THE ACCOUNTABILITY OF THE COURTS
YEAR 12 TEACHER RESOURCE

This resource addresses the following Year 12 Stage 3 Politics and Law syllabus item:

3B: The accountability of the courts
- **through the appeals process**
- **through parliamentary scrutiny and legislation**
- **through transparent processes and public confidence**
- **through the censure and removal of judges**

Part A: Introduction, Appeals and Legislation

Possible Preliminary Discussion Points

a) Discuss what the term 'the accountability of the courts' actually means.

b) In what ways should judges be held accountable?

c) What problems may occur if the accountability of the judiciary was the task of the executive arm of government?

Introduction

"The independence of the judiciary lies at the heart of the rule of law and hence of the administration of justice itself. The essence of judicial independence is that the judge in carrying out his judicial duties, and in particular in making judicial decisions, is subject to no other authority than the law.... In particular, the judiciary should be free from the control of the executive government or of any department or branch of it."[1]

"No judge could be expected to carry out judicial tasks with impartiality if one side in the dispute had the power to dismiss that judge, move the judge out of office or reduce his or her salary or could cause its elected representatives to do so. The issue was put succinctly by Australia's former Chief Justice, Murray Gleeson, in a Boyer Lecture in December 2000 when he declared: 'The ultimate test of public confidence in the judiciary is whether people believe that in a contest between a citizen and government they can rely upon an Australian court to hold the scales of justice evenly.'"[2]

"That the purpose of judicial independence was not to provide a benefit to the judiciary but to enable the judicial system to function fairly with integrity and impartiality"[3] was indicated by Western Australia's Chief Justice, the Honourable Wayne Martin AC, at a conference in New Zealand in 2011. He told the delegates. "Independence without accountability has many potential dangers, ranging from despotism to inefficiency. Courts are accountable as institutions, to the community for the quality, integrity and efficiency of their administration of justice. Judicial education has an important role to play in assisting institutional

[1] *R v Moss: Ex parte Mancici* (1982) 29 SASR 385, 388 (King CJ).
[2] Thomas MacKay, (2013) *Justice in Jeopardy*. Skyeboat Publishing, Perth, 22.
[3] Ibid. 74.

accountability, by equipping judges to serve their courts in ways which enhance the quality of the administration of justice."[4]

"Accountability for the exercise of executive power is an aspect of a wider and pervasive principle of modern liberal constitutionalism that demands accountability for the exercise of public power in general. As a branch of government wielding public power, the judiciary is subject to this principle. Obviously the judiciary is accountable for its decisions through the right to open justice, an appellate procedure and an increasing willingness to engage in public discussion as to its role."[5]

Thus, there are a number of aspects in which the judiciary are held accountable:

- Much of the work of judges is done in the public eye – trials are for the most part, open to the public
- Judicial performance and behaviour is open to media scrutiny
- Judges are obliged to give reasons for decisions which are published online for anyone to read
- All judges, except those in the appellate division of the High Court, are accountable through the appeal process
- Parliamentary scrutiny and subsequent legislation
- Like all Australian citizens, judges are subject to the law.

The Appeals Process

One aspect of judicial accountability is the appeals process. A person can appeal a judge's decision to a higher court but can only do so on the grounds of an error of law, an error of fact or an error of mixed fact and law.[6] Thus, an appeal can be granted if the Court is satisfied that an alleged error may have been made and/or there may have been an alleged miscarriage of justice. Thus, this aspect of accountability is on judicial performance rather than personal behaviour.

An appellant usually has 21 days in which to lodge an appeal notice after the primary court decision. If an appeal is granted by the court of appeal, the matter is heard and a judgment made that is then published with reasons for the judgment given. The process in which an appeal can be lodged in Western Australia can be found at Supreme Court Rules 2005.

The District Court hears appeals from the Magistrates Court, from the Criminal Injuries Compensation Assessors and WorkCover WA Conciliators. The Court of Appeal division of the Supreme Court hears appeals from single judge decisions of the Supreme Court, decisions from the lower courts and decisions from various tribunals. The highest court in the Australian judicial system is the High Court. It hears appeals, by special leave, from Federal, State and Territory courts. The High Court of Australia is the final court of appeal.

Parliamentary Scrutiny and Legislation

Judges are required to apply the law in all cases. "The Constitution vests the judicial power of the Commonwealth—the power to interpret laws and to judge whether they apply in

[4] Ibid. 74.
[5] Simon Evans and John Williams, *Appointing Australian Judges: A New Model.* http://sydney.edu.au/law/slr/slr30_2/Evans.pdf
[6] *Supreme Court (Court of Appeal) Rules 2005*, http://www.austlii.edu.au/au/legis/wa/consol_reg/scoar2005368/, S32(4)(c).

individual cases—in the High Court and other federal courts."[7] Where there is ambiguity in the legislation, judges must use their discretion in interpretation. Sometimes this may expose a loophole in the original legislation that the Legislature (parliament) may then address by amending the legislation.

Click on the 'Legal Loophole' link and read the article about mandatory sentencing.
Legal Loophole

1. What was the legal loophole identified in the article?
   The original legislation on sentencing required those convicted of assaulting a police officer to serve a minimum imprisonment term of six months. However, a person serving a prison term of less than three years can be eligible for parole after serving only half their sentence. Thus, the offender in this article who was serving nine months imprisonment was released after four months on parole. This went against the mandatory sentencing of six months.

2. How will this loophole be corrected?
   The WA Attorney General, the Honourable Michael Mischin MLC, introduced an amendment Bill in parliament in December 2013 to remove the loophole and ensure that the minimum term of six months be served.

The introduction of the Bill in parliament can be found using the following links.

Sentencing Legislation Amendment Bill 2013
http://www.parliament.wa.gov.au/Parliament/bills.nsf/21FCEE8EA4542EC548257C37000EF518/$File/Bill056-1.pdf

Introduction of the Bill by Hon Michael Mischin (Attorney General)
http://www.parliament.wa.gov.au/hansard/hansard.nsf/0/8729D156C327FC4248257C390026E717/$FILE/C39%20S1%2020131204%20p7204b-7205a.pdf

Explanatory Memorandum
http://www.parliament.wa.gov.au/Parliament/bills.nsf/21FCEE8EA4542EC548257C37000EF518/$File/EM56-1.pdf

Statement by Minister for Police
http://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/21a919edfd1a4bd648257c3900183bda/$FILE/A39+S1+20131203+p6994c-6995a.pdf

Extension Task
Is it possible for Parliament to make legislation that is unconstitutional?

Yes, it is possible for Parliament to make legislation that is unconstitutional, however any legislation that does not align with the constitution can be challenged in the High Court.

[7] Parliament of Australia, *The Australian System of Government*
http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government

One of the major functions of the High Court is to interpret the Constitution. The High Court may rule a law to be unconstitutional—that is, beyond the power of the Parliament to make—and therefore of no effect. While the Parliament may override a court's interpretation of any ordinary law by passing or amending an Act of Parliament, the Parliament is subject to the Constitution."[8] An example where an Act of legislation was judged to be invalid was in the case of *Kable v Director of Public Prosecutions* (NSW)(1996).

Click on The Kable Case and read the Executive summary. (You may want to have a quick look at the background to the case on page four to help understand the context.)

3. Why was the *Community Protection Act 1994* (NSW) judged invalid by the High Court?
   "On 1 August 1990 Gregory Wayne Kable (henceforth Kable) was convicted of the manslaughter of his wife, Hilary Kable, and sentenced to a minimum term of imprisonment of four years and an additional term of one year and four months. During his stay in prison Kable wrote a series of threatening letters, mainly to relatives of his deceased wife, such as to cause serious concern that, upon his release, there would be a repetition of the same conduct that led to his wife's death. He was due to be released from prison on 5 January 1995. Responding to these concerns, on 2 December 1994, the NSW Parliament passed the *Community Protection Act 1994* (NSW) (henceforth, the CPAct). That Act provided for the preventive detention of Kable, by order of the Supreme Court on the application of the Director of Public Prosecutions."[9]

   The *Community Protection Act 1994 (NSW)* was found to be unconstitutional:
   "In providing for the virtual imprisonment of Kable without a finding of guilt, federal judicial power was not exercised 'in accordance with the judicial process'. Thus, the decision would appear to extend the requirement of procedural due process to those State courts vested with federal jurisdiction."[10]

   McHugh J made it clear that "courts exercising federal judicial power must be perceived to be free from legislative or executive interference and that this requirement is not restricted to where a State court which is vested with federal jurisdiction is actually exercising federal judicial power."[11]

   "The *Kable* decision seems to establish that the test of incompatibility of function, based on the maintenance of public confidence in the integrity and independence of those State courts vested with federal jurisdiction, is to be applied to all the judicial and nonjudicial functions of relevant State courts and their member judges."[12]

[8] Ibid.
[9] Gareth Griffith, *The Kable Case: Implications for New South Wales*, Briefing Paper no 26/96, http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/654B41B7E2821FB2CA2579A7000598E0/$File/KableCase.pdf
[10] Ibid.
[11] Ibid.
[12] Ibid.

4. Identify a law/s that is currently being challenged in the High Court as being unconstitutional
   Queensland's anti-bikie laws.

The Separation of Powers
Former Chief Judge of the District Court, the Honourable Antoinette Kennedy, "took pains to explain the relationship between the judiciary and the two other arms of government. 'The judiciary is the third arm of government,' she wrote. 'You are contracted to the second arm, the executive. Judges are not public servants and in our judicial role we do not take directions from the executive.'

Part of the role of a judge was, if necessary, to stand between the citizen and the State. As a result of this burden and responsibility, it was essential that judges controlled their own courts."[13]

Possible discussion point – Is mandatory sentencing unconstitutional in that it takes away judicial discretion in applying the law for individual cases?

"Whether they like them or not, courts must apply the law as enacted by parliament. One aspect of the confidence that the public may have in the integrity of the courts is that they faithfully adhere to the laws enacted by parliament, whatever a judge's private views are. A pertinent example of this is mandatory sentencing legislation. While such legislation may curtail judicial discretion in determining the sentencing applicable to a particular crime, or impose a minimum or a maximum term, that loss of discretion alone is unlikely to make the legislation unconstitutional. Sir Anthony Mason explained that:

> **To deprive the courts of their entire sentencing discretion or part of it and compel them to apply a fixed rule is not, according to the authorities discussed so far, a departure from the general doctrine of the separation of powers. There are other authorities which take a different approach. However, they deal with constitutions which contain entrenched guarantees of fundamental rights. For that reason they should be viewed with caution.**

While Mason agrees that the retention of judicial sentencing discretion is desirable he concludes that mandatory sentencing could only be unconstitutional if it was possible to imply a constitutional judicial right to 'consider whether the sentence mandated by the legislation should be imposed'. Consistently with this, in the cases of *Palling v Corfield* and *Wynbyne v Marshall* constitutional challenges to federal and territory mandatory sentencing legislation, respectively, have been rejected. In *Wynbyne*, which concerned a defendant who was sentenced to 14 days mandatory imprisonment for stealing a can of beer, Bailey j observed:

> **There is nothing…which suggests that merely because a court, having found the appellant guilty of an offence, is mandated to record a conviction and impose a minimum sentence of imprisonment, that [it] is an interference with the independence of the judiciary. The amending Act is not ad hominem and applies equally to all adults found guilty of certain defined property offences.**

[13] Ibid above n 2. 16.

> **Nor does the amending Act direct the court to reach a finding of guilt. Guilt is proven in the usual way – by admissible evidence led by the prosecution. Only when guilt is established is a court required to convict."[14]**

"If there are to be successful challenges to sentencing laws that may be regarded as unfair, oppressive, 'bad, unjust, ill-advised or offensive to notions of human rights', under the present constitutional arrangements, they are more likely to be mounted in the political than the curial arenas. In the absence of substantive, effective and entrenched human rights legislation, both the *Commonwealth Constitution* and the common law are unlikely to provide the means whereby meaningful limits can be placed on the state's ability to interfere with individual liberties in the sentencing context."[15]

[14] Arie Freiberg and Sarah Murray, *Constitutional Perspectives On Sentencing: Some Challenging Issues,* Federal Crime and Sentencing Conference, The National Judicial College of Australia and the ANU College of Law, Canberra, 9-10. http://njca.com.au/wp-content/uploads/2013/07/Freiberg-Murray-Constitutions.pdf
[15] Ibid. 31.

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Part B: Complaints, Misconduct and Incapacity

Transparent processes and Public Confidence
"Complaints about the conduct of state judicial officers are generally handled by the court or tribunal of which that officer is a member. This is done under a nonlegislative document called the 'Protocol for Complaints Against Judicial Officers in Western Australian Courts'" [16]

1. Click on the above link and explain in your own words the three categories of complaints against the judiciary.

"The Protocol divides complaints into three categories:
a) Delay in delivering reserved decisions;
b) Complaints alleging non-criminal misconduct; and
c) Complaints received by the Police Service."[17]

Additional details:

Category (a)
"Complaints Against Judges, Masters, Magistrates, Registrars and other Judicial Officers - Delivery of Reserved Decisions
5. Parties, or their legal representatives, are at liberty to make enquiries regarding the progress of a judgment which has not been delivered within those periods set out in paragraph 3, or by the "not before" date given when the judgment was reserved.
6. Enquiries concerning the progress of a reserved judgment should be made directly to the associate to the presiding Judge in the case of the Court of Appeal, or where the relevant judicial officer has an associate, to that associate.
7. In the event that a party or practitioner is reluctant to raise the matter directly with the presiding Judge or judicial officer, the enquiry may be made to the head of the relevant jurisdiction or, in the event that the head of the jurisdiction is the presiding Judge, to the Chief Justice. In such a case, the matter will be taken up with the judicial officer concerned without disclosure of the identity of the party making the enquiry."[18]

Category (b)
"Complaints Against Judges, Masters, Magistrates, Registrars and other Judicial Officers - Non-Criminal Misconduct
9. Any person affected is entitled to make a complaint of non-criminal misconduct regarding any member of the judiciary concerning the performance by that judicial officer of his or her judicial functions. It should be noted that the procedures below do not address complaints in respect of non-judicial members

[16] Law Reform Commission of Western Australia, *Complaints against Judiciary Final Report*, 2013, 4.
[17] Ibid.
[18] *Protocol for Complaints Against Judicial Officers in Western Australian Courts* (2007), http://www.supremecourt.wa.gov.au/_files/2007_Complaints_Protocol_31082007.pdf 2.

of the State Administrative Tribunal, which are to be dealt with in accordance with the *State Administrative Tribunal Act 2004* (WA).

10. In all cases, a complaint regarding a judicial officer should be made to the relevant head of jurisdiction. In the event that a complaint is made regarding a head of jurisdiction, the complaint should be made to the Chief Justice. Where a complaint is made concerning the Chief Justice, the complaint should be made to the next most senior Judge of the Supreme Court who should take the steps described below with reference to a Head of Jurisdiction."[19]

Category (c)

"Complaints Against Judges, Masters, Magistrates, Registrars and other Judicial Officers received by Police Officers

18. Three categories of complaint about a judicial officer may be made to a police officer, involving allegations of:

(i) criminal misconduct;

(ii) misconduct not involving suspected criminal behaviour (rudeness, professional negligence, unethical behaviour etc); and

(iii) conduct that may attract the jurisdiction of the Corruption and Crime Commission.

The following procedures have been agreed with the Commissioner of Police for the handling of complaints received by police officers in relation to any of these three categories of alleged misconduct by judicial officers. Where such an allegation is received by a police officer, it should be reported by the officer to the Assistant Commissioner (Corruption Prevention and Investigation). The Assistant Commissioner (Corruption Prevention and Investigation) will report the complaint to the Commissioner of Police and the relevant Head of Jurisdiction."[20]

In August 2013 the Law Reform Commission of Western Australia published the final report on Complaints against the Judiciary. Click on the final report link of the *Complaints Against the Judiciary* and read *Terms Of Reference* on page 1 and the *Structure Of This Report* on page 9.

2. Copy what the terms of reference must recognise as a complaints system on page 9 of the report.

"The terms of reference recognise that a complaints system:

(a) must 'protect and preserve the independence and impartiality of state courts from the executive and legislative branches of government';

(b) ought to be efficient, accessible, transparent and accountable; and

(c) should be established having regard to the experience of other jurisdictions."[21]

Click on the link to the *Complaints Against the Judiciary* final report and read *the incidents of complaints* on pages 5 to 7.

[19] *Protocol for Complaints Against Judicial Officers in Western Australian Courts* (2007), http://www.supremecourt.wa.gov.au/_files/2007_Complaints_Protocol_31082007.pdf 3.
[20] Ibid. 5.
[21] Law Reform Commission of Western Australia, *Complaints against Judiciary Final Report*, 2013, 9.

3. What were the main conclusions drawn from the statistical information?
"Although it is difficult to draw much from the statistical information described in the preceding paragraphs, it appears that:
(a) the level of complaints is low;
(b) most complaints fall within the category of ordinary complaints;
(c) no complainants have alleged criminal misconduct; and
(d) with the one exception mentioned, no complainants have alleged judicial misbehaviour or incapacity."[22]

4. What was the main recommendation found on page 75 of the report?
It is a recommendation of the Commission that "a formal complaints regime be established in Western Australia."[23] This regime would serve the goals of "efficiency, accessibility, transparency and accountability."[24] It would include a judicial commission and a conduct division to handle complaints.

Censure and Removal of Judges

Read section 72 of the Commonwealth Constitution Act found in Chapter 3: The Judicature.

5. What are the three main elements of a *Judges' appointment, tenure, and remuneration*?
"The Justices of the High Court and of the other courts created by the Parliament–
(i) Shall be appointed by the Governor-General in Council:
(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:
(iii) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office."[25]

6. At what age does a Justice of the court retire?
"The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years. The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such

[22] Ibid. 7.
[23] Ibid. 75.
[24] Ibid.
[25] Ibid.

repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment."[26]

7. How is a Justice of the Court able to resign prior to retiring age?
"A Justice of a court created by the Parliament may resign his office by writing under his hand delivered to the Governor-General."[27]

"It follows that judges have security of tenure. This is an important feature of our constitutional system because it allows judicial functions to be exercised impartially and without fear or favour. It is a critical element of the concept of judicial independence and it is in the public interest that it be respected.[28]

However s72(ii) of the Australian Constitution indicates that judges can be removed from office 'on the ground of proved misbehaviour or incapacity'. It is worth noting that "there is no recorded instance of a motion in Parliament for the removal from office of a Western Australian judge."[29]

Click on the following link Judicial Accountability and go to the document *1748 Judicial Accountability* by the Hon Michael Kirby and read the section *discipline and removal* on pages 18-21.

8. Have any judges been removed from office for disciplinary reasons in Australia? If so, what happened?

"The Australian constitutional procedures for the removal of judges have not resulted in a single case in removal of a member of the federal judiciary. Although an inquiry into allegations against Justice Murphy had been initiated, it was abandoned when it became clear that the judge was suffering from terminal cancer. One State judge, Justice Angelo Vasta of the Supreme Court of Queensland, was removed from office by the Queensland Parliament following a report of a commission of inquiry chaired by the former Chief Justice of the High Court, Sir Harry Gibbs. Justice Vasta returned to practice at the Queensland Bar and has quite often appeared for disadvantaged litigants. In New South Wales, an attempt was made to remove a judge of the Supreme Court, Justice Vince Bruce, in connection with serious and repeated delays in the delivery of his decisions. In response, Justice Bruce addressed the Upper House of the New South Wales Parliament. By majority, the members rejected the motion for his removal. He resigned judicial office soon afterwards, having delivered his last judgments."[30]

9. What other ways can judges be held accountable other than formal proceedings of removal for 'proved misbehaviour or incapacity'?

"These formal proceedings for the removal of judges do not tell the entire story of their accountability for serious defaults. In several cases, complaints against

[26] Ibid
[27] Ibid.
[28] Ibid above n 21. 3.
[29] Ibid. 5.
[30] The Hon Justice Michael Kirby AC CMG' *Judicial Accountability In Austrailia,* Commonwealth Legal Education Association (2001) Brisbane. 20. http://www.michaelkirby.com.au/index.php?option=com_content&view=article&id=45&Itemid=73

judicial officers have led to investigations and resignations by the judges concerned, rather than face formal procedures for removal. Such cases are exceptional. But instances are known to every judge. They demonstrate that, in appropriate cases, the machinery is in place to exact the ultimate accountability of a judge to the citizens and to remove the judge from office. Such a sanction is reserved to the extreme case. Indeed, this is one reason why consideration has been lately been given to procedures for more low key, flexible and appropriate sanctions where dismissal would be disproportional and therefore out of the question."[31]

Possible Discussion Questions

a) Currently, the behaviour of judges can only be reviewed within the judiciary. Is it possible to have an objective review without an independent body?

There have been some concerns about how judicial officers can review one of their own impartially. Public confidence in how complaints are handled is important. If a member of the public does not believe their complaint will be heard fairly, there is the potential for apathy and a lack of trust in the system. Transparent processes are essential even if an independent body is included in handling complaints.

b) No member of the judiciary has been removed from office in WA. What does that indicate about the appointment of judges in WA?

The process of appointment and promotion of judges has a successful history in WA. "With few exceptions, judges were appointed from the Bar. This was a small *cadre* of experienced advocates who knew each other and who normally had the measure of each other's strengths and weaknesses."[32]

There is some argument against the wisdom of such a process as it embodies a limitation where only one type of person is selected to be part of the judiciary – those with skills from the Bar. "Critics point to the somewhat monochrome character of the judiciary of the past. It included few women, few judges of non-Anglo Celtic ethnicity, few (if any) openly homosexual judges, indeed few who did not fit the ordinary professional mould. I know of no serious observer who contends that the judiciary should be representative of all the many minorities in society. But many informed judges now consider that it is desirable that "different voices" should be heard "in the marketplace of judicial ideas""[33]

c) Why is it important that a complaints system 'protect and preserve the independence and impartiality of state courts from the executive and legislative branches of government'?

"No judge could be expected to carry out judicial tasks with impartiality if one side in the dispute had the power to dismiss that judge, move the judge out of office or reduce his or her salary or could cause its elected representatives to do

[31] Ibid.
[32] Ibid.9
[33] Ibid 22-23

so."[34] Thus the independence of the judiciary is crucial for it to be effective. The separation of powers doctrine remains a fundamental aspect of the Australian Constitution and a cornerstone to fair government. If judicial independence is not protected, judges may be influenced by external pressures when making decisions.

[34] Ibid above n 2. 22.