
TRANSCRIPT OF PROCEEDINGS

MEDICO-LEGAL SOCIETY OF VICTORIA

THE MELBOURNE CLUB

MELBOURNE

FRIDAY 23 AUGUST 2013

"WHO JUDGES THE JUDGES"

PRESENTED BY: His Excellency the Honourable Alex Chernov AC QC
Governor of Victoria

1 MS FLATMAN: Your Excellency, Mrs Chernov, members and guests,
2 welcome to this meeting of the Victorian Medico-Legal
3 Society. We particularly welcome the judges amongst us
4 tonight, all anxiously waiting to find out who is going to
5 judge them.

6 We are privileged tonight to be addressed by His
7 Excellency, the Governor of Victoria, the Honourable Alex
8 Chernov. The Governor was born in Lithuania and came to
9 Australia as a young boy. He was educated at Melbourne
10 High School and the University of Melbourne where he
11 graduated in Commerce and Law with Honours. He signed the
12 role of counsel at the Victorian Bar in 1968 and practised
13 almost exclusively in company law and commercial law and
14 equity.

15 While he was a barrister he played a significant
16 role in leadership of the legal profession and legal
17 education. He has been Chairman of the Victorian Bar,
18 Vice-President of the Australian Bar Association,
19 President of the Law Council of Australia and Vice-
20 President of Law Asia. In 1997 he was appointed a judge
21 in the Trial Division of the Victorian Supreme Court and
22 the following year was appointed to its Court of Appeal.

23 He has maintained an important association with the
24 University of Melbourne. He has served on the Council, he
25 has been Deputy Chancellor and in 2009 he was appointed
26 Chancellor of Melbourne University. The university have
27 awarded him with an Honorary Doctorate of Laws. He has
28 been appointed an Officer of the Order of Australian and a
29 Companion of the Order of Australia and he was sworn in as
30 the 28th Governor of Victoria in April 2011, eminently
31 qualified to address the question "Who judges the

judges", His Excellency the Governor.

HIS EXCELLENCY: Madam President, distinguished guests, ladies and gentlemen. In his great book "The History of Nearly Everything" Bill Bryson says that considering all that has gone on in our universe it is a miracle that we are here at all and although my presence here is not a miracle of the type Bill Bryson had in mind, I am here by reason of accident or good fortune, depending on how you view things, including this paper.

A few months ago we were at a concert and at interval I ran into the president whom I have always known as Margaret Flatman. She said to me that she was President of the Medico-Legal Society and she was looking forward to hearing me speak at the forthcoming dinner and I assured her that that was news to me and she had got the wrong person. Just to make sure that I was right I asked the following day one of my aides to check the name of your president and when I was told it was Dr Lithgow I took this as confirmation that Margaret has got the wrong person. As far as I was concerned, speaking at the Medico-Legal was off the screen and I relaxed and thought no more about it. It was only when some weeks ago I received a request from the Society for my CV and the topic on which I could speak, and the two pennies dropped that Dr Lithgow and Margaret Flatman were one and the same person and, secondly, it was true that some months earlier I had agreed to speak at the dinner but had forgotten all about it, given my age. So here I am. I am very conscious that I am standing between you and your dinner but I see that you have got bread rolls at the table. Can I encourage you to eat them, at least they will stop you

1 throwing them at me.

2 In racking my brain about the topic on which I would
3 speak this evening, I tried to remember speeches at past
4 Society dinners to which I have been. I regret to say I
5 could only remember two of them: the first and the last
6 one, the rest are just a blur, they were great nights.

7 The first one to which I went was in this very room.
8 The late Peter Barmford gave a light-hearted paper based
9 on the great poem by A.A. Milne, "The Dormouse and the
10 Doctor". You know, the one about the dormouse dreaming of
11 delphiniums blue and geraniums red while the doctor was
12 trying to convert it to liking chrysanthemums, cuttings
13 from Kent who were yellow and white. Choosing the subject
14 of his talk, Peter obviously had in mind Oscar Wilde's
15 observation at a dinner such as this one eats wisely but
16 not too well and speaks well but not too wisely. It is
17 really hard to believe, but he read the poem in his
18 theatrical style interspersing it only with humorous
19 comments and extrapolations and he had everybody in fits.
20 It was a wonderful speech.

21 By way of contrast, the learned paper given at the
22 last Society dinner to which I went would not have come
23 within Oscar Wilde's observations. It dealt with an
24 esoteric legal principle which many lawyers find extremely
25 difficult to grasp and they care about it even less and
26 particularly at the dinner where wonderful wines were
27 served. I just cannot imagine what on earth the medicos
28 thought about it.

29 With these experiences firmly in my mind and knowing
30 that I could not match either speaker in content or
31 presentation I debated what on earth I could possibly talk

1 about. A number of inappropriate topics crossed my mind
2 including a dissertation on my hero Biggles and the
3 influence of Captain W.E. Johns on English literature
4 after World War 2. But in the end I thought it best to be
5 a friend to all and settle on dealing with the question
6 "Who judges the judges".

7 I think there are two principal reasons for judging
8 the judges. One is to determine whether the judge made an
9 error of law that warrants overturning his decision or her
10 decision; the other is to determine the conduct of the
11 judges fallen below acceptable standards and, if so, to
12 what extent and what consequences would follow from such
13 behaviour.

14 The first matter obviously involves the appellate
15 process and interesting though it is to some lawyers, I
16 doubt that it would grip the audience tonight. Rather,
17 what I propose to do is examine briefly who it is that
18 relevantly judges the judges' conduct whether it be on or
19 off the Bench and what sanctions exist in circumstances
20 where the judges acted below acceptable standards of
21 behaviour and hopefully I never have to appear before a
22 judge who is here tonight.

23 The answer is relevantly straightforward where the
24 claim is that the judge's conduct has been so bad that it
25 warrants his/her removal from office. In those
26 circumstances the effect of judges' parliament (both
27 houses of it) and I will explain this shortly. But in
28 relation to lower levels of judicial misconduct there are
29 numerous categories of judge watchers, including members
30 of the community, the professions, the litigants, fellow
31 judges and of course always present, the media.

1 Although such attention to judicial behaviour can be
2 said to be a healthy reflection of our democratic society
3 and the Australian characteristics of irreverence, the
4 amateur judges must be careful, I suggest, not to cut
5 across the principle of judicial independence which
6 requires, amongst other things, that judges should not be
7 subject to improper inference of government and partisan
8 interests but must decide the case on the evidence before
9 them according to law.

10 The principle is a fundamental prerequisite to the
11 operation of the rule of law, which itself is a primary
12 foundation stone of our democratic society. A number of
13 consequences flow from this: One is that judges cannot be
14 sued for damages where any error when dealing with cases.
15 Another is that the judges must have security of tenure
16 and appropriate salary.

17 In Victoria, as most of you know, judges are
18 appointed until they reach the age of 70 and cannot be
19 removed from office other than in exceptional
20 circumstances and such an entrenchment of judicial
21 independence dates back to the English Act of Settlement
22 of 1701. the provisions of which are essentially
23 reproduced in the Victorian Constitution Act of 1975 in
24 the Australian Constitution.

25 In Victoria, for example, a Supreme Court judge can
26 only be removed from office by the Governor on the address
27 of both Houses of Parliament on the ground of "proved
28 misbehaviour or incapacity". A similar limitation applies
29 to County Court judges. That Parliament has to decide
30 this is clear enough. What is less clear is what is the
31 meaning of the words "proved misbehaviour" in the

1 Constitution.

2 A lack of consensus on this issue became apparent
3 during the investigation of the alleged misconduct of the
4 late Justice Murphy of the High Court. Now some of you
5 remember that it all began in 1983 when a newspaper
6 published what it claimed were transcripts - and I digress
7 to say they were unlawfully obtained - of taped telephone
8 conversations between Morgan Ryan who was a solicitor in
9 Sydney and a friend of the judge. Ryan was then subject
10 to committal proceedings and it was suggested that the
11 contents of the tapes disclosed, the commission of
12 offences by His Honour, namely seeking to influence the
13 Chief Stipendiary Magistrate as to the outcome of the
14 committal proceedings against Ryan whom the judge called
15 "My little mate" in the telephone conversation, that is.

16 As a result the Attorney set up a committee to
17 advise him of what to do in that regard and when that
18 committee's deliberations proved to be inconclusive
19 another one was set up and the majority reported that in
20 its view Justice Murphy had attempted to influence the
21 course of justice in relation to the proceedings against
22 Ryan and that this amounted to misbehaviour for the
23 purposes of the Constitution.

24 Eventually His Honour was tried and he was convicted
25 of attempting to pervert the course of justice but the
26 conviction was quashed on appeal and a retrial ordered and
27 the judge was acquitted. Now I mention by way of
28 completeness that notwithstanding this acquittal the
29 Commonwealth Parliament established a Commission of
30 Inquiry to examine whether His Honour's conduct amounted
31 to misbehaviour but it was terminated when it was learned

1 that the judge was terminally ill with cancer.

2 In the course of these investigations a number of
3 different interpretations were put forward on the meaning
4 of "misbehaviour". The Commonwealth Solicitor-General
5 claimed that it was confined to conduct relating to
6 judicial office including non-attendance, neglect of, or
7 refusal to perform duties or the commission of an offence
8 of such quality as to indicate that the incumbent was
9 unfit to exercise that office.

10 But the members of the Commonwealth Commission of
11 Inquiry, the Chairman of which was Sir George Lush, a very
12 famous and very highly respected judge of this Supreme
13 Court, that committee said that misbehaviour should be
14 given a broad meaning, so as to include misconduct by a
15 judge according to prevailing standards, providing of
16 course they would impair public confidence in his/her
17 suitability to hold office or in the standing of the
18 Court.

19 It seems to me that what they were saying was that
20 the question whether a judge is guilty of misconduct
21 raises a jury question and I can see barristers rubbing
22 their hands immediately. That jury question is to be
23 determined by Parliament and in the case of Victoria the
24 jury would consist of 128 members.

25 To my knowledge, since Federation there has only
26 been one superior court judge who has been moved from
27 office by Parliament for misbehaviour. That was Mr
28 Justice Angelo Vasta, a judge of the Supreme Court of
29 Queensland - although he did, I hasten to say, came from
30 Victoria - who was removed by Parliament for misbehaviour
31 in 1989.

1 Now whether Vasta's impugned conduct constituted
2 relevant misbehaviour, he was first considered by
3 commission of inquiry that had been set up to look at His
4 Honour's activities. It found that he had given false
5 evidence to a defamation hearing, made and maintained
6 allegations that the Attorney-General, the Chief Justice
7 and Tony Fitzgerald has conspired against him and made
8 false statements, false claims and arranged sham
9 transactions to his own taxation advantage. It
10 transmitted its findings to Parliament, recommending that
11 there were grounds for removal on the ground of
12 misbehaviour and the unicameral parliament agreed and
13 dismissed the judge from office.

14 But as far as I know since that time there has only
15 been one attempt to remove from office a judge of the
16 superior court, that was Mr Justice Bruce, a judge of the
17 Supreme Court of New South Wales, while the impugned
18 conduct was said to have been constituted by his failure
19 to deliver judgments in several cases within an acceptable
20 period. To be more precise, in three of the cases delays
21 in handing down judgments ranged between 30 and 36 months
22 that left the parties in no man's land in relation to
23 their costly dispute and all that goes with such terrible
24 situation.

25 The complaint against His Honour was first dealt
26 with by the New South Wales Judicial Commission which
27 found that the delays did amount to such misbehaviour as
28 to justify Parliament removing him from office. The
29 matter eventually came before Parliament but after an
30 address by His Honour in which he claimed that the delays
31 were caused by his then clinical depression - he had

1 medical evidence to prove it, he said - for which he had
2 since recovered, the dismissal motion failed pursuant to a
3 conscience vote.

4 I give you two relevantly recent examples in
5 Victoria that indicate the type of conduct by a judicial
6 officer that may amount to relevant misconduct. One case
7 concerned a former Chief Magistrate in Victoria in October
8 2000. A special meeting of a large body of magistrates
9 passed a no confidence motion in the Chief Magistrate
10 alleging that over a considerable period of time he
11 engaged in misconduct which involved excessive drinking
12 during working hours, sexually harassing female
13 magistrates, defying a ban on smoking in the court
14 building and engaging in crude and abusive behaviour,
15 principally towards his fellow magistrates. The Attorney
16 moved to persuade him to resign but at first he refused to
17 do so. The Attorney then moved to take proceedings to
18 have him removed from office and the Chief Magistrate
19 wisely resigned.

20 The other case involved a judge of the County Court.
21 Before his appointment His Honour was an eminent Silk
22 practising in criminal law at the Victorian Bar and who
23 had one stage of his career held the office of Chief
24 Justice of Vanuatu. After he became embroiled in a
25 dispute with the government of that island on the question
26 of judicial independence he returned to practise in
27 Australia and not long after was appointed to the County
28 Court.

29 While at the Bar, however, His Honour had failed for
30 some time to lodge tax returns and this regarded reminder
31 notices from the ATO which warned of possible prosecution

1 unless the matter rectified. Somewhat surprisingly, he
2 neglected to tell the Attorney of all this before
3 accepting judicial office. Of course the matter came to
4 public attention after His Honour's appointment and just
5 shortly before the ATO issued proceedings against him.
6 The judge was ultimately convicted of the offence of
7 failing to lodge tax returns but, notwithstanding this, he
8 refused to resign. The Attorney took preliminary steps to
9 have the matter of his dismissal from office considered by
10 Parliament. Before this progressed, however, the judge
11 resigned from office and, sadly, died not long thereafter.

12 There are at least one perhaps two quite recent
13 cases where magistrates resigned just before removal
14 proceedings were instituted for giving false information
15 to police in relation to the magistrate's unlawful
16 conduct.

17 These few cases confirm, of course, that where the
18 conduct of a judge is said to deviate from appropriate
19 standards to such a degree as to call for removal of the
20 judge from office then, notwithstanding the difficulty of
21 establishing that it amounted to proved misbehaviour, it
22 is the Parliament who judges the judges.

23 What then of complaints about less serious behaviour
24 of judges that would not call for their removal from
25 judicial office, such as rudeness, bullying, intemperate
26 or gender-biased language and the like. One thing about
27 which we can be certain is that there is no shortage of
28 lay members of the public who are keen to judge the
29 judges. One feels always a little bit self-conscious
30 about this. But I suspect that in the medical field there
31 is probably no shortage of patients who are keen to tell

1 doctors their self-diagnosis because they have read about
2 it in Google.

3 Now members of the public who are most keen to judge
4 the judges - and there are many of them - are those who
5 consider that a particular sentence imposed on a convicted
6 person is far too lenient and journalists, of course,
7 excel in this. The fact that many of these critics don't
8 bother to learn about the particular sentencing process or
9 what was relevant to the impugned sentencing disposition
10 never stops them from baying for the judges' blood. Many
11 of them become zealots and take up their view as a cause.

12 But experienced judges will tell you that sentencing
13 is the most demanding and difficult part of a generally
14 demanding job. The judge has a duty to impose a sentence,
15 having regard to the particular circumstances of the
16 offending and of the offender and in light of the
17 legislative directions. Moreover, contrary to the view of
18 many lay people, the help afforded to a judge by earlier
19 sentences is limited because no case is exactly comparable
20 with any other and no two offences or no two offenders are
21 exactly the same.

22 Research and experience show, however, that most
23 people who are at first convinced that the sentence is too
24 lenient change their minds once they are appraised of
25 facts that were relevant to that process. I mention by
26 way of example a recent study to which Justice Harper
27 referred in his Kerferd Oration on 31 July 2011 that
28 examined responses of 698 jurors who between them had
29 participated in 138 trials. 90 per cent of them agreed
30 that the sentence handed down following the trial in which
31 they had found the accused guilty was very or fairly

1 appropriate. 52 of them, however, said that they would
2 have imposed a more lenient sentence than the one the
3 judge imposed.

4 In Victoria there is not yet a formal body to which
5 complaints concerning judicial behaviour can be directed
6 and thus far such complaints have found their way to the
7 head of jurisdiction, either through complaints made about
8 the judge by members of the profession or litigants.
9 Thus, in many cases it is the head of jurisdiction who is
10 called upon to assess whether one of his/her colleagues
11 has transgressed, as alleged.

12 But such procedure is not without problems, which
13 include lack of transparency and the fact that the head of
14 jurisdiction has no formal power to sanction his/her
15 colleague. The head is only the first amongst equals.
16 But I believe that the Victorian Government has in mind a
17 proposal to establish a judicial commission which will
18 receive and deal with complaints against sitting judges.
19 As I understand it, it is proposed that where the
20 complaint is of a type currently managed by the head of
21 jurisdiction, the commissioner will handle the matter in
22 like manner. But where the matter is more serious it may
23 involve Parliament considering the removal of the current
24 constitutional arrangements will not be displaced but the
25 commissioner will examine the claim in the first instance
26 and then transmit to Parliament its decision.

27 In light of this it may be useful to look briefly at
28 the New South Wales' experience in this regard. In the
29 2011/2012 Annual Report of the Judicial Commission it is
30 shown that most common complaints come from disgruntled
31 litigants who allege, amongst other things, bias on the

1 part of the judicial officer and failure to provide the
2 complainant with a fair hearing.

3 29 and 24 complaints were received respectively of
4 these categories. The Commission noted that this type of
5 complaint is usually made when a party to a litigation is
6 aggrieved by an unfavourable decision but for one reason
7 or another does not wish to appeal to a higher court. Not
8 surprisingly, the important difference between making a
9 wrong or supposedly wrong decision and engaging in
10 judicial misconduct is stressed by the Commission.

11 The Annual Report records that it received during
12 that financial year 110 complaints from 65 individuals
13 about 99 judicial officers. 90 were examined (that is to
14 say in the financial year) and 79 or 81 per cent were
15 determined as warranting no further examination as no
16 wrongful conduct has been disclosed.

17 Now, of course, there are others who judge judges.
18 For example, fellow judges play an important role in the
19 process. Judges are often conscious that neither they nor
20 their brethren should appear to the public to be aloof or
21 arrogant or intemperate. A good example of their action
22 in that regard occurred as long ago as the opening of the
23 Royal Courts of Justice by Queen Victoria in 1882. The
24 judges met to settle a speech to be delivered by Lord
25 Salborne who was the Lord Chancellor. He drafted the
26 speech and he was to read it out to his fellow judges but
27 he only got as far as the opening words which were "We,
28 Your Majesty's judges who are deeply sensitive of our many
29 shortcomings, ...".

30 Now Sir George Jessel who was Master of the Rolls,
31 that is in charge of the Court of Appeal, who never had

1 any doubt about the correctness of his own views, objected
2 to those words. He said he was not conscious that he had
3 many shortcomings and that had he been conscious of it he
4 would not be entitled to sit on the Bench. There was a
5 great debate between the judges and a characteristic
6 compromise was reached and the speech began with the
7 following words: "We, Your Majesty's judges, who are
8 deeply sensitive of many shortcomings of each other, ...".

9 Now, of course, during the last quarter of a century
10 in particular there has been an accelerating trend in
11 Australia in the assessment by the judiciary of its own
12 conduct. Practical steps have been taken by judges to
13 raise awareness amongst themselves of the standard of
14 conduct that is to be expected from the judge both on and
15 off the Bench.

16 For example, the establishment of the Australian
17 Institute of Judicial Administration and its work in that
18 regard has been of considerable significance and over the
19 years have published many papers and held many seminars
20 and conferences on judicial education. Similarly, the
21 emphasis on judicial education through the Judicial
22 College and judges school - or they call it "the baby
23 judges school" for newly appointed judges - has emphasised
24 very much the need for appropriate judicial conduct.
25 Moreover, the behaviour and appropriate behaviour of
26 senior judges serves as an example to their more junior
27 colleagues.

28 But I can say that the profession also plays a
29 significant role in judging the behaviour of judges. It
30 goes almost without saying that counsel has no hesitation
31 in pulling out the rug from under an over-confident judge.

1 For example, in the case before the House of Lords, senior
2 counsel began explaining to Their Lordships that the
3 appeal concerned breach of contract. He went on to say
4 that the essential elements of an enforceable contract
5 required and offer, an acceptance, consideration and then
6 he stopped at that point. The presiding judge told him he
7 could assume that the Bench had an understanding of the
8 basic law of contract to which senior counsel said "My
9 Lords, I have made that mistake in the court below and I
10 don't want to repeat it".

11 As I have indicated, where necessary the Chairman of
12 the Bar or the President of the Law Institute make
13 representation to the Chief Justice about inappropriate
14 judicial conduct in court, usually the matter is resolved
15 by the complaint being brought to the judge's attention
16 and more often than not it comes out that the judge not
17 having quite realised that his/her impugned behaviour was
18 perceived to have been below acceptable standards. But it
19 should be emphasised that judges do rely on the profession
20 in that regard and expect it, to bring these matters to
21 their notice albeit in an appropriate manner.

22 The media of course also takes a part in judging the
23 judges by publishing and analysing the circumstances
24 surrounding the alleged misconduct of judges. Some
25 newspapers even engage in campaigns against what they
26 perceive are sentences that are too low. The media is
27 particularly vocal in relation to the type of cases that I
28 have mentioned where there is a possibility that the
29 conduct of a serving judge may warrant removal from
30 office. They frequently shine the spotlight on the
31 judiciary in relation to lesser misconduct often

1 compelling judges to reflect what is the desirable
2 standard of behaviour.

3 For example, a judge's careless remarks that appear
4 gender bias or otherwise offensive are almost guaranteed
5 to receive significant publicity, notwithstanding that no
6 offence or other impropriety may have been intended by the
7 remarks that were made in regrettable ignorance. Although
8 some of the media criticism is ill-informed much of it
9 serves as a reminder for the Bench that careless
10 formulation of remarks can and often do cause offence.

11 To sum up, I think that putting aside complaints
12 concerning judicial misconduct that are handled by
13 Parliament, judges are really essentially judged by a
14 range of stakeholders, more particularly the lay members
15 of the public, judicial colleagues, the media, the
16 profession and litigants. History shows that in Australia
17 this system of checks and balances has worked relatively
18 well and has contributed to ensuring that save for
19 exceptional circumstances judicial conduct on and off the
20 Bench has been within acceptable parameters.

21 Importantly, I think that broadly the current system
22 of judging judges balances the need to ensure that proper
23 watch is maintained on the propriety of judicial behaviour
24 on the one hand and on the other the need to ensure that
25 this process does not unduly interfere with the judicial
26 independence. I am confident that judges in Australia
27 will continue to be mindful of their power and importantly
28 their responsibility and will continue to keep in the
29 forefront of their minds the need to observe appropriate
30 judicial standards.

31 It should be remembered that to date the conduct of

1 all but very few judges has been unimpeachable and there
2 is no reason to think the situation will alter for the
3 worse, notwithstanding the remarkable increase in the
4 number of judges that have been appointed in the last
5 decade and no doubt will be appointed thereafter.

6 Judges always hear cases in open court and one can
7 remain confident that judicial indiscretion of the kind I
8 have mentioned would be brought meaningfully to the notice
9 of the offending judge. Thank you.

10 MS FLATMAN: His Excellency has offered to take some questions
11 from the floor and Michael Gronow will be roving with his
12 microphone. We do ask that you identify yourselves before
13 your question.

14 Mr GRONOW: Your Excellency, my name is Michael Gronow, too. I
15 am a gynaecologist. Just with what is going on in the
16 media at the moment about the Parole Board, do similar
17 assessments apply?

18 HIS EXCELLENCY: Oh dear, you are really hitting a political
19 spot there. I toyed with the idea of actually mentioning
20 the Parole Board and only for the purpose of emphasising
21 that - and you are probably well aware of it - judges have
22 really nothing to do with it. The judge sentences a
23 convicted person for a particular period in prison, if
24 that is the case, and fixes a non-parole period and it is
25 for the Parole Board to decide it and, as you know, it is
26 chaired usually by a Supreme Court judge. But the rest of
27 it are all lay people or at least the great majority are
28 and there is controversy about it and I regret that there
29 is a controversy. I think for many many - or for decades
30 it has been doing a wonderful job and no doubt it is still
31 doing it, but I think there has been a bit of controversy

1 about it about which we all know. But I can't tell you
2 more than that about it for the simple and good reason I
3 do not know. I know what I read in the papers and gossip.
4 QUESTION: Thank you. John Court, I am a paediatrician. Can I
5 ask whether the process that you are telling us tonight
6 about judges, does that also apply to lower orders
7 including magistrates, particularly those involved in
8 cases that do not go before a jury?

9 HIS EXCELLENCY: Yes, magistrates can also be removed from
10 office. There is a slightly different procedure there.
11 The Supreme Court plays a role in that but, again, proved
12 misbehaviour has to be established. In relation to VCAT,
13 of course the members are appointed only for a specific
14 period of time but they, too, can be removed. But where
15 there is misbehaviour and I think - although I have not
16 seen the proposed legislation - I think the proposed
17 Judicial Commission would include members of VCAT. Of
18 course VCAT is a huge body now and plays a very important
19 role in the administration of the law in this state. But
20 I would expect that they would be under the same auspices
21 or come under the same control (if that is the right word)
22 as superior court judges.

23 MR FIELD: I am Peter Field, a surgeon. Your Excellency
24 referred to the concept of continuing judicial education.
25 This sounds analogous to what medical practitioners are
26 now compelled to undertake in continuing professional
27 development and I am wondering whether the judicial
28 process is capped per judge at \$2,000 per annum and if not
29 is this a threat to judicial performance?

30 HIS EXCELLENCY: It has been some time since I have been on the
31 Bench but my recollection is - and I believe it is still

1 the case - that judges do not pay anything for judicial
2 education. My own view is that judges are educated every
3 day. They will learn partly because of the facts that
4 they consider so different one from the other, they will
5 learn because barristers appear before them and you always
6 have two sides and usually the two sides are equally
7 matched. But the establishment of the Judicial College,
8 for example; the establishment of what they call "baby
9 judges' schools" when judges are first appointed where
10 they go into a conference, where a number of new judges
11 who are appointed come together and they learn about those
12 things. But there is no suggestion to my knowledge that
13 they undergo a certain minimum of hours of education on
14 judicial conduct.

15 QUESTION: Your Excellency, I am Michael Boquest, I am an
16 anaesthetist. Given the intense nature of today's media
17 and the expanding nature of today's communications, is
18 there a pressure felt within the judiciary to change
19 sentencing in response to those pressures and that
20 scrutiny? Also, I am just wondering if you could comment
21 on the concept of mandatory sentencing which sort of comes
22 up every now and then as an issue.

23 HIS EXCELLENCY: I do not believe that the media exerts undue
24 pressure on judges. I think judges are sufficiently
25 astute and are of experience to handle pressure. When you
26 say "pressure" I assume that means publicity for the
27 particular case and sometimes criticism for the judge. It
28 does occur but it is a rarity where there has to be a
29 response to the media on the basis that the criticism is
30 unfair and contrary to the public interest. As far as
31 mandatory sentences are concerned, that is a question for

1 a political consideration on which I am not competent to
2 speak.

3 HIS EXCELLENCY: Your Excellency, I am James Naylor, a guest.

4 I think you mentioned in your speech that there is a role
5 played by counsel in reporting perceived misconduct
6 perhaps on the part of the judiciary. Can you see any
7 ways that that system could be improved? I am not a
8 lawyer but if I am a member of the Bar and I am appearing
9 for a client and I am unhappy with that and what has
10 happened in court with a particular judge and if I stick
11 my neck out and make a complaint about that I am going to
12 lose the confidence of future clients who might be sent my
13 way by solicitors. I have got ambitions to be appointed
14 to the Bench in years to come, that is not going to
15 happen; I am going to get a lot of people's noses out of
16 joint if I put my hand up and complain about someone.
17 Surely the system could be improved and made more
18 formalised in a sense, protecting the identity of the
19 complainant, if it is a member of the Bar. I think that
20 is hard to do if there is an instance where the case has
21 to be brought to the attention of the judge concerned and
22 I do not see how the identity of the barrister could be
23 protected.

24 HIS EXCELLENCY: That is a very good point, if I may say so.

25 But, of course, I think there will be a judicial
26 commission to which complaints can be made. That is in
27 the future. As I say, I have not seen the legislation but
28 that is what I believe is going to happen which is
29 probably a wise thing, although if you look at the New
30 South Wales' experience it sort of attracts complaints, if
31 you like. If you look at the complaints that are made and

1 some of the figures that I read out and those figures are
2 the same for the past ten years, most of them are
3 frivolous. But your point is, if I may say so, a valid
4 one. What happens to the barrister who finds the judge's
5 conduct is intolerable and usually barristers have enough
6 experience and courage to tell the judge to stop behaving
7 that way in one form or another. But what happens often
8 is - and I have experienced this - when you are Chairman
9 of the Bar that is the person to whom one goes. So the
10 barrister would go to the Chairman and ask that the
11 particular judge's conduct be referred to the Chief
12 Justice and that happens and it brings results without any
13 repercussions about the barrister who happened to appear
14 in the case, because anybody can make a complaint about
15 the judge's behaviour. Don't forget, they always sit in
16 open court. The public is there; the solicitor is there;
17 the clients are there; the barristers are there. So any
18 of them could have arguably made the complaint to the
19 Chief Justice and sometimes it happens. It is not always
20 the person who is the primary barrister who is at the end
21 of the - or his client is at the end of judge's wrath. It
22 has worked very well. It is not a very pleasant task, I
23 can tell you from personal experience, to go and tell the
24 Chief Justice that but that is what the Chairmen of the
25 Bar have done. The Presidents of the Law Institute also
26 do that. I do not know of any but I can tell you Chairmen
27 of the Bar have done that.

28 MS FLATMAN: I will now ask Michael Gronow to come and thank
29 His Excellency on our behalf.

30 MR GRONOW: Ladies and gentlemen, this is the third function I
31 have attended this year at which His Excellency has been

1 present. On the first occasion he sang to us. On the
2 second occasion which was the Bar dinner he was introduced
3 by a very lengthy and magnificent brass fanfare.
4 Notwithstanding the complete absence of music tonight, I
5 am sure you will agree with me that His Excellency's talk
6 to us has been both interesting and informative.

7 As His Excellency says, in Australia our judges are,
8 generally speaking, well behaved such that examples of
9 serious misconduct can be enumerated by name. When people
10 here are critical of our politicians I often think of
11 overseas countries where they would probably be very
12 grateful to have politicians like ours and I think also if
13 one looks overseas in most other countries around the
14 world they would be very pleased, indeed, to have a
15 judiciary of such a high standard of honesty and
16 competence as we do in Australia and we should be very
17 grateful for that.

18 The issues that His Excellency has raised are
19 important and complex and particularly involve a balance
20 between accountability on the one hand and judicial
21 independence on the other, bearing in mind that one of the
22 reasons why our system works well is because if the
23 government is doing something really bad to you you can
24 often go and get a judge to apply the law to stop them.

25 On your behalf I would like to thank His Excellency
26 for coming to speak to us tonight and present him with a
27 small gift.

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