



Global Judicial Integrity Network Substantive Breakout Session Report

I. TITLE OF THE SESSION:

Title of the Session:	A Trade-Off ? Balancing Independence and Accountability.
Date and time of the Session:	9th April 2018 15.45
Topic of the session:	Achieving a balance between Judicial Independence and Judicial Accountability.
Organizer(s):	Commonwealth Magistrates' & Judges' Association
Contact information of the session coordinator:	hollis12@me.com

II. RAPPORTEUR¹

Rapporteur:	Keith Hollis
Position:	Mediator. Retired Judge. Former Director of Studies for the CMJA
Organization:	Commonwealth Magistrates' & Judges' Association

¹ Responsible for drafting the session report.



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III. MODERATOR AND PANELLISTS:

Moderator:	Keith Hollis
Position:	As above
Organization:	

Name:	The Honourable Justice M.C.C. Mkandawire
Position:	Head of High Court Civil Division
Organization:	Judiciary of Malawi
Topic of presentation:	Establishing independent and accountable disciplinary mechanisms, appointments, lay involvement: an African Perspective.



<p>Outline of presentation (max. 1000 characters):</p>	<p>Delegates were invited to look at</p> <ul style="list-style-type: none">- the Commonwealth (Latimer House) Principles www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf <p>The Nairobi Plan of Action</p> <p>www.cmja.org/downloads/news/octnov2005.doc</p> <p>(i) each institution of government to exercise responsibility and restraint in the exercise of power and that Commonwealth Africa needed to pay particular attention to processes of democratisation that meet the needs of Africa's historical, cultural and economic peculiarities in a manner which is consistent with the principles. (ii) there should be adequate observance of principles of accountability in its processes, professional ethics and conduct amongst judicial officers as well as court officials. For accountability to be effective, there must be judicial independence and security of tenure. The judiciary must be well resourced. (iii) Concern over the Status of Magistrates: The appointment of Magistrates, their security of tenure and removal as well as their conditions of service fall short of the requirements of an independent judiciary as contained from the Commonwealth (Latimer House) Principles and International Law. (iv) In majority of Commonwealth jurisdictions, the legislative safeguards of the independence of Magistrates' are minimal if they exist at all. (v) In a number of jurisdictions, Magistrates are still considered as civil servants. Their mode of appointment, ethical obligations, disciplinary procedures and grounds of removal reflect this situation. (vi) In most jurisdictions removal of Magistrates is governed by the rules that apply to civil servants. In some jurisdictions removal of Magistrates is left to the Judicial Service Commissions. (vii) It is submitted that many similar issues arise for magistrates and junior judicial officers in non-Commonwealth countries (viii) Judicial officers at all levels should be subject to suspensions or removal <u>only</u> for reasons of incapacity or proven misbehavior, established by due process, and such that clearly renders them unfit to discharge their duties.</p>
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Name:	Keith Hollis
Position:	As above
Organization:	
Topic of presentation:	Introduction to the issue - Devising and enforcing appropriate and proportionate sanctions for breaches



<p>Outline of presentation (max. 1000 characters):</p>	<p>How to strike a balance between Independence and Accountability.</p> <p><u>Independence:</u> Fundamental to what we do. Clear from judicial oaths. Can't do job if not independent. No effective rule of law. Successive generations of judges, politicians and administrators have to learn that lesson. Clearly set out in UN Basic Principles, and the Bangalore Principles. Commonwealth Principles: Latimer House Guidelines set position out succinctly.</p> <p><u>Accountability:</u> How to have mechanisms that are on the one hand effective and fair and on the other hand do nothing to undermine the ability of judicial officer to make independent decisions and so uphold the Rule of Law? Quis custodiet ipsos custodes? Many words, declarations, reports. But it is practical issues in each jurisdiction that are central. Two categories of accountability mechanism</p> <p>1. <u>Formal:</u> Judges publicly giving reasons for decisions: finding facts, applying law, exercising discretion. For many errors: Appeals. For misbehaviour, bad conduct: disciplinary tribunals. For corruption and criminal behaviour, no shades of grey here, issue for normal Criminal justice system</p> <p>2. <u>Informal</u> Perhaps more important? Why become a judge, if you don't want to be judicial? We want a good reputation as a judge: to be fair, and wise, and respected by our peers, and by those who appear before us. with reputations for fair dealing. Self respect.</p> <p>Collegiality, support, and professionalism amongst judges. Proposed Declaration on Judicial Integrity makes clear measures taken to strengthen integrity and to prevent corruption among members of the judiciary.</p> <p>3. <u>Practical issues central:</u> Decent pay and pensions, paid promptly. Conditions of work. Quality and integrity of support staff can be a central issue. Case listing and itinerary planning very important. Especially crucial for the first level judge or magistrate.</p> <p>Participation in the G.J.I. Network on that basis.</p> <p>But should it be stronger? How far can it be made to help address those practical issues? Can we ensure that formal mechanisms do not undermine informal mechanisms? and undermine mutual respect between all levels of judge.</p> <p><u>Proposed Declaration on Judicial Integrity</u> makes it clear that measures taken to strengthen integrity and to prevent corruption among members of the judiciary</p> <p>is subject to the United Nations Basic Principles on the Independence of the Judiciary and the Bangalore Principles and</p> <p>participation in the Global Judicial Integrity Network must be on that basis.</p> <p>But should it be stronger? How far can it be made to help address those practical issues? Can we ensure that it doesn't undermine "informal" mechanisms?</p>
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Name:	Justice Lynn Leitch
Position:	Judge: Federal Court of Canada
Organization:	
Topic of presentation:	How to implement effective judicial conduct review mechanisms that do not and are not used to hinder the Independence of Judges.
Outline of presentation (max. 1000 characters):	<p>While a judicial conduct review mechanism must enhance the public interest in judicial accountability, judicial independence must also be protected.</p> <p>Guiding Principle A guiding principle is that any conduct review process be examined for its potential to undermine the independence of a judge both independently and institutionally. The interests of the public are best served by a strong judiciary.</p> <p>In Valente, the Supreme Court of Canada noted that the first of the essential conditions of judicial independence is security of tenure, which is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.</p> <p>Key principle #1 – a conduct review process cannot be arbitrary A key principle therefore emerges – the tenure or term of a judge whose conduct is under review cannot be interfered with in a discretionary or arbitrary manner.</p> <p>Key Principle #2 – a conduct review process must preserve the integrity of the judiciary as a whole In a more recent decision in 2001 in Therrien, the Supreme Court of Canada noted further that a conduct review process must preserve the integrity of the judiciary as a whole, and public perceptions of it. The process must not weaken the judiciary leaving individual judges incapable of fulfilling their responsibilities. The conduct in issue must be specific and related to the judge’s capacity to perform his or her judicial functions. The complainant’s rights or interests are superseded by the overall public interest in the process. In other words, the focus of conduct review is not to examine particular findings in a particular case.</p> <p>Key Principle #3 – conduct review must be fair, objective and effective The judge whose conduct is being reviewed must have reasonable notice of, and full disclosure, of the subject matter of the review – that is the complaints or allegations. The judge must have an opportunity to respond fully to the complaint. The principle of fairness and due process raise a number of issues: Should an anonymous complaint be sufficient to spark conduct review?</p>

– permitting anonymous complaints to be acted upon risks not only potentially unfair investigations but also unnecessary investigations
Is there a role for the complainant after his or her complaint is lodged?
– bearing in mind the need for transparency a complainant should receive notice of the proceeding and be advised of the ultimate decision
– is it most appropriate to conclude that the complainant is not a necessary or proper party and cannot make submissions or present evidence?

Key principle #4 – the procedural steps in a conduct review process must be clear and could involve a series of clearly delineated steps

A “screening” mechanism is appropriate and complaints that are trivial and not worthy of further review would not be pursued.

The next step could be a review by a panel or group constituted by representatives of various constituencies. The procedural issues raised here are:

While participation or representation of senior judiciary is expected (and should that be from a different jurisdiction?) should there also be representation from the judge’s peers? - in Therrien the point was made that “it is important that discipline be dealt with in the first place by peers” endorsing a legal academic who opined that “the primary responsibility for the exercise of disciplining authority lies with the judges at the same level”

Lawyers?

The public? - involvement of lay persons in the process enhances the transparency of a conduct review process and thus is beneficial to the enhancement of public confidence. It may also provide valuable outside perspectives which would also enhance public confidence.

How are those additional representatives to be selected?

By the senior representative of the judiciary?

At random from an approved pool of candidates?

By appointment for a term?

Would the final step be an inquiry or hearing?

What is the role of the judge’s Chief Justice?

To what extent is any part of the process made public?

As noted in Friedland, any model in which the process serves to compromise the privacy and reputation of a judge also threatens judicial independence.

Key Principle #5 – there must be a standard against which judicial conduct is reviewed

In considering this question, I mention that in Canadian jurisprudence the relevant test is as follows:



	<p>Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?</p> <p>This is a nuanced test. It is responsive to evolving values in society. It allows for the application of judgment. It is a principle based approach and reflects that judicial conduct transcends rules.</p> <p>A rules-based approach, based on required adherence to a code of conduct, stands in contrast.</p> <p>I am an advocate of the concept that ethical principles should be forward looking, aspirational and advisory. As such, they are not an appropriate measure of judicial conduct.</p> <p>Key Principle #6 – a conduct review process must address the conduct in issue</p> <p>There must be appropriate disciplinary or remedial measures.</p> <p>Under the Canadian Judges Act which applies to federally appointed judges the only option at the conclusion of a conduct review process is to recommend the removal of a judge from office.</p> <p>In contrast, in relation to provincial and territorial judges, the reviewing body may impose a wide range of sanctions and remedial measures such as warnings and reprimands, suspensions, or the requirement of a specific measure tailored to the issue in question such as an apology to a complainant, the attendance at specified continuing education or undergoing treatment as a condition of continuing to preside as a judge.</p> <p>I add the caveat that the concept of suspension of a federally appointed judge is highly contentious and is said to be unconstitutional.</p> <p>Final Issue</p> <p>Should there be a right of appeal from a decision made in a conduct review process?</p> <p>Issues of due process must be considered.</p> <p>In addition, delay is a concern. Cost is also a concern.</p>
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IV. BACKGROUND INFORMATION ON THE TOPIC: There are many international declarations in existence already. Just some of these are recited in the discussion guide. The present programme is to be welcomed as a practical step to putting those declarations into practice, especially in jurisdictions that were challenged to do so. How is progress to be made to do so?



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V. SUMMARY OF THE SESSION: The session was fully attended and the questions posed led to a stimulating discussion. The following points need to be headlined:

1. Although the engagement at this initial stage of senior judges was to be welcomed. It was stressed that most people's engagement with justice systems is with first level judges and magistrates and that closer attention should be given to their particular needs, they are the most vulnerable and in many jurisdictions they do not have an appropriate level of constitutional protection. It is to be hoped that the GJIN will focus on this issue.
2. That close attention should be given to the "informal" bulwarks of judicial protection, such as collegiality and judicial education, to ensure higher levels of judicial integrity
3. It was rarely possible to act on anonymous complaints, they were usually impossible to investigate fairly and were more likely to be motivated by malice. Save in allegations of criminal behaviour, it would be better to think in terms of "conduct review" rather than "judicial discipline". Conduct review procedures should always follow due process and be proportionate in procedure and outcome to the issue being addressed.
4. On balance most felt that there should be involvement by peers of the judicial officer concerned in conduct reviews, there were mixed views on the lay involvement or involvement with the legal profession. Consideration should always be given to whether or not the process was primarily a disciplinary process or a remedial one. This may depend on the gravity of any allegation.
5. Some countries had government appointed judicial inspectors, strong concern was expressed as to the efficacy and appropriateness of this course.

VI. HOW THE SESSION SUPPORTS THE OVERALL OBJECTIVE OF THE GLOBAL JUDICIAL INTEGRITY NETWORK OF STRENGTHENING JUDICIAL INTEGRITY AND PREVENTING CORRUPTION IN THE JUSTICE SYSTEM:

SEE ABOVE

VII. PROPOSED OUTCOME(S) OF THE SESSION AND THEIR ACHIEVEMENT:

See the discussion points in IV above.

VIII. CONCLUSIONS OF THE SESSION AND RECOMMENDATIONS TO THE GLOBAL JUDICIAL INTEGRITY NETWORK: SEE ABOVE

IX. ADDITIONAL OBSERVATIONS, IF APPLICABLE