judicial Commission has multiple functions, which include conduct and judicial education. This ensures that the education program respond to the type of difficulties which have become apparent through the complaint process.

2. I understand New Zealand to be adopting a similar structure to Victoria.

3. An important component of the Commission's process is that unless a Conduct Division decides otherwise in relation to a serious matter the investigation and any hearing are held in private (s 24). This avoids the problem of the "wounded judge" as occurred in the matter of Pratt in Queensland.