We need a better way of judging the judges

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Because Judges set the standard for what's a fair go in Australia, their own performance should be capable of being monitored, evaluated and reviewed in a fair, open and transparent manner. The nation needs to be confident it is getting the justice it desires and deserves. Academic lawyer, Trevor Hoffman explores the dilemma.

An effective judicial complaints system is long overdue

*By Trevor Hoffman**

Recent entreaty by the Federal Attorney-General, Robert McClelland, to his State counterparts to cooperate in setting up an expert national body to rule on complaints of judicial misconduct for all Australian courts is a cause that should be enthusiastically embraced by all Australians, but especially by Victorians.

Despite the Victorian Government's extravagant assurances of efficacy for the judicial complaints system it produced in 2005, the unfortunate truth is that the basic design structure is so seriously flawed it is incapable of working effectively. Indeed, as we shall see, when it comes to the investigation of truly serious complaints the flaws are fatal.

The writer's interest in the subject of an effective judicial complaints system arose out of an experience as plaintiff in civil proceedings in the Victorian Supreme Court. Having promised his family that the Supreme Court trial would be the end of the litigation, the writer did not appeal the judge's findings. The litigation, however, was not the end of the matter.

So disturbed was the writer by the manner in which the judge had arrived at his findings, and the manner in which the judgement had been conceived, he exercised his right to complain. In fact, so concerned was the writer about the conduct of this judge, as well as formally complaining to the Victorian Attorney-General and the Chief Justice, he forwarded copies of the complaint to every other judge on the bench of the Supreme Court and Court of Appeal.

Many people think (some lawyers included) that public criticism of judicial conduct constitutes contempt of court, but that is not strictly correct. According to the High Court of Australia *(Nationwide News Pty Ltd v Wills (1992) 177 CLR 1),* public comment on judicial conduct that is disreputable (in the sense that it would impair the

confidence of the public in the competence or integrity of the court) as long as it is fairly made, is in the public benefit.

Many people also think (some lawyers included) that it is up to the appellate system to correct anything that might go wrong with a trial in court, but again that is not correct. The primary function of appellate courts is to review decisions made in lower courts, the focus being on the particular findings a judge has reached in a particular case, not on the behaviour of the judge. Judicial conduct as an issue, in itself, is not part of the brief for a court of appeal.

Judicial findings are, of course, written up in the form of judgment, so before going on to consider the more important aspects of the current Victorian judicial complaints system, it will be helpful to remind ourselves why judges are required to deliver written judgments.

Why judges deliver written judgements

Eminent High Court judge, Sir Frank Kitto, explained the rationale behind the delivery of the written judgement (*Why Write Judgments? 66 Australian Law Journal*) as follows:

> *The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance.*

In a paper (*The Trial Judge's Duties from an Appellate Point of View, 2004*) delivered to the National Judicial College in 2004, the Honourable Justice David Ipp of the New South Wales Court of Appeal, had this to say on the topic:

> *The primary purpose of a trial judge's reasons for judgment is to explain to the parties, appellate courts and the general public how the judge came to his or her decision… The reasons for judgment must explain the judge's reasoning process and should not, in effect, have the practical result of negating or frustrating the losing party's right of appeal…*

One of the most important points to note here is the great degree of trust that reposes in the trial judge in respect of assessing the credibility of the parties in any given case.

Justice Ipp (2004) explains:

> *The approach of appellate courts is dictated by the fact that the judges of such courts neither see nor hear the witnesses. …the all-important task of the trial judge is to find the relevant facts [and this] usually requires deciding between two or more conflicting versions.*

He then asks the crucial question:

> *How does a judge go about deciding whether a person is telling the truth?*

Justice Ipp proceeds to discuss difficulties often encountered here, and then goes on to stress just how dependent the appellate court judges are on the judgement of the trial judge for this information:

> *Appellate judges accept that not having seen and heard the witnesses puts them in a permanent position of disadvantage as against the trial judge. Thus, appellate judges are very reluctant to overturn the decision of trial judges as regards what are known as 'primary' facts.*

Any barrister will tell you just how true the above words are; it is well accepted within the profession that it is almost impossible to get an appellate court to interfere with the findings of fact made by a trial judge.

The present judicial complaints system in Victoria

With a judicial complaints system, the focus of attention is exclusively on the manner in which a judge has conducted himself. Major concerns here revolve around who judges the judges, by what standards are they to be judged, and what consequences might follow. In the words of the Honourable Justice Alex Chernov of the Court of Appeal of the Supreme Court of Victoria, in his 2002 keynote address (*Who Judges the Judges? 2002*) to the Malaysian Bar:

> *We are not concerned [here] with the consideration of the most common form of judicial accountability, the appellate process. Rather, we are concerned to analyse who judges the behaviour of a judicial officer, for the purpose of determining if it has fallen below acceptable standards and if so, who determines what consequences should follow.*

The current judicial complaints procedure in Victoria is based on a report *(Judicial Conduct and Complaints System in Victoria, 2003)* by Crown Counsel, Professor Peter Sallman.The Victorian Chief Justice, the Honourable Marilyn Warren, delivering a paper (*Judicial Appointments, Judicial Behaviour and Complaint Mechanisms, 2007*) at the National Judicial College Conference, refers to the Sallman Report, acknowledging that there are basically two categories of complaint, the first being *complaints that, although perhaps on a sound factual basis, do not warrant the removal of the judge;* these minor complaints, the Chief Justice tells us, are *dealt with internally.* Though we are not concerned here with grievances of a lesser nature, no indication is given as to what sort of behaviour is drafted into this category, nor are we told what sort of process and consequence attends it when *dealt with internally.*

The more serious complaints that might amount to *proved misbehaviour or incapacity* are subject to a complex procedure whereby a judicial officer may actually be removed from office, though as the Chief Justice admits in her paper *what is meant by 'proved' and 'misbehaviour' in this context is quite uncertain.* Leaving unaddressed the question of grading judicial grievances, the Chief Justice goes on to outline the procedure for the removal of a judicial officer in Victoria:

> *The removal provisions in Victoria now apply to all judges and masters of the Supreme, County and Magistrates' Courts. Under this procedure a judge may only be removed if the following occurs:*
>
> 1. *The Attorney-General is satisfied that there are reasonable grounds for the carrying out of an investigation;*
> 2. *The Attorney-General appoints an investigating committee from a pool called the Judicial Committee, consisting of seven ex-Federal and Family Court judges as well as Supreme Court judges of the other States;*
> 3. *The investigating committee conducts an enquiry vested with powers similar to those of a Royal Commission;*
> 4. *The investigating committee submits a report to the Attorney-General as to whether facts exist that could amount to proved misbehaviour or incapacity such as to warrant the removal of that office-holder from office;*

5. *If the Attorney-General considers it appropriate, a report of the investigating committee is laid before each House of Parliament;*
6. *Each House of Parliament, having considered the report, passes a resolution by special majority (that is, a majority of three-fifths) praying for the removal of the relevant judicial officer on the grounds of proved misbehaviour or incapacity;*
7. *If all of the above occurs, the Governor, acting on the advice of the Executive Council, may remove the judicial officer.*

What comprises 'reasonable grounds' to investigate?

As can be seen the procedure is complex, but the threshold question revolves around the first condition, because before we get round to worrying about *what is meant by 'proved'* and *'misbehaviour'* we need to know what sort of judicial misconduct it is going to take to satisfy the Attorney-General *that there are reasonable grounds for the carrying out of an investigation*. This in turn gives rise to yet another question, a question which is perhaps the most important of them all, and one which we will return to, namely:

What process does the Attorney-General have in place to investigate the more serious types of judicial complaints in the first instance?

To summarise so far: With complaints of a lesser nature we simply have question, upon question, whereas with more serious complaints we have question, upon question, upon question. More correctly though, for there are no criteria offered as to how any of these questions might be answered, what we really have is mystery, upon mystery, with the lesser complaints, and mystery, upon mystery, upon mystery, with the more serious ones.

At first glance such a system might appear to be just a little vague, but unfortunately the problem cuts much deeper than that. Despite the fact that this writer's complaint could only be described as of the most serious nature, the Attorney-General responded by letter:

> *Following careful consideration of your letter [of complaint] and supporting material, [there was no supporting material] I consider that there is no basis on which a complaint of misbehaviour could be sustained, or any evidence of incapacity…. Accordingly, I do not intend to take this matter any further.*

And the written response from the CEO of the Supreme Court stated:

> *I don't regard that there are any issues raised in your correspondence that require a response from this court.*

While these responses might sound unfairly dismissive it should be borne in mind that letters of complaint, in themselves, are proof of nothing, and because everyone who ever lost a court case is in one way or another a disgruntled litigant, it is not hard to understand why they are easily dismissed. In a particularly insightful paper (*Judicial Conduct: Still A Live Issue, Some Thoughts On The Paper By Professor Peter A Sallman*) delivered to the Judicial Conference of Australia's Colloquium in 2005, the Honourable Justice Peter McClellan, Chief Judge at Common Law of the Supreme Court of New South Wales, points out that in respect of judicial misconduct … *The overwhelming majority of complaints are either dismissed or if not dismissed, are classified as minor.*

That said, however, obviously every complaint is not minor, and the consequences of failing to investigate complaints, especially serious, specific, and articulate complaints, are potentially ridden with hazard. One cannot help but wonder where is the great difficulty in the straightforward investigation of a complaint? It is not as though this writer's complaint was a matter of great complexity. Further, it was scrupulously specific and

written by an academic lawyer of more than twenty years standing. Given that any half-competent researcher, irrespective of whether they had legal training, could quickly and easily verify or refute the allegations, one would have thought that some sort of examination was in everybody's interests, even if just to clear the air. The integrity of the Supreme Court is too important, for too many reasons, to allow complaints containing grave allegations of misconduct to go unanswered.

To expect the Victorian public to have confidence in its courts when they operate within a complaints system that refuses to investigate complaints, especially serious ones, is not only unreasonable, and inequitable, it is totally out of step with the modern world. In this day and age there are effective complaint mechanisms in place for almost every product, service, trade, craft or profession one can think of, many of them highly refined.

As Justice McClellan (2005) points out:

> *The development of consumer interest groups, a product of an increasingly well educated and sophisticated society cannot be ignored… [It is] important to have in place mechanisms to deal with [judicial] complaints which are both understood by and generally acceptable to the community.*

Litigation is serious business, and litigants, like consumers of any other expensive product, have every right to expect they will be served by the highest standards. Anything less in an Australian legal system is unacceptable. When litigants point to specific irregularities or flaws in the process, and exercise their right to complain, surely they are entitled to expect their complaints will be seriously considered?

The cost of conducting civil cases in the higher courts runs into hundreds of thousands of dollars; litigants can not be expected to pay that kind of money for a system that not only delivers a flawed product, but refuses to even consider the possibility that a flaw exists. It is difficult to imagine any other profession or trade tolerating a situation that sees itself so completely unaccountable.

It is appropriate now to enquire as to just how a judicial complaints system that refuses to look into the most serious allegations of judicial misconduct could be tolerated in a sophisticated society.

Justifying the appellate system as watchdog

The legal profession offers various reasons as to why there is no need for the type of complaint system envisaged by the Federal Attorney-General, the most forceful being that the appellate process, in itself, is the most effective watchdog.

Here is Justice Ipp (2004) in defence of the appellate system:

> *The reasons for judgment lie at the heart of every appeal. Except for judgments of the High Court, all judgments might be taken on appeal. Once a judgment is given, it is scrutinized for errors. Usually, the judge has limited time to write the judgment. Once it is delivered, however, armies of highly paid barristers and solicitors will examine it at their leisure. Every word, every reference, every authority, will be subjected to analysis, and any error will be exposed… There can be no other profession where the work of the individual is exposed to such **rigorous scrutiny** and such public and lasting exposure of error. I think it laughable when members of the public say that judges are not held accountable. They are indeed held accountable and in a merciless way.*

And here is Justice Chernov(2002):

> *When a judge delivers reasons for judgment there is always the healthy concern that others, particularly the Bar, the academics, fellow judges, not to mention the appellate court, may pore over the chosen words and subject the reasoning and conclusions to critical analysis. I say 'healthy' because I think this feeling of apprehension, however minor, is conducive to the production of better judgments. It is like having a **police car** driving immediately behind you on the road; it is rare that in those circumstances, the speed limit is exceeded.*

There is undeniable logic to these quotes, and doubtless in the normal course of events the logic holds firm, but we will shortly revisit Justice Ipp's ***rigorous scrutiny***, and Justice Chernov's ***police car*** to see how they fare in circumstances outside the norm.

From the quotes we have looked at so far, it has become abundantly clear that whatever material gets to be considered on appeal is dependent on the judgement delivered by the trial judge; which, of necessity, means appeals in our Australian legal system are, for all practical purposes, dependent upon the competence and integrity of that trial judge.

And this, in turn, begs the question: Can we be assured that every trial judge is a person of competence and integrity?

To answer that the writer will backtrack some forty or so years to when, as an undergraduate, he had the good fortune to take jurisprudence under the tutelage of that pre-eminent jurisprudentialist, H. L. A. Hart, who gave a particularly memorable lecture on exactly this topic. Professor Hart claimed that even the most sophisticated judicial selection process could not get it right every time, and this unfortunate fact meant that occasionally well-qualified jurists who were flawed in some way that made them unsuited to be judges, would make it onto the bench. The Professor offered various examples: they might not possess the particularly diverse skill range required, or they might have socio-psychological problems that impinged upon their decision-making abilities, or they might lack the trustworthiness to do the right thing when faced with making difficult decisions.

Accepting Herbert Hart's claim for the moment, let's place one of his flawed judges in a supposed trial situation where he's presented with a common-enough judicial scenario: If the judge finds for the plaintiff it will lead to his having to consider some further issues, which for one reason or another he'd rather not deal with, but if he finds for the defendant the case is dismissed and he's done with the matter.

Let's say the problem for this judge is that the vast bulk of the evidence favours the plaintiff. For example, we'll say that the defendant has dishonestly assumed ownership of the plaintiff's assets, admitted to lying about these same assets while under oath in earlier court proceedings, admitted to taxation fraud, and has demonstrably lied to the judge on several important occasions throughout the trial.

Well, you say, a month or so back Renate Mokbel received a jail sentence for lying about her assets while under oath, and we all know the dismal predicament former Federal Court judge, Marcus Einfield, now sees himself in. We have seen too the deadly seriousness with which the legal profession was treating the possibility of lying under oath in matters involving Steve Vizard, Belinda Neal, John Della Bosca, Richard Pratt, and more recently, several high-ranking Victorian police officers. And we also know how seriously the courts take the matter of taxation fraud, because not so long ago we saw Glenn Wheatley sent to jail for just such an offence. No judge could close his eyes to such criminal admissions, you say. And as for the defendant's wrongful possession of the plaintiff's assets: no judge could ignore that either.

But perhaps he could.

You see there is a significant distinguishing feature in our supposed trial situation. High profile cases like those mentioned above attract intense media scrutiny and consequent public interest. Ours is just a run-of-the-mill case with no media scrutiny, no public interest, and no reason to expect there might be any *post-mortem*, public or private. If the judge decides to state in his judgment that he believes the defendant, manipulates the evidence to suit his findings, and omits any reference to the defendant's lies and criminal admissions, what's to stop him? The judgment might not come out till seven or eight months after the trial, by which time the lawyers, even the parties, have forgotten most of what happened in court; everyone has moved on.

So what is happening here, you exclaim? Does the Victorian legal system have some sort of secret protocol whereby high profile cases litigated under the glare of the media are subjected to the full vigour of the law, but little backwater cases, that attract no media attention, are not?

No, it doesn't, but we are talking about the exception here, not the rule. We are talking about the sort of thing that could happen with one of Professor Hart's flawed judges. The vast bulk of judicial officers in this country, would act honourably irrespective of whether they were being closely watched.

Well, you say, this is where the appellate system comes to the rescue; the truth will come out on appeal.

But will it?

Remember Justice Ipp (2004) explaining that it was up to the trial judge to find the relevant facts and decide between any conflicting versions? That means the trial judge not only gets to decide who will be believed, what evidence will go into the judgment, and how that evidence will be presented, but also, very importantly, what evidence *will not* go into the judgment.

In Justice Ipp's (2004) own words:

> *Appellate judges accept that not having seen and heard the witnesses puts them in a permanent position of disadvantage as against the trial judge. Thus, appellate judges are very reluctant to overturn the decision of trial judges as regards what are known as 'primary' facts… In deciding appeals, Australian appellate courts generally consider only those facts that were determined by the judge or jury in the trial court. They rarely receive additional evidence.*

Now to return to Professor Hart for a moment: this most accomplished and erudite of jurists maintained that in almost every case, when it came to making decisions there was room for the judge to manoeuvre, and in those rare instances where there might appear to be none, if a judge was so minded, he could make room. A judge who was in some way flawed might do this by manipulating the evidence confident in the knowledge that his fellow judges would back him on appeal with that ancient aphorism:

> *The trial judge was there to hear the facts so he's the best one to decide what those facts were.*

By this stage it should be blindingly obvious that because appellate court judges are so reluctant to question the findings of trial judges, and equally loathe to receive additional evidence, that Professor Hart's flawed judge is pretty much free to write up his judgement as best it suits him. Even if he manipulates and omits crucial evidence, and states that he believes a party when the evidence shows the party could not have been telling the truth, the chances of his findings being reversed on appeal are still very slim. If the appellate court won't interfere with the trial judge's findings and won't receive additional evidence, Justice Chernov's *police car*

wouldn't know if it was following a truck or a trike, and no matter how painstaking Justice Ipp's *rigorous scrutiny,* one cannot possibly find that which is not there.

As can be seen, the manner in which the appellate system operates makes it ill-equipped to even recognise serious judicial misconduct, let alone deal with it. It was for precisely these reasons that Herbert Hart argued the best way to guard against deviant behaviour within the judiciary was to have in place an effective watchdog. The failure of the Victorian complaints system to investigate allegations of serious misconduct, such as those of the writer, demonstrates that the Victorian watchdog is completely dysfunctional, and highlights just how urgent the need is for reform. Indeed, the implementation of a properly functioning judicial complaints system in Victoria, such as that envisaged by the Federal Attorney-General, would not so much be the replacement of a system, as the filling of a vacuum.

And this writer is not alone in criticising the Victorian system. The Honourable Justice Peter McClellan (2005) explains in the aforementioned paper why he has no doubts that a NSW type system, where all judicial complaints are considered by a special Judicial Commission, is eminently more sensible than the Victorian system.

By way of subtle reproach the Chief Judge points to the admission in Professor Sallman's report that in arriving at his recommendations for the Victorian system he *was significantly influenced by what appears to have been vocal opposition by the Victorian judges to a NSW-type complaint mechanism.* The Chief Judge goes on to dismiss such opposition as unwarranted, and after noting the benefits that flow from the NSW system, predicts that:

> *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.*

Needless to say, this writer is in full concord with the above sentiments. For any properly functioning legal system the competence, integrity, and independence of its judiciary are of paramount concern, and the conduct of its judges in the execution of their duties must not only be beyond reproach, but must be seen to be beyond reproach. And this leads us to the heart of the matter, the fatal flaw in the Victorian judicial complaints system.

Victoria's judicial complaint system fatally flawed

There is another even more important reason why the Victorian Attorney-General should never have been placed in the politically delicate position the State's judicial complaints system now sees him occupying. Here again is the Chief Judge at Common Law of the Supreme Court of New South Wales (2005):

> *… if, as I understand the Victorian model contemplates, 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… [And the Attorney's] 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.*

The Chief Judge is too polite in describing the *boundary* that *has been crossed* here as merely *significant*; and the *difficulty* he refers to, apart from being *obvious*, is also enormous. Indeed, one has to wonder just what sort

of rationale lies behind the creation of a system that so dramatically upsets the balance of power in that sacred trinity of our governmental structure, the Separation of Powers.

Placing the Victorian Attorney-General in a position of such obvious ascendancy over the judiciary sees him sitting in unenviable discomfort between the proverbial rock and a hard place. If on the basis of any given complaint he instigates an investigation into a judge's conduct, he risks the accusation of abuse of power, whereas if he summarily dismisses the complaint, as he has chosen to do in the writer's case, he stands to be accused of inaction, as he is by the writer. In other words: He's damned if he does, and he's damned if he doesn't!

It is not, however, difficult to see why the Attorney-General might prefer inaction to the alternative. Launching an investigation into the conduct of a Supreme Court judge is grim business, and potentially fraught with all sorts of political implications. Justice McClellan (2005) makes the point:

> *…the initiation of a formal investigation… is a serious step and… very often leads to the resignation of the judicial officer.*

Then, in thinly veiled censure the Chief Judge goes on to comment:

> *Perhaps I do not fully appreciate the Victorian proposal. If I do, I am surprised it has not received more significant criticism.*

Needless to say, this writer too is surprised, and on that note will return to that particularly important question we set out to ask the Victorian Attorney-General earlier, namely:

> *What process does the Attorney-General have in place to investigate the more serious types of judicial complaints in the first instance?*

If the writer's experience is anything to go by, there is none. And it is abundantly clear that the elaborate procedure we have seen rolled out for the investigation of judicial complaints in the State of Victoria is so seriously flawed that not only does it not work, but it can not work.

The peremptory manner in which the writer's complaint was dismissed provides an astonishing insight into how easily serious misconduct in high places could endure *ad infinitum*, and serves to illustrate just how important it is for the legal profession, and everyone else for that matter, to get behind the Federal Attorney-General in his efforts to set up an expert independent body to handle all Australia's judicial complaints. Because irrespective of whether we are judges or lawyers, litigants or criminals, or simply innocent bystanders caught up in the system, our courts of law set the standards by which we are all judged, and if we wish to be judged by the highest standards, we must have in place the most effective means of ensuring our courts achieve them.

On any scoreboard the present judicial complaints system in Victoria is a hopeless failure, but worse than that, the incongruous nature of its design sees it inherently predisposed to perpetuate the very problem it was set up to remedy.

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Stun guns will kill Australians, CLA says

Experts highlight flaws: when will Conroy listen?