THE INAUGURAL NEIL WILLIAMSON MEMORIAL LECTURE
JUDICIAL INDEPENDENCE REVISITED

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I. INTRODUCTION

At the 1993 New Zealand Law Conference I presented an address entitled "Judicial Independence — Fact or Fiction?" Sufficient of interest has happened since then to justify revisiting the topic. Further, having regard to the time restrictions understandably imposed by the Law Conference organisers on oral presentations, my 1993 speech was deliberately confined to discrete aspects of the subject. As well as updating those, this occasion[1] gives an opportunity of expansion into some other topics.

When I was a young lawyer, judicial independence was not much discussed. It did not require discussion. It was not so much that it was taken for granted, because that assumes some knowledge of the principles of the subject matter and frankly I do not think that was widely present. At that time, and before, judicial independence existed as a matter of fact, and was rarely if ever under serious pressure, let alone threat; similar to the position which I imagine prevailed in most countries of the British Commonwealth. Contributing, was an unquestioning public attitude towards institutions and authority figures in general.

I do not ask you to mourn the passing of that era. In many respects, the present is healthier, more open, more democratic. Certainly however, one of the side effects is that a wider knowledge of judicial independence is required, and that its boundaries need to be patrolled more vigilantly. If the Asian lawyer friend quoted in my earlier paper was correct in saying that countries like New Zealand took judicial independence for granted, that is not a quotation with which I would commence such a paper today.

As a starting point some definition is required. For a recent attempt at an exhaustive declaration, to which New Zealand is a party, I refer to the Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia region to which 20 Chief Justices or their representatives subscribed in 1995. It runs to 44 propositions. But for present purposes, it is unnecessary to go beyond what I described in 1993 as the essentials to support judicial independence in the following terms:

> First, independence in judicial decision-making, meaning freedom from Government pressure, independence from the other branches of Government, non-alignment with any group in society, immunity from civil action and harassment by the public.
> Second, guaranteed tenure of office for Judges, and adequate remuneration.
> Third, an appropriate degree of judicial control over the administration and finances of the judicial system.
> Fourth, Government commitment to retaining traditional jurisdiction in the Courts, rather than tribunals.
> Fifth, that the legal system includes an independent legal profession of good standing in the community.
> Sixth, public support and understanding.

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1 Lecture delivered by the Rt Hon Sir Thomas Eichelbaum, Chief Justice of New Zealand, at the Millenium Hotel, Christchurch on 13 August 1997.

So far as the general public is concerned probably the least well understood aspect of judicial independence is that it exists for the benefit of the community. Sir Geoffrey Palmer, a former Prime Minister and Attorney General, said recently:

> The independence of the judiciary means that Judges cannot be given orders by Ministers and that their independence has to be protected, and protected very strongly. It is one of the bulwarks of our democratic system that the Judges are independent, a third branch of Government.[2]

Sir Ninian Stephen, then a Judge of the High Court of Australia, and later Governor-General of that country, observed that what ultimately protects the independence of the judiciary is a community consensus that independence is a quality worth protecting.[3] The community however, will not protect what it does not understand. Judicial independence does not imply a privileged position for Judges, it is not a licence for idiosyncrasy let alone a passport to step outside the boundaries of the law. The critical point is the independence of a judicial system from improper pressure and influence, whether from Government sources, or individuals, corporates or interest groups within the community itself, so that the Judges in their decision making are not deflected in any way from impartial justice. A paradigm example of the need, in the community's interest, for the Courts to be able to operate freely and fearlessly is the landmark case of *Fitzgerald v Muldoon* in 1976.[4] There a Government employee sought and obtained a judgment from the then Chief Justice, Sir Richard Wild against the Prime Minister of the day declaring that an announcement by the Prime Minister of the abolition of the statutory superannuation scheme was illegal, because it infringed the sovereign right of Parliament alone to make and unmake laws. As Sir Anthony Mason, the former Chief Justice of Australia has stated:

> Judicial independence is a privilege of, and a protection for, the people. It is a fundamental element in our democracy, all the more so now that the citizen's rights against the state are of greater value than his or her rights against another citizen.[5]

Notwithstanding its incalculable value for the community it serves, in countries like New Zealand an independent judiciary is never likely to be a subject to take hold of public attention or sympathy. Nor, in a democracy such as ours, is judicial independence a bastion which will suddenly fall. The danger lies in the risk of an insidious weakening of the castle foundations over a period of time. Thus it will largely be for the legal profession, and the judiciary itself, to explain the concept's essential significance, and to ensure that there is a continuous process of maintaining the judiciary's credibility, keeping its procedures up-to-date, and enhancing its performance.

2 Radio Interview, 5 August 1997.
3 "Judicial Independence - A Fragile Bastion" (1982) 13 MULR 334, 339.
4 [1976] 2 NZLR 615.
5 "The Independence of the Bench, the Independence of the Bar and the Bar's Role in the Judicial System" (1993) 10 Aust Bar Rev 1,3.

II. Administration and Finance

This was the first of the three major headings addressed in my earlier paper. Certainly under past New Zealand practice, this is the area where the concept of judicial independence has been at its most fictional. The Crown is the litigant most frequently before the Courts. The funding of the judicial system is provided by Government. The administration supporting the judiciary is answerable to Government. The buildings in which the Judges operate are owned by the Crown. Yet the judiciary is said to be, and expected to be, independent of Government.

Under the traditional New Zealand model, administrative services to the judiciary were provided by a division of a department of state, the Justice Department. As an entity the Department had many other responsibilities. As a Judge, in common with others I had already developed a measure of dissatisfaction with the existing system. When as Chief Justice I started to probe into the issue, I discovered that dissatisfaction with the services delivered, and the delivery, was widespread. Following the establishment of a Government Review Committee, and its recommendations, on 1 July 1995 a new Department, the Department for Courts, came into being. It was established for the express purpose of providing a dedicated focus on the operations of courts and tribunals, to work in partnership with the judiciary, and to develop strategies to improve the services provided.

The challenges facing the new Department have been daunting, and progress has necessarily been slow. Changing a deeply ingrained culture takes time, and as many long serving officers have moved to other positions, or left, the personal cost has been high. The absence of past emphasis on management, whether of personnel or cases, has been exposed. Both at national level, and locally, it has been necessary to establish virtually a new management structure. A new ethos, dedicated to servicing the needs of court system users, has gradually become visible. Clearly it is a long haul, and in order to go one step forward we have sometimes found ourselves temporarily slipping back a greater distance. I have every confidence that we shall reach the goal of an effective, efficient administration supporting an able and impartial judiciary.

In terms of a continuum of models of court governance we have moved off the bottom rung, courts administered by a division of a law centred executive department. We may console ourselves with the thought that that description still fits some Australian state models. We are on the second step: "Administration by executive department, with regular judicial consultation" and may be regarded as having one foot on the third — most administrative responsibilities belong to the law centred executive department, but specified responsibilities are designated for Judges. According to theory the next move would be to judicial governance, where the governing body is a Judicial Council accountable to Parliament. Under this model the Chief Executive, currently responsible to the Minister for Courts, would be responsible to the Judicial Council. Funding would be by means of a one line appropriation, and responsibility for the budget would pass to the Judicial Council, operating as an executive board. The concept is that the judiciary controls decision making at board level; the "board" selects and supervises the Chief Executive, and is accountable for court administration. This overcomes one of the current problems, that the

Chief Executive effectively is expected to answer to two sets of masters, being responsible, by virtue of statute and his contract, to the Minister but at the same time having to respond to the legitimate requirements of the judiciary.

In today's conditions, with the emphasis on control of Government spending, funding is dependent first on competition between departments and then, priorities within the department itself. I do not know how one weighs the competing public needs for enhanced court facilities in South Auckland against the provision of other community facilities in the same area let alone elsewhere in New Zealand. Nor would I pretend that all problems in the court system can be solved simply by throwing more money at them. But the public may not realise that the courts frequently have to make do with fewer resources and facilities than would be ideal. For example we have a large backlog of jury trials, particularly in the District Court, but trials could be speeded considerably by the use of modern evidence recording technology. The Department is now planning to bring in MSR/CAT (machine shorthand recording/computer aided transcription) but even if all goes according to plan this method will be adopted in New Zealand some 15 or more years after it became recognised as the fastest and most efficient system. By the time we adopt this technology it will probably have become obsolete in more modern courts, since they are already turning to voice activated videotaped recording. Sufficiency of resources is a vital element in maintaining the rule of law as administered by an independent judiciary.[6]

In the days of a less complex society and a smaller judiciary there was little need, real or perceived, for judicial education. The pre-eminence of the candidates for judicial appointment precluded any thought that they might require "training" while the relative stability in the applicable law and legal processes rendered superfluous any issue of ongoing legal education. In today's very different conditions, such considerations have passed beyond the optional to the essential. If as is widely felt to be desirable we should cast the net of judicial appointment over candidates from a broader range of backgrounds than previously, we must provide those who lack a wide litigation experience, in particular, with proper preparation and support. Yet despite several years of agitation by the Judges, it has not yet been possible to obtain funding for the judiciary's proposal of an Institute for Judicial Education.

It would be optimistic to suppose that had the Judges themselves had control over their budget process they would have lobbied more advantageously for such items than the Department has done on their behalf. Indeed the Department has been remarkably successful and must be congratulated on its achievements in the current budget round, particularly in laying the groundwork for a fully computerised court system. This is essential to progress and if priorities have to be set, I have no quarrel with computerisation taking precedence over some of the other facilities mentioned. This however, will not console the Associates, typists and Judges who, because of the absence of better evidence recording facilities, will contract occupational overuse syndrome between now and such time as MSR/CAT is implemented.

6 Sir Anthony Mason, "The Judiciary, the Community and the Media", 12 Commonwealth Judicial Journal No. 1, 4.

When the New Zealand judiciary last debated the topic, in 1994, it did not wish to move further along the continuum of models of court governance. It was I believe a sound decision at the time but eventually the bullet will need to be bitten, and in order to protect independence to the fullest, the judiciary will need to be made responsible for the administrative process with a budget provided by the state for which the judiciary is accountable.

Notwithstanding the public interest in maintaining judicial independence, there will also be reservations about any move seen as aggregating greater power in the hands of the judiciary. However, it should be understood that this would be balanced by greater accountability. At present the judiciary is regarded as responsible for administrative deficiencies over which, often, it has no control.

Those who are cautious about proceeding further, while acknowledging the desirability of enhancing judicial independence also see the presence of a threat. The control of a budget pre-supposes accountability. There is the spectre of the Chief Justice and other Heads of Court being brought to account before a Parliamentary Committee, compelled to debate priorities, and defend the best use of public funds. The now extensive Australian experience with such systems, which operate in all the Federal Courts, including the High Court of Australia, and in at least one State Court system, indicate that with the appropriate exercise of restraint such fears do not come to fruition.

In the meantime, the present system will serve us much better than the past. The fulcrum of the administrative system is the Courts Executive Council, comprising the Chief Executive of the Department, his Deputy, the Chief Justice, the President of the Court of Appeal and the Chief District Court Judge, and an experienced chief executive from the private business sector. There is ample ongoing consultation with the judiciary at all levels and on a large variety of topics but major issues, as well as regular reports, are brought before the CEC at its monthly meetings. Although presently a consultative body, clearly it has the potential to become a fully empowered decision making board.

III. Public Confidence

In terms of public attention upon the judiciary, for reasons partly general and partly particular, the last few years have been without precedent.

Under the heading of general I would put, broadly, the increasing political and public interest in the role of the courts in our society. In accordance with world-wide trends, although rather to the rear of them, our community has looked to the courts, to a progressively increasing degree, for the solution of public disputes and problems. At the same time, considerations of delay, caused by increased workloads, and coupled with expense, often lead to a sense of frustration on the part of those seeking access. The rise, over the last 25 years, in the use of proceedings to review governmental administrative decisions, including ministerial decisions, the enactment of a Bill of Rights, and the constant appearance of Maori issues in the courts has catapulted the previously least known branch of Government into public prominence. It is not a prominence that Judges seek or relish.

In addition to this general trend a number of specific events focused media, public and political attention on the Judges. Some of the wounds have been self-inflicted; two Judges were charged with fraud relating to travel expenses claims, while others have made unwise remarks from the Bench. Other instances have arisen, in the fields of bail decisions and sentencing, which although not involving any dereliction of duty on the part of the Judges, have raised a storm of controversy.

The judiciary cannot, and does not, complain about such issues being ventilated publicly. Unfortunately, they are rarely the subject of any informed discussion. Sir Geoffrey Palmer gives admirable radio interviews but in this country there is a paucity of intelligent written analysis of legal topics in terms understandable to a broader audience, such as, on the other side of the Tasman, in The Australian and The Age. Here it is more likely that any instant reactions critical of a decision or outcome will be published and will become the definitive judgment on the issue.

In maintaining judicial independence, public confidence in the justice system is an essential element. Increasingly, it has become apparent that to achieve a balance the Judges themselves will need to take steps to present their point of view. In this respect the last period has seen some significant advances. Commencing with the 1995 calendar year the judiciary is now presenting an Annual Report. As well as providing information regarding workloads statistics and other matters of record, it provides an opportunity for the Heads of Court to speak out on controversial matters occurring in the year under review. The first report contained general background information on the judiciary, and the structure of the courts system as a whole. In addition, the reports have recorded information about the administrative organisation of the court system, the principles of caseflow management, the administration of the judiciary itself, the judicial support staff and the various judicial committees and their work. Brief information has been given on topics under consideration such as alternative dispute resolution, the delegation of quasi judicial functions, improvements relating to child witnesses, Maori issues relevant to the courts, judicial security and judicial education and studies. Progress on technological issues was reported, for example the electronic libraries project, and the increasing use of computers. Separate sections of the reports have dealt with the year's work of the Court of Appeal, the High Court and the District Court, and with particular issues of interest regarding the administration of each of those courts. The decision to issue such a publication has been well received. The reports have helped to dispel the professed mystique about the judiciary's organisation and mode of operation.

Another step forward has been the appointment of a judicial communications adviser, employed by the judiciary and reporting directly to the Heads of Court. The judiciary sees him as fulfilling an important role in helping to ensure that reporting on matters concerning the judiciary is accurate, fair and balanced. He will act as a conduit for information between the media and the judiciary, and assist the media in the accurate reportage of legal and judicial matters. As can be imagined the number of requests made of the Heads of Court for media information or comment has increased greatly and the assistance of the judicial communications adviser will enable the judiciary to respond more effectively than has always been the case in the past.

I refer briefly to the judiciary's project on gender equity. There was no reason to think that the difficulties faced by women within the judicial system would be any different from those experienced in other professions and institutions here and overseas; but the members of the judiciary who assisted to drive this project considered that in conformity with the judicial oath it was essential that our judiciary should address the issue and be seen to be doing so. Progress will necessarily require commitment over a long term, but the well planned seminar, enhanced by outstanding contributions from New Zealand and overseas speakers, gave this ambitious undertaking the best possible start.

Finally under this heading I mention the pilot project for television in court. That has been its popular name, and the showing of film taken in court that day on the evening television news has been the pilot's best known form of presentation. The pilot has also trialled the use of still photography, and radio recordings, taken in the courtroom. In addition to the now familiar court scenes shown in the course of the daily news broadcasts there have been two documentaries covering high profile trials. The accurate picture given of the actual working of our courts, functioning in a calm, fair and rational atmosphere, can only be helpful in fostering a more accurate public perception of the judicial system.

IV. The appointment process

In my previous paper I discussed the New Zealand system, which basically was (and is) that High Court and Court of Appeal Judges are appointed by the Attorney General, District Court Judges by the Minister of Justice, each of whom consults as thought appropriate, my theme being that it was timely to consider a more visible, systematic and accountable process. The difficulty was (and remains) to suggest something better.

An aspect not widely known or understood is that by convention, the Attorney and the Minister make appointments as part of the responsibilities of their particular office, this not being regarded as a Cabinet decision. While this is one of the strengths of the present system one cannot be completely confident that under a dramatically changed political environment, it will prove possible to maintain the convention. From my observations it is not easy for modern Attorneys-General and Ministers of Justice, when fulfilling their traditional independent role in relation to the judiciary, to distance themselves from the collective Cabinet responsibilities by which ordinarily they are bound. Their Cabinet colleagues, who are subjected to electorate pressures in relation to judicial conduct in matters such as sentencing, must find it difficult to understand why in such situations the Attorney and the Minister feel obliged to defend the judiciary. To date these tensions have surfaced to a greater degree in Australia than here, where the judiciary has appreciated how successive Attorneys-General and Ministers of Justice have held to the conventional role.

It may be said that there is no history of any political appointments in New Zealand, and no risk of any in the future because politically influenced judicial appointments would be self-evident, and will continue to be avoided because the cost to both the judicial system and to those charged with the appointment process is obvious. This however, is not a complete answer. What remain unknown and unseen are the cases where for politically influenced reasons, particular persons are not appointed.

If a member of the judiciary speaks on this theme there is a danger of a misconception that the Judges wish to capture the system. That is simply not so. The picture of the judiciary as a self perpetuating oligarchy is entirely unattractive. The judiciary however, has legitimate reason to be concerned about the process. First and foremost the whole community has a common interest in having the best available judiciary. The solution — to appoint those best qualified — is deceptively simple. At a time, now long past, when we had a smaller judiciary, and fewer numbers in the profession, it was a relatively straightforward task which would have produced the same results regardless of the method employed. The profession could generally tell you the name of the next Supreme Court Judge before the candidate himself was aware of it. It was rare for anyone approached to decline. Even if we move to more recent times, and illustrate the point by reference to the period when I was appointed a Judge, between 1980 when our present Governor-General was appointed to the Bench, and 1982, when I was, there were only two other appointments. Going back two years from today, I have sworn in 13 new Judges. Hopefully this will turn out to have been an exceptional period but the increase in numbers has coincided with an era when it is common knowledge that many leading members of the Bar are unwilling to accept appointment. In turn this is leading to a situation where the age group of appointees is such that compulsory retirement at 68 means a shortened period of service, leading to more frequent vacancies and further pressure on the appointment process.

The second aspect of the process of concern to the judiciary is public perception. Although there is no case for creating a judiciary that is "representative" of the community — it is the antithesis of the judicial process that the Judge should "represent" any particular sector or interest group — an essential element in retaining public confidence is to ensure that the overall appearance of the judiciary is one with which well informed members of the community, at any rate, can be comfortable. I think there is now general recognition that a judiciary comprising solely of persons of the same gender, with similar backgrounds, and predominantly middle-aged or more, will not meet these criteria, however well such a body of persons may have served in the past.

There is no point in raising unrealistic expectations. The current Attorney-General and Minister of Justice have both recorded their opposition to a judicial commission. Since I last addressed the issue both have stated willingness to widen the range of their consultations, and to formalise the procedures. To the extent that the latter step may require greater involvement of Departmental officials, caution is needed in case the process is seen as captured by a branch of Executive Government. As to consultation, while additional consultation is to be applauded I predict that to make an impact, more radical change will be needed.

The appointment process is necessarily a sensitive exercise. To accompany it by the glare of publicity of open hearings, as in the USA, would deter even a greater number of worthy candidates from allowing their names to go forward. Likewise, when it comes to consultations regarding the suitability of individual candidates, there must be an assurance of complete confidentiality if candid and worthwhile responses are to be obtained. So the actual workings can never be completely transparent, but I submit there is no reason why the nature of the process should not be made visible. Experience has shown that the term "judicial commission"

can be misunderstood. Some believe that it envisages a body comprised solely of Judges. Plainly this is unacceptable. "Judicial Appointments Board", or something similar, would indicate the intent better. Overseas such bodies have functioned successfully on the basis of nominating a small list of names from which the appointing Attorney or Minister will make a selection. If the Attorney or Minister goes outside the nominations, this is publicly notified. I suggest that the time has come when a system along these lines should be adopted here.

As distinct from a nominating body of the kind discussed above, the North American literature also refers to review committees; boards or commissions with a vetting function only. That is, they investigate, consider and approve (or reject) candidates nominated by an Attorney or Minister. Review committees may be the precursor of a true nominating body. A Canadian author has warned that a switch to nominating committees or commissions may not be either as simple or as helpful as it sounds.[7] The Editor of the Australian Law Journal states that the difficulty in finding qualified persons as Judges would be exacerbated by any appointments board system.[8]

Questions remain as to the membership of the nominating committee, and how appointments to the committee are to be made. One would not wish the outcome to be simply to replace the ideology of the previous appointor with that of the members of the committee. Clearly, issues relating to the composition of such a body, its mode of appointment, and the way it functioned would require detailed study and consideration before one could contemplate their adoption in New Zealand. However, the central rationale for their existence is the need for reassurance and verification that the candidate under consideration is in all respects suitable for appointment. In this respect too we have to recognise the significance of changes in the current era. As I said earlier, in times past well-informed observers were quite accurate in their pick of the next Judge. By reason of professional reputation, Law Society service, public achievements and in many cases, simply personal acquaintanceship, the qualities of the candidate were well known to the Attorney-General and those with whom he might consult, such as the Chief Justice and the President of the New Zealand Law Society. Today, often such in-depth personal knowledge will be absent. Undoubtedly, there is a need for rigorous checking, of a kind previously unnecessary and unknown.

V. Judicial Accountability

As has been said there is a natural tension between judicial independence and judicial accountability.[9]

As a matter of constitutional protection, the dismissal from office of a Judge of the High Court or the District Court is possible only in extreme circumstances. In the case of the High Court, the procedure is by way of an address by Parliament to the Governor-General. In the case of District Court Judges, removal may be effected by the Governor-General, presumably acting on the advice of the Executive Government. I say

7 "Judicial Conduct and Accountability" the Hon Mr Justice T David Marshall, 1995 ("Marshall").
8 Mr Justice P W Young, (1997) ALJ 582.
9 "A Place Apart: Judicial Independence and Accountability in Canada" Martin L. Friedland, 1995, 264 ("Friedland").

presumably, because the legislation has never been used. No procedures have been established, whether by way of legislation, regulation or convention, to assist in determining the facts. In itself however, this is not as fundamental a difficulty as might appear at first sight. Parliament or the Minister would presumably establish a mechanism, for example an ad hoc tribunal of retired Judges, to adjudicate upon the facts, under a procedure which gave the Judge a proper opportunity to answer. Great care would be needed both in relation to the composition of the tribunal, and its processes; a similar procedure in Australia attracted strong criticism.[10] A point to be emphasised is that the discussion is not about how to handle allegations of criminal offending on the part of Judges. As contemporary events have made clear, these are simply dealt with by the ordinary processes of law.

From publicity it is apparent that some sectors enjoy the prospect that Judges may be "disciplined". To find any discussion of the concomitant dangers to the public through impairment of traditional concepts of delivery of impartial justice, one has to go to legal and academic writing. The essence of the danger is the risk that Judges may give their decisions not solely on a determination of the merits, but influenced to some degree by the effects those decisions may have on their position and career prospects. Marshall[11] quoted Professor Dawson as saying that the problem thus becomes one of how to obtain the most conscientious performance of the judicial functions, without involving intimidation or fear, and without offering the hope of gain or preferment. Complaints procedures expose Judges to accusations by anyone, including disgruntled litigants or those acting out of malice or revenge.[12] A Judge's reputation may be injured by the mere holding of a complaints hearing no matter the outcome. Marshall[13] quotes Mr Justice Thomas, a Queensland Supreme Court Judge, as saying:

> "Plainly the system is seen by disgruntled litigants and others as a forum for getting back at the Judge.... If Judges are presented as an available target, it is inevitable that many will roll up for a shot."

Such systems inevitably run the risk of putting Judges in a position of siege, rendering them vulnerable to a form of harassment, and unacceptable and dangerous pressure.

Other potential consequences of an unfortunate kind are that litigants will seek to disqualify particular Judges from hearing a case by use of the complaints procedure, and the diversion of judicial resources in answering complaints. The Canadian author on whom I have drawn earlier concluded that formal complaints procedures had the ability to have a profound impact on a Judge's subjective sense of independence, and ultimately on the position of the judiciary in a liberal democracy.[14]

There is a dilemma to be solved. On the one hand, there are the dangers just discussed, which undeniably are real; but there is equally a risk of weakening confidence in the judiciary as an institution if the constant outcries about lack of accountability remain unanswered. In the nature of things, situations calling for the use of a removal procedure will be rare. When they arise, if well-founded the probability is that the Judge will

10 "The Independence of Judges and Lawyers: A compilation of International Standards" - Centre for the Independence of Judges & Lawyers, Bulletin No. 25-26, 1990 p 48.
11 Marshall 74, quoting R M Dawson "The Government of Canada" 1948, 490-491.
12 *Gratton v Canada (Judicial Council)* (1994) 115 DLR (4th) 81, 106-7.
13 Marshall, 83.
14 Marshall, 93.

retire without the need for a formal process. However, in New Zealand the main perceived deficiency in the present situation is the absence of an official procedure to deal with less serious complaints. At present they are made to or referred to the Head of Court. In substance or effect the majority are complaints about the outcome of particular litigation, in which case the complainant is referred to the appeal procedure. Or what is sought amounts to a request to intervene in current cases in a manner inappropriate or outside the scope of the powers of the Chief Justice or Chief Judge. The remainder are considered and, to the extent thought appropriate, investigated, for example I may arrange for confidential enquiries to be made from counsel, sometimes with the help of the Solicitor-General, and in other instances may refer the matter to the Judge for comment. All genuine complaints will be acknowledged.

Neither the Chief Judge nor I have any formal disciplinary powers. Given our constitutional position, summarised in the phrase "first among equals", that is as it should be. While the Chief Justice is the Head of the Judiciary, he is in no sense the employer or superior of the other Judges. We can draw the subject matter of the complaint to the Judge's notice, counsel the Judge, or administer some form of private or (rarely) public rebuke. It is a delicate and often difficult area. Fortunately, in my experience the occasions requiring entry into it have been rare.

Complaints relating to the judicial system raise a problem of an unusual and possibly unique kind in that the very nature of the process lends itself to a level of dissatisfaction and criticism, simply because in every case that goes to judgment there will be an unsuccessful litigant. In criminal jury trials the problem is not as acute because there the Judge can be seen in the role of referee rather than adjudicator, although even then it is the Judge who bears the sole responsibility for the sentence. In all other instances, where the Judge makes the actual decision, one may safely assume that in the majority of cases the losing party will be less than satisfied with the outcome and the reasons given for it.

Within the limitations of the means available to us the Chief Judge and I will I hope have been seen as dealing conscientiously with the complaints we receive. Nevertheless, from the public's point of view it may well be said that the system is not readily accessible; that it is unsystematic, or at least not as systematic as it could be, that it is non-transparent and that being conducted by the heads of the judiciary, it is not seen as neutral.

Formal complaints procedures exist in overseas jurisdictions. Having regard to the variety of the USA models, and the diversity of the conditions which they serve, they are beyond the reasonable scope of this paper. I will however, refer to two other prototypes of which New Zealanders have some knowledge, which may be regarded as operating in conditions having at least a degree of similarity to our own. The Judicial Commission of New South Wales, constituted by the Judicial Officers Act 1986, consists of 8 members. Six are official members, being the heads of the various court divisions and jurisdictions. Two other persons, appointed by the Governor-General on the nomination of the Minister, are a legal practitioner and a person of high standing in the community. The Commission is given jurisdiction to deal with complaints where they may either justify parliamentary consideration of the removal of the judicial officer, or warrant further examination because the matter may affect or may have affected the performance of judicial or official duties by the officer. The

Commission, or a committee of its members, conducts a preliminary private enquiry. As a result the complaint may be dismissed, or classified as minor or serious. There is a Conduct Division consisting of three judicial officers appointed by the Commission. The members need not be members of the Commission. A minor complaint may be referred either to the Conduct Division or if thought more appropriate, to the Head of the Court of which the Judge is a member. A serious complaint is one which if established could justify parliamentary consideration of removal from office.

In examining complaints, whether minor or serious, the Conduct Division may initiate such investigations as it thinks appropriate. As far as practicable these are to take place in private, but there is authority to conduct a hearing. Hearings on serious complaints would normally be in public. If the Conduct Division decides that a minor complaint is substantiated, it shall either so inform the Judge complained about, or decide that no action is necessary. Apart from this it appears that the only other action the Conduct Division is obliged to take in respect of a substantiated minor complaint is to furnish a report to the Commission. It may refer any complaint to any person or body considered by the Division to be appropriate in the circumstances. Presumably, under this provision the Division could refer a complaint or a matter arising under a complaint to the Head of the Court concerned. The Division is empowered to give directions, preventing or restricting the publication of evidence.

Initially, the establishment of the New South Wales Judicial Commission attracted considerable criticism, mainly because of its potential to threaten judicial independence. My enquiries indicate that over the years, the judiciary and the profession have become more accepting of the concept. In part, this is thought to be because in practice, the main component of the Commission's work has been in the field of judicial education, and this has been seen as a worthwhile development. So far as the Commission's role in dealing with complaints is concerned, my information is that the Attorney-General and the Heads of Court have appreciated the existence of an official channel for complaints. A more detailed investigation would be needed before an outsider could assess how satisfactorily the complaints process had worked. So far as appointments are concerned, the New South Wales Commission does not have any role; the traditional methods continue in place.

The Canadian Judicial Council was created by statute in 1971. It followed upon, and appears in part to have been motivated by, an enquiry of an ad hoc kind which had ultimately led to the resignation of a Judge of the Supreme Court of Ontario. Evidently there was unease about the Royal Commission procedure deployed in that case.[15] The legislative approach adopted was essentially one of self-discipline. There is a Judicial Conduct Committee with power to act for the full Council in the initial stages of the complaint process. The complaint is first reviewed by the Chair who may close the file without further reference to the Judicial Conduct Committee, or the Chair can send the complaint to a panel (normally of three persons) to consider what further action should be taken. If the panel decides that a formal investigation is warranted it makes a recommendation to that effect to the full Council. Any formal investigation is carried out by an Inquiry Committee, established it seems on an ad hoc basis. In two recent cases

15 Friedland, 88.

cited by Friedland the Inquiry Committee comprised three Judges and two members of the Bar. The Inquiry Committee reports its recommendations back to the Council which in turn submits its own recommendation to the Minister of Justice. The Council reports annually on its handling of complaints, the vast majority of which are closed by the Chair on his own authority. In cases where complaints are regarded as substantiated, but do not reach the level to justify a recommendation for removal, the Judicial Conduct Committee may reprimand the Judge or express disapproval of the conduct in question. Before critical comments are made that are communicated to a complainant, the case must be sent to a panel. The figures in the Council's latest Annual Report[16] show a fourfold increase in complaints over a period of 9 years, although having regard to the number of Judges to whom the procedures potentially apply, the latest figure of 200 complaints in a year does not seem unduly large. Only a small minority proceeded as far as a panel. It appears to be exceptional for the decisions of the Committee to be announced publicly. However, the Council issues an annual report of its proceedings giving a synopsis of particular complaints, although without necessarily naming the Judge involved.

The Canadian Judicial Council's jurisdiction is over Federal Judges. All Canadian provinces have their own legislation adopting various forms of a Judicial Council. The Canadian Judicial Commission is not involved in the appointment process. Whereas the Canadian Judicial Council is composed entirely of Chief Justices and Associate Chief Justices, Provincial Councils typically comprise a mixture of judicial and non-judicial members.

In New Zealand the idea of a Judicial Commission is not new. The 1978 report of the Royal Commission on the Courts, chaired by the then Mr Justice Beattie, recommended the establishment of a Commission not only for appointment and disciplinary functions, but also to take charge of administering the courts and arranging judicial education. Although supported by the Law Society, the concept was opposed by the judiciary, and after initial discussions the proposal lapsed. As seen, the issues regarding courts administration, and judicial education, which the Beattie Commission would have included in the functions of the Judicial Commission, could not wait indefinitely and have since been addressed in other ways. The issues of appointments, and discipline, remain as before, tending to resurface when a Judge is thought to have stepped out of line. So far, they have not been accompanied by any in-depth examination of the considerations in favour of or against the establishment of a Judicial Commission, its potential impact on judicial independence, and the manner in which it would function. To cover the ground thoroughly would require careful examination of the overseas models, particularly in New South Wales and Canada, and a more detailed study of the composition, functions and procedures of a proposed Commission than is possible within the context of an address such as the present.

In a recent paper[17] the Chief Judge of the New Zealand District Courts, Judge R L Young contended there is a need for an open and publicly known system for dealing with complaints of judicial misconduct. Although I continue to have concerns about the impact of any formal complaints system on judicial independence, it is difficult to argue with the Chief Judge's

16 1995-1996.

17 "Judicial Independence and Accountability in New Zealand - Recent Developments", paper presented at the Second Worldwide Common Law Judiciary Conference, Washington, 1997.

proposition. It was a point made by the Beattie Commission nearly 20 years ago. In his paper the Chief Judge saw the three major problem areas as follows: preserving judicial independence; devising a fact-finding mechanism; and establishing who should censure where misconduct not justifying dismissal is found. The factual assessment I suggest must be carried out by persons with judicial fact-finding experience. As to rebukes, or similar forms of disapproval, to have Judges subject to disciplining of this kind by a person or body outside the judicial system would be an unprecedented intrusion upon judicial independence. This leaves the Chief Justice or the Head of the Judge's Court as the only appropriate alternatives. The fact-finding proceedings should not normally be held in public but it is essential that there should be a set procedure which is publicly known, and a reporting mechanism, at a minimum by way of a requirement for an annual report.

A committee of High Court Judges who recently studied the subject concluded that there should at least be a point to which complaints can be directed, to ensure they are dealt with appropriately. The Judges gave weight to public frustration caused by the absence of formal avenues of complaint. They proposed there should be a formal mechanism for lodging complaints with the Chief Justice or the Chief Judge, that an initial investigation should be carried out administratively, and that the Head of the Bench concerned would determine whether the matter required to be referred to a Judicial Commission. A critical provision would be a safety valve in the form of a lay observer who, on the request of a person whose complaint had been summarily dismissed, could direct that the matter be referred to the Commission. The lay observer concept seems to have worked well in relation to Law Society complaints and the ability to refer to a person independent of the institution concerned is advantageous in avoiding a sense of grievance on the part of complainants. The Judicial Commission would consist of the Chief Justice, the President of the Court of Appeal, the Chief District Court Judge, a Law Society nominee, and a lay person nominated by the Attorney-General. The proposal has yet to be discussed by the judiciary as a whole.

Differing in this respect from the Chief Judge's proposal, the High Court group would have the necessary fact-finding carried out by the Judicial Commission itself. This is one of the areas of the debate relating to Judicial Commissions likely to be controversial. Understandably, there are bound to be strong calls for lay involvement at some stage of the process and as the High Court group has recognised, they will be difficult to resist. At the same time, the threat to judicial independence is at its greatest in two key areas, the judicial fact-finding process, and the administering of any rebuke or other form of censure or criticism. As Friedland says,[18] the Head of Court should have the first opportunity to deal with the complaint. Except in extreme cases the object of the complaints procedure, as well as obtaining satisfaction for the complainant where justifiable, should be to change behaviour, not to humiliate or promote the removal of the Judge. Pending further investigation and debate it would be premature to take a fixed position as to any mechanism capable of enhancing judicial accountability without endangering independence. I submit however, that if a Commission or equivalent body is established it will be advantageous to incorporate in

18 Friedland, 264.

the system a separate fact-finding tribunal, and the retention of the power of rebuke in the hands of the Head of Court, combined with lay participation in the complaint filtering process, and again in the membership of the Commission itself.

Discussions on judicial accountability often link the lack of transparency of the appointments process, with the absence of a satisfactory mechanism to deal with complaints against the judiciary.[19] In such discussions the term Judicial Commission is frequently offered as a kind of mantra that will cure all shortcomings. I hope this paper may serve at least to initiate the necessary consideration of the topic, and outline some of the matters for decision. A fairly fundamental one is whether the linkage between the appointments and disciplinary processes is inevitable. The discussion shows that quite discrete functions are involved, and that while the same senior judicial officers may be required in both roles, it does not necessarily follow that exactly the same personnel would be most appropriate for both purposes. Further, while the term "Judicial Commission" may be suitable for the disciplinary function, "Judicial Appointments Board" or some similar term may more accurately describe the appointments function.

VI. Conclusion

Events are likely to place increasing pressure on judicial independence. Especially in the absence of other informed comment in New Zealand, the judiciary needs to explain to the public the vital significance of the concept to the well-being of a free and democratic community. There is need for rational informed discussion on topics such as judicial appointments and judicial accountability. Systems which have served well in the past may no longer suffice, but changes which may impinge on judicial independence need careful consideration. Knee-jerk reactions to aberrant events affecting the judiciary should be avoided.

The New Zealand judiciary has an enviable history of integrity. No institution however, can afford simply to rest on its history. Recent events which have detracted from the judiciary's reputation have shown that it is more important than ever that the judiciary should work on its credibility. It will not be enough to be squeaky clean. If public confidence is to be retained the judiciary must show a willingness, where appropriate, to amend its traditions, philosophies, and processes so as to keep them appropriate to current conditions. To do so without detracting from the traditional qualities expected of Judges and a judiciary is intensely difficult but it is a challenge to which the judiciary, Government, the media and the public must rise. Yielding to fashionable populist demands is not the answer but then neither is rigid adherence to concepts whose time has passed. With these thoughts in mind, my final contribution to the debate, tonight, is to lay on the table the following as possible additions to the next revisit: a code of judicial conduct; periodical performance evaluations of Judges, by their peers, and the Bar; and a courts charter, informing the public of the delivery they may expect from the judicial system.

19 The author has done so himself - "Key Issues in Australian and New Zealand Judicial Administration", (1997) 6 JJA 152.

VII. The late Justice Neil William Williamson

I should like to thank the trustees of the Neil Williamson Memorial Trust, and especially Mrs Maree Williamson for the opportunity to deliver the first Neil Williamson Memorial Address. It is an honour I greatly appreciate, because I had the greatest admiration for Neil. I say these things for the record, because they will be well known to everyone present. Neil came to the Bench at the relatively early age of 46. His considerable experience in advocacy, particularly the many years he had conducted trials and legal arguments in criminal cases as Crown prosecutor in Christchurch, meant that he brought ample experience to the new task. In addition to that practical background he had exceptional gifts of judgment, integrity and humanity. He conducted many of the most difficult trials of his time, and he did so impeccably. He was a model Judge, and I as Chief Justice and all the Judges who served with him continue to miss the sterling contribution he made, and the substance and solidity which he provided to the judiciary not only here in Christchurch but throughout the country. But Neil was much more than an outstanding Judge, as the diversity of tonight's audience shows. There was a depth and a spread to his interests and activities that except to his family was perhaps not fully revealed until his untimely death. Much of his extra-legal activity was devoted to church and community work and other good causes. And notwithstanding all he did and achieved, he remained a modest, one could say a humble person.

The Canterbury District Law Society's tribute to him was headed "A Very Special Man". I cannot improve on that.

The idea of establishing a Memorial Trust, and an annual lecture or address, was an inspired one. It will serve to keep alive the memory of a fine Judge and an exceptional human being.