
THE ACCOUNTABILITY OF THE COURTS YEAR 12 STUDENT RESOURCE

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 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

¹ *R v Moss: Ex parte Mancini* (1982) 29 SASR 385, 388 (King CJ).

² Thomas MacKay, (2013) *Justice in Jeopardy*. Skyboat Publishing, Perth, 22.

³ *Ibid.* 74.

⁴ *Ibid.* 74.

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, 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 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](#)

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).

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

1. What was the legal loophole identified in the article?

2. How will this loophole be corrected?

Extension Task

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

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?

⁸ Ibid.

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

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Part B: Complaints, Misconduct and Incapacity

July 2020: The sexual harassment allegations recently raised against a former High Court Justice are very relevant to this topic.

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’](#)... 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.”¹⁰

1. Click on the above link and explain in your own words how a person may make complaints against the judiciary in each of the three categories.

Category (a)

Category (b)

¹⁰ Law Reform Commission of Western Australia, *Complaints against Judiciary Final Report*, 2013, 4.

Category (c)

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.

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

3. What were the main conclusions drawn from the statistical information?

4. What was the main recommendation found on page 75 of the report?

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 the *Judges' appointment, tenure, and remuneration*?

6. At what age does a Justice of the court retire?

7. How is a Justice of the Court able to resign prior to retiring age?

“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.”¹¹

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.”¹²

¹¹ Ibid. 3.

¹² Ibid. 5.

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?

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

Possible Discussion Questions

- Currently, the behaviour of judges can only be reviewed within the judiciary. Is it possible to have an objective review without an independent body?
- No member of the judiciary has been removed from office in WA. What does that indicate about the appointment of judges in WA?
- 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'?



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