

**THE HON T F BATHURST**  
**CHIEF JUSTICE OF NEW SOUTH WALES**  
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**‘WHO JUDGES THE JUDGES, AND HOW SHOULD THEY BE JUDGED?’**  
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**Introduction**

1. I would like to begin by acknowledging the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their elders past, present and emerging.
2. To bastardise Shakespeare, I don’t come this evening to bury judges, nor to praise them.<sup>1</sup> I do however want to consider two somewhat “thorny” questions: who judges the judges, and how should they be judged?
3. Towards the end of last year, the *Australian Financial Review* published a series of articles dissecting the productivity of judges of the Federal Court of Australia based on published judgments, as measured by average words written per day, average paragraphs per day, and average days to deliver judgment. Individuals were ranked in a table and the suggestion was made that the speed of justice was unjustifiably slow. The blame was placed squarely on the judges on the basis that, and I quote: “the data suggests that [they] could finish their cases more quickly by better time management”.<sup>2</sup>
4. In response to criticism of their methods from legal and judicial organisations, including the Court itself, the *AFR* hit back. They said, and I quote again, that “many professions and industries are assessed using

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\* I express my thanks to my Research Director, Ms Naomi Wootton, for her assistance in the preparation of this address.

<sup>1</sup> William Shakespeare, *Julius Caesar*, Act III, Scene II.

<sup>2</sup> Aaron Patrick, ‘In the Federal Court, speed of justice depends on the judge’, *Australian Financial Review* (online), 26 October 2018, <<https://www.afr.com/business/legal/in-the-federal-court-speed-of-justice-depends-on-the-judge-20181014-h16mk9>>.

quantitative measurements”, and that “bankers, stockbrokers, doctors, sportspeople, entertainers and business owners know this”. Even at the *AFR*, they noted that every reporter’s performance, “measured by the popularity of their articles over any time frame, can be seen by any editorial employee”. It concluded that, as compared to Members of Parliament and Ministers, who are subject to “intense scrutiny of their performance, often on a daily basis”, the “judiciary is the least accountable” of the three arms of government.<sup>3</sup>

5. A few weeks later, the leader of the Opposition in Victoria made an election promise of “greater accountability and scrutiny” of judges in that state. He promised to publish “performance information” of individual judges, including their “sentencing records” — I assume meaning what sentences they gave for particular offences — and the number of their judgments overturned on appeal. He stated that the intention of these reforms was, and I quote, to “see exactly what sort of sentences individual Judges and Magistrates are imposing for what sorts of crimes” because “there is no reason for denying the public this important, basic factual information about how Judges and Magistrates are performing their roles”.<sup>4</sup>
6. The impression to be gained from the proposal was the same expressed more explicitly by the *AFR*: that the judiciary is at present unaccountable in a manner contrary to the public interest.
7. Now, because I have the greatest respect for the *AFR*, and because I have not been brought here to make an entertaining after-dinner speech, I am going to, by and large, resist the temptation of considering what would happen if parliamentarians, doctors, bankers and perhaps even the *AFR* itself were judged on the metrics suggested. But, just a few examples: suppose parliamentarians were judged by the number of speeches they

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<sup>3</sup> Aaron Patrick, ‘With respect, the Federal Court is not above scrutiny’, *Australian Financial Review* (online) 5 November 2018, <<https://www.afr.com/business/legal/with-respect-the-federal-court-is-not-above-scrutiny-20181102-h17fxj>>.

<sup>4</sup> Matthew Guy MP, ‘Greater accountability and scrutiny for judges’ (Media Release, 19 November 2018) <<https://www.matthewguy.com.au/media-release/guy-greater-accountability-and-scrutiny-for-judges/>>.

made, or the number of 30-second grabs per day they did. Some might say a chatty politician is a good politician. Others might say “I just wish he or she would shut up”. William Mathers Jack was the federal member for North Sydney from 1949 until he retired in 1966. He was born in Dundee, and could certainly be described as a dour Scot. In his 17 years in parliament, “silent Billy”, as he was known, only made five speeches, including his maiden speech and his farewell speech. His most famous speech was made in 1962, when, after seven years’ silence, he commenced with “I can remain silent no longer”.

8. Let’s take the *AFR* itself. It is common knowledge that every subscriber turns first to “Rear Window” to read about the latest corporate gossip. But that does not mean that the *AFR* should simply consist of a gossip column. No-one would subscribe to it if it was. This really shows the difficulty with pure quantitative analysis. For a more serious example, we could take doctors. No-one would want to judge the performance of doctors by the number of patients they see on a given day. That is plainly not necessarily the measure of a good doctor. And I don’t think, at least these days, a good banker would be judged by the profits he or she earns, or by the salary or bonuses which he or she receives – certainly not if Mr Hayne has anything to say about it. Now, quantitative analysis certainly has its place. But, in the case of the judiciary, and I think most professions and businesses, what accountability, or a deficit of accountability requires is a far more nuanced approach.

### **Accountability**

9. It is to this proposition that I now want to turn — to whom are judges accountable, for what, and in what ways? More to the point, just how unaccountable are they?
10. In terms of “who”, at one level, the function of the judiciary is to resolve disputes between parties by the application of the law to facts. To that

extent, they are accountable to the parties in any given case.<sup>5</sup>

11. However, as has been said on many occasions, the judiciary is not simply a publicly-funded provider of dispute resolution services; it is the third branch of government.<sup>6</sup> It performs the governmental function of enforcing legal rights and obligations to the benefit of society as a whole.<sup>7</sup> It must therefore be accountable to the public at large, whose interests it exists to serve, and I might add, who fund its operations.<sup>8</sup>

12. What does accountability mean? At its heart, the concept is simple: it is the obligation to give reasons or an explanation for decisions or conduct.<sup>9</sup> The perception that the judiciary is unaccountable is, I think, grounded in a misconception that accountability must come with a “sacrificial” element: that is, where those reasons or explanations are inadequate, a sanction, penalty, or dismissal must follow.<sup>10</sup>

13. Except in cases of proved misbehaviour or incapacity,<sup>11</sup> judges are shielded from “sacrificial” accountability by security of tenure, which is the ultimate guarantee of judicial independence, and in turn, the separation of powers. I will return momentarily to the importance of this, but I first want to outline why it is misleading to point to the lack of “sacrificial” accountability, as if it is sufficient to prove the claim that judges are unaccountable. In fact, the concept is far broader than that, and can involve a variety of different

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<sup>5</sup> H P Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2<sup>nd</sup> ed, 2013) 250.

<sup>6</sup> James Spigelman, ‘Judicial Accountability and Performance Indicators’ (Speech delivered at the 1701 Conference, Vancouver, 10 May 2001).

<sup>7</sup> James Spigelman, ‘Address to the Magistrates’ Institute of NSW Annual dinner’ (Speech delivered on 3 June 1999) 3.

<sup>8</sup> Lee and Campbell, above n 5, 250.

<sup>9</sup> Graham Gee et al, *The Politics of Judicial independence in the UK’s Changing Constitution* (Cambridge University Press, 2015) 17.

<sup>10</sup> *Ibid* 19.

<sup>11</sup> See, eg, *Constitution Act 1902* (NSW) s 53(2). See also *Constitution* s 72(ii).

processes and methods.<sup>12</sup>

14. Professor Graham Gee, in the United Kingdom context, has noted that there is also “explanatory” accountability in the sense of a duty to explain or justify, “content” accountability in the sense of responsibility to an appellate court for the substance of a decision, and “probity” accountability, which includes accounting for the expenditure of money.<sup>13</sup> Judges, both individually and collectively, are subject to accountability in all these forms.

15. First, in adherence to the “open court” principle, judges conduct almost all the business of judging in public.<sup>14</sup> The High Court has said that the rationale of that principle “is that court proceedings should be subjected to public and professional scrutiny”.<sup>15</sup> Bentham, many years before, said that “publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity”.<sup>16</sup> This is because exposure to public scrutiny and criticism creates an environment in which abuses are less able to flourish undetected.<sup>17</sup>

16. In exceptional circumstances, courts do act contrary to the “open court” principle.<sup>18</sup> Those exceptions are limited, but exist for good reason,<sup>19</sup> such as where the proceedings are being brought in relation to trade secrets or

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<sup>12</sup> See John Doyle, ‘Accountability: Parliament, the Executive and the Judiciary’ in Susan Kneebone (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (Proceedings of the 1998 National Administrative Law Forum) 18, 19.

<sup>13</sup> Gee et al, above n 9, 16-21.

<sup>14</sup> See generally James Spigelman, ‘Seen to be Done: The Principle of Open Justice – Parts 1 and 2’ (2000) 74 *Australian Law Journal* 290, 378.

<sup>15</sup> *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46, [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>16</sup> J Bentham, *The Works of Jeremy Bentham*, J Bowring (ed) (William Trait, 1843) Vol 4, 305 quoted in *R v Jackson* (1986) 20 A Crim R 95, 98 (Carruthers J).

<sup>17</sup> *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

<sup>18</sup> *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46, [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>19</sup> See generally Lee and Campbell, above n 5, 254-5.

in matters affecting national security.<sup>20</sup> In general, however, courts function in public, even where it might be painful or humiliating for the parties. These things are endured because on the whole, public trials are the “best security for the pure, impartial and efficient administration of justice”.<sup>21</sup>

17. Second, judges must give reasons for their decisions. This is “one of the defining features of the judicial process”,<sup>22</sup> and as a form of accountability, “is not to be taken lightly”.<sup>23</sup> As former Chief Justice Gleeson asked: “apart from judges, how many other decision-makers are obliged, as a matter of routine, to state, in public, the reasons for all their decisions?”.<sup>24</sup> The other two arms of government have, in recent years, subjected themselves to greater transparency with the advent of legislation to compel the production of government information.<sup>25</sup> However, this has long been “in the nature of things” for the courts.<sup>26</sup>

18. It is somewhat ironic that the claim that the judiciary is the least accountable branch of government emerged from a publication which, in the next breath, was able to report the words and paragraphs per day that individual judges were apparently producing, using publicly-available information.

19. Reasons also promote good decision-making. As a general rule, being obliged to explain a decision in a manner open to scrutiny is more likely to result in a reasonable decision which, in turn, is more likely to be acceptable to those whom it affects.<sup>27</sup> It is also consistent with the

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<sup>20</sup> See, eg, *Hogan v Hinch* (2011) 243 CLR 506, [21] (French CJ).

<sup>21</sup> *Scott v Scott* [1913] AC 417, 463 (Lord Atkinson).

<sup>22</sup> Doyle, above n 12, 23.

<sup>23</sup> Murray Gleeson, ‘Judicial Accountability’ (1995) 2 *The Judicial Review* 117, 122.

<sup>24</sup> *Ibid.*

<sup>25</sup> See, eg, *Government Information (Public Access) Act 2009* (NSW).

<sup>26</sup> Bret Walker, ‘The Information that Democracy Needs’ (Speech delivered at the Whitlam Oration, Sydney, 7 June 2018).

<sup>27</sup> Gleeson, above n 23, 122.

requirement of, (and I quote from Murray Gleeson again),

“a democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions”.<sup>28</sup>

20. The public nature of those reasons is also significant, as they are thereby exposed to contemporaneous analysis by not only the public and the media but also the legal profession. While these mechanisms of accountability are informal, they are nevertheless powerful. Judges must publicly accept responsibility for their decisions, and it is not inconsequential to have your work subjected to intense public criticism or indeed, collegiate disapproval from other judges or lawyers.<sup>29</sup>

21. Third, most decisions can be subject to the appeal process, whereby decisions are formally reviewed. One of the points made by the *AFR* was that, while judges say they are, and I quote, “subject to a rigorous appeals process”, “judgment by peers is, by definition, not independent”.<sup>30</sup> This is a view that warrants strong resistance. Judges take an oath, or make an affirmation, to do right according to law, independently, “without fear or favour, affection or ill-will”.<sup>31</sup> This applies whether it be favour towards a party, or favour towards a fellow judge, when the correctness of their decision is subject to appeal. The suggestion that they would do otherwise is not an allegation to be made lightly, and is easily refuted by the simple fact that appellate courts do frequently overturn the decisions of inferior courts. There is one further point which can be made. What is the alternative to “judgment by peers” in these circumstances? A decision on a matter of public interest can provoke a wide variety of views. Is a judge right if, as a result of an Ipsos poll, a majority find his or her decision

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid 124.

<sup>30</sup> Patrick, above n 3.

<sup>31</sup> *Oaths Act 1900* (NSW) sch 4.

acceptable, or is he or she right if the law is correctly applied to the facts? I want to suggest the latter.

22. Fourth, judges' reasons for decision are also exposed to the legislature, which can, in response, change the law.<sup>32</sup> Now, more so than ever, the bulk of the work of judges in this country involves applying statutes enacted by democratically-elected legislatures. Where the results of that process prove unacceptable to the public, it is open to the legislature to change or clarify the law.

23. Finally – and this goes to “probity” accountability – the judiciary must account for the public resources it uses. The Supreme Court of New South Wales presents an annual review on its stewardship of the resources entrusted to it. It includes information on the timeliness of each Division of the Court, as measured against national benchmarks, as well as listing delays in each Division. It also includes statistics on the number of matters filed in the Court and how many cases remained pending at the end of the calendar year.<sup>33</sup> The Department of Justice also furnishes an annual report which includes detailed financial statements.<sup>34</sup> Legislation in some states imposes similar statutory reporting obligations on their courts.<sup>35</sup>

24. The point I am trying to make from all this is simply that the suggestion that the judiciary is unaccountable, or even the least accountable arm of government, is, in my opinion, misconceived.<sup>36</sup> Judges have “explanatory” accountability in their obligation to provide open, public justice and reasons explaining their decisions, “content” accountability in terms of the appellate process and “probity” accountability in terms of their use of public

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<sup>32</sup> Doyle, above n 12, 23.

<sup>33</sup> The Annual Reviews of the Supreme Court of NSW dating back to 2004 can be viewed at: [http://www.supremecourt.justice.nsw.gov.au/Pages/sco2\\_publications/SCO2\\_annualreviews.aspx](http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_publications/SCO2_annualreviews.aspx).

<sup>34</sup> The NSW Department of Justice annual reports can be viewed at: <https://www.justice.nsw.gov.au/publications-research/annual-reports>.

<sup>35</sup> See, eg, *High Court of Australia Act 1979* (Cth) s 47(1), *Federal Court of Australia Act 1976* (Cth) s 18S, *Family Law Act 1975* (Cth) s 38S, *Supreme Court of Queensland Act 1991* (Qld) s 19.

<sup>36</sup> See also Doyle, above n 12.

resources.

25. What they don't have is "sacrificial" accountability, by reason of their security of tenure. Unlike the legislature and executive, the public isn't afforded the opportunity to boot us all out every three or four years.<sup>37</sup> However, as former Chief Justice Doyle has argued, the content of "accountability" varies according to its context. The judiciary is accountable in a way that is compatible with the precepts of judicial independence.<sup>38</sup>

## **Independence**

26. I now want to return to this topic of independence, because it is perhaps so generally accepted as beneficial, especially by lawyers, that at times we do not articulate why this is so, and, why it is well worth the loss of "sacrificial" accountability. Independence is not a right, privilege or "perk" of office enjoyed by individual judges. It is, ultimately, the right of the public to have a judiciary that is free from political interference.<sup>39</sup>

27. The right to a hearing before an independent and impartial tribunal is recognised as a fundamental human right. It is a necessary feature of the rule of law. The principles were well put by Justice McGarvie, in a 1991 paper, where he stated:

"In a democratic government ... the law stands above and controls them all. The law is the mortar that holds the components of government together and keeps them in their proper places. The judiciary of a democracy is not responsible to any governmental power. Its responsibility, owed to the whole community, is to apply the law and to apply it impartially ... It is obvious that this system can only work effectively if those against whom the law is applied

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<sup>37</sup> Gee et al, above n 9, 20-1.

<sup>38</sup> Doyle, above n 12, 29.

<sup>39</sup> John Faulks, 'Judicial Accountability and the Separation of Powers: Judging the Judges' (Paper presented at the Confidence in the Courts Conference, Canberra, 9-11 February 2007) 8-9.

have confidence in the impartiality, fairness and ability of the judges in making their decisions ...”<sup>40</sup>

28. Independence is important so that the community will have confidence that the judiciary will apply the law fairly and impartially, and will hold other branches of government to account where necessary. In contemporary society, judicial independence from the executive branch is particularly critical, because so many legal disputes pit citizens against the government – in criminal matters, environmental matters, challenges to administrative decision-making, and tax disputes, to name just a few.
29. A further corollary, and one that may seem a bit circular, is that because the judiciary has neither “the might of the sword or of the purse”, as the old saying goes, the institutional strength of the courts necessary for judicial independence itself largely relies on community confidence. It is, at least in part, the community’s confidence and support for the judiciary that serves to protect the courts from incursions by other arms of government. In other words, community confidence in the judiciary is a goal, and an important element in maintaining, the separation of powers.
30. Sir Frances Forbes, the first Chief Justice of New South Wales, emphasised this in February 1827 by stating that (and excuse the gendered language),: “A judge cannot be too careful of his reputation for independence. If he loses that he loses his necessary influence over public opinion ... his charges bear no weight, the juries do not respect him and his decisions carr[y] no conviction over the mind of the public”.<sup>41</sup>
31. However, I am also wary of independence being invoked inappropriately, to protect judicial self-interest rather than the public interest, or to frustrate

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<sup>40</sup> R E McGarvie, ‘The Foundations of Judicial Independence in a Modern Democracy’ (1991) 1 *Journal of Judicial Administration* 3, 4.

<sup>41</sup> Sir Frances Forbes quoted in Spigelman, above n 7, 1.

legitimate calls for “content”, “explanatory” or “probity” accountability.<sup>42</sup> As Murray Gleeson put it in an address in 1998, and I quote:

“sometimes there is an unfortunate tendency to overstate the principle of independence and to invoke it in circumstances where it is not in truth under threat. There is a tendency in some people to turn every disagreement about the terms and conditions of judicial service, or the funding of the court system, into an issue of judicial independence. This creates a degree of cynicism. Such cynicism is not always unjustified. It debases the currency of principle if we overstate our case”.<sup>43</sup>

32. It is important to recognise that disputes between the legislature, executive, and judiciary are not antithetical to democratic governance. Dr Henry Kissinger made the point that the original theorists of the separation of powers saw its objective as to avoid despotism, not to achieve harmonious government.<sup>44</sup> Harmony between the three branches “is not the natural order of things”, nor is it necessarily desirable.<sup>45</sup>

33. For example, Professor Gee, in the United Kingdom context, has argued that judicial independence is consistent with political authorities articulating the limits of proper judicial action, and those authorities standing ready to reverse judgments that exceed or defy those limits.<sup>46</sup> In this country, Dyson Heydon has similarly stated that “one aspect of the responsibility borne by politicians is to identify defects in all three arms of government and seek to remedy them”.<sup>47</sup> It is entirely legitimate for members of parliament to

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<sup>42</sup> Graham Gee, ‘Enemies of the people: defending the independence of the Judges’ (Panel Discussion at the University of Oxford, 26 April 2017).

<sup>43</sup> Murray Gleeson, ‘The Role of the Judge and Becoming a Judge’ (Speech delivered at the National Judicial Orientation Program, Sydney, August 1998).

<sup>44</sup> Dr Henry Kissinger cited in Gleeson, above n 23, 136.

<sup>45</sup> Ibid.

<sup>46</sup> Gee, above n 42.

<sup>47</sup> Dyson Heydon, ‘Judgment in the Balance’, *The Australian* (online), 21 March 2018 <<https://www.theaustralian.com.au/news/inquirer/judgment-in-the-balance/news-story/e33071e09066fcb28aff454a82cf0408>>.

disagree with judicial decisions, and for such disagreements to be articulated in the non-lawyerly lexicon of political discourse.<sup>48</sup>

34. My point is this: judicial independence should not be used as a shield from legitimate public or political criticism, and it overstates the case to treat every instance of criticism from the executive and legislature towards the judiciary as though it is a “sledgehammer to the rule of law”.<sup>49</sup> It is in the public interest that the shortcomings in the judicial branch be exposed “with a view to their eradication”.<sup>50</sup>

35. The upshot of this, however, is that it must be done consistently with the precept that a judge cannot be punished or disciplined for making a wrong or unpopular decision. At the point where this principle is undermined, citizens can no longer trust that when they bring an action in tort against a government official, or when they are tried for a criminal offence, or when they want to challenge an administrative decision, that the judge can decide their case without “fear or favour” from the executive.

36. This is the fundamental reason for the security of tenure which judges have, and why any cost to the community occasioned by the lack of “sacrificial” accountability is worth bearing, for the payoff of living under the rule of law in a democratic society underpinned by the separation of powers.

37. Of course, as with everything, there must be a balance. The central ideal of a democratic system and an important purpose of judicial independence is that power should never go uncontrolled, so the judiciary must be trusted impartially to hold the government to account. However, even controlling power should not be irresponsible, or itself uncontrolled.<sup>51</sup>

38. And importantly, it is not. By no means does judicial conduct in this country go uncontrolled or unchecked, even in terms of delay in delivering

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<sup>48</sup> Gee, above n 42.

<sup>49</sup> Ibid.

<sup>50</sup> Heydon, above n 47.

<sup>51</sup> Gleeson, above n 23, 119 quoting M Cappalletti, ‘Who Watches the Watchmen?’ (1983) 31 *American Journal of Comparative Law* 1, 61-2.

judgment. The first line of control is in the role of the Head of Jurisdiction – the Chief Justice of the Supreme Court, Chief Judge of the District Court or the Chief Magistrate of the Local Court. It is the job of the head of jurisdiction to manage delays and counsel other judicial officers when delay becomes unreasonable. I believe that this role is one that heads of jurisdictions around the country take very seriously.

39. Second, the parties, who are ultimately the ones affected by delay, do have rights. In New South Wales, there is a publicly-available policy in relation to delays in reserved judgments.<sup>52</sup> If a party or legal representative becomes concerned that a reserved judgment has been outstanding for an unreasonably long time, a written inquiry can be directed to the relevant head of Division. Each inquiry is discussed with the judicial officer concerned and a written response is provided to the party. The identity of the inquirer is not revealed to the judicial officer concerned, to avoid any concern on the part of the party that they will be disadvantaged by the making of such an inquiry.

40. Third, when it comes to serious delays, there are formal mechanisms for complaints. The Judicial Commission of New South Wales investigates complaints about judicial officers, and that includes complaints of incompetence or unreasonable delay.<sup>53</sup> Complaints can be referred to a panel of the Conduct Division for examination, and that panel can make a finding that the matter could justify parliamentary consideration of the removal of the judicial officer.<sup>54</sup> The Conduct Division comprises two judicial officers, although one may be a retired judicial officer, and a community representative, nominated by Parliament. The Commission must notify the

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<sup>52</sup> Supreme Court of NSW, 'Delays in Reserved Judgments' <[http://www.supremecourt.justice.nsw.gov.au/Documents/Practice%20and%20Procedure/policyreserved\\_judgment\\_delays\\_sc\\_2018.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Practice%20and%20Procedure/policyreserved_judgment_delays_sc_2018.pdf)>.

<sup>53</sup> This process is governed by the *Judicial Officers Act 1986* (NSW) pt 6. The Judicial Commission of NSW provides a range of detailed information on the complaints process, see, eg, 'How the Complaints Process Works' <[https://www.judcom.nsw.gov.au/wp-content/uploads/2014/07/JCNSW\\_complaints\\_process.pdf](https://www.judcom.nsw.gov.au/wp-content/uploads/2014/07/JCNSW_complaints_process.pdf)>.

<sup>54</sup> *Judicial Officers Act 1986* (NSW) s 21.

Minister if a complaint is referred to the Conduct Division. On the furnishing of such a report to the Governor, judicial officers can be removed from office on an address from both Houses of Parliament to the Governor, on the ground of proved misbehaviour or incapacity.<sup>55</sup> Since the inception of the Commission, three judicial officers have been referred to Parliament. In each case, Parliament declined to remove them.

41. Finally, I should make the obvious point that judicial officers are subjected to the ordinary processes of the criminal law, should there be allegations of corruption or misconduct. In particular, judges in this state are subject to scrutiny by ICAC.<sup>56</sup> The *ICAC Act* applies to judges, whether exercising judicial or other functions.<sup>57</sup> The Judicial Commission is obliged under the *ICAC Act* to report to ICAC any matter suspected on reasonable grounds to concern corrupt conduct.<sup>58</sup>

42. Ultimately, judicial power is not uncontrolled; it is checked in a manner consistent with independence.

### **Quantity vs quality**

43. This brings us now to my second question for this evening, which is on what basis should judges be judged? I accept that it is entirely appropriate for the judiciary to be criticised for its performance by the media and, by extension, the public. However, both catalysts for my topic this evening focused on quantitative measures of performance: the *AFR* primarily being the number of days to deliver judgment, and the Victorian proposal being how harsh or lenient particular judges are and how often they are overturned, all in terms of the numbers.

44. One quick point I want to make in relation to the Victorian proposal is that a lot of this data is already publically available, as it relates to sentencing. The Sentencing Advisory Council of Victoria provides a vast array of information to

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<sup>55</sup> See *Constitution Act 1902* (NSW) s 53; *Judicial Officers Act 1986* (NSW) s 41.

<sup>56</sup> *Independent Commission Against Corruption Act 1988* (NSW) s 4.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid* s 11(2).

the public online on sentencing outcomes for particular offences. It includes graphs as to the types of sentences imposed which can be broken down further into the lengths of custodial sentences.<sup>59</sup> The main difference between what was proposed and what was already available was that the statistics were to be published at the level of individual judges. Given that the apparent purpose was to improve confidence in the judiciary as an institution, it is difficult to see what additional benefit would be drawn from the individualisation of the data.<sup>60</sup> The New South Wales Judicial Commission provides similar statistics, albeit on the payment of a fee.

45. But speaking more broadly, I want to take a minute to talk about the place of quantitative analyses. It would be disingenuous of me to say that they are entirely irrelevant. In the Supreme Court, we regularly look at the numbers in terms of the days that judgments have been outstanding or listing delays in terms of weeks or months. But it is also disingenuous to take these analyses and use them as the only, or even the most important, criterion by which to judge the judges.

46. As my predecessor, Jim Spigelman, said on a number of occasions, and in a neat instance of symmetry, on this occasion exactly 20 years ago, the most important criteria by which the performance of courts must be judged are qualitative – fairness of the processes used and the fairness of the outcomes.<sup>61</sup> Measures of analysis based only on turnover or output are inappropriate for a number of reasons.

47. The first is that they take no account of the length and complexity of particular matters. An example of the fallacy of measuring judicial conduct by the numbers goes as follows. Hypothetically, it might be that in any given year, Judge A was able to produce 30 judgments, and Judge B, 60 judgments, and Judge A takes

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<sup>59</sup> See Sentencing Advisory Council, 'Statistics for Specific Offences' <<https://www.sentencingcouncil.vic.gov.au/statistics/sacstat>>.

<sup>60</sup> See Jan-Marie Doogue, Colin Doherty and Jeff Simpson, 'Accountability for the Administration and Organisation of the Judiciary' (Paper presented to the Asia Pacific Courts Conference, Auckland, 7-9 March 2013) 14.

<sup>61</sup> James Spigleman, 'Opening of Law Term Dinner' (Speech delivered in Sydney, 1 February 1999) <[http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman\\_speeches\\_1999.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_1999.pdf)>

on average 20 days to deliver judgments, while Judge B takes 40. As a result, it may appear that Judge B is not as efficient as Judge A. However, Judge A may have produced 20 haphazard judgments which resulted in a number of successful appeals.<sup>62</sup> This aspect of quality is not reflected in the days to deliver judgment, nor the number of words or paragraphs per day.

48. Now, the examples I have given probably ensure that you are bored even if you were not bored before. If I wanted to manipulate quantitative data, I would simply direct judges to put on Caselaw all rulings on evidence, all rulings on applications for adjournments, and other similar matters on which rulings are given in the day-to-day operations of a court. I won't do this for two reasons. First, they are not useful statistics, and second, it would crash the system.

49. In another example, both Judge A and Judge B might have produced judgments of exceptional quality, but Judge A produced less because one matter ran for half the year and involved voluminous material. Without reference to the quality of the input from the parties, the difficulty of the matters, or the quality of the output, the pure figures are meaningless. The inability of quantitative analyses to reflect the quality of the work of a judge means that there are very significant limitations in such attempts to measure judicial performance.<sup>63</sup>

50. Second, the numbers take no account of the resources available to the court. Outputs are inextricably linked to inputs, and those inputs are "a matter over which judges have no control and very little influence".<sup>64</sup>

51. Thirdly, and most importantly, courts are not simply publically funded providers of dispute resolution services. The argument made by the *AFR* was that there is no reason for the performance of judges, as compared to bankers, stockbrokers, entertainers and even journalists, not to be assessed quantitatively. And this is where they are, with respect, wrong. The tendency to treat courts as if they are private corporations and judges as if they are private employees, or even as if the

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<sup>62</sup> I am grateful to Faulks, above n 39, 43-4, for the example.

<sup>63</sup> *Ibid* 44.

<sup>64</sup> Murray Gleeson, 'Current Issues for the Australian Judiciary' (Speech delivered at the Supreme Court of Japan, Tokyo, 17 January 2000) 2.

courts are just another government department, is the primary fallacy in the analysis and the point at which it breaks down. Courts “no more deliver a service in the form of judgments than the Parliaments deliver a service in the form of statutes”.<sup>65</sup> As Jim Spigelman has said:

“The judgments of courts are part of a broader public discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances. This is a governmental function of a similar character to that provided by legislatures but which has no relevant parallel in many other spheres of public expenditure.”<sup>66</sup>

52. The fallacy of characterising the function of courts in this way is highlighted by reference to criminal justice. When a criminal court determines according to the strictures of due process whether a person is guilty or innocent, it conducts a process that “reflects and affects the aspirations and values of the community”.<sup>67</sup> Murray Gleeson has made the point that, if our only objective was the efficient determination of guilt or innocence, then the process would look very different. In fact, when we look around the world there are many places in which criminal justice does look very different, and is far more efficient. We don’t regard those places as role models.<sup>68</sup> We adhere to what managerialism might deem “inefficient methods” of criminal justice for reasons far more important than time or money.<sup>69</sup>

53. Even in the civil context, there is any number of ways we could make trials more efficient. For example, the Supreme Court could institute a system where cases had no discovery, no oral argument, a maximum of five pages of written submissions, and where judgment would be delivered with no reasons. Our

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<sup>65</sup> James Spigelman, ‘Seen to be Done: The Principle of Open Justice’ (Keynote Address to the 31<sup>st</sup> Australian Legal Convention, Canberra, 9 October 1999) 9.

<sup>66</sup> Spigelman, above n 6.

<sup>67</sup> Murray Gleeson, ‘The Future State of the Judicature’ (Speech delivered at the Judicial Conference of Australia Colloquium on the Courts and the Future, Surfers Paradise, 8 November 1998) 2.

<sup>68</sup> Spigelman, above n 65, 10.

<sup>69</sup> *Ibid.*

performance indicators would be through the roof. It would also fundamentally undermine essential aspects of the administration of justice and rightly erode community confidence that the judiciary was fairly and impartially making decisions according to law.

54. Like criminal trials, civil trials also serve important public functions. At the end of such matters there is “a public affirmation that one party is right, and the other is wrong”.<sup>70</sup> Further, civil courts have a vital role, beyond the dispute of the parties who are waiting for judgment, in clarifying legal principles that enable disputes to be avoided in the future. It would be impossible to quantify in a neat interactive table how many disputes are settled or never get to court at all because judicial decision-making enables lawyers accurately to advise their clients what the likely outcome of litigation will be.<sup>71</sup> This function has an important economic value to the community. It maintains the stability necessary for the regular flow of commerce, facilitating trade and investment.<sup>72</sup> Again, a public function whose value is impossible to quantify.

55. A striking example was given in 1998 by Murray Gleeson. He referred to the decision in the *Mabo* case, saying, and I quote:

“it might be possible to say that what the court was doing was engaging in the resolution of a dispute between the State of Queensland and some people of the Torres Strait Islands. However, even the most committed managerialist would acknowledge that to be a ridiculously incomplete account of the functions the High Court was performing”.<sup>73</sup>

56. The judiciary does not just provide a service to litigants or accused persons as consumers.<sup>74</sup> To the contrary, the enforcement of legal rights and obligations is the exercise of a governmental function.<sup>75</sup> Analyses which judge performance

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<sup>70</sup> James Spigelman, ‘Compensation Court Annual Conference’ (Speech delivered on 7 May 1999) 3.

<sup>71</sup> Gleeson, above n 67, 3.

<sup>72</sup> Spigelman, above n 70, 4.

<sup>73</sup> Gleeson, above n 67, 2.

<sup>74</sup> Spigelman, above n 70, 3.

<sup>75</sup> *Ibid.*

based primarily on financial efficiency and timeliness to the exclusion of other factors miss the fundamental point that not everything that is important to the administration of justice can be measured. Or, as Jim Spigelman put it, “not everything that counts can be counted”.<sup>76</sup>

57. The obvious objection to what I have said might be to question why these important values cannot continue to be served, at the same time as the courts are working more efficiently. It is a good point, and I think that courts should strive to be efficient and for justice be delivered as quickly as possible. Indeed, it is trite to say, delay lessens confidence in the judiciary. However, it must be recognised that steps to increase efficiency, as measured by quantitative analysis of output, can, in fact, adversely impact the fundamental aspects of our system.

58. When courts are treated as “just another government department”, to be judged primarily against how efficient they are, they are judged against criteria that do not take into account the particular functions and duties of a court.<sup>77</sup>

59. The push to efficiency also fails to recognise that “justice rushed” is as much denied as justice delayed.<sup>78</sup> The proper reflection necessary to formulate a judgment is a time consuming exercise.<sup>79</sup> The parties and the public deserve no less than properly considered judgments. In addition, as I have said, the value of a judgment is not just to the parties for whom it resolves a dispute, but the broader public as well.<sup>80</sup> Pressure to come to judgment more quickly or cheaply can risk compromising its quality and thoroughness, and create wider legal uncertainty and instability.

60. The problem is that denigration in the quality of justice is not something that can neatly be measured or even observed. It can happen in small, barely perceptible

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<sup>76</sup> James Spigelman, ‘Measuring Court Performance’ (Speech delivered at the Annual Conference of the Australian Institute of Judicial Administration, Adelaide, 16 September 2006) 4.

<sup>77</sup> See generally TF Bathurst, ‘Separation of Powers: Reality or Desirable Fiction?’ (Speech delivered at the Judicial Conference of Australia Colloquium, Sydney, 11 October 2013) 14.

<sup>78</sup> Spigelman, above n 70, 5.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

steps, until finally we reach a point at which our institutions no longer reflect the values or fulfil the functions we expect of them.<sup>81</sup> The measures of public confidence can be deceptive; you only really know that it was there once it's gone, and once it has gone, it is not easily rebuilt.

61. Having said all that, I do want to make clear that I think very lengthy delays are completely unacceptable. Dyson Heydon has set out some cogent reasons that delay is harmful. It can affect the outcome irrespective of the real merits of the case, for example, in commercial matters where circumstances change over the course of time. It may cause matters to fade in a judge's mind, weakening the capacity for justice to be done. And it is simply "cruel to the litigants", since the stress of litigation imposes an enormous strain on any individual's health, well-being and quality of life.<sup>82</sup>

62. Sometimes there are understandable matters affecting "unreasonable" delay on the part of the court, such as ill-health, personal problems or overwork.<sup>83</sup> But it is the parties who are primarily affected by these matters, and as I have said, the parties have options, such as contacting the court and receiving an explanation, or where the problem is chronic, making a formal complaint to the Judicial Commission.

63. I must emphasise again that parties are entitled to judgments without undue delays. Courts must ensure that they are as efficient as possible, in order to maximise access to justice. There is always a risk of institutional blindness — that judges sitting on a court will not be able to see flaws in process in the same way an outsider may be able to. Constructive discussions about reform should be part of a continuous process of assessment and improvement in courts' operations. Those discussions can only be enhanced by constructive comments from outside the courts, including from the media.

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<sup>81</sup> James Spigelman, 'The "New Public Management" and the Courts' (Address to the Family Courts of Australia 25<sup>th</sup> Anniversary Conference, Sydney, 27 July 2001).

<sup>82</sup> Dyson Heydon, 'Court in the Crosshairs', *The Australian* (online), 29 September 2018 <<https://www.theaustralian.com.au/news/inquirer/judgment-times-courts-in-the-crosshairs/news-story/b46a19cc3941f5c004afe619772c1cbf>>.

<sup>83</sup> *Ibid.*

64. What is essential, however, is that, in judging the judges, the qualitative factors inherent in the administration of justice, including the quality of judgments and fairness of process, are taken into account. Critically, the role of the courts as an independent arm of government essential to our stable and democratic society must also be appropriately considered.

### **A side note on sentencing**

65. There is one further matter that I want to discuss, and it is brief. I can hear your collective sigh of relief. It relates to the particular aspects of the Victorian proposal that purported to provide greater and further particulars about the sentences that individual judges were handing down. Sentencing engages the interest of the public more than anything else that judges do.<sup>84</sup> It is the area in which judges are most often criticised for being “out of touch” with the public interest, and this was the clear impression emanating from the Victorian proposal.

66. I make no comment on whether that criticism is justified. However, I do want to draw some attention to the results of what I think is a very important study done into jury sentencing in Tasmania and Victoria. This study, led by her Excellency Kate Warner, the Governor of Tasmania, looked at the differences between the sentences that judges gave in actual cases, and the sentences which jurors would give. The jurors were those who had in fact convicted the offender, and who were therefore in possession of almost the same information as the judge.

67. In the first stage, the jurors were asked to formulate their own sentence for the offender in the case they tried. In the second stage, jurors were asked to comment on the appropriateness of the judge’s actual sentence. In both states, jurors’ sentences were more likely to be lenient than the sentences of judges. In the Victorian study, 62% of the 918 jurors surveyed suggested a sentence that was more lenient than that which was actually imposed. After sentence, 87% of jurors said that judge’s actual sentence was appropriate, and 55% of those said that it was “very appropriate”. In relation to violent offences, the researchers had

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<sup>84</sup> James Spigelman, ‘The power of twelve: a new way to sentence for serious crime’ (2005) 86 *Australian Law Reform Commission Reform Journal* 5.

expected that jurors would be harsher than the judge. In fact, 71% of jurors were more lenient.<sup>85</sup>

68. In Japan, a “mixed jury” system known as the *saiban-in* was introduced in 2009. Juries are comprised of both judges and lay-persons, who jointly determine both guilt and sentence in serious criminal cases. The aim was to democratise the criminal legal process.<sup>86</sup> Were such a system to be introduced here, with juries participating in the sentencing process, the results of the jury study suggest that, contrary to popular belief, and according to a strict quantitative analysis, criminal defendants might in fact receive lighter or shorter sentences from the public than they currently do from the judges.

## Conclusion

69. What to make of all this? First, courts are, and should be, subject to public scrutiny, and where appropriate, criticism. To facilitate that scrutiny and to assist in ensuring that criticism is informed, courts should operate as transparently as possible. In that way, they become accountable to the other arms of government, and to the public. But the appropriate measure of accountability cannot be determined solely by some form of quantitative analysis of a court’s output. What must be considered is whether the courts are performing their role of fairly and impartially administering justice according to law, a function essential to the rule of law, and to the maintenance of a just and democratic society.

70. Quantitative analysis does have a role to play, providing that the inherent limitations of any particular form of such analysis is recognised, and providing that it is recognised that such an analysis provides no real measure of accountability unless it assists in answering the critical question: are courts and their judges performing their function of administering justice according to law?

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<sup>85</sup> Kate Warner, ‘Are Courts Soft on Crime? Lessons from the Victorian Jury Sentencing Study’ (Speech delivered at the Victorian Law Foundation Oration, Melbourne, 21 August 2018) <[https://www.victorialawfoundation.org.au/sites/default/files/attachments/victoria\\_law\\_foundation\\_oration\\_21\\_august\\_2018\\_0.pdf](https://www.victorialawfoundation.org.au/sites/default/files/attachments/victoria_law_foundation_oration_21_august_2018_0.pdf)>.

<sup>86</sup> See generally Setsuo Miyazawa, ‘Citizen Participation in Criminal Trials in Japan’ (2014) 42(2) *International Journal of Law, Crime and Justice* 71.

71. Thank you for your patience. I would only like to add one last thing: after all that I have said, I am still a reader of the AFR.