

THE HON T F BATHURST AC

CHIEF JUSTICE OF NEW SOUTH WALES

LAW COUNCIL OF AUSTRALIA DIRECTORS' DINNER

**'NOT A MASTER, BUT A TEACHER: THE ROLE OF THE JUDICIAL
COMMISSION OF NEW SOUTH WALES'**

FRIDAY 22 MARCH 2019*

1. I would first like to acknowledge the traditional custodians 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. I also acknowledge any First Nations people who may be in attendance today.
2. Now, the “working of the Judicial Commission”, while important, is hardly the sort of topic which would tend to generate much excitement in a typical audience, particularly at ten past nine on a Friday night after the main course has been served. By this stage, most ordinary lawyers would be hoping for some brief remarks, possibly coupled with a few wry observations, to lighten their way to dessert. Of course, I would not dare to suggest that the directors and associates of the Law Council of Australia are either “typical” or “ordinary”. Evidently, you are all far more discerning in your choice of after-dinner entertainment than your average lawyer.
3. For that reason, I will start in the conventional way, as one always should, with the terms of the statute which establishes the Commission.¹ We can see that there are three broad functions conferred on the Commission. First, the Commission is empowered to “monitor” the sentence imposed by courts and “disseminate” information about those

* I express my thanks to my Research Director, Mr Damian Morris, for his assistance in the preparation of this address.

¹ *Judicial Officers Act 1986* (NSW).

sentences.² Secondly, the Commission is empowered to “organise and supervise” the “continuing education and training of judicial officers”.³ Finally, the Commission is required to conduct preliminary examinations of complaints about judicial officers received from members of the public.⁴ Reference can then be made to the relevant head of jurisdiction or a separately constituted “Conduct Division” of the Commission.⁵

4. One might be forgiven for not being aware that the preliminary examination of complaints forms only one part of the work of the Commission. This function has received outsized attention from the media and the proponents of a “federal judicial commission”. I find that this commentary tends to distort, rather than aid, an understanding of how the Commission operates and the benefits which it has undoubtedly brought to the judiciary of New South Wales. Rather, it is necessary to look at the working of the Commission holistically, and this can best be done by a perusal of its most recent annual report,⁶ which sheds a great deal of light on the sentencing information and judicial education functions of the Commission.
5. The first function of the Commission which I mentioned, the monitoring and dissemination of sentencing information, is possibly the most significant for lawyers in everyday practice. Through the Judicial Information Research System, or “JIRS” for short, the Commission provides a comprehensive database on information relating to all aspects of sentencing. It collates and presents statistical data on the range and frequency of penalties imposed in particular types of case, which aids sentencing judges and counsel in understanding the direction

² Ibid s 8.

³ Ibid s 9.

⁴ Ibid s 18.

⁵ Ibid s 21.

⁶ Judicial Commission of New South Wales, *Annual Report 2017–18* (Report, 2018) <<https://www.judcom.nsw.gov.au/wp-content/uploads/2018/11/Judicial-Commission-of-NSW-Annual-Report-2017-18.pdf>> (*Judicial Commission Annual Report*).

of sentencing practice for any given offence. It also maintains an extensive commentary on sentencing principles in the form of the *Sentencing Bench Book*.

6. These resources are almost indispensable for the magistrates or District Court judges who are frequently required to sentence a large number of offenders over the course of a single day, with few spare minutes to engage in the abstract philosophising and pontificating which we like to indulge in from time to time in the Court of Criminal Appeal. The work which the officers of the Commission do in preparing these resources are not a mere adjunct to the administration of criminal justice in New South Wales; they form an integral part of it. Even in the ivory tower of an appellate court, these resources make it much easier to assess current trends in sentencing practice, which continues to be a relevant consideration in appeals against sentence.⁷
7. While sentencing information for the judiciary might have been the original focus of JIRS, the system has expanded to also include general updates on developments in the criminal law, both common law and statutory, as well as maintaining other bench books covering a wide range of the types of work conducted in our court system.⁸ No less than for their work in relation to sentencing, the concise statements of the law which these publications provide are essential for busy magistrates and judges who need to identify and ascertain the applicable law within a very short space of time. The effort which goes into their preparation is greatly appreciated by many judicial officers around New South Wales.
8. These resources are also widely available outside the judiciary to the profession and the public. While JIRS in its entirety is only available by subscription,⁹ a significant portion of the information published by the

⁷ *Hili v The Queen* (2010) 242 CLR 520, 536–7 [53]–[54] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁸ *Judicial Commission Annual Report 2017–18* (n 6) 39.

⁹ ‘Judicial Information Research System (JIRS)’, *Judicial Commission of New South Wales* (Web Page) <<https://www.judcom.nsw.gov.au/judicial-information-research-system-jirs/>>.

Commission on JIRS is freely available. Importantly, this includes the series of bench books and the updates on developments in the criminal law, which are accessible both online and via app for the technologically savvy.¹⁰ Not only does the Commission provide an excellent service to the judiciary, but it also helps provide high-quality educational resources to the profession and the public, which, judging from the statistics provided in the annual report, are well-used.¹¹

9. The second function of the Commission which I mentioned earlier, judicial education, is necessarily more judicial in its focus. Part of this function, of course, includes the publication of the bench books and updates which I have already spoken about in relation to the sentencing information provided by the Commission. However, the judicial education services provided by the Commission also extend much wider. They include an annual conference for the members of each of the courts of New South Wales as well as workshops on individual issues, including orientation programs for new judicial officers. The feedback suggests that all of these events are roundly well-received and useful to judicial officers in their court work.¹²
10. Several of these events also offer the opportunity for the judiciary to engage more broadly with the community. A particular example is the “Ngura Yura” program, which “aims to raise judicial awareness about Aboriginal history and culture, Aboriginal interactions with the justice system, and to provide an opportunity for judicial officers to meet and exchange ideas with Aboriginal people”.¹³ These kinds of events can go a long way towards addressing the difficulties which Aboriginal people have faced and still face in the justice system today by providing judicial officers with the training necessary to overcome cultural communication

¹⁰ Ibid.

¹¹ *Judicial Commission Annual Report 2017–18* (n 6) 40, 43–4.

¹² Ibid 25–6.

¹³ Ibid 28.

barriers in their everyday work in court, supplemented by resources such as the *Equality Before the Law Bench Book*.¹⁴

11. Both of the functions of the Commission which I have outlined so far have the common goal of strengthening the competence and knowledge of the judicial officers in carrying out the administration of justice in New South Wales and thus building public confidence in the judiciary. They should be regarded as lying at the heart of the task which the legislature has set the Commission. Its primary and most significant role is not to be a judicial police officer, but rather, to provide educational resources to the judiciary to allow them to effectively discharge their duties fairly and in accordance with the law.
12. The Commission does have a responsibility to receive complaints from members of the public when judicial officers fail to fulfil this task. However, the Commission only exercises powers of preliminary investigation and summary dismissal over complaints.¹⁵ If a complaint is not summarily dismissed, then it effectively passes out of the purview of the Commission. Less significant complaints are referred to the head of jurisdiction,¹⁶ who may take any action which they might otherwise have taken under their existing powers. Other complaints are referred to an independently constituted "Conduct Division" of the Commission,¹⁷ which conducts an investigation of the complaint.¹⁸
13. The limited powers of the Commission and the Conduct Division in relation to complaints should not be elevated to be its principal function when compared to its sentencing and judicial education functions. Indeed, one could almost say that the functions of the Commission in

¹⁴ See Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (Online Resource) <<https://www.judcom.nsw.gov.au/publications/benchbks/equality/index.html>>.

¹⁵ *Judicial Officers Act 1986* (NSW) ss 18, 20.

¹⁶ *Ibid* s 21(2).

¹⁷ *Ibid* s 21(1).

¹⁸ *Ibid* pt 6 div 3.

relation to complaints are a triage process, determining whether a complaint should be referred to the head of jurisdiction or sent to a Conduct Division. It has no compulsory powers apart from the power to require a judicial officer to undergo a medical examination if there is reason to suspect impairment in the performance of their duties.¹⁹ It is only the ad hoc panels of the Conduct Division which exercise more extensive powers, and even then, these are scarcely different in scope from those which could be exercised by a royal commission.²⁰

14. Neither the Commission nor the Conduct Division can exercise any disciplinary powers over a judicial officer. Their functions are investigative.²¹ Further, they cannot make any findings which would ultimately affect any decision about whether to remove the judicial officer by the legislature. In particular, the role of the Conduct Division is to produce a report after a hearing concerning the complaint which sets out its decision on whether it is “wholly or partly substantiated”.²² Even if it is of the view that there are grounds which “could justify parliamentary consideration of the removal of the judicial officer”, its role is limited to forwarding its report to the Governor.²³
15. I do not point these matters out to diminish the excellent work which has been done by the Commission over its three decades of existence. Its staff is professional, and their output is always of the highest quality. I seek only to say that the reason for its utility does not lie in the particular powers or roles with which it has been conferred, but rather, in the broad-based support which it receives from the judicial officers who participate in it and constitute its directing mind and will alongside other

¹⁹ Ibid s 39D.

²⁰ Ibid s 25.

²¹ Ibid ss 18, 23.

²² Ibid s 28.

²³ Ibid s 29.

prominent and respected members of the community.²⁴ The Commission has not succeeded because it has exercised coercive disciplinary powers to “keep the judiciary honest”. It has succeeded because it operates with the consensus and co-operation of all the relevant stakeholders.

16. I think that this fact is essential to understand in the current debate about the merits of a “federal judicial commission”. Without the full support and involvement of the federal judiciary, I find it difficult to understand how it would add any benefit to the internal complaint-handling procedures which have been adopted by each of the major federal courts,²⁵ most of which, I note, already bear some similarity to the procedures which are already followed by our Commission in New South Wales. If a complaint is not summarily dismissed, the procedures provide for it to be either referred for assessment to an independent “Conduct Committee”, which then prepares a report, or referred to the Commonwealth Parliament through the Attorney-General, which may then establish a separate independent commission under statute with powers of compulsion,²⁶ and which then prepares a report. The principal difference is that the determination of whether a complaint should be summarily dismissed or sent to a “Conduct Committee” of Parliament is done internally, generally at the direction of the head of the relevant jurisdiction.
17. The dangers of establishing an external complaint-handling procedure without the support of the judiciary are well-illustrated by the history of

²⁴ Ibid s 5. For the selection of the “appointed members” from the community, see sch 1.

²⁵ ‘Judicial Complaints Procedure’, *Federal Court of Australia* (Web Page, 3 May 2013) <<http://www.fedcourt.gov.au/feedback-and-complaints/judicial-complaints>>; ‘Judicial Complaints Procedures’, *Federal Circuit Court of Australia* (Web Page, 14 May 2013) <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/contact-us/feedback-complaints/judicial-complaints>>; ‘Judicial Complaints Procedure’, *Family Court of Australia* (Web Page, 25 May 2017) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/contact-us/feedback/fcoa_judicial_complaints_proc>.

²⁶ *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth).

our Commission.²⁷ As proposed by Attorney-General Sheahan, the original plan for the Commission would have placed it under the control of the executive government with powers to discipline judges or remove them from office.²⁸ This proposal quickly generated a hostile reaction from the judiciary, and the Bill as it was eventually introduced retained the traditional role of the Parliament in removing judicial officers.²⁹ However, while the Bill was ultimately passed, controversy continued to rage around questions about the independence of the Commission from the Attorney-General's Department until provisions were introduced which made the Commission an independent statutory body with the power to employ its own staff.³⁰

18. The New South Wales judiciary ultimately accepted the need for the Commission as a result of several issues of public concern about the administration of justice which had developed over the course of the early 1980s. Despite their reservations about the initial model which was adopted, there could have been little doubt at the time that some action was needed to maintain public confidence in the ability of judicial officers to discharge their duties. I suspect that things would have turned out quite differently if there had not been an acknowledged need for reform of the way in which complaints about judicial officers were being managed. The broad support which the final model for the Commission received means that there is no need to speculate about what might have occurred.
19. I think that this support of the Commission by the judiciary underlies its successes in performing each of its functions which I have mentioned in

²⁷ For more detail about the history of the Commission, see Judicial Commission of New South Wales, *From Controversy to Credibility: 20 Years of the Judicial Commission of New South Wales* (General Publication, 2008) <<https://www.judcom.nsw.gov.au/wp-content/uploads/2014/07/judcom-20years-web.pdf>>.

²⁸ Ibid 2.

²⁹ Ibid.

³⁰ *Judicial Officers (Amendment) Act 1987* (NSW) sch 1.

this address. It has provided excellent legal resources and training which are available to judges in every court because it works closely with the judiciary to develop material which is relevant to their key areas of work. It has become accepted as the appropriate means by which complaints should be assessed because it retains a role for the judiciary in that process. But, in the end, the most important benefit of the engagement of the judiciary with the Commission is that it has made the judiciary conscious of the fact that their performance in their role will be judged by the members of the public who appear before them.

20. This has had a civilising effect on the judiciary. It has not resulted from the threat of any disciplinary sanction, but from an acceptance that, since how they carry out their work can affect the lives of members of the public who appear before them in significant ways, they must do so fairly, politely and, it almost goes without saying, in accordance with law. This is where the value of a body such as the Commission lies. There have been few complaints which have required meaningful action to be taken over its lifetime, and no cases where there has been any finding of corruption of any sort. I think that there has, however, been a general increase in awareness among the members of the New South Wales judiciary about the importance of proper conduct attributable to their engagement with the Commission and its work, which is to the benefit of the members of the public who come before the courts.
21. However, the importance of support from the judiciary should never be forgotten. I think it should be regarded as indispensable to the functioning of any body like the Commission. Isolated calls for reform are unlikely to gain much traction unless they proceed by engaging respectfully with the judiciary and building consensus over time based on a genuine and identified need for reform. The Commission in New South Wales has succeeded because its relationship with the judiciary is constructive and the product of many years of respectful dialogue. This approach is, I think, one which should be commended and followed.
22. Thank you for your time.