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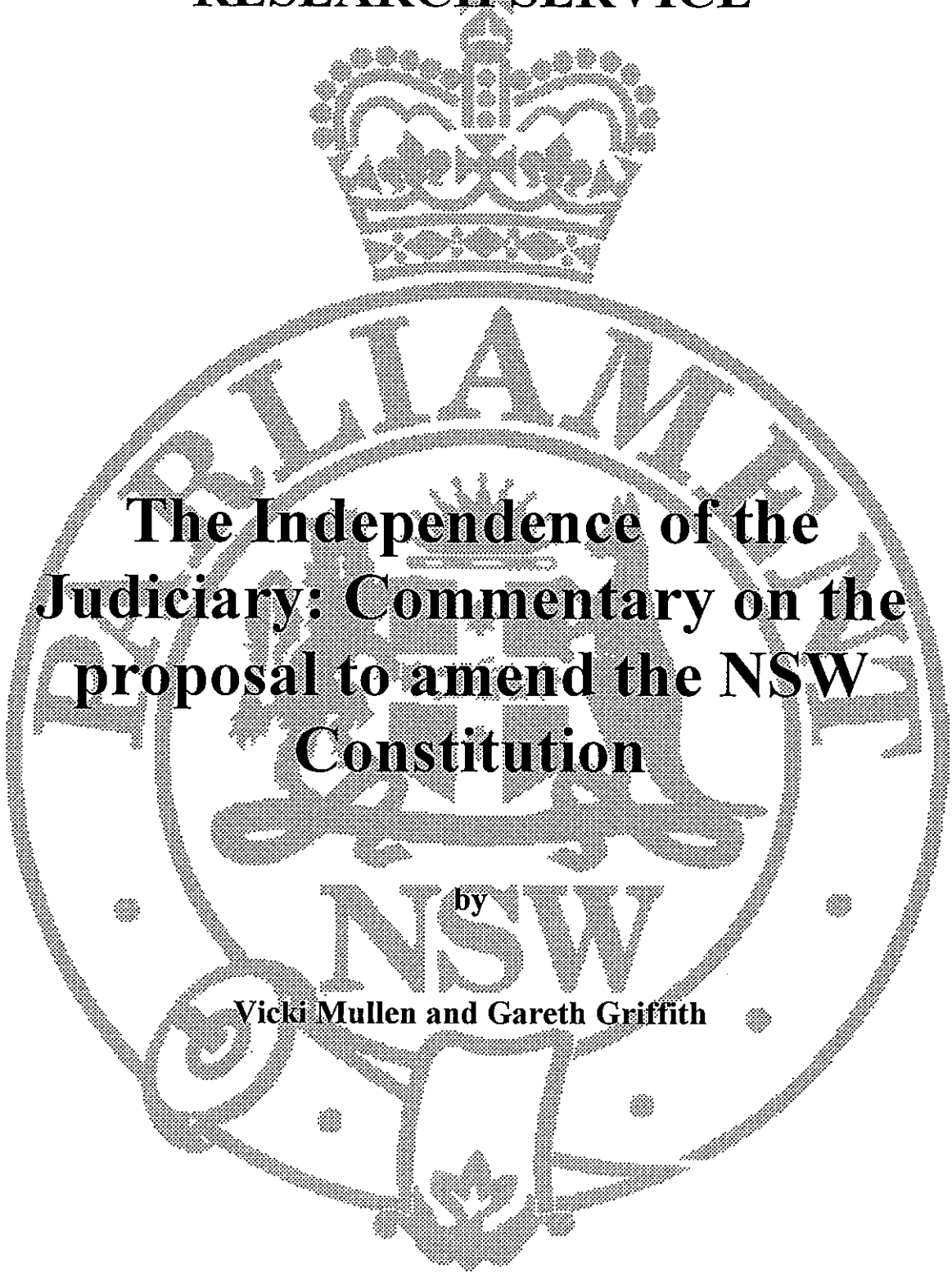

The Independence of the Judiciary: Commentary on the proposal to amend the NSW Constitution

by

Vicki Mullen and Gareth Griffith

Briefing Paper No 9/95

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1 INTRODUCTION

The two key principles which underpin the contemporary debate about the judiciary are those of independence and accountability. The first principle, the independence of the judiciary, is to be the subject of a referendum at the forthcoming State election on 25 March 1995. At issue is the question of the entrenchment of that principle in the NSW *Constitution Act 1902*.

In 1992 a new section, Part 9, dealing with the independence of the judiciary was inserted in the NSW Constitution. This was inserted by the *Constitution (Amendment) Act 1992*. Cognate to that legislation was the Constitution (Entrenchment) Amendment Bill 1992 which proposed the entrenchment of new Part 9. It is that proposal which is the subject of the forthcoming referendum.

In fact the *Constitution (Amendment) Act 1992* dealt with issues other than the independence of the judiciary, including the amendment of the Constitution to specify the method of election of the Speaker of the Legislative Assembly. However, it is not proposed that those additional matters be entrenched.

These reforms and proposed reforms were introduced as a consequence of the Memorandum of Understanding of 31 October 1991 between the Government and the Independent Members of Parliament, Mr John Hatton, Ms Clover Moore and Dr Peter MacDonald. As noted, the *Constitution (Amendment) Act 1992* inserted a new Part 9 in the NSW Constitution dealing with the independence of the judiciary. Under Part 9 no holder of a judicial office could be removed from office except "by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity" (section 53 (2)). Also, further requirements for removal may be set out in other legislation. Thus, section 53 (3) of Part 9 provides that "Legislation may lay down additional procedures and requirements to be complied with before a judicial officer may be removed from office". Specifically, it was said by the Premier, Mr Fahey, in the Second Reading Speech, that it was intended that Part 9 would operate in conjunction with the provisions of the *Judicial Officers Act 1986*. On the issue of security of tenure, Part 9 of the NSW *Constitution Act* provides that a person holding a judicial office which is abolished is given an entitlement to be appointed to another judicial office in the same court or in a court of an equivalent or higher status (section 56 (2)). The Premier went on to say:

> The most significant innovation that is proposed with respect to judicial independence is contained in the cognate Constitution (Entrenchment) Amendment Bill. This bill will entrench new part 9 of the Constitution Act, so that it can only be amended with the approval of the electors voting at a referendum.[1]

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[1] NSWPD, 17 November 1992, pp 9004-9005.

The particular object of the Constitution (Entrenchment) Amendment Bill 1992 is to amend section 7B of the NSW *Constitution Act* so that any amendment or repeal of provisions of Part 9 of the Act will be required to be submitted to a referendum and will not become law unless approved by a majority of electors. However, section 7B cannot itself be amended without a referendum. The Premier said, "As the Constitution (Entrenchment) Amendment Bill involves an amendment to section 7B of the Constitution Act, it will need to be itself approved by the electors at a referendum". Explaining the matter further the Premier added, "If the proposal is not approved, the provisions relating to judicial independence will be law but will not be entrenched".[2] Thus, if the referendum is not passed then Part 9 of the *Constitution Act 1902* will continue in operation, subject to amendment by ordinary legislation.

The long title for the Constitution (Entrenchment) Amendment Bill 1992 reads, "An Act to prevent Parliament from changing laws about the independence of judges and magistrates without a referendum". The referendum question will be in this form.

It can be said that the concept of judicial independence has a number of aspects and that it can be defined in variously broad or narrow terms. The point was recognised by the Chief Justice of the High Court, Sir Anthony Mason, who opted in his discussion of the issue for a wide use of the term which extended to the institutional autonomy of the courts.[3] On the other hand, the focus of the present proposal for constitutional reform is on the narrower subject of the "personal independence" of judges, which means that "the judicial terms of office and tenure are adequately secured".[4] That in turn serves as the conceptual focus for this Briefing Note. However, it should be noted that this seemingly narrow approach may prove to have implications of a practical and theoretical kind which touch on the concerns found in the wider debate.

The main purpose of this Briefing Note is to examine constitutional issues surrounding the entrenchment of judicial independence in the NSW Constitution. It begins with an historical overview of the debate on judicial independence, both generally and with special reference to the statutory position in NSW (pages 5-11). This is followed by a consideration of the doctrine of the separation of powers at the State level and of the issue of

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2 ibid.

3 A Mason, "Judicial Independence and the Separation of Powers - Some Problems Old and New" (1990) 13 (2) *UNSW Law Journal* 173, p 174.

4 S Shetreet and J Deschenes, *Judicial Independence: The Contemporary Debate*, Dordrecht 1985, p 598. Shetreet maintains that the independence of the individual judge is comprised of two essential elements, namely, "personal independence" and "substantive independence" which means that "in the making of judicial decisions and exercising other official duties, individual judges are subject to no other authority but the law".

security of judicial tenure in relation to this (pages 11-14). Next the issue of "manner and form" and the validity and effectiveness of the proposed entrenchment of Part 9 is considered (pages 14-20), after which there follows a brief discussion of the problems associated with constitutional entrenchment (pages 21-23). A final section reviews the position in other selected jurisdictions (pages 23-27).

The full text of Part 9 of the NSW *Constitution Act 1902* is set out in Appendix A.

2 HISTORICAL NOTE

The principle of judicial independence is basic to the doctrine of the separation of powers. At its core lies the idea that, once appointed, a judge should be independent of executive control or direction. The purpose of judicial independence is to ensure that judges exercise their judicial functions impartially. Thus, it is said that "judicial independence is a means to an end, the end being the impartiality of judges".[5]

The starting point for the discussion of the independence of the judiciary is the *Act of Settlement* of 1700 which established the rule that superior court judges should be appointed during good behaviour, but that they could be removed by the Crown on an address of both Houses of Parliament.[6] This was the first statutory restriction on the Crown's prerogative powers in this area and it came, of course, hard on the heels of the constitutional struggles of the seventeenth century. In the words of Quick and Garran, "Anciently, the judges held their commissions during the King's pleasure, and under the Stuart kings the Bench was systematically packed with partizans of the Crown".[7]

Professor James Crawford explains that, unlike other fundamental legislation, section 3 of the *Act of Settlement* was not received on the establishment of the Australian colonies: "Colonial judges were at first appointed at pleasure, and were liable to removal by the Crown, or to what was termed 'amoval' by the

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[5] V Morabito, "The Judicial Officers Act 1986 (NSW): A Dangerous Precedent or a Model to be followed" (1993) 16 (2) *UNSW Law Journal* 481, p 490.

[6] Section 3 of the *Act of Settlement* provides, "...Judges Commissions be made Quamdiu se bene gesserint, and their salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them".

[7] J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth*, Sydney 1901, p 728.

Governor in Council under the provisions of Burke's Act 1782".[8] It was the establishment of responsible government which brought with it security of tenure, similar to that provided the English judges. In NSW the security of tenure of judges of the superior courts was consolidated in this form in 1900 under section 10 of the *Supreme Court and Circuit Courts Act*. Subsequently, the matter was dealt with under section 27 of the *Supreme Court Act 1970* which provided for security of tenure during "good behaviour", with subsection (2) stating "The Governor may remove the Chief Justice, the President of the Court of Appeal, and any other Judge of Appeal or any other Judge upon the address of both Houses of Parliament". In contrast to the present position under section 53 (2) of the Constitution, no reference was made to removal "on the ground of *proved misbehaviour or incapacity*" (emphasis added).

Mr CR Briese explains that, until 1985, magistrates in NSW were officers in the public service. Thus, although their duties were judicial, magistrates were nevertheless structured as part of the executive arm of government. The situation changed with the *Local Courts Act 1982*, which became effective on 1 January 1985. That Act placed magistrates in a position similar to that of judges of the District Court: "Unlike the situation obtaining in the Supreme Court where removal of judges could only be by Parliament, District Court judges were subject to removal by the Governor under s.14 of the District Court Act 1973 (NSW). Section 18 of the Local Courts Act was therefore included to give the Governor similar power over magistrates".[9]

3 JUDICIAL OFFICERS ACT 1986

In NSW much of the recent debate about the independence and accountability of the judiciary has crystallised around the making and implementation of the *Judicial Officers Act 1986*. The Act was introduced amidst considerable controversy and it has since been described as a "revolutionary" piece of legislation. Morabito has commented, "the Act can truly be said to be revolutionary, for it established a formalised system of judicial accountability which is the first of its kind in Australia".[10] One view is that the Act represented the legislature's attempt to resolve the competing values of judicial accountability and judicial independence. Shetreet wrote in this context of the ongoing tension between these central values in the administration of justice:

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[8] J Crawford, *Australian Courts of Law*, 3rd ed, Melbourne 1993, p 63. Crawford adds that amoval under Burke's Act remained a possibility, at least until 1964. The Act gave statutory power to the "Governor and Council" of a colony to remove from office for misbehaviour a person holding office by Letters Patent, with the removed officer having the right to appeal to the Privy Council.

[9] CR Briese, "Future Directions in Local Courts of New South Wales" (1987) 10 (1) *UNSW Law Journal* 127.

[10] V Morabito, op cit, p 482.

"Judges must be independent, but at the same time they must be accountable".[11] Professor Lane added, "The more one is insisted upon, the more the other is intruded upon".[12]

The background to the Act was one of public controversy based on a number of inquiries into the conduct of judges.[13] Briefly, during 1985 and 1986 Justice Murphy of the High Court was acquitted on two charges of attempting to pervert the course of justice. Similarly, Justice Foord of the NSW District Court was acquitted on two charges of attempting to pervert the course of justice in October 1985. On the other hand, in March 1985, a former NSW Chief Stipendiary Magistrate, Murray Farquhar, was convicted of attempting to pervert the course of justice and served a prison sentence. There was, in addition, the controversy in NSW surrounding the decision not to "reappoint" five magistrates, based apparently on allegations of "unfitness", when the Court of Petty Sessions was abolished and the magistrates' courts were re-constituted as the Local Court. In 1987 the NSW Court of Appeal held that the decision was voided by procedural unfairness.[14] Fuelling the debate on judicial accountability still further, in September 1986 Professor Vinson released his report dealing with the sentencing of drug cases in the District Court between 1980 and 1982, which purported to find that a particular judge had exercised leniency in dealing with clients of a particular solicitor. It was revealed later that Justice Foord was the judge in question. More generally, the Vinson report concluded that the system of justice in NSW "is neither systematic nor just".[15] Having regard to these matters, the then Attorney-General, Hon. TW Sheahan, said "it is the soundness and integrity of the judicial system itself that the community is uneasy about. Whether the community concern is blameless or not is now immaterial. Reassurance must be provided and justice must not only be done but be seen to be done".[16]

The Judicial Officers Bill 1986 was introduced in the context of this debate. Its initial impact was to add to the controversy. The judges of the Supreme Court were unanimous in their opposition to the bill. Whereas the NSW Chief Magistrate, Mr CR Briese, endorsed it, reportedly on the grounds that

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[11] S Shetreet, "The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986" (1987) 10 (1) *UNSW Law Journal* 4.

[12] "The Week Our Judges Revolted", *The Sydney Morning Herald*, 20 September 1986.

[13] For a more detailed account see V Morabito, op cit, pp 482-485.

[14] *Macrae v Attorney General for NSW* (1987) 9 NSWLR 268.

[15] Vinson et al, *Accountability and the Legal System: Drug Cases Terminating in the District Court 1980-1982*, Report to the Criminology Research Council 1986.

[16] NSWPD, 24 September 1986, p 3874.

magistrates had been doubly handicapped in the past - by not enjoying the judicial independence of judges of the higher courts, and because "there has been no satisfactory mechanism to deal with complaints against magistrates".[17]

What the *Judicial Officers Act* offered was a uniform framework for dealing with the tenure and discipline of judicial office holders at all levels. The term "judicial officer" was defined widely, therefore, to include a judge of the Supreme Court, the Land and Environment Court, the District Court, the Industrial Court and the Compensation Court, as well as a Magistrate (section 3).[18] Tenure of judicial office was set out under section 4 which provided that, subject to the Act, "every judicial officer remains in office during ability and good behaviour".[19] However, the major innovation of the Act was the establishment of a Judicial Commission and the complaints procedure against judicial officers thereunder. Under the Act "any person" has the right to complain to the Commission "about a matter that concerns or may concern the ability or behaviour of a judicial officer" (section 15 (1)).

It is enough to note for present purposes that the Judicial Commission is constituted predominantly by the chief judicial officers of the State. Thus, the heads of the various State courts and the Chief Magistrate constitute six of its eight members; the Commission's remaining two members are appointed by the Governor, on the nomination of the Attorney General. A complaint which has been classified by the Commission as "serious" must be referred to the Conduct Division. The Conduct Division(s) is a three-member panel appointed by the Commission; any or all of the members may or may not be members of the Commission itself (section 22). A "serious complaint", if wholly or partly substantiated, is one which "could justify parliamentary consideration of the removal of the judicial officer complained about from office" (section 28). In these circumstances the Conduct Division must present a report to the Governor setting out the Division's conclusions. Importantly, the report is in the nature of an "opinion" and not a recommendation. The Minister must then lay the report before both Houses of Parliament or, when Parliament is not sitting, the Minister must present the report to the Clerks of both Houses (section 29). As initially enacted, section 41 provided that, upon the conclusion of the above procedures, the Governor could remove the relevant judicial

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[17] "When Judges Are Divided", *The Sydney Morning Herald*, 7 November 1986.

[18] Part 9 of the *Constitution Act 1902* follows and elaborates upon that broad approach.

[19] That section was repealed by the *Constitution (Amendment) Act 1992* The relevant provision now is section 53 of the *Constitution Act 1902*.

officer from office "on the address of both Houses of Parliament".[20] Subsequent to the *Constitution (Amendment) Act 1992*, however, section 41 of the *Judicial Officers Act* now reads:

> (1) A judicial officer may not be removed from office in the absence of a report of the Conduct Division to the Governor under this Act that sets out the Division's opinion that the matters referred to in the report could justify parliamentary consideration of the removal of the judicial officer on the ground of proved misbehaviour or incapacity.
>
> (2) The provisions of this section are additional to those of section 53 of the Constitution Act 1902.[21]

The *Judicial Officers Act* has been the subject of academic and other comment. Some of the arguments put forward on the critical side are as follows:

- Mr Justice McLelland of the NSW Supreme Court has said that "the mere establishment of an official body with the express function of receiving complaints against judges as a first step in an official investigation renders judges vulnerable to a form of harassment and pressure of an unacceptable and dangerous kind, from which their constitutional position and the public interest require that they should be protected". His Honour also commented on other matters, including the issues of the waste of judicial time involved and the anomalous position that is created where a complaint against a judge of the Supreme Court is dealt with by a "Judicial Commission consisting predominantly of judicial officers of lower rank than himself". His general argument, expressed first at the Australian Legal Convention in 1989, was that establishing legislative procedures for receiving, investigating and adjudicating complaints against judges presented the greatest threat to the independence of the judiciary since colonial times.[22]

- Shetreet has argued that a major problem with the Act concerns the granting of disciplinary powers to the administrative heads of the judiciary collectively and individually: "The result is the introduction of

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[20] It seems that originally the Government had planned to omit Parliament from the removal procedures, but that Parliamentary address was restored as a result of concerns expressed by many NSW judges: V Morabito, op cit, p 502.

[21] As discussed on page 3, it was intended that section 53 of the Constitution should operate in conjunction with the *Judicial Officers Act*, which could thus set out additional procedures and requirements for the removal of a judicial officer.

[22] MH McLelland, "Disciplining Australian Judges" (1990) 64 *ALJ* 388.

hierarchical patterns into the judiciary, which in turn have the result of chilling judicial independence".[23]

- The Judicial Advisory Committee to the Constitutional Commission concluded that an organisation like the Judicial Commission, a major function of which was to receive complaints against judges, would detract from the reputation, authority and standing of judges: "if a judge thinks that a particular decision will make him or her the subject of complaint to a disciplinary organisation, the equipoise of mind essential to the proper discharge of judicial work is eroded".[24]

- Professor Crawford has said that, while the Act does strengthen the independence of judges of inferior courts and magistrates, it goes "too far" in allowing a Conduct Division to investigate minor complaints (that is, those which could not justify removal), and in vesting in the presiding officers of each of the courts the power to suspend judges, even in respect of minor complaints.[25]

- According to Morabito, the biggest deficiency of the Act is its failure to set out more fully the rights of judges against whom complaints are lodged and the restrictions on the powers of the Judicial Commission and the Conduct Division.[26]

On the positive side, however, Shetreet commended the Act to the extent that it shielded the judges from executive interference.[27] Morabito argues that the experience of implementing the Act has contradicted the prediction that it would diminish the authority and standing of the judiciary. On the contrary, he maintains that the NSW system has enhanced the judiciary's standing in the community and points to the small number of complaints under the Act as evidence of general public confidence. His central contention is that judicial independence and accountability should not be regarded as inherently inconsistent. It depends on the system of accountability that is in place: "If a given system of judicial accountability has sufficient safeguards to ensure that

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[23] S Shetreet (1987), op cit, p 11.

[24] Constitutional Commission, *Australian Judicial System Advisory Committee Report*, 1987, p 90.

[25] J Crawford, op cit, p 67.

[26] V Morabito, op cit, p 504.

[27] S Shetreet (1987), op cit, p 10. The exceptions are the provision allowing the Minister to refer any complaint to the Judicial Commission and the selection of the appointed members of the Commission. Shetreet comments that both these are acceptable under the International Bar Association Code of Minimum Standards of Judicial Independence adopted in 1982.

it cannot be manipulated to the detriment of judges and is also able to generate or enhance public confidence in the judiciary...it will provide judicial accountability and, at the same time, enhance judicial independence".[28]

What is clear is that, in an Australian context, the *Judicial Officers Act* establishes a unique model for dealing with the related but competing principles of judicial accountability and independence. The main emphasis of the Act is on the first principle of accountability. Since 1992 the latter principle of independence has found expression in the NSW Constitution. Entrenching the principle of judicial independence in the Constitution, as proposed under the Constitution (Entrenchment) Amendment Bill 1992, would confirm its practical and symbolic significance within the framework of our liberal democratic polity. The proposal received cross-party support, as well as the support of the Independent Members of Parliament. For the Shadow Attorney-General, Mr Whelan, the impartiality of the judiciary was "a matter of great constitutional significance".[29] According to the Member for the South Coast, the proposal to entrench judicial independence in the Constitution was "an important statement of principle more than anything. But should the day arise where, because of the pressures of the day, the independence of the judiciary is under stress - I doubt that will happen but we have to provide for it - there is sanctuary in the Constitution of our State".[30]

4 CONSTITUTIONAL ISSUES

Whilst the entrenchment of Part 9 is an important statement of principle, it also raises key constitutional issues:

- Could the entrenchment of the protection of judicial independence affect the powers and operation of the NSW Parliament in light of the (arguably) express provision for a limited doctrine of separation of powers?

- Would the entrenchment of Part 9 be valid and binding as a fetter on the law-making capacity of future Parliaments?

- What are the problems associated with constitutional entrenchment?

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[28] V Morabito, op cit, p 490. In fact, Morabito proposes an alternative model of judicial accountability, one which does not combine judicial tribunals and Parliament.

[29] NSWPD, 27 November 1992, p 10468.

[30] Ibid, p 10469.

(i) Separation of powers in NSW: does it or could it exist and if so, what does it mean for the powers of the NSW Parliament?

The only restrictions on the legislative power of a State Parliament are the federal Constitution, extra-territorial restrictions, the manner and form provisions of section 6 of the Australia Act and the underlying principle of the Rule of Law in the sense that legislation is subject, to an extent, to judicial interpretation:

> ...the sovereignty of Parliament is subject to the Rule of Law for...under our Constitution, Parliament is sovereign only in respect of what it expresses by the words used in the legislation it has passed. ... Judges interpret the words. Often judges do surgery to legislation, in order to ensure its consistency with basic constitutional assumptions. ... But if the legislation is clear, and though the judge considers it to be unjust or even oppressive, it is not for him to substitute his opinion for that of the elected representatives assembled in Parliament.[31]

It has been commented that "[d]ividing governmental power is the oldest device for restraining it, and thereby protecting liberty."[32] However, the doctrine of the separation of powers, which provides for the separation of the functions of the three arms of government, namely the legislature, the executive and the judiciary, has never directly or expressly operated at a State level to restrict the ability of State Parliament to exercise judicial power. Unlike federal Parliament[33], State Parliaments have never been constrained in their legislative capacity to the extent that legislation may be held to be invalid on the basis that it is tantamount to the exercise of judicial power. In the *BLF* case ((1986) 7 NSWLR 372) before the NSW Court of Appeal, the validity of legislation passed to "'remove doubts' and validate certain Ministerial acts in

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[31] *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, per Kirby P at 405-406.

[32] Winterton, G, 'The Separation of Judicial Power as an Implied Bill of Rights', *Future Directions in Australian Constitutional Law*, (Lindell, G - Editor), The Federation Press, 1994, p 185.

[33] See Chapter 3 of the federal Constitution which expressly provides for a separate judiciary. In particular, section 71 states that the 'judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.' Section 72 provides for the Justices' appointment, tenure and remuneration. The federal Constitution is entrenched to the extent that it cannot be amended unless in the manner and form as prescribed by section 128, so that any amendments must be put to a referendum, and to pass, the amendment must be approved by a majority of electors in a majority of the States.

relation to the cancellation of the registration of the Union"[34], which were at issue in an appeal to be heard before the Court of Appeal, was upheld as a valid exercise by the NSW Parliament of judicial power. Street CJ (as he then was) made the following observations and pronouncements in this case:

> Judges have traditionally fought to exclude the Executive and Parliamentary government from interfering in the judicial process. This is seen to be essential if due process of law and true administration of justice is to be protected. That exclusion is accomplished in constitutions that embody to a sufficient degree the doctrine of separation of powers. The commonwealth Constitution and the United States Constitution are two such.[35]
>
> I recognise that the New South Wales Parliament has judicial power; I recognise that Parliament has, without attracting constitutional criticism, exercised that power in general enactments, consistently with the convention that it is for Parliament to make the laws and for the judiciary to interpret and apply them; but it is contrary both to modern constitutional convention, and to the public interest in the due administration of justice, for Parliament to exercise that power by legislation interfering with the judicial process in a particular case pending before the Court.[36]

Street CJ was bound to find the legislation valid. However he expressed a level of dissatisfaction with such an exercise of judicial power by the NSW Parliament.

Further, Kirby P indicated that the complete absence of the provision for and recognition of the judiciary in the NSW State Constitution (as it was in 1986) leads to the conclusion that the State Parliament has the power to exercise judicial power on the basis of the lack of recognition of a separation of powers:

> Indeed, the [NSW Constitution in 1986] makes no relevant provision in respect to the judicature at all. Therefore, neither from its structure nor its terms can a Montesquieuian separation of powers be derived.[37]

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[34] The *BLF* case, op cit, p 372.

[35] Ibid, p 379.

[36] Ibid, p 381.

[37] Ibid, p 400.

Kirby P commented further that:

> ...far from providing a constitutional protection, separation and entrenchment of the judiciary, with limitation as by the requirement of special majorities for any change in the judiciary or its function, the *Constitution Statute* and the *Constitution Act* both specifically contemplated that, in respect of New South Wales, power would be held by the legislature not just to impinge upon courts and the judicial function but even to abolish, alter or vary such courts. ...Any limitations in that regard must be derived from politics and convention, grounded in history. They are not based upon legal restrictions.[38]

These comments beg the question as to the existence of an express, albeit limited, doctrine of separation of powers in NSW if Part 9 is entrenched, thereby giving not only constitutional recognition (as currently exists) but also constitutional protection to judicial independence through the entrenchment of provisions concerning judicial tenure. This is an important question. If, with the entrenchment of Part 9, a constitutional separation of powers between the legislature and the judiciary existed in NSW, this could curtail the power of the NSW Parliament in the future to exercise judicial power. It is recognised that the entrenchment of provisions concerning judicial tenure alone in the NSW Constitution would not go as far in the recognition of a separate judiciary as does Chapter 3 of the federal Constitution. Nonetheless, the question can be posed whether the *BLF* case would have been decided differently if Part 9 had been an entrenched part of the NSW Constitution in 1986.

(ii) Manner and Form and Parliamentary Sovereignty

A threshold issue with respect to restrictive legislative procedures is the extent to which the law-making powers of the Parliament are fettered. It seems that the English doctrine of parliamentary sovereignty has a limited role in the protection of the plenary powers of State Parliaments. Hanks notes that the notion of "legislative omnicompetence"[39] does not operate in the Australian States to the same extent as it does in the UK, "[h]owever, the English rule about parliamentary sovereignty is not without influence, for the interpretation of those provisions of the State Constitution Acts conferring legislative power is influenced by principles which operate in England as part of the law of parliamentary sovereignty."[40] The questions are then necessarily asked:

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[38] Ibid, p 401.

[39] Hanks, PJ, *Australian Constitutional Law, Materials and Commentary,* (4th edition), Butterworths, 1990, p 117.

[40] Ibid.

> If the powers conferred by Imperial law on the Australian State parliaments are as plenary and of the same nature as those of the Imperial Parliament, are they disabled from reconstituting themselves or from fettering their legislative action? Can they deprive themselves of the power to legislate on any particular topic or to repeal any statute they may enact? Can they transfer or surrender some or all of their power to new legislative bodies of their own creation? The answers to these questions are controlled by a consideration of the various constituent statutes, not by a consideration of the English rules of parliamentary sovereignty; but those constituent statutes may be interpreted in the light of principles that form part of the rules of parliamentary sovereignty.[41]

Statutory instruments that directly govern the operation of manner and form provisions in the States include their respective Constitutions as well as the *Australia Acts 1986* (Cth and UK) which were passed in order to "bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation" (see preamble to the Cth Act). Section 2(2) of the *Australia Act 1986* (Cth) ("the Australia Act") states that:

> ...the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State...

It has been commented that "[t]oday, sub-s. 2(2) of the Australia Act grants continuing constituent power to the State Parliaments."[42] The fetter on the plenary powers of a State Parliament is always an issue where manner and form provisions are concerned, as these provisions affect the capacity of present and future Parliaments to enact legislation according to the normal legislative process. Section 6 of the Australia Act expressly renders certain manner and form provisions valid and effective to the extent that:

> Notwithstanding [section] 2..., a law made after the commencement of this Act by the Parliament of a State respecting the *constitution, powers and procedure of the Parliament of the State* (emphasis added) shall be of no force or effect unless it is made in such *manner and form* (emphasis added) as may from time to time be required by a law made by that Parliament, whether made before or after the

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[41] Ibid, p 118.

[42] Goldsworthy, JD, 'Manner and Form in the Australian States', (1987) 16 *Melbourne University Law Review*, 403 at 412.

commencement of this Act.

(a) Manner and Form and the amendment of section 7B

An interesting question may be posed in relation to the proposed amendment of section 7B of the NSW Constitution by the Constitution (Entrenchment) Amendment Bill 1992. Does the Bill need to comply with the manner and form requirements of section 7B itself? This question is an academic one, as the amendment of section 7B will in fact comply with the manner and form requirements of section 7B by being submitted to a referendum on the same day as the election. However, an examination of the issue assists in an understanding of the operation of manner and form provisions in NSW.

In relation to this issue, the exact meaning of "constitution, powers and procedure of the Parliament of the State" under section 6 of the Australia Act should be considered with respect to the proposed amendments under the Constitution (Entrenchment) Amendment Bill 1992. That is, can the proposed amendment of section 7B be characterised as "a law...respecting the constitution, powers and procedure of the Parliament of the State" and is it therefore subject, according to section 6 of the Australia Act, to the requirement under section 7B itself, that any amendments of section 7B "shall not be presented to the Governor for Her Majesty's assent until the Bill has been approved by the electors in accordance with this section"? If the Bill may be so characterised, then the manner and form provisions in section 7B must be complied with, according to section 6 of the Australia Act. If the Bill does not come within the ambit of section 6 of the Australia Act, then an amendment of section 7B may not *necessarily* have to comply with a referendum requirement in section 7B itself and section 7B could possibly be amended according to the normal legislative process.

The key proposed amendment of section 7B is the amendment of subsection (1) to include Part 9 of the Constitution (which deals with judicial tenure) as a further part of the Constitution, the amendment of which would also be subject to the manner and form provisions set out in section 7B. The effect of this amendment would be to "entrench" Part 9, so that it could only be repealed or amended if the relevant legislation was passed by both Houses of Parliament according to the normal legislative process, as well as at a referendum. However, the Constitution (Entrenchment) Amendment Bill 1992 is not a Bill itself which amends the provisions concerning judicial tenure. It is a Bill that amends section 7B of the Constitution which deals with referenda for Bills with respect to the Legislative Assembly and "certain other matters". It could be said that the subject matter of the amendment of section 7B by the Bill is the alteration or amendment of the legislative process (albeit with respect to certain provisions only), and therefore it may be characterised as a law respecting the constitution, powers and procedure of State Parliament. Goldsworthy has stated that "[a] law to repeal or amend the restrictive procedure would be a law respecting the constitution, powers or procedure of the Parliament, because a

restrictive procedure is, by definition, such a law".[43] Would this formulation extend to the *extension* of the restrictive procedure to further provisions? It is suggested that as a matter of logic that it would. Lumb describes the legislation that comes within the ambit of section 6 in the following way:

> Legislation of this nature [ie Acts which depend for their entrenching force on section 6 of the Australia Acts]...takes the form of provisions regulating the duration of the legislature, its nature, composition, *the powers of legislature to enact legislation* (emphasis added), the privileges and immunities of the Houses etc. However, matters relating to the executive and the judiciary do not fall within this category.[44]

(b) The validity and effectiveness of entrenchment of Part 9

A further and more important question is whether the entrenchment of Part 9 would be binding and effective on future Parliaments? The short answer is that there is some difference of opinion. However, it is concluded, on the basis of the weight of academic opinion, that the proposed entrenchment of Part 9 would be binding and effective. Its validity as a restrictive procedure would lie outside section 6 of the Australia Act, and would rest instead on the basis that the referendum requirement for future legislation amending Part 9 would constitute a representative reconstitution of the NSW Parliament and would therefore operate as an acceptable fetter on its law-making powers.

In relation to section 6 of the Australia Act, legislation amending or repealing Part 9 could not be characterised as law respecting the constitution, powers or procedure of State Parliament. The subject matter of such legislation would be judicial tenure. For this reason, such legislation would not need to comply with manner and form provisions according to section 6 of the Australia Act. The manner and form provisions of section 7B could be bypassed, unless there is some other reason apart from section 6 of the Australia Act why the passage of legislation must comply with manner and form provisions or "restrictive procedures".

The issue as to the validity and binding nature of restrictive procedures concerning legislation not within the ambit of section 6 of the Australia Act has been summarised as follows:

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[43] Goldsworthy, JD, 'The "Principle in *Ranasinghe*", A reply to HP Lee', (1992) 15(2) *UNSW Law Journal*, 540 at 544. This quote is taken from footnote 20 to this article, which in turn, refers to the author's previous discussion of this rather complex issue in the article 'Manner and Form in the Australian States', (1987) 16 *Melbourne University Law Review*, 403 at 414-417.

[44] Lumb, RD, 'Manner and Form in the Australian Constitutional System Post Australia Acts', 12(5,6) *The Queensland Lawyer*, 177 at 181.

> The contested issue simply is whether an Australian State Parliament has to comply with an existing "manner and form" provision when the Parliament seeks to enact a law which cannot be characterised as a law 'respecting the constitution, powers and procedure of the Parliament of the State'.[45]

The validity and effectiveness of the proposed *entrenchment* of Part 9 of the NSW Constitution dealing with judicial tenure must be examined in this way. At issue, is whether the entrenchment of Part 9 would be a valid fetter on the plenary powers of future Parliaments? Lumb frames this question as follows:

> Does there exist a method of entrenchment outside the *Australia Acts*? The answer to the question is: probably, although there is no decisive judicial authority. In *Victoria v Commonwealth,* [(1975) 134 CLR at 163-164], the *West Lakes* case [(1980) 25 SASR 389 at 431], and the *Comalco* case [[1976] Qd R 231 at 247] there are dicta which support the proposition. The basis of the view is the doctrine of legislative reconstruction, ie that the legislature, subject to any existing conditions, may amend the structure for the purposes of future legislation either generally or in particular respects. ... The principle also applies to reconstruction by addition, ie by adding a component part (such as the electorate) either generally or for particular purposes. What is the specific legislative source of the power of reconstruction? It is to be found in the power of a State Parliament to make laws for the peace, welfare and good government of the State.[46]

Goldsworthy gives a comprehensive analysis of restrictive procedures that may be binding as an alternative to the manner and form provisions of section 6 of the Australia Act.[47] On the basis of the High Court decision in *A-G for the State of NSW v Trethowan*[48], he concludes that two alternatives are available:

- the principle of reconstitution; and

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[45] Lee, HP, '"Manner and Form": An Imbroglio in Victoria', (1992) 15(2) *UNSW Law Journal,* 516.

[46] Lumb, RD, op cit, pp 181-182.

[47] Goldsworthy, JD, 'Manner and Form in the Australian States', op cit, p 403.

[48] (1931) 44 CLR 395. In this case the issue was whether the government could abolish the Legislative Council through the enactment of legislation through the normal legislative process, contrary to the manner and form provisions set out in section 7A (which itself was entrenched) of the Constitution.

- the principle of "pure procedures" which affect "neither the legislature's constitution (otherwise reconstitution would be the issue) nor its substantive powers (otherwise they would invalidly restrict Parliament's continuing constituent power)."[49]

Of the two principles, the principle of reconstitution is relevant to the proposed entrenchment of Part 9. The referendum requirement would add the direct decision of the electorate as part of the legislative process. Goldsworthy states:

> As for reconstitution, [the continuing constituent power of State Parliament] is not diminished by a law which merely reconstitutes the body which possesses [this power] (the legislature): thenceforth the power can still be exercised, but only by the legislature *in its reconstituted form.*[50]

With respect to valid restrictive procedures generally, Goldsworthy concludes as follows:

> There seem to be only three possible grounds for restrictive procedures that are compatible with sub-s. 2(2) [of the Australia Act]. The first is s. 6 of the Australia Act, to which sub-s. 2(2) is expressly subject: it makes binding requirements as to the manner and form in which laws respecting Parliament's constitution, powers or procedure must be passed. The second is that pure procedures or forms of legislation of any sort do not, by definition, impermissibly restrict Parliament's constituent power. The third is that a partial reconstitution of Parliament for special purposes also preserves the power granted by sub-s. 2(2), at least provided Parliament's ability to act is not destroyed or unreasonably impaired... .[51]

In particular, regarding the vital balance between restrictive procedures and the plenary powers of State Parliaments, Goldsworthy considers that:

> while genuine manner and form requirements are binding, attempts to restrict Parliament's substantive powers are not. Provisions requiring referenda...are of the former sort; provisions requiring a very large majority, or arguably, anything more than a simple or absolute majority in Parliament, and those requiring the approval of outside bodies other than the whole

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[49] Goldsworthy, JD, 'Manner and Form in the Australian States', op cit, p 408.

[50] Ibid, p 409.

[51] Ibid, p 428.

> electorate, are of the latter sort.[52]

In relation to the principle of reconstitution, Goldsworthy states that this type of restrictive procedure is "available in relation to legislation of any kind"[53]. However:

> there are limits to a State Parliament's power to reconstitute itself. Parliament cannot be validly reconstituted by the inclusion within it of either an unrepresentative element...or what would otherwise be an external fetter such as a special majority requirement of a very onerous kind, or arguably, of any kind....[54]

It can be said that while the English doctrine of parliamentary sovereignty may not be directly applicable to the legislative powers of State Parliaments, this doctrine is nevertheless reflected in the statutory conferral of plenary powers on State Parliaments through their respective constitutions and through the operation of subsection 2(2) of the Australia Act.

In the case of the possible future repeal or amendment of Part 9 of the NSW Constitution (if it is entrenched according to the Constitution (Entrenchment) Amendment Bill 1992), it is suggested, on the basis of academic analyses, and in the absence of any definitive case law on the matter, that the entrenchment of Part 9 would be valid and binding in light of the reconstitution principle as an alternative and valid restrictive procedure. The requirement of a referendum to be put to all electors of NSW, before Part 9 could be amended or repealed, would arguably not damage the representative character of Parliament.

Further, a referendum requirement (on the basis of a simple majority) is generally not considered to be an extreme fetter on the law-making capacity of a State Parliament. However:

> it would be within the power of a court, faced with a manner and form provision which rendered it virtually impossible to repeal an act [sic] on the statute book, as for example by requiring that the repealing bill be approved by ninety per cent of electors voting at a referendum, to invalidate such legislation as fettering a State parliament in the exercise of its powers of legislating for the peace, welfare and good government of the

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52 Ibid.

53 Ibid.

54 Ibid, p 429.

State.[55]

(iii) Problems associated with entrenchment

If the Constitution (Entrenchment) Amendment Bill 1992 is passed at the referendum, subsection (1) of section 7B will read as follows:

> A Bill that
>
> (a) *expressly or impliedly* (emphasis added) repeals or amends section 11B, 26, 27, 28 or 29, **Part 9** (emphasis added), the Seventh Schedule or this section...
>
> shall not be presented to the Governor for Her Majesty's assent until the Bill has been approved by the electors in accordance with this section.

In an article examining the entrenchment of the jurisdiction of the Supreme Court in Victoria in the *Constitution Act 1975* (Vic), Foley examines the problems associated with the issue of constitutional entrenchment.[56]

In relation to the proposed entrenchment of Part 9 in the NSW Constitution, two problems identified by Foley that may be relevant to the NSW situation are:

- the issue of the determination of whether future legislation would *expressly or impliedly* repeal or amend Part 9; and
- the issue of "disproportionality"[57] which refers to the situation where one provision only of a whole Bill expressly or impliedly repeals or amends Part 9. The failure of the complete Bill would ensue, if it was not passed according to section 7B.

These two problems may be illustrated by a brief analysis of the situation in Victoria and amendments that were made in 1991 to the Victorian Constitution.

Subsection 18(2) of the *Constitution Act 1975* (Vic) provides:

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[55] See Lumb, RD, *The Constitutions of the Australian States,* (5th edition), University of Queensland Press, 1991, pp 130-131.

[56] Foley, CA, 'Section 85 Victorian Constitution Act 1975: Constitutionally Entrenched Right...or Wrong?', (1994) 20(1) *Monash University Law Review,* 111.

[57] See ibid, p 126.

> It shall not be lawful to present to the Governor for Her Majesty's assent any Bill...
>
> (b) by which this section, ...Part III [which deals with the Supreme Court of Victoria], except section 85 [which deals with the power and jurisdiction of the Court] ... may be *repealed altered or varied* (emphasis added).
>
> unless the second and third readings of such Bill shall have been passed with the concurrence *of an absolute majority of the whole number of the members of the Council and of the Assembly respectively* (emphasis added).

Specifically with respect to section 85, subsection 18(2A) now provides:

> A *provision* (emphasis added) [as opposed to the Bill in its entirety] of a Bill by which section 85 may be repealed, altered or varied is void if the Bill is not passed with the concurrence of an absolute majority of the whole number of the members of the Council and of the Assembly respectively.

Section 18 was amended by the *Constitution (Jurisdiction of Supreme Court) Act 1991* with the addition of subsection (2A) as a means of preventing the complete failure of legislation if only one or a few provisions repealed, altered or varied section 85. This was an attempt to overcome the problem of disproportionality. The result is that only the offending provisions will be void instead of the complete Bill. The need to introduce this amendment as specifically relevant to section 85 was a result of the problems associated with the questionable validity of legislation which "indirectly attempted to detract from the jurisdiction of the Supreme Court by granting exclusive jurisdiction to other bodies in respect of certain matters",[58] and which had not been passed according to the special majority requirements of section 18. The problem had been that "Parliament had, since 1975, read s 18(2)(b) as applying only to direct amendments to s 85."[59] Further, as a result of this uncertainty, section 85 was itself amended in 1991 to overcome the problem of the determination of which legislation repealed, altered or varied section 85. Subsection 85(5) now specifically provides for this problem and reads:

> A provision of an Act, other than a provision which directly repeals or directly amends any part of this section, is not to be taken to repeal, alter or vary this section unless:

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[58] Ibid, p 123.

[59] Ibid.

(a) the Act expressly refers to this section in, or in relation to, that provision and expressly, and not merely by implication, states an intention to repeal, alter or vary this section; and

(b) the member of the Parliament who introduces the Bill for the Act or, if the provision is inserted in the Act by another Act, the Bill for that other Act, or a person acting on his or her behalf, makes a statement to the Council or the Assembly, as the case requires, of the reasons for repealing, altering or varying this section;...

Subsections (6)-(9) also give specific examples of legislation that does or does not have the effect of repealing, altering or varying section 85.

It is recognised that the subject matter of the Victorian provisions concerning the entrenchment of judicial independence (through the recognition and protection of the jurisdiction of the Supreme Court) are distinct from Part 9 of the NSW Constitution. However, the 1991 amendments to the Victorian Constitution draw attention to the general problems of statutory interpretation that may arise. In relation to Part 9 of the NSW Constitution, the use of the word "impliedly" in section 7B recognises the potential problems of the doctrine of implied repeal. However, the question as to whether future legislation must comply with the manner and form provisions of section 7B in light of its effect on Part 9, may not always be immediately clear.

5 THE POSITION IN OTHER SELECTED JURISDICTIONS

(i) The Commonwealth

Section 72 of the Commonwealth Constitution provides that Justices of the High Court and other federal courts:

(ii) Shall not be removed except by the Governor General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.

Section 53 (2) of the NSW *Constitution Act* is clearly modelled on this provision of the Commonwealth Constitution. The Constitutional Commission in its *Final Report* of 1988 said that no federal judge has been removed under the provision but that, in relation to the controversy surrounding Justice Murphy, there was dispute both about the meaning of the phrase "proved misbehaviour" and about the procedures that should be pursued to give effect to the provision.

The Judicial Advisory Committee to the Commission opposed the creation of an organisation to deal with complaints against judges as has been previously noted. The Commission itself concluded that it was a matter of policy to be dealt with by the Parliaments of Australia rather than an issue calling for constitutional amendment. However, it did recommend substantial amendment of section 72 of the Commonwealth Constitution, both in order to change the procedures giving effect to the provision and to extend the guarantee to the judges of the States and Territories.

On the procedural issue, the Commission's main concern was that the Houses of Parliament are not suitable bodies to determine the facts that are alleged to constitute misbehaviour or incapacity. This was recognised in the case of Justice Murphy. The result was the creation of a Parliamentary Commission under the *Parliamentary Commission of Inquiry Act 1986* (Cth). Three Commissioners, who were retired Supreme Court judges were appointed by resolution of both Houses. For the Commission, the question was one of accommodating the traditional role of Parliament with the desirability of "ensuring that the facts are determined fairly and objectively".[60] Further to this the Commission recommended that the Commonwealth Constitution be altered to provide:

- that there be a Judicial Tribunal established by the Federal Parliament to determine whether facts established by it are capable of amounting to proved misbehaviour or incapacity warranting removal of a federal judge and that the Tribunal should consist of persons who are judges of a federal court (other than the High Court) or of a Supreme Court of a State or Territory; and

- that an address under section 72 of the Constitution shall not be made unless: the Judicial Tribunal has reported that the facts are capable of amounting to misbehaviour or incapacity warranting removal; and the address of each House of Federal Parliament is made no later than the next session after the report of the Tribunal.

There are clear similarities between this recommendation and the current position in NSW under the *Constitution Act* and the *Judicial Officers Act*. The main difference is that the proposed Judicial Tribunal would not be established as a permanent organisation dealing with complaints against judges.

In relation to the removal of State and Territory judges, the Commission recommendations included that the Commonwealth Constitution be altered to provide:

- that a judge of a Superior court of a State shall not be removed except by the Governor-in-Council or an address from each House of the State

[60] *Final Report of the Constitutional Commission*, Vol 1, 1988, p 404.

Parliament, praying for such removal on the ground of proved misbehaviour or incapacity; and

- the removal shall not take place unless the Judicial Tribunal, referred to above, has found that the conduct of the judge is capable of amounting to misbehaviour or incapacity warranting removal (where the Federal Parliament has not established a Tribunal, the State Parliament may do so).

Under the Commission's recommendations, separate constitutional provision was also to be made for the appointment and removal of judges of inferior State and Territory courts. Removal should be by the Governor-in-Council on a report from the Supreme Court of the State or Territory, with the relevant Parliament having the power to prescribe additional conditions of removal.

A discussion of the issue of the removal of judges at a federal level would not be complete without noting the controversy surrounding Justice Staples. The matter arose in 1989 when the Australian Conciliation and Arbitration Commission was abolished and replaced by the Australian Industrial Relations Commission. All but one of the members of the old Commission were appointed to the same office in the new body. The exception was Justice Staples. Basically, the summary removal of Justice Staples was made possible by the separation of powers doctrine expounded in the *Boilermakers* case. The upshot of which was that Justice Staples was not a federal judge in the constitutional sense and therefore his removal was not subject to the requirements of section 72 of the Commonwealth Constitution.[61]

(ii) Victoria

Judicial independence is entrenched in the *Victorian Constitution Act 1975*, at least in regard to the tenure of judges of the Supreme Court. A number of provisions are of note in this respect. Section 77 provides that the commissions of the judges of the Supreme Court shall continue during "their good behaviour", subject to the Governor's power to remove a judge "upon the address of the Council and the Assembly". In contrast to section 72 of the Commonwealth Constitution and section 53 (2) of the NSW Constitution Act, proof of misbehaviour or incapacity is not a legal condition for the removal of a judge on an address of Parliament. Professor Crawford explains: "The power of removal is expressed as a reservation upon tenure, not as a method of determining an appointment upon misbehaviour. Under such provisions the Parliament may in law move an address for removal on any ground at all".[62] Section 77 of the Victorian *Constitution Act* is entrenched by the manner and

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[61] M Kirby, "The Removal of Justice Staples and the Silent Forces of Industrial Relations" (1989) 31 *The Journal of Industrial Relations* 334.

[62] J Crawford, op cit, p 65.

form provision found in section 18 (2) (b) which, as previously noted, states that any bill amending, repealing or varying section 77 cannot be presented to the Governor unless its second and third readings have been passed by an absolute majority of the whole number of the members of Council and Assembly respectively. Thus, section 18 (2) (b) could not be changed without an absolute majority, whereas a judge of the Supreme Court could be removed under section 77 by a simple majority.

The tenure of judges of the County Court is the same as that for judges of the Supreme Court, except that the relevant provision is not entrenched in the Constitution.[63]

The suspension or removal of magistrates is dealt with under section 11 of the *Magistrates' Court Act 1989*. Removal would depend on a determination of the Supreme Court that proper cause exists for removing a magistrate from office. Grounds for removal are set out in the provision.

Under the Constitution (Independence of Judges and Public Officers) Bill 1991 the tenure of judges of the County Court and magistrates would have been entrenched in the Constitution. Also, in relation to the removal of a judge of the Supreme Court, the bill would have amended section 77 of the Constitution to require an absolute majority of members of each House. The bill passed through the Legislative Assembly but failed to proceed beyond the Second Reading stage in the Legislative Council.[64]

Also of interest in this context is section 85 of the Constitution, the substance of which would appear to be unique to Victoria. This was discussed previously with reference to the potential problems of statutory interpretation which may arise as a result of constitutional entrenchment (pages 21-23). Section 85 deals with the powers and jurisdiction of the Supreme Court itself and this is entrenched by section 18 (2A) which requires that a bill, a provision of which repeals, amends or varies section 85, must be passed by an absolute majority of both Houses of Parliament. The possibility of indirect amendment is further guarded against under section 85 (5). According to the Legal and Constitutional Committee of the Victorian Parliament, "In granting to the Supreme Court jurisdiction in all cases whatsoever, the constitutional principle enshrined in s.85, however opaquely expressed, is that in Victoria, there is to be 'Rule of Law', enforced by a court of law".[65]

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[63] Section 9, *County Court Act 1958* (Vic).

[64] VPD (LC), 17 March 1992, p 26.

[65] Legal and Constitutional Committee of the Victorian Parliament, *A Report to Parliament upon the Constitution Act 1975*, 39th Report, p 13. This interpretation of section 85 is challenged by CA Foley, op cit.

(iii) Other States

Following Professor Crawford's analysis from 1993, it can be said that Supreme Court judges of the other States are appointed during good behaviour. This is in similar terms to section 77 of the Victorian *Constitution Act 1975*, with the difference that in the other States the relevant provisions are not entrenched and can therefore be repealed or amended by ordinary legislation. Having noted the terms of these provisions and commenting on the abolition and reconstitution of courts as an alternative method of removing judges, Professor Crawford stated: "Even if existing removal provisions are applied, they may not provide much real security". His argument is that, in the absence of the sort of constitutional reform proposed by the Constitutional Commission, security of tenure depends in these other States on the value attached to judicial independence by public opinion and on political compliance with certain conventions of parliamentary behaviour.[66]

Brief mention can be made in this context of the one occasion when a judge has been removed by an address of Parliament in Australia. This relates to Justice Vasta, a judge of the Queensland Supreme Court. In that case a Commission of Inquiry, chaired by Sir Harry Gibbs, was established under the *Parliamentary (Judges) Commission of Inquiry Act 1988* (Qld). The initial allegations against Justice Vasta were not upheld. These referred to suggestions that he had given false evidence in a defamation action relating to the extent and nature of his friendship with Sir Terrence Lewis. However, the Commission's terms of reference were broad and it ultimately recommended removal of the judge in relation to matters concerning financial transactions and tax avoidance. Parliament concurred with that recommendation and the judge was removed from office.

A number of issues have been raised in regard to the removal of Justice Vasta. Concern has been expressed that the Commission operated as a roving inquiry into "any behaviour" of Justice Vasta. Also, that in this case the Parliament effectively delegated its supposedly exclusive power to conclude that a judge of a superior court should be removed from office. Justice Michael Kirby has said in this context that if such a Commission is to have a role "it should simply be to find the facts".[67]

6 CONCLUSION

There can be no doubt that the independence of the judiciary is fundamental to the maintenance of the Rule of Law in a liberal democracy. As noted, Professor Crawford has argued that existing removal provisions may not

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[66] J Crawford, op cit, p 66.

[67] M Kirby, "Judicial Independence in Australia Reaches a Moment of Truth" (1990) 13 (2) *UNSW Law Journal* 187, p 201.

provide real security of tenure and that much depends on political compliance with the conventions of parliamentary behaviour. Reform has occurred in NSW both under the *Judicial Officers Act 1986* and the Constitution. The Conduct Division of the Judicial Commission can act as a fact finding body reporting its opinion to Parliament concerning serious complaints made against judges. The alternative method of removal, whereby a court is reconstituted under new legislation and then some of the previous judges are not reappointed, is now expressly prohibited by section 56 (2) of the *Constitution Act*. But the *Judicial Officers Act* is not without its critics and, under the present scheme, the safeguards in the Constitution can be repealed or amended by an ordinary Act of Parliament. To an important extent, therefore, the principle of judicial independence still depends on political compliance with the conventions of parliamentary democracy. Thus, the issue remains squarely in the political domain.

The proposal to entrench judicial independence in the NSW Constitution, under the Constitution (Entrenchment) Amendment Bill 1992, would not take the issue out of the political domain. Under section 53 (2) of the Constitution, the power to remove a judicial officer would be exclusive to Parliament. However, Part 9 of the Constitution and the safeguards found therein for the principle of judicial independence could not be repealed or amended without the express approval of a majority of electors. In an important sense, therefore, the independence of the judiciary would be recognised as a fundamental tenet of our liberal democratic polity, outside and beyond the constraints and pressures of the political arena.

One argument on behalf of entrenchment is that it stands primarily as a statement of principle. Yet, that is not to say that it would not also serve an important practical purpose. A good indication of the significance of the constitutional entrenchment of judicial independence is found in the following statement from the *Final Report* of the Constitutional Commission:

> As events in recent times in many areas of public life have illustrated, it is not enough to say, when one is concerned with basic institutions, that there is no immediate problem or threat or that political practice or usage in the past makes legal provision unnecessary. The protections for the judiciary in the Constitution were not inserted because any immediate mischief was anticipated. It is the function of a Constitution to lay down a firm framework of government which will, so far as possible, withstand unexpected threats and emergencies. It would be hard to argue that the freedom and independence of the judiciary was not basic to that framework.[68]

The statement was made with reference to the Commonwealth Constitution,

[68] *Final Report of the Constitutional Commission*, op cit, p 407.

but it would seem to apply with equal force to the entrenchment of the independence of the judiciary in the NSW *Constitution Act 1902*.

Some of the potential difficulties which could arise as a result of an effective constitutional entrenchment have been discussed. In particular, there is the issue of the determination of whether future legislation would expressly or impliedly repeal or amend Part 9 of the Constitution; also, there is the issue of "disproportionality" which refers to the situation where one provision of a whole bill expressly or impliedly repeals or amends Part 9. The potential implications for the doctrine of the separation of powers in NSW have also been considered.

In looking at the background to the contemporary debate about judicial independence in NSW this Briefing Note has focussed on the *Judicial Officers Act 1986*. This is by no means the only piece of legislation which has been passed in this State in recent years dealing with issues relating to the courts and the legal profession. Indeed, in a more general sense it can be said that issues concerning judges, lawyers and the law have been very much in the public eye of late and it may be that the present proposal to entrench judicial independence should be viewed in the context of this wider debate. Arguments for increased judicial administrative independence and accountability, as well as concerns about access to justice are part of that debate, which has itself intensified as the role of the judiciary has received greater public attention and scrutiny. To an important extent the perceived need to give the strongest legislative recognition and protection to the independence of the judiciary would seem to arise within the framework of this wider debate.

APPENDIX A

PART 9, CONSTITUTION ACT 1902 (NSW)

PART 9 - THE JUDICIARY

Definition and application

52. (1) **In this Part:**

"judicial office" means the office of any of the following:

(a) Chief Justice, President of the Court of Appeal, Judge of Appeal, Judge or Master of the Supreme Court;

(b) Chief Judge, Deputy Chief Judge or Judge of the Industrial Court;

(c) Chief Judge or Judge of the Land and Environment Court;

(d) Chief Judge or Judge of the District Court;

(e) Chief Judge or Judge of the Compensation Court;

(f) Chief Magistrate, Deputy Chief Magistrate or Magistrate of the Local Courts; Senior Children's Magistrate or Children's Magistrate of the Children's Court; Chief Industrial Magistrate or Industrial Magistrate; Chairman, Deputy Chairman or Licensing Magistrate of the Licensing Court.

(2) For the purposes of this Part:

(a) the Supreme Court, the Industrial Court and the Land and Environment Court are taken to be courts of equivalent status, and are of higher status that the courts referred to in paragraphs (b) and (c); and

(b) the District Court and the Compensation Court are taken to be courts of equivalent status, and are of higher status that the court referred to in paragraph (c); and

(c) the holders of the judicial offices referred to in paragraph (f) of the definition of "judicial office" are taken to constitute one court; and

(d) the relative status of any other court is to be as determined by legislation.

(3) This Part extends to the removal or suspension of judicial officers after the commencement of this Part because of matters arising before that commencement.

Removal from judicial office

53. (1) No holder of a judicial office can be removed from the office, except as provided by this Part.

(2) The holder of a judicial office can be removed from the office by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity.

(3) Legislation may lay down additional procedures and requirements to be complied with before a judicial officer may be removed from office.

(4) This section extends to term appointments to a judicial office, but does not apply to the holder of the office at the expiry of such a term.

(5) This section extends to acting appointments to a judicial office, whether made with or without a specific term.

Suspension from judicial office

54. (1) No holder of a judicial office can be suspended from the office, except in accordance with legislation.

(2) A suspended judicial officer is entitled to be paid remuneration as a judicial officer during the period of suspension, at the current rate applicable to the office from which he or she is suspended.

Retirement

55. (1) This Part does not prevent the fixing or a change of age at which all judicial officers, or all judicial officers of a court, are required to retire by legislation.

(2) However, such a change does not apply to a judicial officer holding office when the change takes effect, unless the judicial officer consents.

Abolition of judicial office

56. (1) This Part does not prevent the abolition by legislation of a judicial office.

(2) The person who held an abolished judicial office is entitled (without loss of remuneration) to be appointed to and to hold another judicial office in the same court or in a court of equivalent or higher status, unless already the holder of such an office.

(3) That right remains operative for a period during which the person was entitled to hold the abolished office, subject to removal or suspension in accordance with law. The right lapses if the person declines appointment to the other office or resigns from it.

(4) This section applies whether the judicial office was abolished directly or whether it was abolished indirectly by the abolition of a court or part of a court.