

TRANSFORMING COURT GOVERNANCE IN VICTORIA

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ABSTRACT

This thesis by publication analyses the emergence of independent judicial councils and their role in facilitating judicial control of court administration in Australia, Canada, Ireland, the Netherlands, Sweden, the UK, the USA and other countries. While much research has been conducted into the relative merits of judicial control of court administration, the thesis extends the court governance literature by developing an analytical policy framework for a model Judicial Council of Victoria with broad statutory responsibility for improving the quality of justice in the court system. The thesis then applies the proposed analytical model to assess the legal and institutional framework of Court Services Victoria ('CSV'), which was established in 2014 in order to transfer the responsibility for court administration from the executive government to the judiciary. The thesis argues that an independent judicial council, such as CSV, requires a strong developmental mandate to assist the courts improve their operations and respond to a multitude of internal and external challenges that they inherited from the executive system of court administration. At the level of the courts, the framework envisages the establishment of a compact management board, comprising executive judges and the court CEO, which is modelled upon a corporate board of executive directors, with full responsibility for court administration.

Overall, the thesis contends that greater internal transparency and administrative 'corporatisation' of the judiciary is essential at all levels of the judicial organisation

in order to improve court performance, enhance the social legitimacy of the courts and reinforce judicial independence.

Contributions of each journal article

The first article undertakes a detailed comparative analysis of key international models of court administration and proposes the establishment of an independent ‘Judicial Council of Victoria’ with specific institutional powers, composition and competencies vis-a-vis the courts and the executive government.

The second article refines the proposed judicial council model, by incorporating certain governance features from northern European judicial councils, in areas such as the governing board design, organisational transparency and ministerial powers.

The third article concentrates on the proposal to establish an executive board of judges in each court with full responsibility for court administration. The article argues that the duties, tasks and powers of the executive judges and the board itself should be clearly specified in the legislation and court rules.

The final article provides the answer to the principal research question of the thesis, which is to determine whether the legislative and institutional framework of CSV in Victoria meets the proposed model policy benchmarks for an independent judicial council that is effective, relevant and accountable.

Key findings

The thesis concludes that the Victorian court system reform broadly meets the identified policy benchmarks, but that the legislation is insufficiently clear in important aspects, requiring a set of specific amendments. In particular, the legislation should specify that CSV has a mandate to improve the quality of justice in the courts and clarify CSV’s powers in court administration. Similarly, the functions and powers of judicial executives in courts should be clearly defined in the courts legislation.

To Julia and Jamie;
И мојим родитељима, Весни и Бори.

STUDENT DECLARATION

I, Tin Bunjevac, declare that the PhD thesis by publication entitled Transforming Court Governance in Victoria is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work.

Signature:

Date: 3/2/17

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Declaration by Tin Bunjevac:

Signature:

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1 INTRODUCTION

This study of court governance charts a critical period in the development of modern judicial systems around the world. Over the last 20 years, courts in Australia and many developed countries have experienced an exponential increase in the number and complexity of cases coming before them, which has also been accompanied by increasing public expectations regarding the cost, timeliness, quality and accessibility of justice.¹ Judges have found themselves under increasing pressure from politicians, prosecutors, lawyers, the media and other stakeholders to share the burden of cost-cutting in the public sector and deliver more justice in less time and for less money.² There appears to be implicit recognition that governments have all but exhausted their regulatory tool kit for combating delay in the justice system: record numbers of judges have been appointed, new tribunals have been established and successive legislative reforms have been implemented in an attempt to simplify the rules of evidence and legal procedure, and encourage alternative ways of resolving disputes.³ And yet, despite all of these efforts, the challenges of

¹ See generally Stephen John Parker, *Courts and the Public* (Australasian Institute of Judicial Administration, 1998); Marco Fabri and Philip Langbroek, *The Administration of Justice in Europe: Towards The Development of Quality Standards* (Istituto di Ricerca sui Sistemi Giudiziari, Consiglio Nazionale delle Ricerche, 2003); Tania Sourdin, *The Timeliness Project: Background Report* (Australian Centre for Justice Innovation, 2013).

² Marco Fabri and Philip M Langbroek, 'Developing a Public Administration Perspective on Judicial Systems in Europe' in Marco Fabri and Philip M Langbroek (eds), *The Challenge of Change for Judicial Systems: Developing a Public Administration Perspective* (IOS Press, 2000) 1.

³ See e.g. Sir Harry Woolf, 'Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' (Department of Constitutional Affairs, 1996); Adrian AS Zuckerman, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, 1999); Victorian Law Reform Commission, 'Civil Justice Review' (Report No 14,

complexity, cost and delay in litigation have only continued to grow, threatening a crisis of confidence that could potentially undermine the independence and legitimacy of the judiciary as well.⁴

While many judges have been acutely aware of the emerging challenges in their environment, they also found it difficult to initiate meaningful reforms, for a variety of reasons. Traditionally, the executive government had been in charge of court administration, which left judges poorly equipped to manage the courts and ‘unmotivated to do anything strategic about it.’⁵ The organisational separation between judges and court staff also led to a divergence in policy and operational objectives of court administration. Court managers had no access to the judicial side of court administration, while judges lacked insight into, or influence over, the court administration policy, despite the fact that they controlled the most critical organisational ‘outputs.’

Finally, because of their specific professional training and experience, judges showed little inclination to work together with court staff and assiduously sought to protect their individual independence, even in the performance of basic administrative tasks. Over time, all of these factors had contributed to the sense of a deepening institutional atrophy, leading to a growing realisation among many judicial leaders and policy makers that structural organisational change was needed in order to transform the courts into modern, thriving and, above all, responsive institutions.⁶

Victorian Law Reform Commission, 2008); Tania Sourdin and Naomi Burstyn, 'Justice Delayed is Justice Denied' (2014) 4 *Victoria University Law and Justice Journal* 46, 48-9.

⁴ Sir Gerard Brennan, 'Key Issues in Judicial Administration' (1997) 6 *Journal of Judicial Administration* 138, 139; For a more recent analysis of the problems of delay in Australia see A. Marfording and A. Eyland, 'Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany' (UNSW Law Research Paper No. 28, 2010).

⁵ Peter Sallmann, 'Courts' Governance: A Thorn in the Crown of Judicial Independence?' (2007) 16(3) *Journal of Judicial Administration* 139, 141-2.

⁶ Gar Yein Ng, 'A Discipline of Judicial Governance?' (2011) 7 *Utrecht Law Review* 102. Ng argues that all of identified trends call for a new scientific discipline of judicial governance. For a Victorian perspective on these issues, see Supreme Court of Victoria, *Courts' Strategic Directions Project* (State of Victoria, 2004).

This thesis examines the recent structural reforms of court governance and the establishment of judicial councils in Victoria, South Australia, Canada, Ireland, the Netherlands, Sweden, the UK, the USA and other jurisdictions, which have been implemented largely in response to the identified challenges. It will be argued that the transfer of responsibility for court administration from the executive government to an independent judicial council has the potential not only to safeguard judicial independence, but also to assist judges and courts improve the efficiency and quality of the administration of justice. To this end, the thesis develops an analytical policy framework for a judicial council and courts that is based on a synthesis of international best practices in court governance.

The centrepiece of the proposed framework is an independent judicial council with broad statutory responsibility for improving the quality of the administration of justice in the court system. The framework outlines the essential governance characteristics of the council (such as its composition, tasks and competencies in court administration) and defines the administrative principles that should govern its relationship with the courts, the executive government and other stakeholders. The council is vested with a wide range of competencies, such as to assist the courts improve their working methods and to act as a research and development engine for the court system as a whole, in order to compensate for the withdrawal of the executive government from this area.

At the level of the courts, the proposed framework envisages the establishment of an autonomous board of judicial executives with full responsibility for the management of each court, which would be modelled upon a corporate board of executive directors. The thesis contends that this management system has the potential to improve the court efficiency, by fostering better integration of the judicial and administrative processes. Ultimately, the thesis contends that fully integrated and autonomous court management – supported by the judicial council – would lead to greater institutional responsiveness of the courts and improvements in efficiency, innovation, client orientation and quality of justice.

1.1 Case study: transformation of court governance in Victoria

As the official title of the thesis suggests, one of the key aims of the thesis is to examine the recent institutional transformation of the Victorian judiciary as a contemporary case study of court governance. On 1 July 2014, the *Court Services Victoria Act 2014* (Vic) (*CSV Act*) established an independent judicial council, called Court Services Victoria (*CSV*), and transferred the administrative responsibility for the management of the Victorian courts and tribunals from the executive government to the judiciary. The thesis analyses the Victorian reform by contrasting the legislative and institutional frameworks established by the *CSV Act* against the model policy benchmarks for a judicial council that are developed in the thesis.

The Victorian court system reform is significant for a number of reasons.

- First, it represents the most recent attempt, in Australia and internationally, to address the problems inherent in the ‘executive model’ by transferring the control over court administration from the executive government to the judiciary.
- Secondly, Victoria follows a growing number of jurisdictions from around the world that sought to address those problems by creating an independent judicial council with controlling competences in court administration. As the analysis in the following chapters shows, a judicial council, such as CSV, has the potential not only to safeguard judicial independence, but also to improve court performance, achieve greater customer focus in the court system and to bring about an institutional renewal of the judiciary as a whole.
- Thirdly, CSV itself is a suitable subject of study from an institutional perspective, because it was conceived as a public sector entity *Sui Generis*. This is because CSV is a new public sector entity that is uniquely positioned within the judicial arm of government, while also having the responsibility for future development of the court system as a whole.

- Finally, the Victorian courts had been on the forefront of international developments in the area of court performance, even prior to the establishment of CSV. For example, the Supreme and County Courts were among the first courts in Australia to have trialled and adopted the International Framework for Court Excellence, which is designed to measure both qualitative and quantitative aspects of court performance.

Although the analysis focuses on Victoria, the proposed policy benchmarks are intended to have broad application; they are designed to assist judicial leaders, court administration scholars and policy makers devise more effective structural organisational solutions to common contemporary challenges of court administration in many jurisdictions around the world. The research shows that designing and implementing structural organisational change in judicial systems can be a gargantuan task, because it involves detailed consideration and interplay of key threshold concepts of court administration, such as the independence of the judiciary, administrative transparency and accountability, organisational efficiency and accessibility, as well as the quality of justice. Above all, the transfer of responsibility for court administration to the judiciary requires a thorough reassessment of the judicial role in court administration, because no meaningful institutional reforms can be undertaken without a robust system of administrative accountability and judicial participation and leadership in that process. Accordingly, the thesis contends that greater internal administrative transparency and institutional ‘corporatisation’ of the judiciary is essential at all levels of the judicial organisation in order to improve court performance, enhance the social legitimacy of the courts and reinforce judicial independence.

1.2 Key research questions and contributions to knowledge

The overarching theme of this dissertation is the development of an analytical policy framework for a judicial council that is effective, accountable and capable of promoting future development of the court system. This task has been addressed by undertaking a detailed examination of the judicial councils in more than ten

Australian and international jurisdictions, in order to provide the answers to the following research questions:

1. What should be the key governance characteristics for a modern judicial council and courts?
 - a. What should be the key aims and competencies of the judicial council?
 - b. Who should be represented on the council?
 - c. What function(s) should the judicial council perform in court administration?
 - d. How should the courts be organised internally?
 - e. What role should the Minister perform in the new institutional framework and what should be his or her powers in court administration?
 - f. What practical mechanisms can the judicial council and courts introduce in order to promote transparent and accountable relationships with the executive government and other stakeholders?

The final research question that the thesis seeks to answer is whether the CSV reform in Victoria meets the policy benchmarks identified in the answers to question 1:

2. Does the legislative and institutional framework of the *CSV Act* meet the policy benchmarks identified in the answers to question 1?

In answering these questions, the thesis contributes to existing knowledge in the following two ways: First, it develops a comprehensive policy framework for a judicial council and courts that is accountable, responsive and capable of supporting future development of the court system. Second, it utilises that policy framework as an analytical tool to provide a critical assessment of the Victorian court system reform.

1.3 Outline of the thesis

The next chapter undertakes a review of the relevant literature in order to frame the research questions just outlined. The chapters that follow include four journal articles published between 2011 and 2016 in three peer-reviewed journals, including an A-tier generalist journal (*Monash University Law Review*) and two leading Australian and international journals specialising in court administration (*Journal of Judicial Administration* and the *International Journal for Court Administration*). Each chapter begins with a detailed analytical commentary that explains how the particular article contributed to the development of the policy framework.

The first two articles predate the CSV reform and provide a contextual analysis of the problems affecting the court administration in Victoria and other jurisdictions in the decade leading up to the CSV reform. The articles also undertake a detailed comparative analysis of key international models of court administration and propose the establishment of an independent ‘Judicial Council of Victoria’ with specific institutional powers, composition and competencies vis-a-vis the courts and the executive government. The proposed judicial council is largely inspired by northern European judicial councils, and incorporates a range of features from the Irish, Dutch, Danish, Swedish and the UK models of court administration. Under the proposed framework, the courts should be managed independently of the judicial council by an executive board of judges, because this system has the potential to improve courts’ efficiency and self-responsibility for the primary process.

The remaining two articles were published following the introduction of the *CSV Act* and the establishment of CSV in 2014. The third article principally focuses on the internal governance arrangements in the Victorian courts, which were not substantively altered by the *CSV Act*. The article further elaborates on the proposal to establish an executive board of judges in each court with full responsibility for court administration. The article argues that the duties, tasks and powers of the executive judges and the board itself should be clearly specified in the legislation and court rules. A further original contribution of this article is that it seeks to apply

the corporate governance theory of board design to court governance by arguing that the proposed judicial executive board can be reconciled with the so-called ‘Stewardship theory’ of corporate governance, which sees benefits from greater integration of policy-making and management in certain types of heterogeneous organisations, such as the courts.

The final article undertakes an in-depth critical analysis of the institutional and legislative frameworks of the *CSV Act*. This article seeks to provide the answer to the principal research question of the thesis, which is to determine whether the legislative and institutional framework of the *CSV Act* meets the proposed model policy benchmarks for an independent judicial council that is effective, relevant and accountable. The article concludes that although CSV broadly meets the proposed benchmarks, its formal legislative functions and powers appear to be largely administrative and technical in nature. As a result, it is argued that CSV requires a more comprehensive legislative mandate to improve the quality of justice in the court system, even if some of the existing statutory provisions in the *CSV Act* are capable of broad interpretation. The article also points out that the existing duties, tasks and powers of the judicial executives in the courts remain largely informal and insufficiently defined.

The concluding chapter summarises the findings of the research and identifies areas for future reform, study and analysis.

1.4 Research methodology

The thesis employs a range of research methods that are qualitative and summative in nature, including document content analysis, case study research, interdisciplinary research and comparative legal research.

The traditional desk-top content analysis method is used to examine a wide range of primary and secondary materials, such as statutes, regulations, expert reports, academic texts, books, journal articles, records of conference proceedings, government reports, records of parliamentary debates, newspaper articles and other relevant documents from the jurisdictions reviewed.

According to Bryman, qualitative content analysis is one of the oldest and most prevalent methods of document analysis that involve a search for themes, concepts and categories in the documents that are being analysed.⁷ Accordingly, the thesis systematically analyses, structures and categorises the information collected from the documents in order to define and explain underlying concepts, create typologies and, ultimately, develop a comprehensive framework for analysis.⁸ In particular, the thesis develops a policy framework of court governance which is then used as an analytical tool to assess the court governance reforms in Victoria and other jurisdictions from multiple analytical perspectives, such as the legal, organisational, stakeholder and systemic perspectives.⁹

The examination of the Victorian court system reform also represents an example of ‘case study research,’ which allows the thesis to test and illustrate the application of the proposed analytical policy framework in a contemporary setting. According to Kohlbacher, case study research is recognised as playing an important role in generating hypotheses and building theories.¹⁰ Yin defines case study research as a research strategy that investigates phenomena within their context, in order to provide ‘an analysis of the context and processes which illuminate the theoretical issues being studied.’¹¹ To achieve these aims, the thesis employs a number of recognised analytical techniques of case study research, such as the matching of

⁷ Alan Bryman, *Social Research Methods* (Oxford University Press, 2nd ed, 2004) 392, as cited in Florian Kohlbacher, ‘The Use of Qualitative Content Analysis in Case Study Research’ (2006) 7(1) *Forum: Qualitative Social Research* <<http://www.qualitative-research.net/index.php/fqs/article/view/75/153>>.

⁸ Jane Ritchie and Liz Spencer, ‘Qualitative Data Analysis for Applied Policy Research’ (2002) 573 *The qualitative researcher’s companion* 305, 310-312. The authors highlight the practical utility of developing an ‘analytical framework’ in applied policy research. They identify the following stages to qualitative data analysis involved in creating an analytical framework: familiarisation, identifying a thematic framework, charting, indexing and mapping and interpretation.

⁹ The analytical perspectives broadly correspond to the normative, structural, constitutive and technical levels of enquiry that are typically used in researching and understanding organisational policy. See Bruce S Cooper, Lance Darin Fusarelli and E Vance Randall, *Better Policies, Better Schools: Theories and Applications* (Pearson College Division, 2004), as cited in Gregory T Owen, ‘Qualitative Methods in Higher Education Policy Analysis: Using Interviews and Document Analysis’ (2014) 19(26) *The Qualitative Report* 1, 4.

¹⁰ Kohlbacher, above n 7.

¹¹ Robert Yin, *Applications of Case Study Research* (Thousand Oaks, Sage, 2003), 323.

historical, legal and organisational patterns across different jurisdictions in order to generate explanations, categories and models of court governance through cross-case synthesis.¹²

The thesis also investigates interdisciplinary concepts borrowed from corporate governance and public administration theory and applies them to court governance. According to Klein and Newel, interdisciplinary research can be used effectively to address issues that are ‘too broad or complex to be dealt with adequately by a single discipline or profession. [I]t draws on disciplinary perspectives and integrates their insights through construction of a more comprehensive perspective.’¹³ For example, the thesis seeks to reconcile the corporate governance theory of board design with the unique organisational characteristics of the courts.

The thesis also makes extensive use of comparative legal research method, which is critical for legal research. Whelan points out that comparative research is a particularly effective research method for the purposes of law reform and policy development, as it is concerned with the ‘practical use of comparison of laws in law reform.’¹⁴ The comparative method is not intended to be merely descriptive, but is essentially functional in nature, because it seeks to evaluate the similarities and differences between different legal and institutional frameworks in order to identify or address perceived deficiencies across different jurisdictions.¹⁵

However, great care must be taken when analysing foreign legal systems, because legal concepts and institutions from other countries might not be comparable to the

¹² Ibid 109;116-137. Yin explains that there are a number of common techniques used in case study research, such as ‘pattern matching’, ‘explanation building’, ‘time series analysis’, ‘logic models’ and ‘cross-case analysis.’

¹³ J Klein and B Newel, ‘Advancing Interdisciplinary Studies’ in J Bass and J Ratcliff (eds), *Handbook of the Undergraduate Curriculum: A Comprehensive Guide to Purposes, Structures, Practices, and Change* (Jossey-Bass, 1997) 393, 393-4.

¹⁴ Darius Whelan, *The Comparative Method and Law Reform* (LLM Thesis, University College Dublin, 1988) 4. Whelan’s thesis shows that comparative law is a principal research method used by many Law Reform Commissions around the world.

¹⁵ See Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Oxford University Press, 3rd ed, 1998) 34. According to the authors, ‘the basic methodological principle of all comparative law is that of *functionality*.’ [emphasis added]

ones found in our own legal system.¹⁶ The so-called problem of the ‘legal transplant’ is not confined to the nuances of legal interpretation and language, but also depends on the specific social, political, constitutional and historical contexts in which the issues have arisen in each jurisdiction.¹⁷

The potential methodological constraints have been addressed in the thesis through careful choice of the jurisdictions for research and detailed examination of the underlying context in each individual country. One of the factors influencing the choice of the jurisdictions for research was the establishment of judicial councils in Canada, Denmark, Ireland, South Australia, the Netherlands, Norway, Sweden, and the UK, which were all based on the co-called ‘court services model.’ Typically, these councils were established in order to take over the responsibility for court administration from the executive government, due to a range of structural problems that were identified in the ‘executive model’ of court administration, such as concerns about judicial independence, administrative disunity, lack of customer focus and increasing delays. As the following chapters explain, each of these problems was also identified in the executive model in Victoria in the period leading up to the CSV reform.

Overall, the analysis of the ‘court services’ models shows that the management of courts is not necessarily affected by the legal tradition in the same way that judicial decision-making or judicial training may be affected.¹⁸ For example, the contextual analysis of the court administration system in the Netherlands showed numerous parallels between that jurisdiction and Victoria, despite the fact that the Netherlands is a civil law country with a different legal culture and judicial career progression to that of any common law country.

My task in this regard was made easier by the fact that I had lived and studied in the Netherlands in the 1990s and still have a basic command of the Dutch language.

¹⁶ Martin Vranken, *Fundamentals of European Civil Law* (Federation Press, 1997) 4. To illustrate this issue, Vranken analysed the problem of the ‘legal transplant’ and found that the concept of mistake (‘*erreur*’) in the French legal system had little in common with the common law concept of mistake.

¹⁷ Ibid.

¹⁸ Tin Bunjevac, ‘Court Governance: The Challenge of Change’ (2011) 20 *Journal of Judicial Administration* 201, 219.

This allowed me to access and translate many important documents with the aid of electronic dictionaries. In addition, the Dutch Council for the Judiciary and the Swedish National Courts Administration have made available official English translations of the relevant legislation, regulations, Annual Reports and other important documents that had been used during the reform processes in each jurisdiction. Finally, the analysis of the European legal systems was also made easier by the fact that many distinguished European court administration experts have published extensively, in English, about the reforms taking place in those countries.¹⁹

Despite the potential limitations, the comparative research presented in the thesis yields invaluable lessons from all the jurisdictions reviewed. The significance of the research is demonstrated by the fact that the published articles have been cited at important international conferences and consulted by judicial leaders, governments and policy makers from Australia, Europe and the USA. The specific contributions of each article have been noted separately in the respective chapters.

¹⁹ See, e.g. Fabri and Langbroek, above n 2.

2 LITERATURE REVIEW

This chapter undertakes a review of the literature in order to frame the research questions for the thesis. The analysis is also used to identify the key aims and drivers behind the Victorian court system reform and to place the event into a broader international normative context of court governance.

The chapter begins with an analysis of the traditional arguments in favour of greater judicial control of court administration, before moving on to examine two traditional policy challenges of judge-controlled court systems. The first challenge is to develop an effective system of judicial administrative accountability and the second is to devise a policy framework for a judicial council and courts that is effective, relevant and accountable. The analysis of the first challenge is based on the theoretical groundwork developed in the published articles, which seeks to redefine the concept of judicial administrative accountability in court administration. It will be argued that the introduction of formal and transparent administrative hierarchies within the judiciary is both justified and necessary in order to improve court performance, enhance the social legitimacy of the courts and reinforce judicial independence.

The analysis of the second challenge will be used to frame the main research questions and outline the basic contours of the proposed court governance policy framework. In particular, the analysis will be used to identify the key aims, competencies and other essential terms of reference for the proposed judicial council, and to clarify its relationship with the courts, executive government and other stakeholders.

2.1 Arguments in favour of judicial control of court administration

The arguments in favour of greater judicial control of court administration have been traditionally advanced with reference to the doctrine of the separation of powers and the need to protect the collective independence of the judiciary. Justice Robert Nicholson argues that the very existence of judicial independence ‘cannot be separated from adequate and proper judicial administration,’ because the latter requires that both policy making and policy administration are controlled by the judiciary.²⁰ A similar view was expressed by former South Australian Chief Justice Len King, who regarded it as the ‘essential principle [...] that the judiciary has the constitutional responsibility for the administration of justice,’ and therefore should also be responsible for the administration of the courts.²¹ In the Chief Justice’s view, the establishment of the South Australian Judicial Council in 1993 represented the clearest expression of that principle in practice, because the South Australian judiciary had assumed full responsibility for court administration in that state.²²

The arguments for greater judicial control of court administration also find support in the international ‘soft law’ jurisprudence on judicial independence, such as the Montreal Universal Declaration on the Independence of Justice, which expressly provides that the responsibility for court administration should vest in the judiciary.²³ However, there is no general agreement on this issue in the public

²⁰ Robert Nicholson, ‘Judicial Independence and Accountability: Can They Co-exist?’ (1993) 67 *Australian Law Journal* 404, 422.

²¹ Chief Justice Leonard King, ‘A Judiciary-based State Courts Administration – the South Australian Experience’ (1993) 3 *Journal of Judicial Administration* 133, 136. See generally also Chief Justice Leonard King, ‘Minimum Standards of Judicial Independence’ (1984) 58 *Australian Law Journal* 340.

²² Ibid. See also Guy Green, ‘The Rationale and Some Aspects of Judicial Independence’ (1985) 59 *Australian Law Journal* 135, 143-148.

²³ The Montreal Universal Declaration on the Independence of Justice (1983), Art 2.4.

International ‘soft law’ jurisprudence is defined as jurisprudence that includes ‘hortatory, rather than legally binding obligations,’ which fall short of legally binding states under international law. See Andrew T Guzman and Timothy L Meyer, ‘International soft law’ (2010) 2(1) *Journal of Legal*

international law, constitutional theory or the academic literature. For example, the United Nations Basic Principles on the Independence of the Judiciary address certain aspects of court administration in general terms, but ultimately leave it to the discretion of the member states to provide the ‘adequate resources to enable the judiciary to properly perform its functions.’²⁴ The Bangalore Principles of Judicial Conduct also express the need to protect the ‘institutional independence of the judiciary,’ but stop short of endorsing a specific model of court administration.²⁵ The same general theme is reiterated in the Commonwealth Principles on the Three Branches of Government (‘Latimer House Principles’), which call for the ‘adequate resources’ to be provided to the judiciary to allow it to operate effectively and independently.²⁶

Church and Sallmann make a useful distinction between the adjudicatory and administrative independence of the judiciary in this context.²⁷ They point out that there is disagreement in the literature as to whether judicial control over court administration is *sensu stricto* necessary to ensure the impartial decision-making by individual judges.²⁸ A study by Gee et al recently examined a wealth of constitutional literature from the UK and other countries and concluded that ‘there is no settled relationship between structures and behaviour – or what is sometimes called “de jure” and “de facto” independence.’²⁹ They pointed out that judges in the

Analysis 171, 172.

²⁴ The United Nations Basic Principles on the Independence of the Judiciary (1985), Art 7.

²⁵ The Bangalore Principles of Judicial Conduct (2002), Para 1.5.

²⁶ The Commonwealth Principles on the Three Branches of Government (2003), Principle 4(c).

²⁷ Thomas Church and Peter Sallmann, *Governing Australia's Courts* (Australian Institute of Judicial Administration, 1991) 7.

²⁸ See for example Richard McGarvie, 'The Foundations of Judicial Independence in a Modern Democracy' (1991) 1 *Journal of Judicial Administration* 36. Justice McGarvie argues that judicial independence requires only ‘independence in making decisions in court cases between litigants.’ This approach has been characterised as ‘minimalist’. See also Sallmann, above n 5, 142.

²⁹ Graham Gee et al, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press, 2015) 12. For a US perspective, see also Gordon Bermant and Russell Wheeler, 'Federal Judges and the Judicial Branch: Their Independence and Accountability' (1995) 46 *Mercer Law Review* 835, 852-853. The authors note that ‘compared to the matter of decisional

UK traditionally behaved impartially, even in the absence of formal structures that were in theory deemed necessary to ensure the administrative independence of the judiciary.³⁰ Nevertheless, the authors noted that there was an increasing awareness of the need to ensure that there were adequate formal mechanisms available to promote the collective judicial independence in the UK.³¹

While there is disagreement in the literature about the impact of formal governance structures on judicial independence, it is difficult to deny that the executive control of court administration impacts court performance, which – in turn – can potentially also affect judicial independence.³² The interdependence in the relationship between court performance and judicial independence was highlighted by Baar et al in an important study of the *Alternative Models of Court Administration*, which was commissioned by the Canadian Judicial Council (‘CJC’) in 2006.³³ The authors pointed out that judges in the executive system had little fiscal and operational authority, which made it difficult for them to operate outside of broader government directives and, therefore, potentially represented a ‘significant threat to the independence of the judiciary.’³⁴ An Australian court management study commissioned by the Australasian Institute for Judicial Administration (‘AIJA study’) further illustrated this problem in practice by highlighting certain budgetary patterns in the state courts that were managed by the executive government. Alford et al found it unusual that the executive government could – ‘at unpredictable intervals’ – transfer funds from the courts’ agreed annual budget to other areas

independence, the claim for branch independence has a much more tenuous grounding in constitutional history.’

³⁰ Gee et al, above n 29, 13.

³¹ Ibid.

³² Sallmann, above n 5, 141.

³³ Carl Baar et al, *Alternative Models of Court Administration* (Canadian Judicial Council, 2006).

³⁴ Ibid 15. See generally also Justice Tim Smith, ‘Court Governance and the Executive Model’ (Paper presented at the Judicial Conference of Australia Colloquium, Canberra, 6-8 October 2006) 6-7. Justice Smith points out that the Victorian courts constantly had to compete for funding with other agencies within the Attorney-General’s ‘departmental behemoth.’

within the Department of Justice, which made it very difficult for the courts to plan ahead and achieve annual outputs mandated by Treasury.³⁵

The AIJA study also examined the internal division of administrative responsibilities between judges and court staff and concluded that the executive control of court operations was ‘problematic both for judicial independence on the one hand and for the efficiency and effectiveness of the courts on the other.’³⁶ Alford et al explain that the internal management separation between the judiciary and court administration was considered to be sub-optimal in the management literature and was also a potential cause of organisational delay, because more steps were involved in the internal decision-making processes.³⁷

Alford et al pointed out that modern principles of organisational design assume a far greater degree of alignment between ‘authority’ and ‘responsibility’ within an organisation, so that those individuals who have responsibility to achieve certain outcomes should also have authority over the necessary resources to achieve those outcomes.³⁸ The authors concluded that this was clearly not the case in the Victorian courts, where judges had the responsibility to improve court performance, while having insufficient authority over the courts’ administrative and financial resources.³⁹

The findings of the AIJA study did not come as a surprise to the Victorian judiciary, as they had first-hand experience of the problems impacting the court operations. In 2004, the Chief Judges of the Victorian courts prepared a report that painted a grim picture of the state of the Victorian judicature and put forward compelling arguments in favour of greater judicial control of court administration.⁴⁰ They highlighted a series of newly emerging internal and external challenges that were

³⁵ John Alford et al, *The Governance of Australia's Courts: A Managerial Perspective* (Australasian Institute of Judicial Administration, 2004) vii.

³⁶ Ibid 85.

³⁷ Ibid 23.

³⁸ Ibid 20; 85-86.

³⁹ Ibid 85-86.

⁴⁰ Supreme Court of Victoria, above n 6, 51-63.

impacting on the functioning of the courts.⁴¹ These challenges included ongoing political and budgetary pressures, unprecedented delays and backlogs, growing litigiousness of the society, greater complexity of the law, higher service and quality expectations and constant demands that the courts deliver more justice in less time and for less money.⁴²

Analysis of the issues outlined in the document suggests that the focus of the court governance debate had shifted somewhat from the need to protect judicial independence from the executive government alone, towards an urgent need to protect the courts and judges from multiple internal and external threats to judicial independence, integrity and relevance.⁴³

The Victorian Chief Judges were also unanimous in their assessment that the key obstacle to responding to the identified challenges was the executive system of court administration.⁴⁴ In particular, they contended that judges were lacking the managerial authority to strategically plan the operations of their courts. At the same time, the executive officers in charge of court operations were not best-placed to make effective decisions about competing court priorities, because they were embedded in an external government bureaucracy that was physically separated from the courts and had its own organisational demands and priorities.⁴⁵ According to Church and Sallmann, this situation perpetuated a far-reaching interpersonal divide between judges and court administration, to the point that even the courts' own CEOs were routinely not invited to meetings that discussed essential court processes, because judges regarded them as 'executive officers,' rather than 'court people.'⁴⁶

⁴¹ Ibid.

⁴² Ibid.

⁴³ Tin Bunjevac, 'Court Services Victoria and the New Politics of Judicial Independence: A Critical Analysis of the *Court Services Victoria Act 2014* (Vic)' (2015) 41(2) *Monash University Law Review* 299, 307.

⁴⁴ Supreme Court of Victoria, above n 6, 75.

⁴⁵ Ibid 75-79; See also Stephen Skehill, 'Comment on Court Governance' (1994) *Journal of Judicial Administration* 28.

⁴⁶ Church and Sallmann, above n 27, 25.

Following the publication of the *Courts' Strategic Directions* document, it became clear even to government policy makers that the courts simply could not cope with surging demands.⁴⁷ By 2010, the government had exhausted practically all of its options, having implemented extensive procedural reforms and appointed many new judges.⁴⁸ However, despite record levels of funding flowing into the court system,⁴⁹ the Victorian courts' performance continued to lag far behind all other Australian jurisdictions.⁵⁰ The magnitude of the problem is illustrated in Table 1 below, which shows an exponential increase in case lodgements and pending cases backlogs that occurred in the five years *following* the publication of the *Courts Strategic Directions* document.⁵¹

⁴⁷ Tin Bunjevac, 'Beyond Independence: Court Governance in Context' (Paper presented at the Australasian Court Administrators' Group's Conference, Sydney, 7 October 2011) 1-5. See also Attorney-General Robert Clark, *Coalition to Slash Court Delays* <<http://www.robertclark.com.au/feature/ideas-and-solutions/coalition-to-slash-court-delays/>>

⁴⁸ See the *Civil Procedure Act 2010* (Vic), the *Criminal Procedure Act 2008* (Vic) and the *Evidence Act 2008* (Vic).

⁴⁹ Bunjevac, above n 47. There was an increase in funding for the court system from \$181.47m in 1999-2000 to \$384.10m in 2009-10.

⁵⁰ Attorney-General Robert Clark, above n 47. By 2010 Victorian courts had 'the longest waiting lists in Australia when it comes to Supreme Court appeals, County Court trials, Children's Court matters and Magistrates' Court matters.'

⁵¹ Bunjevac, above n 47.

COURT WORKLOAD - ALL COURTS

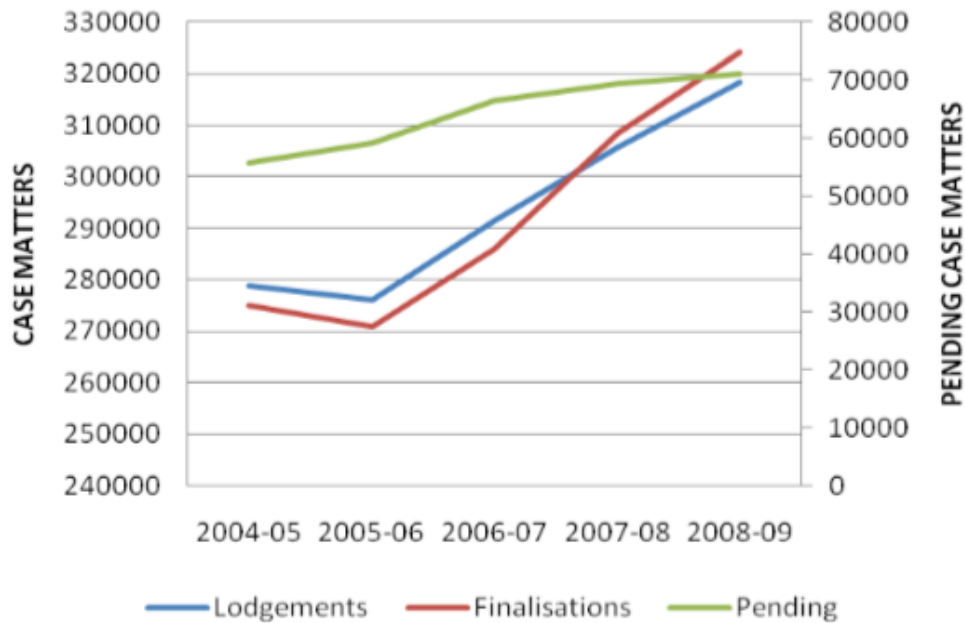


Table 1 - Victorian courts' workload 2005-2009

The data shown in Table 1 is striking and deserves fuller explanation. It shows that the number of pending cases continued to rise despite marked improvement in the case finalisations between 2005 and 2009 (which was primarily achieved through new judicial appointments).⁵² Under normal conditions, an increase in the rate of case finalisations would reduce the pending cases backlog, but this did not occur in Victoria, where the backlog continued to rise. In the circumstances, the continuing rise in the pending cases backlog was a sign that the courts' resources were still insufficient to meet the increasing demand, or – alternatively – that they were simply not being used in an optimal way.⁵³ This was certainly the conclusion

⁵² Ibid. Notably, the data in Table 1 does not capture the full story, as it does not take into account the increases in the volume in the previous 5-year period. For example, in 2000-01 there were 92,294 criminal cases initiated in the Magistrates' Court of Victoria compared to 167,359 in 2008-09, an increase of 90%. See Magistrates' Court of Victoria, 'Annual Report 2000-2001' (Magistrates' Court of Victoria, 2002) 22; Magistrates' Court of Victoria, 'Annual Report 2008-2009' (Magistrates' Court of Victoria, 2010) 23.

⁵³ Bunjevack, above n 47. By 2008-9, Victoria's 'backlog index' had reached 22.3%, which was by far the worst performance in Australia. See also Steering Committee for the Review of Government Service Provision, 'Report on Government Services: Court Administration' (Australian Government

reached by the incoming Victorian Liberal Nationals Coalition government, which promised to ‘slash court delays with a comprehensive package of reforms,’ and establish an independent judicial council to be run by the judges themselves.⁵⁴

2.2 Problems associated with judicial control of court administration

The analysis so far suggests that a judge-controlled system of court administration in Victoria would lead to greater institutional independence of the judiciary and improvements to court performance, through better organisational alignment between authority and responsibility within the courts.⁵⁵ Alford et al also pointed out that greater involvement of judges in court administration would lead to an increase in judicial interest in, and responsibility for, the management affairs of the courts.⁵⁶

However, an increase in judicial interest and responsibility for court administration does not automatically translate into a better court system or more effective court organisation. This point was illustrated by former Queensland District Court Chief Judge Michael Forde, who analysed a range of court performance data from the District Courts of New South Wales, Queensland and South Australia in the late 1990s.⁵⁷ His study concluded that the South Australian courts were less productive than the Queensland courts, despite the fact that they were managed by the judiciary and the Queensland courts were managed by the executive government.⁵⁸

Productivity Commission, 2010) [7.2.7]. The Report sets the national standard of not more than 10% of pending cases on the ‘backlog index.’

⁵⁴ Attorney-General Robert Clark, above n 47.

⁵⁵ Alford et al, above n 35, 85-6.

⁵⁶ Ibid 89-92.

⁵⁷ Michael William Forde, *What Model of Court Governance Would Optimize the Expeditious Delivery of Justice, Judicial Independence and the Accountability of Queensland's Court System?* (LLM Thesis, Griffith University, 2000).

⁵⁸ Ibid 61-2. Judge Forde also found that the South Australian courts were the most expensive courts to litigate in across the three jurisdictions under review. See also Laurie Glanfield, 'Governing the Courts: Issues of Governance Beyond Structure' (Paper presented at the 18th AIJA Annual

While the South Australian court system has been the subject of ‘much favourable comment and attention’ both in Australia and internationally,⁵⁹ the example given by Chief Judge Forde clearly demonstrates the potential dangers facing any jurisdiction seeking to transfer the responsibility for court administration from the executive government to the judiciary. Indeed, experiences from other jurisdictions show that the problems of organisational misalignment can persist in judge-controlled court systems as well. For example, this issue can potentially arise if judges fail to engage with the rest of the court administration, due to ongoing reliance on their traditional judicial administrative arrangements,⁶⁰ or where a new court administration authority merely replicates the management patterns that were established under the executive model.⁶¹ At the more extreme end of the spectrum, a poorly-designed institutional framework can potentially turn the judicial council into a ‘structure of intra-judicial oppression, run in the name of judicial independence,’ as was recently pointed out by Bobek and Kosar in a damning assessment of the newly-established eastern European judicial councils.⁶²

A picture emerges that the transfer of responsibility for court administration to the judiciary is far more complex than a simple handover from the Department of Justice to an independent judicial council, because the character of court governance is fundamentally different than that under the executive model. In the new organisational paradigm, judges are responsible not only for their traditional

Conference, Darwin, 14-16 July 2000) 4. According to Glanfield, in 1997-8 South Australia ranked last on the timeliness criteria published in the Report on the Government Services. However, see also Chief Justice James Spigelman, ‘Measuring Court Performance Address’ (Paper presented at the 24th AIJA Conference, Adelaide, South Australia, 15-17 September 2006), 30-31. Chief Justice Spigelman points out the methodological deficiencies that are inherent in the statistical comparisons between different jurisdictions. He states that different jurisdictions had different ‘case mixes’ with the result that ‘no valid comparison of any character can be drawn’ in most cases.

⁵⁹ Peter Sallmann and Tim Smith, ‘Constitutionalism and Managerial Effectiveness: Revisiting Australian Courts’ Governance’ in *Australian Courts: Serving Democracy and its Publics* (Australasian Institute of Judicial Administration, 2013) 265, 271. Sallmann, above n 5, 143.

⁶⁰ Pim Albers and Wim Voermans, ‘Councils for the Judiciary in EU Countries’ (CEPEJ, 2003) 37; 112.

⁶¹ Carl Baar et al, *Alternative Models of Court Administration* (Ottawa: Canadian Judicial Council, 2006) 102-103.

⁶² Michal Bobek and David Kosar, ‘Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe’ (2013) 15(7) *German Law Journal* 1257, 1288.

administrative arrangements that focus on the legal procedure; they also have assumed the responsibility to act as managers and policy-makers for the administrative, financial and human resources operations of the courts. Undoubtedly, these issues have important ramifications for the structure of court governance and co-ordination of the judicial and administrative processes across the entire court system.

Against this background, it becomes clear that the primary challenge for judges and policy makers lies in devising the appropriate institutional and policy frameworks that are capable of sustaining an effective system of judge-controlled court administration. As Millar and Baar put it in their seminal work *Judicial Administration in Canada*, judge-controlled court systems ‘must evolve from the present non-systems.’⁶³ Drawing upon their extensive experiences from the north American court system reforms, Millar and Baar highlighted two common policy challenges of judge-controlled systems of court administration. The first challenge is for the judiciary to develop an effective system of internal administrative accountability while the second is to establish a judicial council that is relevant, responsive and effective in practice.⁶⁴

2.3 Policy challenge 1: Developing an effective system of judicial administrative accountability

The first policy challenge identified by Millar and Baar lies at the heart of this thesis: How can the judiciary in a mature democracy, such as Victoria, develop an effective system of administrative accountability that is capable of responding to the identified challenges without undermining judicial independence?⁶⁵ The thesis contends that the answer to this question lies in devising a policy framework of

⁶³ Perry S Millar and Carl Baar, *Judicial Administration in Canada* (Montreal, McGill, 1981) 67-71.

⁶⁴ Ibid.

⁶⁵ See also generally, Andrew Le Sueur, 'Developing Mechanisms for Judicial Accountability in the UK' (2004) 24(1-2) *Legal Studies* 73, 74. Carlo Guarnieri, Patrizia Pederzoli and Cheryl A Thomas, *The Power of Judges* (Oxford University Press, USA, 2002) 156-160.

court governance which helps promote greater administrative corporatisation of the judiciary and allows the courts to successfully transition from *organisations of professionals* to *professional organisations*.⁶⁶

According to Langbroek, the difficulty of achieving that transition can be attributed to the fact that the judicial working culture is characterised by individual autonomy and administrative passivity, which is frequently justified by reference to the constitutional doctrine of the separation of powers.⁶⁷ However, while that working culture may be regarded as a strong attribute when it comes to protecting judicial independence, Langbroek sees it as a serious obstacle to achieving future organisational development of the courts, because it is impossible to implement administrative reforms in any large organisation without a more robust system of administrative accountability and discipline.⁶⁸

Langbroek also points out that the courts operate within a broader 'framework of duty' of the public sector, where the work of judges and public servants is intertwined.⁶⁹ As a result, it is evident that the process of organisational development in the courts cannot be successfully carried out by the court staff alone, without active judicial participation and leadership in that process.⁷⁰ This leads Langbroek to conclude that the concept of judicial accountability in court administration requires 'new elaboration.'⁷¹

⁶⁶ Wim Voermans and Pim Albers, 'Geïntegreerde Rechtbanken: Het Vervolg, Evaluatierapport Herziening Rechtlijke Organisatie (onderdeel II)' (Government of the Netherlands, 1994) 70; 90-91.

⁶⁷ Philip Langbroek, 'Quality Management and Autonomy for Court-Organisations' (EGPA Studygroup on Management and Delivery of Justice, 2001) 10.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid. See also Philip Langbroek, 'Two Cases of Changing the Judiciary and the Judicial Administration: The Netherlands and Guatemala' (Paper presented at the Conference on Empowerment, Security and Opportunity through Law and Justice, St Petersburg, Russia, 8-11 July 2001) 10.

⁷¹ Langbroek, above n 67, 10.

2.3.1 Reconceptualising judicial accountability and independence in court administration

The ‘dynamic tension’⁷² between judicial administrative accountability and independence is a central theme in the academic literature about court governance, because it has important implications for the constitutional and organisational aspects of court administration.⁷³

The constitutional aspect arises when the development of an internal system of administrative accountability starts posing a threat to judicial independence.⁷⁴ A classic formulation of this argument is given by Shetreet and Deschênes, who warn that the creation of ‘hierarchical patterns’ within the judiciary might have a ‘chilling effect’ on judicial independence.⁷⁵ For example, this issue could potentially arise if a senior judge improperly assigns a junior judge to a remote location to influence his decision-making,⁷⁶ or a dominant Chief Justice improperly uses the power to assign cases to ensure results he personally approves.⁷⁷

At the same time, however, the development of an internal system of judicial accountability is also concerned with the need to maintain the public confidence in

⁷² Shimon Shetreet and Jules Deschênes, *Judicial Independence: The Contemporary Debate* (Nijhoff, 1985) 639.

⁷³ See generally Le Sueur, above n 65; Nicholson, above n 20; Gee et al, above n 29; Amy B Atchinson, Lawrence Tobe Liebert and Denise K Russell, 'Judicial Independence and Judicial Accountability: A Selected Bibliography' (1998) 72 *Southern California Law Review* 723.

⁷⁴ Richard McGarvie, 'Judicial Responsibility for the Operation of the Court System' (1989) 63(2) *Australian Law Journal* 79, 87.

⁷⁵ Shetreet and Deschênes, above n 72, 639.

⁷⁶ Gee et al, above n 29, 13.

⁷⁷ Neil Andrews, 'Vinegar Free-Sir Garfield Barwick's Recipe for Judicial Salad' (1996) 3 *Canberra Law Review* 175, 189. The author makes reference to Sir Garfield Barwick's controversial practices during his time as the Chief Justice of the High Court of Australia. Arguably, the problem could potentially also arise where a judicial council imposes financial penalties on judges who fail to meet agreed 'production targets.' See Francesco Contini and Richard Mohr, 'Judicial Evaluation in Context: Principles, Practices and Promise in Nine European Countries' (2007) 1(2) *European Journal of Legal Studies* 1, 22-23. The authors give the example of the Spanish Judicial Council which offered bonuses and imposed financial penalties on judges based on their productivity.

the judiciary and improve court performance.⁷⁸ According to Justice Richard McGarvie and Professor Ian Scott, when it comes to court performance, a clear distinction must be made between judicial independence and 'judicial individualism,' which they regarded as a serious obstacle to effective court management.⁷⁹ They separately argue that judicial independence may only be invoked by a judge who is improperly pressured by others in the process of deciding a dispute, but not by a judge who simply refuses to participate in court administration.⁸⁰

This point is also made by Professor Kate Maleson, who sees no inherent conflict between judicial accountability and independence in court administration if a more qualified definition of judicial independence is adopted, that of 'freedom from improper interference which would undermine *party impartiality*.'⁸¹ Maleson argues that it is party impartiality that must be protected and that collective judicial independence has no justification that is separate from its relationship with party impartiality.⁸² Importantly, she also argues that the application of the more qualified definition of judicial independence would allow for the introduction of new forms of administrative accountability by the judiciary, which are needed to improve court performance, maintain public confidence in the courts and counter

⁷⁸ Nicholson, above n 20, 424. See also Francseco Contini and Richard Mohr, 'Reconciling Independence and Accountability in Judicial Systems' (2007) 3 *Utrecht Law Review* 26. See also Chief Justice Murray Gleeson, 'Public Confidence in the Judiciary' (2002) 76 *Australian Law Journal* 558.

⁷⁹ McGarvie, above n 28, 87, citing Ian Scott, 'The Future of Judicial Administration' in *Responsibilities for the Administration of Justice* (AIJA, 1985) 73, 82. See also Sir Harry Woolf, 'Judicial Independence: Not Judicial Isolation' in Christopher Campbell-Holt (ed), *The Pursuit of Justice* (Oxford University Press, 2008) 167. See also Edward C Gallas, Nesta M Gallas and Ernest Friesen Jr, *Managing the Courts* (Indianapolis, Bobbs-Merrill, 1971) 133-4.

⁸⁰ Ibid.

⁸¹ Kate Maleson, *The New Judiciary: The Effects of Expansion and Activism* (Ashgate, 1999) 71 [emphasis added]. See also Kate Maleson, 'Judicial Training and Performance Appraisal: The Problem of Judicial Independence' (1997) 60(5) *The Modern Law Review* 655, 663-6. See also Mauro Cappelletti, "'Who Watches the Watchmen?' A Comparative Study on Judicial Responsibility' (1983) 31(1) *American Journal of Comparative Law* 115, 115-116. According to Cappelletti, 'independence, far from being an end in itself, is but an instrumental value, the goal of which is to safeguard another value - [...] the impartiality of the judge.'

⁸² Maleson, above n 81, 63.

the judiciary's growing influence in public policy.⁸³ Examples of the 'soft accountability' mechanisms proposed by Malleson include greater internal organisational transparency, more diverse representation, a more transparent judicial appointments process, greater openness to academic scrutiny and even the introduction of a formal system of performance appraisals.⁸⁴

Mohr and Contini seek to reconcile the dynamic tension between judicial independence and accountability in court administration by introducing the concept of 'cooperative accountability,' which is similar to Malleson's concept of 'soft accountability' in that it calls for greater administrative transparency within the judiciary.⁸⁵ They argue that the relationship between judicial independence and accountability is not a 'zero sum game,' whereby an increase in judicial accountability automatically leads to a reduction in judicial independence or vice versa.⁸⁶ For them accountability is a broader 'social relation contract'⁸⁷ that involves a two-way channel of communication between the courts and their stakeholders.⁸⁸ Therefore, an accountable judiciary should strive to establish the appropriate processes and strategies that *explain* the internal culture, values and workings of the judicial organisation to its stakeholders.⁸⁹ Secondly, the courts must also provide appropriate organisational strategies and mechanisms to demonstrate that members of the organisation act in accordance with those values.⁹⁰ If conceived in this way, Mohr and Contini conclude, accountability in judicial systems is not limited to promoting court performance, but also serves to reinforce

⁸³ Ibid 38 and 70.

⁸⁴ Ibid 199–202.

⁸⁵ Contini and Mohr, above n 78.

⁸⁶ Ibid, 45.

⁸⁷ Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447, 450.

⁸⁸ Contini and Mohr, above n 78, 30.

⁸⁹ Ibid. See also Gee et al, above n 29, 18-21. Gee et al refer to this process as the 'explanatory accountability' of the judiciary.

⁹⁰ Ibid.

the essential values that the courts seek to uphold, such as the rule of law, equality, independence and impartiality.⁹¹

2.3.2 Administrative accountability and court performance

The relationship between judicial administrative accountability and court performance is also dynamic and must be placed into the broader social context of the administration of justice as an essential public service. In this context, court performance refers to the capacity of the courts to deal in a timely fashion with the volume of cases coming before them, and does not encompass any qualitative aspects of court performance.

Gar Yein Ng classified the court environment as a ‘professional bureaucracy,’ based on the organisational typology developed by Professor Henry Mintzberg.⁹² According to Mintzberg’s typology, a professional bureaucracy is an organisational system that is centred around professional experts who perform highly complex and individualised work that cannot be easily standardised, measured or simplified.⁹³ What is, in effect, being said, according to Ng, is that ‘judges are difficult to manage,’ because they regard themselves as independent actors even when they are performing routine administrative tasks, and this creates substantial difficulties when it comes to evaluating, monitoring and improving court performance.⁹⁴

Ng also points out that the problem of judicial administrative accountability became especially pronounced when the courts started to experience a steady rise in caseloads and judges realised that they were unable to accommodate the additional workload within their individual work routines.⁹⁵ What was remarkable, according to Ng, was that judges showed little inclination to coordinate their work activities

⁹¹ Ibid 31. See also Contini and Mohr, above n 77, 11-12.

⁹² Ng, above n 6, 107, citing Henry Mintzberg, 'Structure in 5's: A synthesis of the Research on Organization Design' (2008) 26 *Management Science* 322, 333.

⁹³ Mintzberg, above n 92, 334 as cited in Ng, above n 92, 107-8.

⁹⁴ Ng, above n 92, 108.

⁹⁵ Gar Yein Ng, *Quality of Judicial Organisation and Checks and Balances* (PhD Thesis, Utrecht University, 2007) 24.

with other judges and court staff, preferring instead to work alone, within the ‘smallest unit within the organisation’.⁹⁶ They persistently argued that they were not responsible for the growing social uncertainty that was caused by the accumulating delays, because they were not in charge of court administration.⁹⁷ While there was truth in those arguments, for Ng this was an indication that judges and courts, as public institutions, failed to address the problem of organisational delay in accordance with their basic constitutional and human rights mandate.⁹⁸

Ng concludes that the traditional mechanisms of (‘hard’) judicial accountability – such as the open nature of court proceedings, publication of reasoned judgments, availability of appellate review and scrutiny by the media – have all proved inadequate to respond to the public’s demands of the courts.⁹⁹

The impact of the traditional judicial administrative style on court performance was also considered in an international study commissioned by the European Commission for the Efficiency of Justice in 2003 (‘CEPEJ’).¹⁰⁰ Professor Wim Voermans and Dr Pim Albers argue that courts are traditionally characterised by poorly defined, collegiate (‘horizontal’) administrative structures that are primarily aimed at reaching a consensus among judges on all aspects of court administration.¹⁰¹ An illustrative example are the principal governing organs in the Victorian courts, which originated in the 19th century and today consist of up to 100 judicial officers on the Council of Magistrates. Such large membership runs contrary to modern court administration and public administration theory according to which

⁹⁶ Ibid 30.

⁹⁷ Ibid.

⁹⁸ Ibid 30. Ng refers to the issue of organisational delay in the context of the *European Convention for Human Rights* (ECHR), Art 6, which provides that ‘everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law.’ [emphasis added]; See also s 25(2)(c) of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic), which provides that a person charged with a criminal offence ‘is to be tried without an unreasonable delay.’

⁹⁹ Ibid 30-1. See also Langbroek, above n 67, 10.

¹⁰⁰ Albers and Voermans, above n 60.

¹⁰¹ Ibid 100.

any governing organ with more than 15 members ‘inevitably gives rise to serious problems of administration and of internal operation.’¹⁰²

Voermans and Albers also point out that the far-reaching organisational and interpersonal divide between judges and court staff contributes to organisational delay, by limiting the possibilities for workflow integration and the creation of deeper patterns of work delegation.¹⁰³ As a result, court performance in this environment depends primarily on the personal commitment and individual professionalism of judges in the distribution and execution of their work, which is ‘lacking on different fronts to provide an appropriate answer to the challenges of the increased caseloads.’¹⁰⁴ The authors conclude, by reference to a series of empirical studies they had conducted in the Dutch courts in the 1990s, that more internally integrated and hierarchical (‘vertical’) judicial administrative structures are essential in order to improve court performance and transform the courts from the traditional ‘organisations of professionals’ to modern ‘professional organisations.’¹⁰⁵

2.3.3 From ‘organisations of professionals’ to ‘professional organisations’

Historically, the introduction of formal administrative hierarchies within courts has been primarily associated with the so-called ‘American model’ of court administration,¹⁰⁶ although the practice has been successfully adopted by the

¹⁰² Thomas Church Jr, ‘Administration of an Appellate Leviathan: Court Management in the Ninth Circuit Court of Appeals’ in Arthur D Hellman (ed), *The innovations of the Ninth Circuit and the future of the federal courts* (Cornell University Press, 1990) 226, 229. See also John Uhrig, ‘Review Of The Corporate Governance Of Statutory Authorities And Office Holders’ (Commonwealth of Australia, 2003) 96. The report points out that a board of between six and nine members represents a reasonable size in public entities.

¹⁰³ Voermans and Albers, above n 66, 72.

¹⁰⁴ Albers and Voermans, above n 60, 100–1.

¹⁰⁵ Ibid 101; 108. See also Voermans and Albers, ‘Geïntegreerde Rechtbanken’, above n 66, 70–2, 90–1.

¹⁰⁶ Millar and Baar, above n 63, 54–55; 63.

Australian federal courts and some European jurisdictions.¹⁰⁷ One of the most remarkable features of the American model was the desire to formalise the administrative structures and relationships within the judiciary in the form of highly transparent rules and regulations.¹⁰⁸ For example, according to Wheeler, the Federal Circuit Councils in the USA had been given formal statutory powers to ensure the ‘expeditious and efficient’ disposition of cases and to issue administrative ‘orders’ that all individual judges had to comply with.¹⁰⁹ Similarly, in the Australian federal courts, the legislation vested in the Chief Justices the administrative powers to ensure the ‘effective, orderly and expeditious’ discharge of the business of their courts, together with the corresponding powers to assign cases to particular judges and to temporarily restrict judges to non-sitting duties.¹¹⁰ According to Church and Sallmann, the key advantage of this approach to court management is that administrative accountability and authority are formally assigned to specific individuals, which means that responses to problems can be ‘swift and consistent.’¹¹¹

The most significant recent study that scrutinises the emergence of formal administrative hierarchies within the judiciary was completed in the UK in 2015. Gee et al examined the establishment of a formal judicial bureaucracy headed by the Lord Chief Justice and concluded that the corporatisation of the English and

¹⁰⁷ In the US, the process of modern corporate transformation of the judiciary can be traced back to Roscoe Pound’s address to the annual convention of the American Bar Association in 1906. It is worth recalling that two of the four “causes of popular dissatisfaction with the administration of justice” that were identified by Pound were essentially problems of court administration; namely, “judicial organisation and procedure” and the “environment of judicial administration”. See Roscoe Pound, ‘The Causes of Popular Dissatisfaction With the Administration of Justice’ (1906) 14 *American Lawyer* 445, 448-449.

¹⁰⁸ See, generally Russell R Wheeler, *Origins of the Elements of Federal Court Governance* (Federal Judicial Center, 1992). Examples of this practice can be found at all levels of the judicial organisation and across different State and Federal Circuits. See, National Center for State Courts, *Key Elements of an Effective Rule of Court on the Role of the Presiding Judge in the Trial Courts* (National Center for State Courts, 2006). See also the detailed *Judicial Administration Rules of the Judicial Council of California* <<http://www.courts.ca.gov/cms/rules/index.cfm?title=ten>>.

¹⁰⁹ Wheeler, above n 108, 18-19; Church and Sallmann, above n 27, 73.

¹¹⁰ *Federal Court of Australia Act 1976* (Cth), s 15.

¹¹¹ Church and Sallmann, above n 27, 68; See also Lou Hill, *Constitutional and Managerial Principles of Judicial Court Governance: Implementation in the State of Victoria* (LLM Thesis, The University of Melbourne, 1995).

Welsh judiciaries was beneficial not only because it improved the judiciary's administrative capacity, but also because it had the effect of *reinforcing* judicial independence.¹¹² According to the authors, the *Constitutional Reform Act 2005* (UK) necessitated the creation of formal administrative relationships both within the judiciary and between the judiciary and the other branches of government.¹¹³ This process was primarily influenced by the exponential growth of the professional judiciary and partly also by a broader political drive to remodel the court system as a public service.¹¹⁴ In addition, there was a growing realisation among senior members of the judiciary that the 'mantra of judicial independence' had at times served to mask poor performance.¹¹⁵

Having interviewed more than 150 senior judges, parliamentarians, bureaucrats and ministers over a three year period, Gee et al concluded that the institutional reform had been largely successful and that the senior judiciary in England and Wales managed to 'pull off a difficult trick' of preserving the essence of judicial independence, while also bringing about a genuine cultural shift towards greater institutional corporatism.¹¹⁶ Ultimately, the study found that the 'shift away from a culture of individualism towards one of corporatism'¹¹⁷ had significantly improved the judiciary's accountability and enhanced its institutional capacity to protect judicial independence.¹¹⁸

2.3.4 Towards a 'new elaboration' of judicial administrative accountability

The foregoing review of the literature provides the basis for a 'new elaboration' of judicial accountability in court administration, which was used in the published

¹¹² See generally Gee et al, above n 29, Chapters 6 and 10.

¹¹³ Ibid 252-253.

¹¹⁴ Ibid 126.

¹¹⁵ Ibid 129-130.

¹¹⁶ Ibid 155.

¹¹⁷ Ibid 126.

¹¹⁸ Ibid 101; 112. See also, generally, Malleson, above n 81.

articles as the theoretical foundation for the proposed policy framework of court governance. The analysis shows that the introduction of formal administrative hierarchies in courts can be justified in order to improve court performance, enhance the social legitimacy of the courts and reinforce judicial independence.

The practical challenge for the remainder of the thesis is to devise a model policy framework for a judicial council and the courts that would be capable of achieving these aims in practice. The analysis of international experiences in the next section shows that a judicial council can play an indispensable role in the court system not only by safeguarding judicial independence, but also by improving court performance, achieving greater customer focus in the court system and bringing about an institutional renewal of the judiciary as a whole.

These issues will be considered next in the context of Millar and Baar's second policy challenge of judge-controlled systems of court administration.

2.4 Policy challenge 2: Establishing a judicial council that is accountable, responsive and effective

The second policy challenge identified by Millar and Baar lies in developing a policy framework for a judicial council and the courts that is not only independent and accountable, but also effective and capable of supporting the future development of the court system.¹¹⁹ In practical terms, the challenge is to identify the appropriate aims, competencies, composition, resources and other essential terms of reference for the proposed judicial council, and to define its relationship with the courts and other branches of government.¹²⁰ Each of the essential terms of reference will now be elaborated upon in more detail, in order to frame the main research questions of the thesis.

¹¹⁹ Millar and Baar, above n 63, 70-71.

¹²⁰ Ibid. They pointed out that many judicial councils in the US had been unable to establish 'any sort of accountability or to develop adequate planning and policy development functions,' because of unclear terms of reference or the absence of permanent administrative staff.

2.4.1 What should be the aims and competencies of the judicial council?

Recent history of justice sector reform shows that there is an emerging global trend of entrusting certain framework aspects of court governance to independent judicial councils, especially in countries that had previously relied on the executive government to manage the courts. Examples of this practice can be found across Europe,¹²¹ South America,¹²² North America,¹²³ Asia,¹²⁴ as well as Australia.¹²⁵ According to Voermans, almost all judicial councils have been designed to operate as an 'institutional buffer' between the executive government and the courts, with the primary aim being that of safeguarding judicial independence.¹²⁶ At the same time, the councils can also perform a wide range of operational and supervisory functions in the court system, including those of supporting the administrative management of the courts and providing general oversight of their budget and other resources.¹²⁷

Autheman and Elena conducted a comparative review of the judicial councils in more than 20 countries and noted that the need to protect judicial independence was

¹²¹ Ibid. The examples given by Voermans include Italy, France, Sweden, Ireland, Denmark, Norway, the Netherlands. For central and eastern European judicial councils see also Michal Bobek and David Kosar, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' (2014) 15(7) *German Law Journal* 1257.

¹²² Linn A Hammergren, 'Do Judicial Councils Further Judicial Reform? Lessons From Latin America' (Carnegie Endowment for International Peace, Democracy and Rule of Law Project, 2002). The examples given by Hammergren include El Salvador, Peru, Mexico and Colombia.

¹²³ Millar and Baar, above n 63, 70-71. The authors give the examples of Ontario, Canada, the Judicial Conference of the USA and several states in the USA.

¹²⁴ For example, the Judicial Commission of Indonesia was established in 2001.

¹²⁵ See King, above n 21. Chief Justice King gives the example of the South Australian Judicial Council. See also Vince Morabito, 'The Judicial Officers Act 1986 (NSW): A Dangerous Precedent or a Model to Be Followed' (1993) 16 *UNSWLJ* 481. The example given by Morabito is the Judicial Commission of NSW.

¹²⁶ Wim Voermans, 'Councils for the Judiciary in Europe: Trends and Models' in Francisco Fernández Segado (ed), *The Spanish Constitution in the European Constitutional context* (Dykinson, 2003) 2133.

¹²⁷ Violaine Autheman and Sandra Elena, 'Global Best Practices: Judicial Councils' (International Foundation for Electoral Systems, 2004) 3.

especially pronounced in Italy, France and several Latin American countries that had a long history of executive interference in the court system.¹²⁸ As a result, the aims and competencies of the judicial councils in those countries have tended to focus primarily on matters impacting the judicial tenure, such as the appointment, assignment and promotion of judges, and the conduct of disciplinary proceedings against judges.¹²⁹ The same reasons were ostensibly behind the establishment of the judicial councils in the former communist states in eastern Europe, which were largely modelled upon the Italian *Consiglio Superiore della Magistratura*.¹³⁰ According to Bobek and Kosar, the defining characteristic of this model is a very robust, often constitutional, separation of the judicial council from the elected branches of government and other justice system stakeholders.¹³¹ Although some of these councils are also involved in court administration, the primary mission of each institution is to serve as a supreme judicial authority with controlling competencies over all aspects of the judicial career.¹³²

In contrast, the judicial councils that operate in countries with a more established tradition of judicial independence usually place a far greater emphasis on the operational aspects of court administration, such as budget management,¹³³ court management,¹³⁴ policy advice,¹³⁵ data collection¹³⁶ and judicial education and training.¹³⁷ Bobek and Kosar broadly classify these types of councils as belonging to the ‘court service model,’ while Voermans refers to them as the ‘northern

¹²⁸ Ibid 2.

¹²⁹ Ibid 2; 28-29. The authors give the examples of Italy, France, Bolivia, Argentina, Mexico, Peru and other countries.

¹³⁰ Bobek and Kosar, above n 62, 1268.

¹³¹ Ibid.

¹³² Ibid.

¹³³ The examples include the judicial councils in Ireland, Norway, Sweden and the USA.

¹³⁴ The examples include the judicial councils in the USA, Ireland and South Australia.

¹³⁵ The examples include the judicial councils in the USA, the Netherlands, Denmark, Sweden and South Australia.

¹³⁶ The examples include the judicial councils in Ireland, South Australia and the USA.

¹³⁷ Autheman and Elena, above n 127, 2; 28-29. The examples include the councils in Sweden and the Netherlands.

European model.’¹³⁸ Indeed, the preference for a service-oriented council has been particularly pronounced in the northern European countries, following the establishment of the judicial councils in Sweden (1975), Ireland (1998), Denmark (1999), Norway (2002) and the Netherlands (2002).¹³⁹ In each of these countries, the primary concern was not only to protect judicial independence, but also to improve court performance, achieve greater client orientation of the court system and bring about an institutional renewal of the judiciary as a whole.¹⁴⁰ As Byrne and McCutcheon point out in their analysis of the Irish Courts Service, there was a ‘fundamental shift in the “philosophy” of the court system, requiring it to take account of the concepts of quality, service and competitiveness more associated theretofore with the private sector ... [T]here can be no doubt of a move from the “courts system” to “courts service.”’¹⁴¹

Another important requirement for a service-oriented judicial council is to have the necessary organisational competencies to support the future development of the court system, in order to compensate for the withdrawal of the executive government from that area of responsibility.¹⁴² According to Voermans and Albers, this issue essentially refers to the court system’s capacity to innovate and effect systematic improvements in the quality of the administration of justice in a far more demanding social, technological, political and legal environment:¹⁴³

These new quality requirements call for efficient streamlining of the working processes within the courts, judicial precision during procedures, permanent

¹³⁸ Bobek and Kosar, above n 62, 1264; Wim Voermans, 'Councils for the Judiciary in Europe' (2000) 8 *Tilburg Foreign Law Review - Constitutional Law* 121; see also Nuno Garoupa and Tom Ginsburg, 'The Economics of Judicial Councils' (University of California, ALACDE Annual Paper No. 050207-02, 2007). Notably, Bobek and Kosar and Garoupa and Ginsburg reject Voermans’ classification as being unhelpful, because some of the judicial councils come from the USA and other non-European countries.

¹³⁹ See, generally, Albers and Voermans, above n 60.

¹⁴⁰ Committee for the Evaluation of the Modernisation of the Dutch Judiciary, 'Judiciary is Quality' (Government of the Netherlands, 2006) 8.

¹⁴¹ Raymond Byrne and J Paul McCutcheon, *The Irish Legal System* (Butterworth, 4 ed, 2001) 156. Notably, many of these issues were also highlighted in Australia in the Parker Report, which identified the need for the courts to become ‘learning organisations’ and to ‘improve the level of two-way communication they enjoy with their public.’ See Parker, above n 1, v.

¹⁴² Millar and Baar, above n 63, 70-1.

¹⁴³ Albers and Voermans, above n 60, 100-1.

training of judges and auxiliary staff, uniformity in applying substantive and procedural law, correct treatment, avoidance of long waiting periods, guarantees concerning the speed of settlement, etc.¹⁴⁴

Professor Gio Ten Berge explains how a service-oriented judicial council can contribute to the expansion of the judiciary's administrative capacity in each of these areas by promoting the efficiency, client-orientation and quality of courts as important public institutions.¹⁴⁵ First, the council can offer technical assistance to the courts in devising new approaches to case management, procedural and organisational accessibility. Second, it can provide various forms of professional support, such as advanced legal research, in order to improve the quality of legal outcomes in individual cases or categories of cases. Third, the council can offer management support by assisting the courts devise best-practice organisational policies and competencies for judges and court staff. Fourth, it can promote greater use of ICT platforms to improve business and legal process analytics and develop more systematic approaches to training, education and professional development for judges and staff. Fifth, from a customer service point of view, the courts would benefit from more uniform policies on customer service and other organisational solutions that place a greater focus on the needs of their customers. Finally, at a broader systemic and political level, the council can establish the necessary legislative and policy proposals on issues impacting the courts and develop appropriate institutional relationships with the government and other justice system stakeholders.¹⁴⁶

2.4.2 Who should be represented on the council?

In their analysis of the eastern European judicial councils, Bobek and Kosar identified the 'problem of representation' as a major objection to any council that

¹⁴⁴ Ibid 102.

¹⁴⁵ JBJM Ten Berge, 'Contouren van Een Kwaliteitsbeleid voor de Rechtspraak' in Langbroek P, Lahuis K and Ten Berge JBJM (eds), *Kwaliteit van rechtspraak op de weegschaal* (WEJ Tjeenk Willink, Zutphen and GJ Wiarda Instituut, 1998) 21, 31-35, as cited in Ng, above n 95, 30-32.

¹⁴⁶ Ibid 32-3.

relies exclusively on a narrow group of chief judges and court presidents.¹⁴⁷ They describe the negative experiences of the Slovak Judicial Council and warn that the very concept of judicial self-governance can quickly turn into ‘unbounded administration by senior judicial officials.’¹⁴⁸ These concerns are consistent with the findings of Linn Hamnergren’s comparative study of the Latin American judicial councils, which identified a series of shortcomings of this model, such as the spread of internal political factions, a lack of accountability to the community and concerns about individual judicial independence.¹⁴⁹ A similar point is also made by Millar and Baar, who chronicled the experiences of a range of judicial councils across the US and Canada. They express strong criticism of the so-called Ontario model, which involved a judicial council made up exclusively of the chief judges of the participating courts, a model which is commonly found in many US jurisdictions and also in South Australia.¹⁵⁰ They particularly highlighted the fact that although the key motivation for establishing the judicial council was to separate court administration from executive control, each chief judge was selected by the executive government, rather than members of the judiciary.¹⁵¹

The problem of permanent or exclusive judicial representation on the council also has important management and community aspects that should not be disregarded. First, as Sallmann and Wright have pointed out, chief judges are often appointed for their legal expertise and therefore may not be best-suited to exercise policy making and management functions on the judicial council.¹⁵² Secondly, permanent composition of the council could lead to personality clashes, which are common in environments where people need to work together for long periods of time.¹⁵³ Thirdly, this type of institutional arrangement could potentially foment ongoing

¹⁴⁷ Bobek and Kosar, above n 62, 1270.

¹⁴⁸ Ibid 1271.

¹⁴⁹ Hamnergren, above n 122, 3.

¹⁵⁰ Millar and Baar, above n 63, 70-71.

¹⁵¹ Ibid.

¹⁵² Peter Sallmann and Richard Wright, 'Governing the Courts: Extract on Courts' Governance From 'Going to Court, A Discussion Paper on Civil Justice in Victoria' (Paper presented at the 18th Conference of the Australasian Institute for Judicial Administration, Darwin, 14-16 July 2000) 9.

¹⁵³ Ibid.

factional disputes and lead to a competition for administrative resources.¹⁵⁴ Finally, Glanfield emphasises the broader community aspect of court administration to argue that community needs and expectations must be built into the organisational framework as a guiding design principle of court governance.¹⁵⁵ He points out that increasing community expectations lie behind recent advances in governance thinking about the issues such as ethics, efficiency, timeliness and accountability.¹⁵⁶ Arguably, then, a judicial council that is composed solely of the chief judges potentially lacks the necessary community perspective and may also diminish the capacity and responsibility of other judges to be involved in the management affairs of the court system.¹⁵⁷

The recent experiences from the northern European countries should also be noted in this context. The judicial councils in Denmark, Norway, Ireland, Sweden and the Netherlands have enshrined broader stakeholder participation at the governing (supervisory) boards that in many cases rely exclusively on fixed term appointments based on merit. For example, in Norway, the board of the National Courts Administration Authority has nine members, including four judges, one court executive and two lawyers appointed by government, together with two representatives of the public, who are appointed by Parliament.¹⁵⁸ In Ireland there are 17 members on the board of the Irish Courts Service, including nine judicial members and eight representatives from the government, trade unions, members of parliament and lawyers' associations.¹⁵⁹ The rationale behind the inclusion of non-judicial members and fixed term appointees on the board lies in the belief that this

¹⁵⁴ D. Semple, Attorney-General's Department and Des Semple & Associates, *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance* (Attorney-General's Department, 2008) 25; 48-51.

¹⁵⁵ Glanfield, above n 58, 5.

¹⁵⁶ Ibid.

¹⁵⁷ Alford et al, above n 35, 91.

¹⁵⁸ A Rosseland, 'Presentation of the National Courts Administration and the Norwegian Court Reforms of 2002' (2007) 51 *Scandinavian Studies in Law* 608, 612.

¹⁵⁹ See *Courts Service Act 1998* (Irl), s 11.

practice enhances the social accountability of the organisation and leads to greater professionalization and depoliticisation of court administration.¹⁶⁰

2.4.3 What function(s) should the judicial council perform in court administration and how should the courts be organised internally?

The establishment of a judicial council also raises important questions about its role in court administration and its relationship with the courts. For example, it is important to define how the new entity should interact with the individual courts, both in terms of their day-to-day operations and also in terms of their policy development and strategic oversight.

Alford et al explain that this is a complex question from a management perspective, because the optimal organisational design ultimately depends on factors such as the size of the jurisdiction and the need to better optimise non-judicial resources, such as administration, infrastructure, finances, ICT and other shared services.¹⁶¹ They suggest that centralised control of staffing, operations and infrastructure would probably work well in smaller jurisdictions, such as South Australia, but not in larger jurisdictions, such as Victoria, because larger organisational units start to exhibit ‘diseconomies of scale,’ accompanied by lower staff satisfaction and commitment to the organisation.¹⁶² These issues were also noted by Church and Sallmann in their analysis of the Judicial Conference of the United States and its central administrative arm, the Administrative Office of the United States Courts.¹⁶³ They noted that the early American court reformers recognised the importance of preserving individual courts’ operational autonomy, by leaving certain aspects

¹⁶⁰ Tin Bunjevac, 'Court Governance in Context: Beyond Independence' (2011) 4(1) *International Journal for Court Administration* 35, 43.

¹⁶¹ Alford et al, above n 35, 53-67.

¹⁶² Ibid 62-3; 66-7. The authors refer to the writings of the influential management theorists Peters and Waterman, who identified the so-called ‘1000-staff’ rule of thumb, representing the optimum division size in successful companies. See Thomas J Peters, Robert H Waterman and Ian Jones, *In Search of Excellence: Lessons From America's Best-run Companies* (Harper and Row, 1982) 272-3.

¹⁶³ Church and Sallmann, above n 27, 72-3.

of court administration, such as case processing, staff selection and management, in most cases to the courts themselves.¹⁶⁴ This practice allowed individual jurisdictions and Federal Circuits to develop innovative administrative rules and practices that were remarkably transparent and functional at the same time.¹⁶⁵

The relationship between the judicial council and courts also has an important *judicial* management dimension that should not be overlooked in allocating the operational responsibilities between council and the courts. According to Baar et al, great care must be taken to ensure that the new institutional framework does not repeat the ills of the executive system of court administration.¹⁶⁶ They give the example of the Courts Administration Service (‘CAS’) in the Canadian federal jurisdictions, which merely replicated the ineffective management patterns that had been established earlier by the executive government. Notably, this occurred despite the fact that the CAS administration was independent of the executive government and was also subject to the directions by the Chief Judges of the participating courts.¹⁶⁷

The underlying problem identified by Baar et al was that judges had continued to rely on the CAS bureaucracy to centrally plan and manage all aspects of the court operations, which in their view rendered this model in practice a ‘variant’ of the executive model.¹⁶⁸ As a result, according to Baar et al, the Chief Judges’ formal powers to intervene in court administration were of little practical utility in the circumstances, because the judiciary’s lack of systematic involvement in court operations had made it difficult to determine whether any direction to CAS was needed in the first place.¹⁶⁹

¹⁶⁴ Ibid 73.

¹⁶⁵ For example, s 6 of the *Omnibus Judgeship Act 1978* (US) allowed courts of appeal with more than 15 judges to experiment with internal administrative units. The administrative innovations of the Ninth Circuit Court of Appeal, in particular, have been well-documented and studied around the world: see, e.g. Church Jr, above n 100; see also McGarvie, above n 74, 30.

¹⁶⁶ Baar et al, above n 33, 102-3.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid 103.

2.4.3.1 Integrated management in the courts

The importance of greater judicial involvement in court management was also highlighted in the CEPEJ report, which discussed the example of the Swedish National Courts Administration authority (SNCA) and its relationship with the courts. According to Voermans and Albers, the most significant feature of SNCA is that it does not have any operational powers in court administration.¹⁷⁰ Instead, its main task is to support the court operations ‘from a distance,’ by managing certain shared services and facilities, such as human resources, ICT, auditing and accounting systems, security and so on.¹⁷¹ In practice, SNCA also offers various forms of professional and developmental support to the courts, such as legal assistance, policy advice and management training for judges and court staff.¹⁷²

For their part, the Swedish courts operate largely autonomously, with each court having full responsibility for their own budgetary, financial, administrative and personnel management affairs.¹⁷³ A key advantage of this system, according to Voermans and Albers, is that it effectively integrates all of the judicial and administrative functions under a single executive court authority, thereby avoiding potential duplication of operational competencies between the courts and the council.¹⁷⁴ Furthermore, the fact that SNCA does not interfere in the courts’ operational management effectively forces the courts to become more self-sufficient as organisations, thus promoting more active involvement of judges in court administration.¹⁷⁵ According to the authors, the Swedish judiciary is strongly attached to the system of integrated management, because it ‘promotes self-responsibility for the primary process’ and ‘increases efficiency.’¹⁷⁶

¹⁷⁰ Albers and Voermans, above n 60, 22-3.

¹⁷¹ Ibid.

¹⁷² Ibid. See also Domstolsverket (SNCA), 'Operational Plan 2010-2012' (SNCA, 2009) ; see also John Bell, 'Sweden's Contribution to Governance of the Judiciary' (2007) 50 *Scandinavian Studies in Law* 83, 98; Voermans, above n 126, 2139-40.

¹⁷³ Albers and Voermans, above n 60.

¹⁷⁴ Ibid 24; 108.

¹⁷⁵ Ibid 108.

¹⁷⁶ Ibid.

The Australian federal courts' experiences with the system of integrated management should also be mentioned in this context due to a number of similarities and differences with their Swedish counterparts. The similarities lie in the effective integration of the administrative, financial, operational and judicial responsibilities under the courts' own umbrella, which has allowed the federal courts to develop more business-like strategic planning and operational capabilities.¹⁷⁷ Secondly, according to the former Chief Justice of the Federal Court, Michael Black, integrated management has brought judges into an 'appropriate working relationship with professional administrators.'¹⁷⁸ As a result, the federal courts have made some remarkable achievements in areas such as judicial innovation,¹⁷⁹ benchmarking and productivity for the judiciary,¹⁸⁰ case management reform¹⁸¹ and even the promotion of outreach projects for overseas judiciaries.¹⁸²

Nevertheless, there are also a number of potential drawbacks associated with the federal courts' self-management system, which set this model apart from its Swedish counterpart. The most obvious difference is that there is no judicial council interposed between the courts and the executive government, which makes the Australian federal courts arguably much more vulnerable to executive interference. Professor Anne Wallace illustrates this point by reference to the recent centralisation of the federal courts' corporate services under the umbrella of the

¹⁷⁷ Warwick Soden, 'The Application of International Court Excellence Framework within the Federal Court of Australia With a Special Look at Strategic Planning to Achieve Excellence' (Paper presented at the Asia-Pacific Courts Conference, Singapore, 4-6 October 2010) 4-5.

¹⁷⁸ Michael Black, 'The Federal Court of Australia: The First 30 Years—A Survey on the Occasion of Two Anniversaries' (2007) 31(3) *Melbourne University Law Review* 1017, 1047. See also Soden, above n 177.

¹⁷⁹ Ibid.

¹⁸⁰ Justice Stephen O'Ryan and Tony Landsell, 'Benchmarking and Productivity for the Judiciary' (2000) 10(1) *Journal of Judicial Administration* 25.

¹⁸¹ Caroline Sage et al, *Case Management Reform: A Study of the Federal Court's Individual Docket System* (Law and Justice Foundation of NSW, 2002); Natacha Vsindilok, *A Comparison of the Case Flow Management and Case Tracking Systems of the Central Administrative Court of Thailand With Those of the Federal Court of Australia, With Reference to Practice in the USA* (LLM Thesis, University of Wollongong, 2007)

¹⁸² See Soden, above n 177, 4. See also Anthony North, 'My Court Car is a Helicopter' (Paper presented at the Canadian Judicial Council Conference Inside the Administration of Justice: Toward a New Model of Court Administration, Victoria, British Columbia, 31 January 2007).

Federal Court of Australia, which was prompted by ongoing financial and operational difficulties experienced by the Federal Circuit Court and the Family Court of Australia.¹⁸³ According to Wallace, the initiative was principally ‘driven by the executive, rather than the courts, and motivated primarily by reducing costs,’ rather than a genuine need to improve services for court users.¹⁸⁴

This example also demonstrates that there can be significant financial and reputational risks associated with each court having the responsibility for operational management while also having to report directly to the executive government. One of the negative consequences of this situation is that the occasional budget overruns may be interpreted as signs of financial incompetence, thus potentially significantly eroding the public confidence in the judiciary.¹⁸⁵

The absence of a judicial council could also have negative ramifications from a wider systemic perspective, because it potentially discourages individual courts from taking a broader view of problems affecting the justice system.¹⁸⁶ Skehill argues that this is not a major concern in the specific context of the federal courts, because each federal court was designed to operate as a stand-alone jurisdiction,

¹⁸³ Anne Wallace, 'Merging Federal Courts' Administration Won't Improve Services for Those Who Need It', *The Conversation* 4 November 2015 <<http://theconversation.com/merging-federal-courts-administration-wont-improve-services-for-those-who-need-it-49944>>. See also the *Courts Administration Legislation Amendment Act 2016* (Cth). Section 53 of the Act specifies that the corporate services include communications, finance, human resources, information technology, libraries, procurement, contract management, property, risk oversight and management, and statistics. See also Stephen Skehill, 'Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio' (Australian Government, 2012) 27. The review predicted increasing annual deficits in the federal jurisdictions reaching \$19.5m by 2014-15.

¹⁸⁴ Ibid.

¹⁸⁵ Michael Pelly, 'Federal Magistrates Court Audit Uncovers \$5m Black Hole', *The Australian* 6 March 2009 <<http://www.theaustralian.com.au/business/legal-affairs/courts-5m-budget-blowout/story-e6frg97x-1111119045969>> The article criticises the court for using the MYOB accounting software, which is designed for a small business, rather than the court with a budget of more than \$55m. See also Nicola Berkovic, 'Diana Bryant Calls for Federal Overseer', *The Australian* 26 September 2014 <<http://www.theaustralian.com.au/business/legal-affairs/diana-bryant-backs-calls-for-federal-overseer/story-e6frg97x-1227070718146>> According to the article, a report by KPMG forecast Family Court and Federal Circuit Court budgetary shortfalls of up to \$75m by 2017, which prompted the executive government to look at reforming the system of court administration in the federal courts.

¹⁸⁶ Church and Sallmann, above n 27, 68-71.

rather than as part of a unified ‘system’ of the administration of justice.¹⁸⁷ In contrast, however, the need for greater systemic oversight would arguably be felt much more strongly in a state jurisdiction such as Victoria, where the separate court tiers do form part of an integrated system of the administration of justice. Accordingly, in that situation, the existence of a judicial council could prove to be instrumental in addressing the identified deficiencies of the federal courts model, by offering an additional layer of protection, expertise and oversight to the courts.

The final point of difference between the Swedish system of integrated management and the Australian federal courts concerns their internal administrative arrangements. Namely, the Swedish courts are governed by a small collegiate *presidium* elected by the councils of judges, which stands in sharp contrast to the Chief Justice governance model that operates in the federal courts.¹⁸⁸ The latter has been the subject of criticism, because it concentrates too much administrative power in the Chief Justices, possibly at the expense of other judicial officers.¹⁸⁹ According to Hill, the arrangement also runs contrary to modern business practices that encourage more collegiate decision-making at the policy-making level.¹⁹⁰

2.4.4 What function(s) should the Minister perform in the new institutional framework?

The establishment of a judicial council represents a significant legal and political challenge for the court system as a whole, because it requires a wholesale redefinition of the duties and responsibilities of all three branches of government in the area of court administration. In theory, at least, the redistribution of power is

¹⁸⁷ Skehill, above n 45, 29.

¹⁸⁸ Albers and Voermans, above n 60, 23.

¹⁸⁹ Church and Sallmann, above n 27, 68. The authors argue that this arrangement can potentially ‘retard’ the development of administrative capacity in the courts. However, see Diana Bryant, ‘The Autonomous Model - Not All Beer and Skittles’ (Paper presented at the The Judicial Conference of Australia Colloquium, Hyatt Hotel, Canberra, 6-8 October 2006). The Chief Justice of the Family Court of Australia explains that in reality the administrative powers are exercised in a collegiate manner.

¹⁹⁰ Hill, above n 111, 74-75; 82-83.

intended to reduce the traditional tensions between the judiciary and other branches of government, because of the corresponding increase in judicial self-responsibility and independence.¹⁹¹ However, as Baar et al remind us, the judiciary's autonomy remains a limited one, not least because the courts will always be financially dependent on the elected branches of government.¹⁹² At the same time, the Attorney-General continues to exercise broad political responsibility for the operation of the courts, because under the Westminster system of government there must always be a minister of the Crown who is responsible for the expenditure of public funds.¹⁹³

Apart from the responsibility for public finances, the government also has other legitimate interests in the proper operations of the court system that may potentially justify some form of ongoing ministerial involvement in court administration. Therefore, one of the key challenges for judges and policy-makers is to define the new limits of ministerial responsibility for the operations of the courts, in the circumstances where the Attorney-General's ability to influence the court administration (and vice versa) is objectively diminished.

2.4.4.1 Minister's reserve powers in court administration

As foreshadowed, there are many legitimate reasons justifying ongoing involvement of the minister in court administration. The first concerns the ability of the government to effectively deliver a suite of justice-sector services to the public that are deeply intertwined with the work of courts, such as public prosecutions, corrections, legal aid and so on. Secondly, as Chief Justice Len King pointed out, the government also has a legitimate interest in the judiciary's decisions about issues such as the locations, openings and closings of court

¹⁹¹ Bunjevack, above n 18, 210.

¹⁹² Baar et al, above n 61, 104.

¹⁹³ King, above n 21, 142. Chief Justice King points out that the key difference between the Westminster System and the American models is that in the US judges deal directly with Congress, whereas in the Westminster System there must always be a minister who is responsible to Parliament for the expenditure of public money.

houses.¹⁹⁴ Thirdly, the electorate will always regard the administration of justice in the courts as an essential public service, which means that the government may be held to be politically responsible for the proper operations of the courts, regardless of who is formally in control of court administration.¹⁹⁵ Arguably, then, when politically sensitive incidents involving the courts do arise, the minister will be under enormous political pressure to respond in order to appease the government and the electorate.¹⁹⁶ This may be the case even if the judicial council is statutorily responsible for the operation of the courts, because, as Voermans and Albers explain in the context of the Irish Courts Service, ‘the line of a minister’s political responsibility to Parliament has different dynamics to that of the much slower and less direct line of responsibility that the Courts Service has with Parliament.’¹⁹⁷

For reasons identified above, there is an emerging trend in jurisdictions that have recently established a service-oriented judicial council of entrusting a range of residual court administration functions in the minister. One important exception to this trend is South Australia, where the relationship between the Attorney-General and the Judicial Council appears to be tilted conclusively towards the judiciary.

According to former Chief Justice King, the Attorney-General is principally responsible for presenting the judiciary’s budget to Parliament and is also entitled to receive adequate information about the operations of the courts.¹⁹⁸ Apart from that, however, he has ‘no control over the decisions of the Court Administration Authority and consequently no direct responsibility for them.’¹⁹⁹ This position is clearly reflected in the South Australian legislation, which explicitly provides that a member of the Council or the CEO must attend a Parliamentary Estimates

¹⁹⁴ Ibid 141-142.

¹⁹⁵ Uhrig, above n 102, 42. The Uhrig Report gives the example of the Civil Aviation Safety Authority (‘CASA’), which was previously managed by a board independent of the Minister. However, following a number of aviation safety incidents, the ‘community expected the Minister to be accountable for the performance of the authority’. This prompted the government to take a greater role in the operation of CASA.

¹⁹⁶ Bunjevack, above n 43, 323.

¹⁹⁷ Albers and Voermans, above n 60, 33.

¹⁹⁸ King, above n 21, 142.

¹⁹⁹ Ibid.

Committee to answer questions about the courts' operations and expenditure of money.²⁰⁰ While at first this may be seen to be inconsistent with the idea of judicial independence, the Chief Justice explains that he would be attending the Estimates hearings in his administrative capacity as the Chairman of the Judicial Council.²⁰¹

In contrast to South Australia, in the northern European jurisdictions the minister's responsibility for certain threshold questions impacting the operations of the courts has not been removed in its entirety. For example, in Ireland, the legislation implicitly recognises that the government should have a say in the administrative affairs of the court system by requiring the Irish Courts Service to obtain the Minister's approval of its strategic plans.²⁰² Secondly, the Courts Service is also required by law to 'have regard to any policy or objective of the Government' that may affect the operations of the courts.²⁰³ Next, in Sweden and the Netherlands, the government and the Minister, respectively, are also entitled to issue broad general directions to the judicial council with the view to ensuring proper operations of the courts, as long as the judicial council considers them to be compatible with the principle of judicial independence.²⁰⁴

In some countries, the justice minister also retains certain 'reserve' powers in court administration that may only be invoked in cases of emergencies. For example, in Denmark and the Netherlands, the minister may be entitled to dismiss the board of the judicial council where the Auditor-General discovers significant financial irregularities in the management of the courts' budget, or the council makes decisions that are 'manifestly contrary to the law.'²⁰⁵ Notably, however, this

²⁰⁰ *Courts Administration Act 1993* (SA), s 29.

²⁰¹ King, above n 21, 140.

²⁰² *Courts Service Act 1998* (Ireland), s 7. In addition, there are representatives of the executive government on the Board of the Courts Service.

²⁰³ *Ibid*, s 13.

²⁰⁴ *Judiciary (Organisation) Act 1827* (Netherlands), art 93; See also Domstolsverket (SNCA), above n 172, 8.

²⁰⁵ Jesper and Poul Sorensen Wittrup, 'Quality of Justice in Denmark' in Marco Fabri and Phillip Langbroek (ed), *The Administration of Justice in Europe: Towards the Development of Quality Standards* (IRSiG, Consiglio Nazionale delle Ricerche, 2003) 119, 125. See also the *Judiciary (Organisation) Act 1827* (Netherlands), Art 106.

solution is only made possible because of the non-permanent composition of the councils, which clearly highlights the potential reputational risks that would be associated with permanent membership in like circumstances.²⁰⁶

Another example of the minister's ongoing involvement in court administration is found in England and Wales, where the control over court administration is currently shared between the judiciary and the executive government in accordance with a formal partnership agreement.²⁰⁷

The policy rationale behind the Lord Chancellor's continuing role in court administration is partly based on an implicit recognition that the 'courts are by their very nature a shared responsibility between the judiciary and government.'²⁰⁸ Thus under the *Courts Act 2003* (UK) and the partnership agreement, the Lord Chancellor continues to be politically responsible for the courts and also has an important say over the policies of Her Majesty's Courts and Tribunals Service.²⁰⁹ Remarkably, however, under the partnership agreement he is also entitled to make 'whatever decision he considers appropriate' in the event of disagreement with the Lord Chief Justice.²¹⁰

Arguably, the Lord Chancellor's power of intervention in England and Wales is too unconstrained, especially when compared with Denmark or the Netherlands. The problem lies in the fact that the powers of intervention may be invoked without any reference to specific emergencies or misconduct by the judicial council.²¹¹

²⁰⁶ Bunjevaca, above n 43, 323.

²⁰⁷ See, however, Lord Chief Justice Igor Judge, 'Letter to the Lord Chancellor the Hon Chris Grayling MP', *The Guardian* 25 June 2013 <<http://www.theguardian.com/law/interactive/2013/jun/25/courts-privatisation-igor-judge-chris-grayling>>. The Lord Chief Justice is proposing the establishment of a new courts and tribunals service that would be independent of executive control.

²⁰⁸ Lord Chief Justice Philips, 'The Lord Chief Justice's Review of the Administration of Justice in the Courts' (Judiciary of England and Wales, 2008) 7; 16.

²⁰⁹ *Courts Act 2003* (UK), s 1. See also Lord Chancellor, 'Her Majesty's Courts and Tribunals Service Framework Document' (HMCTS, 2014).

²¹⁰ *Ibid* [10.4].

²¹¹ Bunjevaca, above n 18, 216.

2.4.4.2 Influencing and engaging politics through greater corporatisation

A separate issue affecting the relationship between the judicial council and the executive government concerns the ability of the judiciary to maintain sufficient institutional visibility in the political arena, in the circumstances when the Attorney-General's political priorities and influence at Cabinet have substantially changed.²¹² According to Kathy Laster, there is a 'real danger' that the courts might find themselves struggling for resources in this environment, because they may be left to their own devices when it comes to securing funds during the highly competitive and often politicised budget bidding processes.²¹³ This issue was also highlighted by Gee et al in their landmark study of the politics of judicial independence in the UK, which identified the 'retreat of the politicians' as being a 'primary challenge' for the independent judiciary in that country.²¹⁴ They pointed out that the nature of the political processes affecting the judiciary had changed substantially following the introduction of the *Constitutional Reform Act 2005* (UK), because the relationships between the judiciary and the other branches of government had become much more dispersed, formal, open and accountable than before.²¹⁵ At the same time, the institutional separation of the Lord Chancellor from the judiciary had also meant that he no longer commanded the same degree of political power, prestige or influence as before.²¹⁶ According to Gee et al, the judiciary's survival in that environment required greater institutional corporatisation, political astuteness and strategic engagement with a much wider range of political actors and institutions, including the Parliament.²¹⁷ They concluded that the development of a more formal judicial bureaucracy with clearly defined organisational structures

²¹² Gee et al, above n 29, 35; 253-4.

²¹³ Kathy Laster, 'Separation of Powers Through Separation of Administration?' (2011) 36(2) *Alternative Law Journal* 135.

²¹⁴ Gee et al, above n 29, 262.

²¹⁵ Ibid, See generally Chapter 10.

²¹⁶ Ibid 253-4.

²¹⁷ Ibid 253-4; 263.

and powers had been the key to meeting the new challenges and enhancing the judiciary's institutional capacity to protect judicial independence.²¹⁸

2.4.5 What mechanisms can be introduced to promote transparent and accountable relationships with the executive government and stakeholders?

As Gee et al pointed out, the likely success or otherwise of any court system reform ultimately depends on the quality of the interaction between the courts, government and other justice system stakeholders. The importance of this issue cannot be overstated, because the Attorney-General's department had previously had complete day-to-day (vertical) insight into the court system's operations, human resources and finances - precisely those levers of power that have now been transferred to the judiciary. The question arises, then, what statutory or non-statutory safeguards should be left in place in order to give the government, parliament and other interested parties an objective insight into the internal operations of the judicial organisation that is funded by the taxpayer?

It is argued throughout the thesis that future institutional relationships between the judiciary and its stakeholders must be rooted in the concepts of organisational transparency and administrative accountability.²¹⁹ According to Langbroek, the traditional, vertical, forms of administrative accountability between the courts and government must be transformed into more transparent, horizontal, accountability relationships between the courts and the government on the one hand, and the courts and the public on the other.²²⁰ That transformation can take place in many different ways, such as through the adoption of more systematic and robust approaches to internal business processes, the introduction of clearly defined administrative duties

²¹⁸ Ibid 101; 112. See also, generally Kate Malleon, *The New Judiciary: The Effects of Expansion and Activism* (Ashgate, 1999).

²¹⁹ Langbroek, above n 67, 6.

²²⁰ Ibid 6. See also Baar et al, above n 33, 104. According to the authors, 'it is through the provision of timely, accurate and comprehensive information to the Legislature and to the public at large that the [self-administered] Courts ensure real transparency and accountability for their administration decisions and actions.'

and responsibilities, and even the development of modern workload measurement systems for the courts that can be used for the purposes of strategic planning and budget formulation. It is argued in the following chapters that the adoption of these and similar measures by the courts would serve to promote greater institutional corporatisation of the courts and enhance the quality and accountability of court administration.

2.4.5.1 Introduction of quality management systems

Langbroek envisages more widespread adoption of modern quality management systems by the courts as a means of furthering organisational self-improvement, engendering public trust and compensating for reduced central control by the executive government.²²¹ A key feature of quality management systems is that they can give the courts a suite of transparent organisational tools to assist them define their own concepts of organisational excellence and the means by which they can achieve those goals.²²² According to Gething, the organisations that use quality management systems must also commit to systematically measuring, recording, improving, learning and changing their work practices, in order to meet and expand their own goals of organisational excellence.²²³ Importantly, the ongoing process of organisational self-assessment takes place across many different areas of court operations, including the financial area, the work processes area, the learning area and the customer area.²²⁴

A growing number of jurisdictions have successfully adopted quality management systems for use in the courts in recent years, including the US, Singapore, Finland

²²¹ Ibid 6-7.

²²² Michael Gething, 'Assessing the Work of a Court: Performance Indicators and Quality' in *Australian Courts: Serving Democracy and its Publics* (Australasian Institute of Judicial Administration, 2013) 325, 333-334.

²²³ Ibid.

²²⁴ Pim Albers, 'Performance Indicators and Evaluation for Judges and Courts' (Paper presented at the Anti-corruption seminar for the Russian Judges, Moscow, Russia, 24-25 May 2007) <http://www.coe.int/t/dghl/cooperation/cepej/events/onenparle/MoscowPA250507_en.pdf> 11.

and the Netherlands.²²⁵ Victoria can also be added to that list, following the recent introduction of the International Framework for Court Excellence ('IFCE') in the Magistrates,' County and Supreme Courts.²²⁶

According to Vallance, the IFCE framework covers the so-called Seven Areas of Court Excellence, including 'court management and leadership,' 'court planning and policies,' 'court resources (human, material and financial),' 'court proceedings,' 'client needs and satisfaction,' 'affordable and accessible court services' and 'public trust and confidence.'²²⁷ The framework is used in conjunction with the traditional indicators of court performance, such as case clearance rates, pending cases backlogs and numbers of case initiations and finalisations.²²⁸

According to the Chief Justice of Victoria, Marilyn Warren, the adoption of the quality management system has many inherent benefits for the courts, because it can be used to demonstrate how the courts are performing at any particular point in time, thus providing a more persuasive basis for funding submissions to the government and the treasury.²²⁹ Other benefits of the system include 'better identification of strategic priorities,' improved 'cohesion between judiciary and administration' and a 'heightened sense of the courts' independence.'²³⁰

²²⁵ See e.g. International Consortium for Court Excellence, *International Framework for Court Excellence* (NCSC, AIJA, 2nd ed, 2013), 1; Quality Project of the Courts in the Jurisdiction of the Court of Appeal of Rovaniemi of Finland, *Evaluation of the Quality of Adjudication in Courts of Law: Principles and Proposed Quality Benchmarks* (Court of Appeal of Rovaniemi, 2006); Council for the Judiciary, 'Quality of the Judicial System in the Netherlands' (Council for the Judiciary, 2008).

²²⁶ Supreme Court of Victoria, *Court Performance*
<<http://www.supremecourt.vic.gov.au/home/about+the+court/court+performance/>>.

²²⁷ Mike Vallance, 'Implementing the IFCE as a "Holistic" Means for Achieving Excellence' (Paper presented at the Asia Pacific Courts Conference 2013 - 'The Pursuit of Excellence and Innovation in Courts and Tribunals', Auckland, New Zealand, 8-9 March 2013). See also International Consortium for Courts Excellence, *Thinking of Implementing the International Framework for Court Excellence?* (NCSC, AIJA, 2011) 3.

²²⁸ Ibid 13.

²²⁹ Chief Justice Marilyn Warren, 'Pursuit of Excellence and Innovation Challenges for Implementation' (Paper presented at the Asia Pacific Courts Conference 2013 - 'The Pursuit of Excellence and Innovation in Courts and Tribunals', Auckland, New Zealand, 8-9 March 2013) 6.

²³⁰ Ibid.

2.4.5.2 Clearly defined administrative powers, rules and rights of access

Another area in which judicial councils and courts can emulate organisational best practices from the business sector is through the introduction of transparent internal administrative ‘constitutions’ and rules with clearly defined duties and responsibilities of judges and court staff. For example, in many US and European jurisdictions there are comprehensive rules that formally regulate the functions and powers of the chief and administrative judges, court administration, court committees, judicial scheduling teams and so on.²³¹ Notably, the *Judicial Administration Rules* in California also provide detailed rules that govern the proceedings of the Judicial Council itself, including the basic rule that the business meetings of the Council are open to the public, subject to a few exceptions.²³²

The courts legislation in the Netherlands similarly prescribes the judicial administrative duties and responsibilities in some detail, while also imposing on the court management additional administrative requirements that must be addressed in separate court management ‘regulations.’²³³ According to Art 23 of the *Judiciary (Organisation) Act*, the court management board is responsible for the budgeting, planning and control cycle, as well as the overall functioning of the courts, including personnel matters, organisational procedure and information and management systems.²³⁴ The court regulations must separately detail the internal management procedures of the management board, including those relating to the decision-making, division of responsibilities, organisational structure, complaints procedure, delegation of duties, replacement of members in the event of illness and the jurisdictional allocation of cases between the court divisions.²³⁵

The principle of internal organisational transparency also has strong roots in the Scandinavian judicial systems. For example, according to Levin, the freedom of

²³¹ National Center for State Courts, above n 108, 2.

²³² See rule 10.6 of the *Judicial Administration Rules* (California)
<http://www.courts.ca.gov/documents/title_10.pdf>.

²³³ *Judiciary (Organisation) Act 1827* (Netherlands), art 19.

²³⁴ *Judiciary (Organisation) Act 1827* (Netherlands), Art 23.

²³⁵ *Judiciary (Organisation) Act 1827* (Netherlands), Art 19.

information laws in Sweden give members of the public and the media extraordinary rights of access to all documents, materials and correspondence that are used by SNCA in its decision-making processes.²³⁶ Secondly, the institution of the Parliamentary Ombudsman is authorised to investigate the conduct of independent agencies, propose legislative solutions to Parliament, and even initiate prosecutions in serious cases.²³⁷ Finally, it was noted earlier that the internal organisational transparency in the Nordic countries is also furthered by the diverse composition of the board of the judicial council.

2.4.5.3 Transparent budgeting, workload measurement and fiscal management

One of the most contentious aspects in the relationship between the judiciary and the executive government concerns the issue of court budgeting and the accompanying criteria for distribution of funds to the courts. In the executive system, there was an expectation that the courts should deliver a certain number of cases mandated by the Treasury, even though they had insufficient operational and fiscal authority over the resources needed to achieve those outputs.²³⁸ According to Alford et al, this resulted in an anomalous situation whereby executive officials who were located outside the courts were effectively in charge of the allocation of funds within the courts.²³⁹

The transfer of fiscal responsibility to the judicial council partially resolves this anomaly, to the extent that the executive government and parliament have agreed to provide the courts with a global budget, while devolving the responsibility for the allocation of the funds to the judicial council. However, even in this situation the problem remains in specifying the appropriate output targets and attaching a monetary value to them, because the services provided by the courts cannot be

²³⁶ See generally, Paul Levin, 'The Swedish Model of Public Administration: Separation of Powers—the Swedish style' (2009) 4(1) *Journal of Administration and Governance* 38, 39-40.

²³⁷ Ibid 41.

²³⁸ Alford et al, above n 35, 43.

²³⁹ Ibid 42-43. They explain that the resulting fiscal discrepancy between 'responsibility' and 'controllability' is viewed unfavourably in accounting theory, because it has the potential to cause 'severe dysfunction within the organisation.'

easily quantified. For example, the agreed ‘outputs’ are typically expressed in a global number of cases to be resolved over a period of time, which does not take into account the complexity and resources involved in processing those cases, such as the cost of court infrastructure or the number of separate hearings and appeals that may form part of each dispute.²⁴⁰

The problem of specifying the appropriate outputs is further compounded by the fact that the Australian courts have not yet developed sophisticated systems for workload measurement, while most judges and court administrators appear to be ‘relatively unfamiliar’ with recent advances in this area in comparable jurisdictions.²⁴¹ Kathy Mack et al recently conducted a series of longitudinal empirical studies of courts across Australia and found that there was ‘limited availability or use of workload measures,’ coupled with ‘reliance on somewhat unwieldy manual systems and implicit institutional knowledge.’²⁴² They noted that even where the statistics about judicial caseloads had been collected on a systematic basis, they did not take into account the differences in weight between different types of cases.²⁴³ Mack et al concluded that the ‘existing systems appear to be largely inadequate’ for the purposes of measuring and allocating workloads in the courts.²⁴⁴

Mack et al also pointed out that a number of jurisdictions in the US, Canada and Europe have successfully introduced sophisticated systems for measuring weighted caseloads.²⁴⁵ They explain that a weighted caseload measurement system has many

²⁴⁰ Ibid 45.

²⁴¹ Kathy Mack, Anne Wallace and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (AIJA, 2012) 166; 168. It is pointed out that the Family Court of Australia had previously developed a system of workload benchmarking for judges and staff but have discontinued its use. See Tony Landsell and Stephen O’Ryan, ‘Benchmarking and Productivity for the Judiciary’ (2000) 10(1) *Journal of Judicial Administration* 25.

²⁴² Mack, Wallace and Anleu, above n 241, 7.

²⁴³ Ibid 164. The authors refer to the collection of data which is regularly published by the Productivity Commission and the Australian Bureau of Statistics. See Australian Bureau of Statistics, ‘4513.0 Criminal Courts 2009-2010’ (ABS, 2011); See also, the Steering Committee for the Review of Government Service Provision, ‘Report on Government Services: Court Administration’ (Australian Government Productivity Commission, 2011).

²⁴⁴ Ibid 166.

²⁴⁵ Ibid.

practical benefits for the courts, because it allows for more accurate estimation of the judicial and administrative staff workloads, which can be used to justify requests for additional resources from the government.²⁴⁶ According to the National Center for State Courts in the US, a weighted caseload system allows courts to determine the amount of ‘judge time’ and ‘administrative time’ that is needed to hear a specific type of case, as well as the amount of time a typical judge has available for hearing cases during a typical year.²⁴⁷ This allows the courts to develop reasonably accurate projections of ‘judgeship’ and ‘supporting staff’ needs to process the anticipated annual caseloads.²⁴⁸

The accuracy of weighted caseload systems largely depends on the quality of data obtained from empirical studies, expert user estimations and historical analyses of court files. As a result, the process can be administratively burdensome and requires regular follow-up studies to ensure that the benchmarked time standards and resource estimations remain accurate. In Germany, the introduction of the Pebssy workload measurement system in 2002 was based on an empirical court study involving almost 2000 judges and prosecutors in more than 40 courts across seven federal states.²⁴⁹ The study came up with average processing times for several different types of cases, expressed in minutes, which were then used to calculate annual workloads for the courts in different states. According to Hess, the quality of the data is gradually improving, due to ongoing modernisation to the IT infrastructure that allows more comprehensive data collection of business processes and activities in the court system.²⁵⁰

The weighted workload measurement system that was introduced in the Netherlands is especially noteworthy in the context of the Victorian court system reform, because the Dutch Council for the Judiciary has been the driving force

²⁴⁶ Ibid 167-168.

²⁴⁷ V.E. Flango, B.J. Ostrom and National Center for State Courts, *Assessing the Need for Judges and Court Support Staff* (National Center for State Courts, 1996) 25.

²⁴⁸ Ibid 41; 59-60.

²⁴⁹ Burkhard Hess, 'Practical Ways of Combating Delays in the Justice System, Excessive Workloads of Judges and Case Backlogs: German Report' (CEPEJ, 2005) 23.

²⁵⁰ Ibid.

behind the development and implementation of the system.²⁵¹ The ‘Lamicie’ workload model is based on periodic time studies conducted by a commission of judges that calculate the average processing times for 49 different types of cases, which are expressed in the number of minutes of judge and staff time required to process each type of case.²⁵² Remarkably, the workload model is used in the annual negotiations between the Judicial Council and government to determine the judiciary’s budget appropriations, based on a fixed cost price assigned to each type of case by regulations.²⁵³

The examples from the foreign jurisdictions should be treated with a degree of caution, however. According to Mack et al, even though the weighted caseload systems are useful in measuring case complexity, they still cannot measure the quality of outcomes, or the experiences of litigants.²⁵⁴ In fact, it has been pointed out that the introduction of output funding and ‘casemix’ systems such as Lamicie could potentially have negative consequences on the quality of justice if the courts get carried away in emphasising productivity over content quality.²⁵⁵ Alford et al explain that similar tendencies had arisen when a casemix system was initially introduced to improve efficiency in the public health system.²⁵⁶ Hospitals had an incentive to shorten patient stays, because they were funded according to the

²⁵¹ Council for the Judiciary, *The Financing System of the Netherlands Judiciary* Council for the Judiciary <<https://www.rechtspraak.nl/SiteCollectionDocuments/The-Financing-System-of-the-Netherlands-Judiciary.pdf>>. See also the *Court Sector (Funding) Decree 2005* (Nld), Ars 2 and 3.

²⁵² Pim Albers, 'Practical Ways of Combating Delays in the Justice System, Excessive Workloads of Judges and Case Backlogs: Reducing Delays: Recent Developments in the Netherlands' (CEPEJ, 2005) 11-13. See also Philip Langbroek, 'Organization Development of the Dutch Judiciary: Between Accountability and Judicial Independence' (2010) 2(2) *International Journal for Court Administration* 21, 28.

²⁵³ Langbroek, above n 252, 28. According to Langbroek, the Council for the Judiciary receives the budget from the Ministry of Justice based on a simplified calculation of 11 broad case types across all courts, while the budget between the Council and the courts is actually based on 49 individual categories of cases.

²⁵⁴ Mack, Wallace and Anleu, above n 241, 170.

²⁵⁵ Langbroek, above n 252, 38. See also Contini and Mohr, above n 77, 22-23. See also Nina Holvast and Nienke Doornbos, 'Exit, Voice, and Loyalty within the Judiciary: Judges’ Responses to New Managerialism in the Netherlands' (2015) 11(2) *Utrecht Law Review* 49. The authors pointed out that ‘[t]he focus on the new public management principles is of particular concern to the judges, as many of these principles may conflict with their professional values.’

²⁵⁶ Alford et al, above n 35, 48.

specific treatment types, rather than the number of days that patients were actually being treated. In addition, the system encouraged hospitals to diagnose patients into categories of cases that attracted higher funding.²⁵⁷

Despite the caveats, Alford et al considered the casemix system to be generally suitable for the courts and did not regard the methodology as an insurmountable problem from a technical point of view.²⁵⁸ They also pointed out that some of the negative tendencies of the casemix system experienced by hospitals would likely be offset in the courts due to the adversarial system of litigation.²⁵⁹ This is because judges have relatively limited capacity to influence the prosecution and defence in criminal cases or lawyers in civil litigation.²⁶⁰

In the Dutch courts, the negative tendencies of the Lamicie model have been counterbalanced by an overarching quality management system called RechtspraakQ, which imposes a series of qualitative measures and standards to ensure that the courts maintain their focus on delivering high quality legal outcomes.²⁶¹ The measures and instruments developed for these purposes include detailed ‘quality regulations,’ court-wide positioning and peer-review studies, mandatory requirements for periodic second-reading of judgments, guaranteed times for judicial education, client evaluation surveys, staff satisfaction surveys, judicial complaints procedures, visitations and audits, as well as a judicial performance measuring system.²⁶²

2.5 Summary of the main research questions

Based on the foregoing review of the literature and conceptual framing of the issues covered in the published articles, it is now time to re-state the principal research

²⁵⁷ Ibid 48.

²⁵⁸ Ibid 47-8. They point out that the case-types can be fine-tuned to provide flexible ‘outliers’ for unexpectedly short or lengthy cases.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ Council for the Judiciary, above n 251.

²⁶² Ibid 5-10.

questions that will be examined and addressed in the remaining chapters of the thesis:

1. What should be the key policy features for an independent judicial council?
 - a. What should be the key aims and competencies of the judicial council?
 - b. Who should be represented on the council?
 - c. What function(s) should the judicial council perform in court administration?
 - d. How should the courts be organised internally?
 - e. What function(s) should the Minister perform in the new institutional framework and what should be his powers in court administration?
 - f. What practical mechanisms can the judicial council and courts introduce in order to promote transparent and accountable relationships with the executive government and other stakeholders?

The final research question that the thesis seeks to answer is whether the CSV reform meets the policy benchmarks identified in the answers to question 1:

2. Does the legislative and institutional framework of the CSV Act meet the policy benchmarks identified in the answers to question 1?

The remaining chapters will be devoted to examining how these issues have been developed and systematically addressed in the published articles.

3 THE CHALLENGE OF CHANGE*

The first article in the series was published in 2011, approximately two years before the introduction of the *CSV Act*. The date of the publication is in itself significant, because the article proposed the establishment of a Judicial Council of Victoria several years prior to the CSV reform and was consulted by the Department of Justice and the judiciary in the process of developing the legislative policy for the *CSV Act*. The Chief Justice of Western Australia has stated that the research presented in the article made an ‘important contribution’ to the advancement of policy debate in this area.²⁶³

The first article analyses the legal, organisational and social challenges facing the Victorian courts in the years immediately preceding the CSV reform and outlines an initial policy framework for a Judicial Council of Victoria. The framework has both a theoretical and institutional component. The theoretical component sets out the basis for a ‘new elaboration’ of judicial accountability in court administration by examining the challenges and problems of judicial administrative passivity that were particularly pronounced in the executive system of court administration.²⁶⁴

The article contends that the traditional judicial qualities are no longer sufficient to provide an adequate response to the modern demands and expectations of the

* Tin Bunjevac, 'Court Governance: The Challenge of Change' (2011) 20 *Journal of Judicial Administration* 201.

²⁶³ Chief Justice Wayne Martin AC, 'Court Administrators and the Judiciary - Partners in the Delivery of Justice' (2014) 6(2) *International Journal for Court Administration* 3, 10.

²⁶⁴ Bunjevac, above n 18, 203-207.

courts. As a result, the existing administrative structures and management patterns in the courts ought to be re-examined in order to improve the quality of the administration of justice in a more demanding external environment. Specifically, the analysis identifies the need for the courts to introduce more hierarchical and internally integrated administrative arrangements in order to improve the coordination of judicial and non-judicial aspects of court operations.

Secondly, the analysis identifies the need to establish a judicial council, in order to fully separate the courts from the executive government and also to assist them improve the quality of the administration of justice in the future.

Following on from the theoretical groundwork, the article identifies the essential features of the proposed Judicial Council of Victoria using a detailed comparative analysis of seven Australian and international jurisdictions, including Victoria, South Australia, Australian federal courts, Ireland, England and Wales, the Canadian federal courts and the Netherlands.²⁶⁵

KEY CONTRIBUTIONS OF CHAPTER 3

The most important contribution of Chapter 3 is that it formulates an original policy framework of court governance that is based on a comprehensive analysis of the key institutional features of each jurisdiction under review. The framework is further developed in later articles.

3.1 Integrated Management in the Courts

Overall, the article contends that the proposed policy framework for a Judicial Council of Victoria is best approximated by the Dutch Judicial Council, because that model encompasses the most significant governance characteristics from the other jurisdictions that were examined in the article.

First, the Dutch courts are managed using the system of integrated management, which was identified as the most significant feature of the Australian federal courts model, because it promotes their self-responsibility for the primary process and

²⁶⁵ Ibid 208-223.

improves overall efficiency. However, the Dutch system of integrated management appears to be more advanced than that in the federal courts, because the Dutch courts are managed by a small collegiate board of judges, which potentially addresses the criticism of the Chief-Justices' administrative dominance in the Australian federal courts. In addition, the management board's powers in court administration are very clearly defined in the legislation, which specifies, *inter alia*, that the board may issue 'general and specific directions' to all judicial and non-judicial officers employed at the court, but that it may not involve itself in the 'procedural aspects or substantive assessment of, or decision in, a specific case or category of case.'²⁶⁶ This suggests that the Dutch legislative framework has adopted Malleeson's qualified interpretation of judicial independence in court administration, which was defined as 'freedom from improper interference which would undermine party impartiality.'²⁶⁷

3.2 Judicial Council with responsibility for improving the quality of justice

The second framework aspect identified in the Dutch model is that there is a Judicial Council that provides system-wide coordination between the courts and offers various forms of administrative and technical assistance where this may be necessary. The article initially identifies these features in the South Australian Judicial Council and the Irish Courts Service. However, the Dutch Judicial Council appears to be superior by comparison, because it is not directly involved in the courts' operational management and has a broad statutory mandate to improve the quality of justice in the court system. The article provides some examples of the initiatives and activities developed by the Dutch Judicial Council in this regard, such as the introduction of a quality management system that is linked to a 'casemix' funding model and the types of research and programs conducted by the

²⁶⁶ Ibid 221. See also the associated footnote 163. See the *Judiciary (Organisation) Act 1827* (Netherlands), Articles 23-24.

²⁶⁷ Malleeson, above n 81, 71.

Council that were designed to improve the quality of justice in the court system.²⁶⁸ In contrast, the formal statutory responsibilities of the South Australian Judicial Council and the Irish Courts Service appear to focus primarily on the provision of technical assistance and operational facilities to the courts, which was considered to be too narrow a focus for a peak administrative body of the judicial arm of government.

3.3 Operating at arms' length from the Minister

Third, the Dutch Judicial Council has both judicial and non-judicial members on the board and is classified as a non-departmental public body ('NDPB'), which means that it is designed to operate at arms' length from the Minister of Justice. These were earlier identified as the key features of the Irish Courts Service and CAS in the Canadian federal jurisdictions, respectively, because the Irish Courts Service has several non-judicial members on the board, while CAS operates at arms' length from the minister and is also managed by a non-judicial CEO. These two features were identified because they serve to protect the judiciary from the executive government and also to ensure greater social accountability and internal transparency of the judicial council.

The non-judicial membership on the board clearly distinguishes the Dutch Judicial Council from the South Australian Judicial Council, because the latter in reality operates as a separate judicial arm of government, rather than an NDPB with substantial (majority) judicial participation.²⁶⁹ This classification appears to be both legally and conceptually significant and will be explored further in later papers, in order to better understand why NDPBs are used in public administration and how their unique features and benefits can be adapted to the specific needs of court

²⁶⁸ Bunjevack, above n 18, 220. See also the associated footnote 150.

²⁶⁹ King, above n 21, 134. Chief Justice King points out that the institutional design of the South Australian Judicial Council was modelled on the Judicial Conference of the USA, which operates as a separate 'judicial arm of government'. Certain features of that model have been modified to suit the Australian constitutional arrangements, but it is pointed out that the council in reality operates as a separate arm of government.

governance. The potential regulatory consequences of this classification will also be briefly noted in the specific context of CSV in Chapter 6.

3.4 Separation of management from ownership on the council

The fourth identified feature of the Dutch Judicial Council is the separation of the judges' judicial function from their administrative function on the board of the council.

The article first identifies this distinctive feature on the board of Her Majesty's Courts and Tribunals Service in England and Wales, where the framework agreement provides that a judicial member's removal from the board will not impact on their judicial appointment.²⁷⁰ The significance of this feature lies in the fact that it serves to separate the 'management' from 'ownership' of the board, which is regarded as an important advantage in public administration and corporate governance theory, because it serves to promote more effective and efficient management of large institutions.²⁷¹ These conceptual issues are explored in more detail in later articles in order to understand how the perceived benefits of this practice can be applied to the unique organisational setting of court administration.

3.5 Board of executive judges in the courts

The first article also singles out a number of unusual features that are unique to the Dutch model, which will be the subject of further study and analysis in later articles. For example, the collegiate management boards in the Dutch courts are fully independent of the councils of judges, with the latter only retaining an advisory function in court administration.

The article briefly comments on this issue by suggesting that the management board effectively functions like a board of *executive* directors in a corporation, because each judicial member on the board is also responsible for the management of

²⁷⁰ Bunjevaca, above n 18, 215.

²⁷¹ Elizabeth J. Boros and John Duns, *Corporate Law* (Oxford University Press, 3rd ed, 2013) 90.

separate court divisions.²⁷² These issues will be studied in greater detail in the article in Chapter 5, which is specifically devoted to examining the internal governance arrangements in the courts. Ultimately, that article proposes that the Victorian courts should introduce an internal executive management board inspired by the Dutch model.

3.6 Minister's reserve powers in court administration

The second unique feature of the Dutch model is that the Minister of Justice retains a number of relatively intrusive powers in court administration, such as to suspend or remove members from the Judicial Council and court management boards in certain situations.

However, in each case the legislation carefully regulates the Minister's relationship with the Judicial Council via a system of multiple checks and balances which effectively serve to protect the judiciary's institutional autonomy and define the boundaries of Minister's political responsibility for the courts.²⁷³ These issues will be further explored in the subsequent chapters as well, but it will be pointed out that the permanent judicial composition on the board of CSV stands in the way of implementing similar measures in Victoria.

The analysis of the Dutch model is also significant because of the extent of the comparative analysis itself, because the article ventures beyond the traditional common law legal systems to identify the best models internationally. The article acknowledges that great care must be taken when transplanting legal concepts from foreign jurisdictions, especially because the Netherlands is a civil law country with a different legal culture and judicial career system to that of the common law jurisdictions. Nevertheless, it also points out that the problems of court management are not necessarily affected by the legal tradition in the same way that decision-making and judicial training may be affected. In fact, the article shows that there were significant parallels between the problems, challenges and internal systems of

²⁷² Bunjevack, above n 18, 221-222.

²⁷³ Ibid 222.

court administration in Victoria and the Netherlands prior to the introduction of the reforms in each jurisdiction.²⁷⁴

3.7 Judicial College of Victoria

The final aspect of the original policy framework in the article is the proposed inclusion of the Judicial College of Victoria ('JCV') as part of the Judicial Council of Victoria. The reason for the proposed inclusion of JCV into the policy framework is that this body performs a vital role in maintaining the quality of the administration of justice in Victoria, by developing programs that are designed to keep judges abreast of developments in the law and some social issues. The proposal is also significant because the *CSV Act* later formally included JCV as part of the Victorian statutory framework.

²⁷⁴ Ibid 219.

Court governance: The challenge of change

Tin Bunjevac*

This article argues that overworked and overburdened individual judges are not in an effective position to initiate meaningful and systematic improvements in the quality of the administration of justice without a supporting judicial institution that would assist the courts in achieving a greater degree of organisational quality, efficiency, responsiveness and integration. The article provides a comparative overview of the Australian, Irish, Canadian, English and Dutch models of court governance. It is argued that the proposed Judicial Council of Victoria should be modelled on the Dutch Judicial Council, because it is the only institution that has a broad and unambiguous mandate to improve the quality of the administration of justice, while at the same time expanding the independence, self-responsibility and accountability of the courts in the areas of judicial administration, management, human resources and finances. The author argues strongly against any models of governance that would maintain internal administrative separation between judges and court administrators in the courts. Ultimately, it is argued that fully integrated and autonomous court management – supported by a judicial council – would lead to greater institutional responsiveness of the courts and improvements in judicial management, innovation, case management and quality of justice.

INTRODUCTION

There is a general feeling that change is necessary to protect the authority and independence of the judiciary in Victoria. Seven years ago, the chief judges of the Victorian courts highlighted numerous demographic, environmental, economic, social, technological and political challenges that are impacting on the functioning of the courts.¹

As a result of the emerging societal pressures and demands upon the courts, the law itself has become much more complex. The increase in the uses of modern technology, such as listening devices, has added significantly to the complexity and length of criminal trials.² The common law of negligence has become “much more complex and less clear”, while a multitude of new statutes and modern forensic and medical procedures have “substantially increased the burden on the courts”.³ More and more often the courts are being called upon to decide on controversial issues that the Parliament has been “too busy, too supine or too fearful to define”.⁴

* The author is a member of the Victorian Bar and the International Association for Court Administration (IACA). The author would like to thank Justice Robert Nicholson AO, a professor at Melbourne Law School, and Mr John Griffin PSM, Executive Director, Courts (Department of Justice) for their helpful comments on an earlier draft of this article. The views expressed in the article are those of the author, except where stated otherwise.

¹ Supreme Court of Victoria, *Courts Strategic Directions Document* (2004), p 52. The identified new challenges include the changes in the economic environment, the absence of community awareness, the existence of language barriers, the emergence of entrepreneurial litigation, the increased specialisation of practitioners, the convergence of international laws, as well as the emergence of new medical procedures and forensic technologies in criminal cases.

² Supreme Court of Victoria, n 1, p 52. See also State of Victoria, *New Directions for the Victorian Justice System 2004-2014: The Attorney-General's Justice Statement* (2004), p 46. An example of the changing nature of the courts' work was the increase in the average length of higher criminal court trials from five days in 1982 to 14 days in 2002.

³ Supreme Court of Victoria, n 1, p 52. It is pointed out that a case which would have involved a simple breach of contract 30 years ago, today typically involves the consideration of numerous complex statutes, rules of common law and equity and even issues of foreign law.

⁴ Malleson K, *The New Judiciary - The Effects of Expansion and Activism* (Ashgate, 1999), pp 20 and 32. Malleson refers to a trend of leaving controversial social issues including immigration, pornography, religion, euthanasia, abortion and human rights to the courts.



At the same time, litigants, prosecutors, government agencies, the media and other stakeholders have come to expect that their matters should be handled in a more “client-friendly” manner, with greater precision, cost-effectiveness and transparency, in plain and understandable language (preferably online) and with greater legal uniformity across all jurisdictions. Above all, litigants are demanding that the courts deliver judgments quickly so that they can get on with their lives, “even if this means that the reasoning is not perfect”.⁵ All of these new developments have created significant additional workload, stresses and pressures on judicial officers and staff, making it extremely difficult for judges to keep abreast of the developments in the law.⁶

Most alarmingly, these new demands, burdens and expectations carry with them hitherto unappreciated and unforeseen threats to judicial integrity and authority. If courts and judges are unable to organise their internal processes and deliver a judgment within a reasonable period of time, litigants will seek alternative ways of settling their disputes, whether by private arbitration or some other non-state-sanctioned means.⁷ After all, these demands are based on basic moral arguments and well-established legal and human rights principles, which state that litigants are entitled to legal certainty and that parties and suspects should not be left in uncertainty about their lives forever.⁸

The underlying theme that is emerging is that the traditional judicial quality attributes – such as impartial, well-reasoned and well-written judgments – are alone inadequate to respond to the challenges of a changing social environment. The new quality expectations demand that the courts have greater operational, financial and managerial expertise, organisational quality, unity and full institutional independence. Greater institutional independence and self-responsibility of the judiciary also require better systems integration, client orientation, organisational transparency, streamlining of procedures, judicial involvement in administration, as well as better functional envelopment of judges and staff in all organisational structures of the courts.

As Professor Philip Langbroek points out, there are difficult choices to be made.⁹ Should judges restrict themselves to deciding their cases, leaving organisational and institutional issues to “others”; or are they going to participate in, or even lead, the change processes? How can judges reconcile the conflicting values within the judiciary? On the one hand, they are independent and autonomous professionals; on the other hand, the informal hierarchy remains very strong. Should judges maintain their traditional administrative passivity or should they more actively engage with other judges and supporting staff? Last, but not least, how can judges embrace the inevitability of change and still maintain those values of the judiciary that constitute their identity and authority?

Against the above background, the main body of this article will critically analyse the existing models of court administration, in an attempt to identify a model that would allow the courts to maintain their traditional judicial values and remain independent and institutionally “responsive”. For,

⁵ Eradus C, “The Power of Innovation” in Fabri M and Langbroek P (eds), *The Challenge of Change for Judicial Systems* (IOS Press, 2003), p 88.

⁶ See Supreme Court of Victoria, n 1, p 52.

⁷ For a graphic illustration of this problem see “Non-Muslims Turning to Sharia Courts to Resolve Civil Disputes”, *The Times Online* (21 July 2009), <http://business.timesonline.co.uk/tol/business/law/article6721158.ece> viewed 9 March 2011. The United Kingdom-based Muslim Arbitration Tribunal states that 5% of its cases involve non-Muslims who are using the tribunal because “they are less cumbersome and more informal than the English legal system”. *The Times* reported that the Muslim Arbitration Tribunal was planning to triple the number of its courts by setting up in 10 new British cities by the end of the year. See also Langbroek P, “Two Cases of Changing the Judiciary and the Judicial Administration: The Netherlands and Guatemala” (Paper presented at the World Bank Conference on Empowerment Through Law and Justice in St Petersburg, Russia, 8-11 July 2001) p 10.

⁸ Fabri M and Langbroek P, *Delay in Judicial Proceedings: A Preliminary Enquiry into the Relation Between the Domains of the Reasonable Time Requirement of Art 6(1) ECHR and their Consequences for Judges and Judicial Administration in the Civil, Criminal and Administrative Justice Chains* (Council of Europe, European Commission for the Efficiency of Justice (CEPEJ), 2003), pp 3-4. See also, for example, s 25(2)(c) of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) which requires that a person charged with a criminal offence is to be tried without an unreasonable delay.

⁹ Langbroek, n 7, p 14.



as Nonet and Selznick point out in their essays on jurisprudence and the sociology of organisations,¹⁰ only a responsive institution “retains a grasp on what is essential to its integrity while also taking account of emerging forces in its environment”.¹¹

The first part of the article discusses the legal, organisational and social challenges facing the Victorian courts and offers a conceptual framework for evaluating the alternative models of court administration. It is argued that an effective response to the identified challenges requires, not only a commitment to safeguarding the independence of the judiciary, but also wider consideration of the quality and appropriateness of judicial, legal and administrative procedures in the courts and their organisational capacity to systematically improve the client orientation and quality of the administration of justice.¹²

The article then contrasts the “executive” model of court administration in Victoria with the South Australian, Australian federal, Irish, English, Canadian and Dutch models. The perceived best characteristics of each of these models are identified and a possible solution is proposed. It is argued that a new judicial institution should be established – a Judicial Council of Victoria – with a strong mandate to assist the courts achieve greater procedural, legal and organisational excellence. This body must be sufficiently funded and equipped to perform the role of an institutional “buffer” between the courts and the Executive, while at the same time expanding the self-responsibility of each of the court tiers in the areas of finance, administration and human resources. The Dutch concept of an integrated court governing board is explored, because it would separate the policy-making and management functions in the courts and remove the dual management structure that exists in the more traditional models, such as the Victorian one.

Ultimately, it is argued that fully integrated and autonomous court management – supported by a judicial council – would lead to greater institutional responsiveness of the courts, and to improvements in judicial management, efficiency and quality of justice.

THE CHALLENGE OF RESPONSIVENESS

Deficiencies in institutional design

In this part of the article it is argued that the principal reasons for the loss of responsiveness, legitimacy and authority of the court system lie in the structural deficiencies of court governance and the absence of more effective and integrated organisational arrangements that are characteristic of other large organisations. According to Alford, Gustavson and Williams, there is an inherent structural deficiency in the existing Victorian model of court governance that can be attributed to the specific institutional design of the courts. They point to the existence of an internal organisational separation between the administrative and judicial functions, which can be found in most Australian State courts.¹³ In Victoria, New South Wales, Queensland, Western Australia and Tasmania, the court administration, human resources, budgeting and infrastructure are controlled by the Executive. Judicial officers separately maintain their responsibility for judicial management, case management, adjudication and procedure.¹⁴ In this so-called “executive model” of court governance, the judiciary

¹⁰ See generally, Nonet P and Selznick P, *Toward Responsive Law: Law and Society in Transition* (4th ed, Transaction Publishers, 2008), p 77.

¹¹ Nonet and Selznick, n 10, p 77. See also Denham S, “The Diamond in a Democracy: An Independent, Accountable Judiciary” (Paper presented at the Annual Conference to the Australasian Institute of Judicial Administration, Darwin, 14-16 July 2000). Justice Denham points out that even the archetypal notions of “democracy”, “rule of law”, “accountability” and “independence” have evolved in response to the changes occurring in society – “they are not set in 1701AD”.

¹² See generally, Voermans W and Albers P, *Councils for the Judiciary in EU Countries* (CEPEJ, 2003), pp 100-102.

¹³ Alford J, Gustavson R and Williams P, *The Governance of Australia's Courts: A Managerial Perspective* (Australian Institute for Judicial Administration, 2004).

¹⁴ Supreme Court of Victoria, n 1, p 71. The judicial management procedures include the management and assignment of the judges, the planning and organisation of sittings and lists, the allocation of courtrooms, as well as the immediate direction of administrative staff carrying out those functions.



does not have a direct formal relationship with the court administration, although, in practice, authority over staff, infrastructure and court operations is shared to some extent between the Executive and the judiciary.¹⁵

This far-reaching organisational separation leads to a “misalignment” of policy objectives in the areas of court administration, judicial management and case management.¹⁶ Professional court administrators and their departmental superiors do not have sufficient understanding of, or access to, some of the critical aspects of judicial operations. As a result, court administrators often are not in an effective position to facilitate the most efficient choices among competing court priorities.¹⁷ Similarly, because of the dual administrative arrangement, judges are lacking the appropriate level of managerial aptitude and the analytical infrastructure to undertake data collection, research, analysis and planning, which are required in order to contemplate new and improved judicial administrative arrangements and case management strategies.¹⁸ In other words, judges are not in a position to fully understand the operations of the organisations in which they control the most critical “outputs”. This raises the question of whether, under the executive model, the judicial management, case management and related organisational policies can be further improved to ensure that justice is administered in the most efficient, innovative and responsive manner.¹⁹

The internal organisational divide is also potentially responsible for the overall loss of authority and accountability of courts as public institutions. The courts are responsible and accountable to the public for the delivery of a certain standard of performance, service and quality. However, neither judges nor professional administrators have the required degree of control over the core operational processes of their organisations to be fully responsible or accountable for the outcomes. In this operational environment the courts do not have even the basic degree of financial, administrative and budgetary discretion that modern organisations enjoy.²⁰ Basic decisions about operational management and activity funding often require approvals from departmental officers who are embedded in an external bureaucracy that is physically separated from the courts and has its own internal organisational priorities. According to Alford et al, such lack of financial control and budgetary discretion significantly affects the business efficacy of the courts and may not be “optimal” for judicial independence.²¹ As a result, there are very significant organisational obstacles to the strategic long-term planning of the courts’ activities.²²

Judicial individuality and administrative passivity

Apart from the structural deficiencies in organisational design, former Victorian Supreme Court Justice Richard McGarvie and Professor Ian Scott famously identified the entrenched intellectual tradition of judicial individualism and administrative passivity that “weighed on the courts” as institutions and prevented them from achieving a more substantial degree of efficiency and administrative competence:

¹⁵ Alford et al, n 13, p 83.

¹⁶ Alford et al, n 13, p 85. The authors call this a misalignment between authority and responsibility.

¹⁷ Baar C et al, *Alternative Models of Court Administration* (Canadian Judicial Council, 2006), p 93, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352223 viewed 9 March 2011. See also Church T and Sallmann P, *Governing Australia’s Courts* (Australian Institute of Judicial Administration, 1991), p 25.

¹⁸ Baar et al, n 17, p 15.

¹⁹ Voermans and Albers, n 12, p 100.

²⁰ Alford et al, n 13, p 85. See also a compelling analysis of this issue by Smith T, “Court Governance and the Executive Model” (Paper presented at The Judicial Conference of Australia Colloquium 2006, Hyatt Hotel Canberra 6-8 October 2006), http://www.jca.asn.au/attachments/2006_smithpaper1.doc viewed 9 March 2011.

²¹ Alford et al, n 13, pp 85-86. The authors note that judicial independence is not undermined in practice.

²² Baar et al, n 17, p 92.



Judges are prone to confuse judicial “independence” ... with judicial “individualism,” which frankly can be most destructive (it can put “collective” independence at risk). I have seen many courts rendered ineffective by judges who would just not accept or would not enthusiastically implement ideas designed to improve court performance.²³

Professor Henry Mintzberg’s seminal work on organisational design explains the consequences of judicial individuality from the perspective of modern organisational theory. Based on his taxonomy of organisational structures, courts can be classified as “professional bureaucracies”. According to Mintzberg, a professional bureaucracy is an organisational form that relies on persons who have been through a process of intensive professional training that turns them into specialists who maintain control over the organisation’s core productivity and quality assurance processes.²⁴ In this professional setting, according to Mintzberg, it can be difficult to develop more standardised and effective operative systems, because these professionals tend to rely on a “complex and stable environment, non-regulating and non-sophisticated technical system”.²⁵ Since most courts were established before the 19th century, judges have developed a specific professional attitude – a highly individualised working culture – where professional status and individual autonomy are regarded as the highest virtues.²⁶ This is particularly true of common law legal systems where judges predominantly practice as sole practitioners (barristers) for a considerable period of time before coming to the bench.

However, as Langbroek points out, while judicial individualism may be regarded as a strong professional attribute in terms of the constitutional demand for judicial independence, when it comes to preparing courts – large and complex organisations – to adapt themselves to societal changes, it can be regarded as a serious weakness.²⁷ Associate Professor Gar Yein Ng completed a dissertation that focused on this issue and noted that judicial individualism became particularly pronounced when the courts and judges started to experience a steady rise in caseloads and increased complexity in the law.²⁸ Judges realised that they were unable to accommodate the additional workload within their individualised working routines and divided organisational frameworks.²⁹ Despite this, they showed very little inclination to systematically coordinate their work activities with other judges and professional court staff. According to Ng, there was simply too much “individuality and loyalty to the smallest unit within the organisation”.³⁰ At first judges argued that they were not accountable for the effectiveness and efficiency of their organisation. Later they argued that they also were not accountable for the legal and social uncertainty which was caused by that situation.³¹ While solid reasons and explanations have been advanced in support of those arguments, it was clear that the courts *as institutions* failed to perform in accordance with their basic constitutional and human rights mandate.³² Ng concludes that the traditional mechanisms of judicial accountability – including the public nature of hearings, publication of judgments, possibility of appeal and scrutiny by the media – have all proved inadequate to respond to the modern demands on the courts and the judiciary.³³

²³ Scott I, “The Future of Judicial Administration” in *Responsibilities for the Administration of Justice* (AIJA, 1985), p 82. Also cited with approval by McGarvie R, “Judicial Responsibility for the Operation of the Court System” (1989) 63 ALJ 79.

²⁴ Mintzberg H, *Structure in Fives: Designing Effective Organisations* (Prentice-Hall, 1983), p 189, as cited extensively in Ng G, “Quality of Judicial Organisation and Checks and Balances” (PhD thesis, University of Utrecht, Holland, 14 March 2007) p 4.

²⁵ Mintzberg H, “Structure in 5’s: A Synthesis of the Research on Organization Design” (1980) 26 *Management Science* 334, as cited in Ng, n 24, p 4.

²⁶ Langbroek, n 7, p 10.

²⁷ Langbroek, n 7, p 10.

²⁸ Ng, n 24, p 24.

²⁹ Ng, n 24, p 24.

³⁰ Ng, n 24, p 30.

³¹ Ng, n 24, p 30.

³² Ng, n 24, p 30.

³³ Ng, n 24, p 30.



According to an expert study of *Councils for the Judiciary in EU Countries* conducted by the European Commission for the Efficiency of Justice (CEPEJ), the problems identified above raise two distinct types of questions.

First, in relation to the nature and appropriateness of judicial procedures in courts, are the existing internal arrangements still appropriate to ensure that justice is administered in the most effective, responsive and efficient manner?³⁴ Professor Wim Voermans and Dr Pim Albers argue that the traditional judicial administrative style “is lacking on different fronts to provide an appropriate answer to the challenges of the increased case loads and the much larger staff within the new-style courts”.³⁵ According to this view, the traditional judicial administrative arrangements are inadequate because they are predominantly based on the individual professionalism of judges and the collective court presidency in the distribution and execution of their work.³⁶ Thus, not only is there an inherent structural and operational divide, there is also a significant functional and interpersonal divide between the judicial and non-judicial officers in courts.³⁷ This greatly reduces the opportunities for the creation of deeper delegation patterns, workflow integration and meaningful professional support for judges in their legal work.³⁸ Voermans and Albers conclude that new, more integrated administrative arrangements are required to give the courts more internal possibilities – *particularly in financial and personnel matters* – to drive the essential processes more effectively and efficiently from intake to judgment.³⁹

The second broad series of questions identified by Voermans and Albers relates to the judiciary’s capacity to innovate and effect future improvements in the quality of the administration of justice in a more demanding social, technological and legal environment:

These new quality requirements call for efficient streamlining of the working processes within the courts, judicial precision during procedures, permanent training of judges and auxiliary staff, uniformity in applying substantive and procedural law, correct treatment, avoidance of long waiting periods, guarantees concerning the speed of settlement, etc.⁴⁰

How can judges respond to the increasing complexity of the law, clients’ new demands, large backlogs of cases, politicians and the media, and remain polite, responsive, transparent, user-friendly, and still continue to contemplate *improvements* in the quality of the administration of justice? Voermans and Albers, as well as Langbroek, separately conclude that the traditional judicial quality attributes – while remaining essential – are no longer sufficient to meet the new quality expectations of the changing social environment.⁴¹ There are numerous external factors that can influence the performance of individual judges, ranging from the size of the budget, changes in society, new legislation, as well as the internal structure and capacity of courts as organisations.⁴² It is argued that, in order to meet the new challenges, judges require the systematic support of a robust judicial organisation – a council for

³⁴ Voermans and Albers, n 12, p 100.

³⁵ Voermans and Albers, n 12, p 100.

³⁶ Voermans and Albers, n 12, p 100.

³⁷ Voermans and Albers, n 12, p 100. See also Albers P et al, *Geïntegreerde rechtbanken: het vervolg, evaluatierapport herziening rechterlijke organisatie* (onderdeel 2), IVA, (1994), pp 72-73 and pp 90-92 (“Integrated Courts part II”).

³⁸ Albers et al, n 37, pp 72-73. See also Voermans and Albers, n 12, p 100.

³⁹ Voermans and Albers, n 12, p 101 and the related footnote 147, which refers to Albers et al, n 37, pp 90-91. In particular, the authors point out that the “new-style courts are now continually pushed in the direction of a *professional organization* characterised by a more vertical and hierarchical drive and more central command of the administrative processes”. They contrast these organisational processes with the traditional judicial arrangements in the executive model, which operate like *organizations of professionals*, with strong horizontal administrative arrangements that are aimed at reaching a consensus between judges on all aspects of court administration.

⁴⁰ Voermans and Albers, n 12, p 102.

⁴¹ Langbroek, n 7, p 11; see also Voermans and Albers, n 12, pp 101-102.

⁴² Albers P, *Performance Indicators and Evaluation for Judges and Courts* at http://www.coe.int/t/dghl/cooperation/cepej/events/onenparle/MoscowPA250507_en.pdf viewed 9 March 2011.



the judiciary – which can contribute to the expansion of the judiciary’s own organisational capacity, and promote the efficiency, client orientation and quality of courts as important public organisations.⁴³

A council for the judiciary

According to Professor Gio ten Berge, a council for the judiciary can provide the necessary professional, technical and logistical support for courts to become modern, thriving and, above all, responsive and learning organisations.⁴⁴ He highlights a number of areas in which the quality of the administration of justice can be systematically improved through the introduction of better organisational policies and professional support for the courts.⁴⁵

First, better organisational policies can lead to more systematic approaches to case management, as well as procedural and organisational accessibility. Second, there is the provision of professional and legal support, such as advanced legal research, which can be provided and coordinated systematically, to assist not only in the development of case law in complex areas, but also to assist judges at the hearing and judgment stages of individual cases. Next, the council can provide the necessary financial, technical and administrative expertise to assist individual courts improve their working methods or to implement quality policies for judges and staff at the case management level (perhaps even at the decision-making level).⁴⁶ In addition, there is the need to achieve greater uniformity of law across the court tiers and different jurisdictions, through the systematic use and expansion of ICT platforms to improve the coordination and customisation of jurisprudence. To these one can add the need to develop and maintain more systematic approaches to judicial training, education and professional development for judges, including the recruitment of professional legal staff who would assume a much more prominent role in the courts. Finally, from a public service point of view, the courts need to develop uniform policies on customer service, deliver information professionally, transparently and efficiently, and consider implementing quality systems that would place greater focus on the needs of clients.⁴⁷ All of these professional, technical and organisational measures can greatly improve the quality of justice and decisions made by individual judges.

This takes us back to the original question of identifying the institutional and governance solutions that would address the accountability problems of efficiency, quality, responsiveness and transparency in courts. Based on the above discussion it can be concluded that the most serious obstacle to achieving greater responsiveness and institutional accountability of the courts lies in the “faulty” institutional design that is inherent in the executive model of governance. However, no less important is the absence of more robust organisational, technical and professional supporting mechanisms, which has prevented the courts – and individual judges – from achieving a more substantial degree of organisational transparency, efficiency and integration.

The following section of this article looks at some of the most important features of a number of Australian and overseas models of court governance in an attempt to identify a model that would be capable of responding to the challenges identified above. It is argued that the Australian federal courts autonomous model of governance (with some internal modifications) would provide the most appropriate answer to the internal structural barrier inherent in the executive model. The discussion will then concentrate on the composition, competencies and characteristics of the proposed Victorian Judicial Council.

⁴³ Voermans and Albers, n 12, p 102; Langbroek, n 7, pp 11-14.

⁴⁴ ten Berge J, “Contouren van een kwaliteitsbeleid voor de rechtspraak” in Langbroek P, Lahuis K and ten Berge J (eds) *Kwaliteit van rechtspraak op de weegschaal* (WEJ Tjeenk Willink and GJ Wiarda Instituut, 1998), pp 21-44 as cited and elaborated extensively in Ng, n 24, p 30.

⁴⁵ ten Berge, n 44, pp 21-44 as cited in Ng, n 24, p 30.

⁴⁶ ten Berge, n 44, pp 21-44 as cited in Ng, n 24, p 30.

⁴⁷ See generally Ng, n 24, p 30. See also Albers P, “Quality of Courts and the Judiciary: European Experiences and Global Developments” in Thijs N and Staes P (eds) *Quality Development in the Field of Justice* (EIPA, 2008), Ch 1.



MODELS OF COURT GOVERNANCE

Federal courts autonomous model

One of the most important features of the federal courts model of governance is that it has a fully integrated and autonomous management structure under the control of the chief judges.⁴⁸ As a result, this arrangement is better known as the “chief justice autonomous model”.⁴⁹ According to Stephen Skehill, the federal government decided to introduce the autonomous model because it was felt that there was “little systemic incentive to efficiency in the traditional executive model” and because the Commonwealth Attorney-General was often distracted by a number of other portfolios.⁵⁰

The principal advantage of this model is that it enables the courts to integrate and strategically develop their own internal administrative, financial and human resources capabilities, allowing them to make decisions that they believe will result in the most efficient and effective operations for each court.⁵¹ Furthermore, from a judicial management perspective, the integration of the administrative, financial and human resources operations has the potential to lead to significant improvements in the quality of the administration of justice, organisational excellence and judicial efficiency.⁵² The courts have the opportunity to become better equipped, in an organisational sense, to contemplate new or more innovative judicial management arrangements and case management strategies.⁵³ Finally, the autonomous model removes the internal administrative divisions and creates a more unified organisation with undivided staff allegiances.⁵⁴

However, as some authors have pointed out, there is a perceived lack of unity of approach or capacity for system-wide improvements in the fields of recruitment, judicial education and organisational unity. According to Church and Sallmann, the existing arrangement discourages judicial officers and administrators of the different courts from taking a broader perspective of court problems, possibly resulting in costly and inefficient duplication of resources and infrastructure.⁵⁵ Arguably, the absence of a coordinating body becomes even more pronounced if the Attorney-General’s strategic role has been scaled back. Thus, while the courts may be able to achieve greater operational

⁴⁸ It should be noted that this model was initially introduced in respect of the High Court of Australia in 1979 and extended further in 1989 in respect of the Federal Court and the Family Court (the “federal courts”). In the High Court, the court as a whole is responsible for the management and administration of its own affairs, under the so-called “collegiate autonomous model”.

⁴⁹ Baar et al, n 17, p 105.

⁵⁰ Skehill S, “Comment on Court Governance” (1994) 4 JJA 28. Mr Skehill was an Assistant Secretary at the Commonwealth Attorney-General’s Department.

⁵¹ Black M, “The Federal Court of Australia: The First 30 Years – A Survey on the Occasion of Two Anniversaries” (2007) MULR 37. For a detailed account of the Federal Court’s unique approach to strategic planning and integration of the judicial and non-judicial operations see Soden W, “The Application of International Court Excellence Framework within the Federal Court of Australia with a Special Look at Strategic Planning to Achieve Excellence” (Paper presented at Asia-Pacific Courts Conference, Swissotel, Singapore 4-6 October 2010).

⁵² Forde M, “What Model of Governance Would Optimise the Expeditious Delivery of Justice” (LLM Thesis, Griffith University, 2000) p 74. Chief Judge Forde notes that the Federal Court under the leadership of Chief Justice Black had been very successful in this regard. See also North M, “Inside the Administration of Justice: Toward a New Model of Court Administration” (Victoria, British Columbia, 31 January 2007). Justice North describes the operation of the individual docket system and the significant expansion of the administrative and legal supporting functions performed by legal officers and registrars in the Federal Court.

⁵³ Forde, n 52, p 75. See also Sage C, Wright T et al, *Case Management Reform: A Study of the Federal Courts Individual Docket System* (Law and Justice Foundation of New South Wales, 2002). For example, the Federal Court introduced the highly efficient individual docketing system 12 years before any other Australian court (the Family Court), and it was the first court in the world to establish a national videoconferencing network. Other unique procedural innovations include the specialist panels and appellate benches and procedures for sequential and concurrent expert evidence.

⁵⁴ Black, n 51, Ch XII: “A well-evolved judicial administration will bring judges into an appropriate working relationship with professional administrators. This is precisely what the Federal Court model of self-administration has done.” See also Sage et al, n 53 and Soden, n 51.

⁵⁵ Church and Sallmann, n 17, pp 68-71. See also generally Millar P and Baar C, *Judicial Administration in Canada* (The Institute of Public Administration of Canada, McGill-Queen’s University Press, 1981), p 67.



efficiencies as individual organisational units, their systemic capacity to adapt to future challenges as part of a unified system of the administration of justice may be diminished without a coordinating body that takes on the functions of system-wide strategy development, coordination and organisational support. In this context it is important to note that the federal courts are specialist jurisdictions that do not necessarily require harmonised organisational policies or system-wide implementation as do courts of general jurisdiction in a State “system” of the administration of justice.⁵⁶

Perhaps the strongest criticism of the chief justice autonomous model is that the principal organisational responsibility for both policy-making and administration permanently resides with the chief judges. According to Church and Sallmann, this arrangement, at least in theory, has the potential to “retard” the development of administrative capacity and involvement of other judicial officers of the court.⁵⁷ Furthermore, according to Hill, this management structure does not sufficiently separate “policy-making” and “administration” from “ownership” of the organisation and does not adhere to modern institutional governance principles, which require a greater degree of horizontality at the policy-making (ie the board) level.⁵⁸ Alford et al illustrate this problem by discussing a hypothetical example of an incompetent, inefficient or even “tyrannical” chief judge who is able to dominate a court’s affairs in a manner contrary to the ideal of judicial independence.⁵⁹

Finally, there are also difficulties associated with the courts exercising full financial responsibility and accountability while at the same time having to deal directly with the Executive. Thus, while it is argued that financial, planning and budgetary competence leads to improvements in the efficiency and self-responsibility of the courts,⁶⁰ occasional budget overruns can create the impression that judicial officers are ill-equipped to manage large public institutions, particularly the finances.⁶¹ As a result, any instances of proven managerial or financial incompetence would have an extremely negative effect on public confidence in the judiciary. In the following sections it is argued that many of these problems would be avoided through the creation of a judicial council, which would serve as an institutional buffer and provide an added layer of financial support, technical expertise and organisational competence for the courts.

South Australian Judicial Council model

The South Australian Judicial Council model is characterised by a combination of semi-autonomous management, at the level of the individual courts, and remote management and coordination by the Judicial Council. The South Australian Judicial Council is an instrumentality of the Crown, which is

⁵⁶ Skehill, n 50, p 29. The author argues that the federal courts’ jurisdictions do not reflect “true complementarity”. The three courts are “so different that there are legitimately separate expectations of each ... they are best left to assume responsibility and accountability for those expectations without being reliant upon each other”.

⁵⁷ Church and Sallmann, n 17, p 68. See also McGarvie R, “The Foundations of Judicial Independence in a Modern Democracy” (1991) 1 JJA 3, p 24. Justice McGarvie highlights the risk of the development of an informal “kitchen cabinet”. See generally also Friesen E, Gallas E and Gallas N, *Managing the Courts* (Bobbs-Merrill, 1971), p 140.

⁵⁸ See generally Hill L, “Constitutional and Managerial Principles of Judicial Court Governance: Implementation in the State of Victoria” (LLM Thesis, University of Melbourne, June 1995), Ch IV (esp pp 94-96). Hill also refers to the corporate governance principles espoused by Professor Frederick Hilmer and the Cadbury Committee *Code of Best Practice*. See also Church and Sallmann, n 17, p 68.

⁵⁹ Alford et al, n 13, p 74. Reference is made to then Chief Justice Sir Garfield Barwick’s dominant role in the High Court of Australia which led to the changes to the High Court’s internal governance model. See also Andrews N, “Vinegar Free? Sir Garfield Barwick’s Recipe of Judicial Salad” (1996) 3 *Canberra Law Review* 165 at 189. According to Andrews, the Chief Justice had used the power to assign hearings to ensure results that he personally approved.

⁶⁰ Sallmann P, “Extracts on Courts’ Governance from Going to Court, a Discussion Paper on Civil Justice in Victoria by Peter A Sallmann and Richard T Wright, Department of Justice, Victoria, April 2000” (Paper presented at the 18th AIJA Annual Conference, Darwin, 14-16 July 2000), p 10; <http://www.aija.org.au/2000ac/SALLMANN.RTF> viewed 9 March 2011. The analysis suggests that financial self-responsibility can be both an advantage as well as a disadvantage.

⁶¹ “Federal Magistrates’ Court Uncovers \$5m Budget Black Hole”, *The Australian* (6 March 2009). The article notes that the Federal Magistrates Court had been using the MYOB accounting program, which is designed for a small business and not an organisation with a budget of more than \$55 million.



permanently governed by the heads of each of the court tiers and administered by the Administrator.⁶² Its principal legislative task is to “provide the participating courts with the administrative facilities and services necessary for the proper administration of justice”.⁶³ In this model, the State’s Chief Justice wields the power of veto over any proposals of the Judicial Council.⁶⁴

One of the most important characteristics of the South Australian Judicial Council is that it acts as an institutional “buffer” between the individual courts and the Executive. The Judicial Council receives and distributes funding in the form of a one-line budget to each of the courts out of funds appropriated by Parliament.⁶⁵ The lines of the Attorney-General’s direct political responsibility for the administration of the courts are therefore restricted to budgeting and remote supervision in the form of annual and ad-hoc reporting requirements. As a consequence it can be argued that the traditional tensions between the political system and the judicial organisation have been slightly reduced from an institutional perspective, with a corresponding increase in judicial self-responsibility.

Nevertheless, the South Australian Judicial Council, in some respects, resembles the Attorney-General’s department because it employs all of the courts’ administrative staff and centrally operates many day-to-day administrative, financial and managerial tasks for the courts – the very services that had been provided previously by the Department of Justice. Therefore, when compared to the federal courts, the South Australian courts appear to be much less integrated internally – *particularly in financial and personnel matters* – although they do retain a degree of operational autonomy in terms of their own administrative and judicial arrangements.⁶⁶ It also appears that the Judicial Council’s focus is heavily placed on the *administrative* side of the courts’ operations, which can affect their efficiency and lead to a “competition for resources”, particularly if different courts have different needs and priorities that require an immediate and unanimous response by the Judicial Council.⁶⁷ Much less attention is paid to the broader contributions which could be made by the Judicial Council to the courts’ organisational excellence, or the possibilities for improvements in the quality of *judicial* administration, legal research, professional legal support, education and quality, which were identified above.

There are other problems associated with this model. The first is that the Chief Justice regularly appears before Parliament to answer questions about the Judicial Council’s activities. This may be seen to be inconsistent with the principle of judicial independence.⁶⁸ Second, from an outside perspective, the South Australian Judicial Council appears to be somewhat of an inward-looking

⁶² *Courts Administration Act 1993* (SA), s 6.

⁶³ *Courts Administration Act 1993* (SA), s 10.

⁶⁴ *Courts Administration Act 1993* (SA), s 9(3) provides that a decision of the Judicial Council is one which is supported by the votes of the Chief Justice and one other member of the Judicial Council.

⁶⁵ *Courts Administration Act 1993* (SA), s 24. See also Doyle J (Chief Justice SA), “Court Governance and Judicial independence – the South Australian Approach” (Paper presented at Judicial Conference of Australia – Colloquium 2006) pp 10-13; http://www.jca.asn.au/attachments/2006-Doyle_paper_2006.doc viewed 9 March 2011. See also King L (former Chief Justice of South Australia) quoted in Hill, n 58, p 50. The courts receive one lump sum from the appropriation, however the Judicial Council may transfer the funds and resources from one court to another. See King L, “A Judiciary-based State Courts Administration – the South Australian Experience” (1993) 3 JJA 133 at 139.

⁶⁶ *Courts Administration Act 1993* (SA), s 10(2). See King, n 65 at 139. The then Chief Justice King noted that the advantages of decentralised decision-making should not be forgotten.

⁶⁷ *Courts Administration Act 1993* (SA), s 10(3) and (4). The Judicial Council has the power to establish key administrative policies and guidelines to be observed by the participating courts in the exercise of their administrative responsibilities. For a more recent analysis of the South Australian model, see Semple D (in conjunction with the Federal Attorney-General’s Department), *Striking The Right Balance: Future Governance Options for Federal Family Law Courts in Australia* (2008), p 25 and pp 48-51. The authors of the review considered and rejected the South Australian model (at pp 48-51). They also pointed out that the changing needs and priorities of the different courts that were sharing the administrative resources in the family law jurisdiction had in practice resulted in a “competition for general and judicial support services” (at p 25).

⁶⁸ See King, n 65 at 140. Chief Justice King noted that if issues of court administration policy came under review as part of the consideration of the budget estimates, there should be no objection to the Chief Justice attending an Estimates Committee. See also the *Courts Administration Act 1993* (SA), s 29, which provides that “a member of the Council, or the Administrator, must at the request of a parliamentary committee attend before the committee to answer questions”.



institution.⁶⁹ Glanfield, Church and Sallmann criticise the fact that the chiefs of the court tiers have practically unlimited and exclusive “ownership” of the Judicial Council.⁷⁰ They also note that there is no community voice in this organisational set-up.⁷¹ This potentially leads to a loss of perspective and may diminish the capacity and responsibility of other judicial officers to be involved in the management affairs of the court system.⁷² There are also no provisions in the legislation requiring the Judicial Council to take into account the government’s justice policy priorities or to coordinate services with other justice agencies in order to improve the quality of the administration of justice and maximise available resources. Arguably, the absence of formal institutional mechanisms for coordination and systems integration could have a negative impact on the availability, efficiency and accessibility of public services in the justice system. This concern in some respects echoes the argument about the lack of a community voice in the Judicial Council. However, from a systems-integration point of view, the focus is on the policy-making and organisational competencies of the judicial organisation to systematically engage with external agencies and improve processes in the areas of client orientation, judicial management, case management, as well as legal quality.⁷³

From an outside perspective, it is difficult to assess the extent to which the South Australian courts have actually benefited from the potential economies of scale that may be realised in smaller jurisdictions, at least according to organisational theory.⁷⁴ Recent statistics published in the *Report on Government Services in Court Administration* do not support the conclusion that South Australian courts are more efficient, accessible or effective than their interstate counterparts.⁷⁵ An earlier comparative study of the productivity data from the District Courts of South Australia, Queensland and New South Wales concluded that the South Australian results “do not reflect a more efficient system”.⁷⁶

It has been pointed out that the administrative involvement of judges leads to an increase in responsibility and interest in the managerial and administrative affairs of the courts.⁷⁷ However, an increase in judicial responsibility and interest in court administration does not automatically translate into improvements in the organisational capacity, quality, responsiveness or effectiveness of a court system. To achieve some of these aims in a larger jurisdiction (such as Victoria) would likely require a different conception of the council’s organisational competence, greater self-responsibility of individual courts for human and financial resources, as well as more robust technical, professional and managerial support to assist the judges in their efforts at improving the courts’ internal capabilities and achieving organisational excellence. As noted earlier, the entire judicial organisation must be equipped

⁶⁹ Glanfield L, “Governing the Courts – Issues of Governance Beyond Structure” (Paper presented at 18th AIJA Annual Conference, Darwin, 14-16 July 2000), pp 2-3. Glanfield argues that the South Australian Judicial Council may be in the best interests of the chief judges but that is not necessarily in the best interests of the community.

⁷⁰ Glanfield, n 69, pp 2-3. See also Church and Sallmann, n 17, p 9.

⁷¹ Glanfield, n 69, 2-3. See also Church and Sallmann, n 17, p 9.

⁷² Glanfield, n 69, 2-3. See also Church and Sallmann, n 17, p 9.

⁷³ King, n 65 at 141. Chief Justice King states that protocols have been agreed between the Judicial Council and the Attorney-General about regular consultations with the Department as to matters arising in the administration of the courts.

⁷⁴ See Alford et al, n 13, pp 62-63 and pp 66-67. The authors refer to the seminal work of Peters T and Waterman R, *In Search of Excellence: Lessons from America’s Best-run Companies* (Harper and Row, 1982), who found that the “1,000-staff rule of thumb” is the optimum size of a unit of administration in modern organisational theory. Beyond that number, Alford et al point out, there are limits to economies of scale (“diseconomies of scale”), which, according to the authors, means that joint administration of staff and infrastructure may be appropriate in the smaller jurisdictions, such as South Australia (with around 800 staff), but not the larger ones, such as Victoria (with around 2,000 staff in 2010) (at p 66).

⁷⁵ See the Commonwealth of Australia, *Report on Government Services* (2011), Ch 7. A cross-jurisdictional comparison of the backlog indicators, clearance rates and cost per finalisation does not support the conclusion that the South Australian courts are more efficient or effective than their interstate counterparts. Notably, South Australian courts also had some of the largest backlogs of all State courts in Australia both in civil and criminal matters ([7.28] and [7.31]).

⁷⁶ Forde, n 52, pp 60-61. Chief Judge Forde analysed a range of quantitative and qualitative data and concluded that “the level of output in South Australia appears to be less productive than Queensland”. According to this study, the South Australian District Court was also the most expensive District Court in which to litigate (at p 56).

⁷⁷ Alford et al, n 13, pp 91-92.



– in an organisational as well as a cultural sense – to contemplate new and more effective procedures and case management strategies to meet the challenges of a changing social environment. From the legislative provisions it is also not immediately clear that the South Australian autonomy model meets the systems integration, client orientation and responsiveness criteria; although, in practice, the South Australian courts are known to have introduced many innovative programs and strategies aimed at increasing the client orientation of the courts and utilising modern technologies.⁷⁸

It is argued below that the Irish Courts Service provides the answers to some of the perceived deficiencies of the South Australian Judicial Council, particularly in the areas of client orientation and systems integration.

Majority partnership model (Ireland)

The Irish partnership model presents an option that retains a significant role for the Executive in court administration, but also significantly increases the direct influence of the judiciary.⁷⁹ In this model, judicial members constitute the voting majority on the board of an independent courts administration authority, which also includes representatives from the government and other relevant stakeholders.⁸⁰ As a result, the judiciary and other justice stakeholders are much more broadly involved in the full range of managerial and administrative issues impacting upon the courts.

Prior to the *Courts Service Act 1998* (Irl) coming into operation, the governance arrangements in the Irish court system were based on a British model that existed before 1922.⁸¹ The early British governance arrangements were kept primarily for continuity reasons without any analysis having been made of the type of administrative infrastructure required for the courts in the independent Irish Republic.⁸² Following substantial increases in the volume of cases coming before all tiers of the court system in the 1990s, the Irish government sought advice from the Working Group on a Courts Commission, chaired by Justice Susan Denham of the Supreme Court in October 1995 (the Denham Group).⁸³ The Denham Group conducted a comprehensive review of the court system and found that the court administration had been operated by eight separate organisations that were not adequately interconnected so as to enable efficient administrative decision-making.⁸⁴ In addition, according to the Denham Group, there were practically no quality standards for assessing the achievements of judges and courts and there was very little interest in instructing or training judges and court personnel. Above all, “the courts had far too little thought for litigants”.⁸⁵

The Irish government accepted the Denham Group’s main recommendation that an independent administrative agency be established in order to centralise the financial and management administration of the courts in a more unified system.⁸⁶ The institutional design of the new statutory

⁷⁸ See eg the South Australian Courts Administration Authority, *Annual Report 2009-2010*, which outlines many innovative programs and initiatives including a Community Relations Committee which sponsors a Community Reference Group comprising representatives from 14 community-based organisations and associations.

⁷⁹ Baar C et al, n 17, p 99.

⁸⁰ *Courts Service Act 1998* (Irl), s 11, which provides for the structure and membership of the board of the Courts Service.

⁸¹ Working Group on a Courts Commission (Ireland), *First Report: Management and Financing of the Courts* (April 1996), [http://www.courts.ie/Courts.ie/Library3.nsf/\(WebFiles\)/E33B888C196A85A980256DA6003459DA/\\$FILE/courts1.pdf](http://www.courts.ie/Courts.ie/Library3.nsf/(WebFiles)/E33B888C196A85A980256DA6003459DA/$FILE/courts1.pdf) viewed 9 March 2011 (Denham Group First Report).

⁸² Denham Group First Report, n 81, pp 18-24.

⁸³ Finnegan J, *Management of the Courts: The Irish Experience* (2007), p 2, http://www.courdecassation.fr/IMG/File/pdf_2007/10-05-2007/10-05-2007_finnegan_eng.pdf viewed 9 March 2011.

⁸⁴ Denham Group First Report, n 81, pp 18-24. The court administrative staff were employed under different service agreements which precluded transfers between the different court tiers. Many court officers had poorly defined responsibility roles and operated in a “bifurcated managerial system”. As a result, the Denham Group concluded (at p 36): “The Working Group are of the opinion that the current administrative system is one of the causes of the critical situation in the courts”.

⁸⁵ See Voermans and Albers, n 12, p 32. See also Denham Group First Report, n 81, pp 35-36. The Denham Group identified a long list of fundamental problems in the courts management system.

⁸⁶ *Courts Service Act 1998* (Irl), s 22. See Denham Group First Report, n 81, p 45.



corporation, the Courts Service, was largely inspired by the South Australian Judicial Council.⁸⁷ However, unlike the South Australian Judicial Council, the Irish Courts Service has an extensive governing board, which is made up of nine judicial members and eight justice system stakeholders.⁸⁸ According to CEPEJ, the inclusion of the external members on the board of the Courts Service has introduced an element of external perspective and social accountability into the organisation.⁸⁹

The aims formulated for the Courts Service by the Denham Group primarily reflect the need for greater administrative consolidation and business efficiency on the *administrative* side of the courts' business.⁹⁰ These include "improved access to justice", "delivery of an efficient and effective system of justice", "elimination of undue delay", "clear focus on objectives", "streamlining of organisational structures", "clearly defined lines of authority and responsibility", as well as the "coordination of management systems through an integration of planning, financial management and human resources management".⁹¹

There are other important features of this model. For example, the involvement of judges on the board of the Courts Service makes it possible to formulate and pursue more coordinated strategies and objectives for the courts.⁹² As a result, according to the Denham Group, more clarity exists about the sharing of powers and responsibilities between the individual courts and the Courts Service, especially when compared to the previous situation.⁹³ Furthermore, the Courts Service is much better integrated into the overall system of the administration of justice. To achieve this aim, the Courts Service is required to have regard to "any policy or objective of the Government or a Minister of the Government insofar as it may affect or relate to the functions of the Service".⁹⁴

However, in some respects, the centralised structure of the Irish Courts Service invokes the same grounds of criticism as the executive model and the South Australian model. In particular, the court staff and the associated administrative and financial services are supplied and controlled by an external service organisation with its own separate bureaucracy that centrally manages the court administration.⁹⁵ According to CEPEJ, the Courts Service has many administrative powers that can "easily affect" the judicial work in the courts.⁹⁶ Consequently, there is insufficient integration of the administrative, financial, managerial and judicial operations in the courts themselves. The judges, registrars, senior clerks and masters continue to operate separately according to their traditional administrative arrangements under the authority of the president of the court to which they belong.⁹⁷ There essentially remain two separate administrative chains of command in the courts. Therefore, it can be argued that neither judges nor professional administrators have the required degree of control

⁸⁷ Working Group on a Courts Commission, *Third Report: Towards the Courts Service* (November 1996), p 10, [http://www.courts.ie/Courts.ie/Library3.nsf/\(WebFiles\)/309888D60FC0961280256DA60038E3CB/\\$FILE/courts3.pdf](http://www.courts.ie/Courts.ie/Library3.nsf/(WebFiles)/309888D60FC0961280256DA60038E3CB/$FILE/courts3.pdf) viewed 9 March 2011 (Denham Group Third Report).

⁸⁸ *Courts Service Act 1998* (Irl), s 11. The other members include the Minister for Justice (or nominee), a Chief Executive officer, a member of the courts' administrative and legal staff, a member representing "consumers of the services provided by the courts", two members of the legal profession, a member designated by trade unions and a member who has relevant knowledge and experience in commerce, finance or administration.

⁸⁹ Voermans and Albers, n 12, p 110.

⁹⁰ Denham Group First Report, n 81, p 45.

⁹¹ Denham Group First Report, n 81, p 45.

⁹² Baar C et al, n 17, p 99.

⁹³ Denham Group First Report, n 81, p 45. See also Voermans and Albers, n 12, p 37.

⁹⁴ *Courts Service Act 1998* (Irl), s 13.

⁹⁵ *Courts Service Act 1998* (Irl), s 20. To perform these functions, the Courts Service has been given specific legislative powers to acquire land, enter into contracts, arrange staff training and education, establish arrangements for consultation with users, make proposals to the Minister of Justice in relation to the distribution of jurisdiction among the courts, as well as to engage with external consultants in connection with the performance of its functions (s 6).

⁹⁶ Voermans and Albers, n 12, p 37. According to CEPEJ, "management and substantial judicial power quickly get into each others' way".

⁹⁷ *Courts (Supplemental Provisions) Act 1961* (Irl), Sch 8. See also Voermans and Albers, n 12, pp 36-37. See also Denham Group Third Report, n 87, p 27.



over the immediate business environment in their courts so as to be fully responsible or accountable for the outcomes – the core criticism of the executive model.

The catalysts for organisational change in the Irish court system are best understood in the context of the particular historical, institutional and economic circumstances in which they developed. First, the Courts Service was designed to take over the administrative functions and responsibilities that had been previously supplied by eight separate and disconnected organisations ranging from the Department of Justice to the County Councils and Dublin Corporation.⁹⁸ From this historical and institutional perspective, it is not difficult to understand why Ireland opted for a centralised administrative agency to manage its courts, staff and administration. Second, the institutional reforms were instituted during a period of unparalleled economic prosperity. According to Finnegan, there were practically “no budgetary constraints on fulfilling the support requirements of the judiciary”.⁹⁹ As a consequence, it is perhaps not surprising to learn that the Courts Service has accomplished most of its organisational objectives to the extent that “the effects of seventy years of under-investment in the courts system have been remedied”.¹⁰⁰ Third, the initial operational successes of the Courts Service highlight the importance of continuously improving the client orientation and systems integration of the courts. As Raymond and McCutcheon point out, there was a:

fundamental shift in the “philosophy” of the courts system, requiring it to take account of the concepts of quality, service and competitiveness more associated heretofore with the private sector ... there can be no doubt of a move from the “courts system” to “courts service”.¹⁰¹

It is clear that the client-oriented organisational philosophy has fostered more business-like organisational arrangements and a greater degree of integration of the court administration into the broader framework of the administration of justice.

It has also been noted that the aims formulated by the Denham Group for the Courts Service place a strong emphasis on the financial and administrative side of the courts’ business, such as reducing delays and improving access to the courts. There appear to be no corresponding legislative expectations about any wider contributions to future improvements in the quality of justice, through greater integration of the judges and support staff, and more substantial contributions by the Courts Service to the legal, organisational and learning processes of individual courts – certainly not in the sense identified above by Professor ten Berge. Furthermore, according to CEPEJ, even the promotion of judicial independence is missing from the list of aims formulated by the Denham Group.¹⁰² Finally, it is remarkable that the Courts Service has 17 representatives at the board level. This is rather surprising because the Denham reports do not contain any “intrinsic detailed motivation” regarding the

⁹⁸ Denham Group First Report, n 81, pp 24 and 35. According to the Denham Group, “there was no clear reporting structure with regular channels of communication between the various constituencies”.

⁹⁹ Finnegan, n 83, p 7. The current size of the Courts Service (with approximately 1,000 employees) is comparable to the South Australian Courts Administration Authority (with approximately 800 employees). See also *Courts Service News*, Volume 12, Issue 4, December 2010, p 12. However, due to announced budget cuts, the number of staff working for the Irish Courts Service will be further reduced to 864 by 2014.

¹⁰⁰ Finnegan, n 83, p 5: “The building stock has been transformed with imaginative refurbishment of architecturally important buildings and the construction of new court houses. Modern technology is very widely if not yet universally available. The court administrative offices have been modernised and are now vastly more efficient. There is a unified structure across the court offices. The widespread introduction of IT across the court offices has made available statistics which were not previously available and which aid in the formation of policy and enable the board to monitor the implementation of policy.”

¹⁰¹ Raymond B and McCutcheon P, *The Irish Legal System* (4th ed, Butterworths, 2001), p 156; cited without reference in Finnegan, n 83, p 4. Nevertheless, the waiting times have again started to build up in many courts, partly as a result of the severe budget constraints. See the *Courts Service Annual Report 2009*, pp 72-76. For example, ordinary appeals in the Supreme Court take almost three years from filing to disposition, while summary criminal matters in the District Courts take between 12 months and 24 months in regional areas, and up to three years in Dublin, from filing to disposition.

¹⁰² Voermans and Albers, n 12, p 38.



scope of the board, other than the need to have external stakeholder representation.¹⁰³ For CEPEJ, the extensive representative composition of the Irish Courts Service means that it is, in principle, “susceptible to politicisation and syndicalism”.¹⁰⁴

Minority partnership model (England)

The court administration in England and Wales is managed by Her Majesty’s Courts Service (HMCS), which is an administrative agency of the Ministry of Justice.¹⁰⁵ Although HMCS is an agency of the Executive, it has substantial judicial participation on its governing board, thereby increasing the direct influence and participation of the judiciary in court administration. Under the terms of a partnership agreement, the Lord Chancellor and the Lord Chief Justice agreed in April 2008 to place the leadership and broad direction of HMCS in the hands of a governing board, without intervening in its day-to-day operational decision-making.¹⁰⁶ According to the terms of the partnership agreement, the board must endeavour to reach agreement by consensus. Where the board cannot reach agreement by consensus, it must refer the issue to the Lord Chancellor and the Lord Chief Justice for a decision.¹⁰⁷

All HMCS staff owe a joint duty to the Lord Chancellor and the Lord Chief Justice for the efficient and effective operation of the courts.¹⁰⁸ The judicial members of the board are accountable only to the Lord Chief Justice and may only be removed subject to a process agreed between the Lord Chancellor and the Lord Chief Justice.¹⁰⁹ Notably, however, a judicial member’s removal from the board will not impact on their judicial appointment.¹¹⁰ The objectives of HMCS include “achievement of best value for money” and “continuous improvement of performance and efficiency across all aspects of the courts’ work, having regard to the contribution the judiciary can appropriately make”.¹¹¹ It should also be noted that HMCS has adopted a less centralised administrative structure than the Irish Courts Service, allowing for many of the court initiatives to be taken locally by region-focused “Court Boards”, which nonetheless operate within a national framework of standards and strategy direction.¹¹²

There are detailed provisions in the partnership agreement, which provide for the finances, resource allocation, performance standards, audits, as well as inspections of HMCS. The Lord Chancellor and the Lord Chief Justice must jointly agree on the budgets and plans, which set out how the budget allocations will be spent. According to the terms of the agreement, no change may be made to the allocations to the HMCS or its budgets or plans other than in accordance with a detailed

¹⁰³ Finnegan, n 83, pp 36-37. In Ireland, the Judges, Registrars, Senior Clerks and Masters separately retain their traditional management functions under the authority of the president of the court to which they belong. See *Courts (Supplemental Provisions) Act 1961* (Irl), Sch 8. See also Denham Group Third Report, n 87, p 27.

¹⁰⁴ Voermans and Albers, n 12, p 110.

¹⁰⁵ Baar C et al, n 17, p 58. The United Kingdom executive model was introduced by the *Courts Act 2003* (UK). It does not operate in the newly established Supreme Court of the United Kingdom, which has an autonomous model of governance.

¹⁰⁶ *Her Majesty’s Court Service Framework Document* (April 2008), pp 6-7 (*HMCS Framework Document*). The governing board of HMCS comprises of an independent non-executive Chair, three representatives of the judiciary, a representative of the Ministry of Justice, the Chief Executive, three other executives and two non-executives. The judicial members include the Senior Presiding Judge for England and Wales and two other members of the judiciary nominated by the Lord Chief Justice.

¹⁰⁷ *HMCS Framework Document*, n 106, p 8.

¹⁰⁸ *HMCS Framework Document*, n 106, p 8.

¹⁰⁹ *HMCS Framework Document*, n 106, p 8.

¹¹⁰ *HMCS Framework Document*, n 106, p 8.

¹¹¹ *HMCS Framework Document*, n 106, p 3.

¹¹² *Courts Act 2003* (UK), s 5 and Sch 1. The Court Boards are not intended to manage the courts themselves, but rather to provide a forum for local issues, to review operations and performance in the local courts and to make recommendations about how they should be run and how service can be improved. Membership of each regional Courts Board consists of a district judge, two magistrates, two people with knowledge or experience of the courts and two local community representatives.



arrangement set out in the agreement itself. This potentially removes one of the traditional obstacles to achieving greater efficiency in court administration in the executive model.¹¹³

One of the most important achievements of HMCS in England and Wales was to consolidate the courts' administrative services, which previously consisted of 43 independent Magistrates' Courts' Committees and an over-centralised courts service of the Crown Courts.¹¹⁴ According to Sir Robin Auld's *Review of the Criminal Courts*, there were substantial differences in procedures, practices, management and culture between the various courts that were found to be "confusing, divisive and inefficient".¹¹⁵ The new institutional arrangement is intended to retain only the best attributes of these organisations in order to deliver "decentralised management and local accountability within a national framework".¹¹⁶ The partnership agreement implicitly recognises that "the courts are by their nature a shared responsibility between the judiciary and government".¹¹⁷ As a result, a significant effort has been made to provide collaboration with a range of justice organisations, agencies and the legal fraternity, in order to improve the service delivery for local communities.¹¹⁸ According to the terms of the agreement, the board of HMCS is required to consult and work with the judiciary and others in the criminal, family and civil justice systems "where necessary", and with the concurrence of the Department of Justice "where appropriate".¹¹⁹ As a result, the new organisational structure has the potential to achieve improvements in the areas of policy consistency, administrative unity as well as systems integration.

However, there are at least two significant disadvantages of this model. First, there remains a sharp division of responsibilities and loyalties between the judges, the court staff and the HMCS bureaucracy, which is characteristic of all the executive models.¹²⁰ The courts are still fully dependent on an external service organisation to effect changes in their immediate business environment. Second, the lines of ministerial involvement in court administration are much more intrusive in the English minority partnership model than in the Irish majority partnership model. Under the *Courts Act 2003* (UK), the Lord Chancellor is ultimately responsible for the courts and the justice system, while under the partnership agreement he is also entitled to make "whatever decision he considers appropriate" in the event of a disagreement with the Lord Chief Justice.¹²¹ What is remarkable is that the Lord Chancellor's power of intervention is not invoked by reference to a defined category of misconduct of

¹¹³ See *HMCS Framework Document*, n 106, p 14. See also Lord Philips of Matrauers, *The Select Committee on the Constitution: Evidence* (9 July 2008), p 29 (Questions 10 and 11). There is a very detailed process under which the Lord Chief Justice takes part in the budgeting process at all the vital stages: "First of all, before a bid is made in each expenditure round to tell the Lord Chancellor how much the Court Service needs; when the Ministry then receives its allowance there will be further discussion as to how much of this is going to go to the Court Service, and once that is decided there will be further discussion as to what it is going to be spent on. Once the Court Service has been allocated its budget it cannot have any taken away without going through the whole process again...This is in reality a kind of ring-fencing."

¹¹⁴ *Courts Act 2003* (UK), s 6, which abolished the Magistrates' Courts' Committees. See also Lord Justice Auld's *Review of the Criminal Courts* (2001), pp 78 and 92. Until the mid-20th century there was a very fragmented system throughout the country of about 1,000 Commissions of the Peace of various sizes. In 1949 the Magistrates' Courts Committees were established to administer petty sessions areas based on the administrative counties and large boroughs Commissions.

¹¹⁵ *Justice for All, A review of the Criminal Justice System presented to Parliament by the Secretary of State for the Home Department, the Lord Chancellor and the Attorney General* (2002), p 148 (*Justice for All*).

¹¹⁶ *Justice for All*, n 115, p 148.

¹¹⁷ Lord Chief Justice Philips, *The Lord Chief Justice's Review of the Operation of the Courts* (2008), pp 7 and 16.

¹¹⁸ *HMCS Framework Document*, n 106, p 3.

¹¹⁹ *HMCS Framework Document*, n 106, p 21.

¹²⁰ See Ng G, "Quality Management in the Justice System in England and Wales" in Langbroek P (ed), *Quality Management in Courts and in the Judicial Organisations in 8 Council of Europe Member States* (CEPEJ, Strasbourg, 2010), p 41: "It appears the policy makers have attempted to create a sort of railway track to access to justice. The two lines of a track represent the two lines of the judicial system: the Independent Judiciary and HMCS ... Whilst this is very logical in principle, given that these two organisations do not appear to have a commonality of purpose and are trying to hammer out the details of an evolving relationship based on quality management and financial restraint, it means that these two lines may not be going in the same direction, and it may mean a bumpy ride for those who choose to use these services."

¹²¹ *HMCS Framework Document*, n 106, p 28.



the HMCS (eg serious financial irregularities or decisions that are manifestly contrary to the law), but by reference to a disagreement with the Lord Chief Justice in relation to (any) operational matters of the HMCS. Consequently, there appear to be few constraints on the Lord Chancellor's exercise of his ultimate discretion if the Executive decided to oppose any of the board's initiatives.

Against this background, it remains to be seen whether the minority partnership model that operates in England and Wales will in practice prove to be as workable as the majority partnership model that operates in Ireland. It is argued below that an intermediary institution which operates at arm's length from the Executive may be better placed to provide an appropriate balance between judicial autonomy and continuing ministerial responsibility.

Canadian executive/guardian model

In the so-called executive/guardian model, an executive agency that operates at arm's length from the Minister has primary responsibility for the day-to-day planning and operations of the courts. The courts have the ("guardian") authority and responsibility to intervene in the administrative operations where they believe that it is necessary or appropriate to ensure effective and efficient provision of administrative services in the courts. According to the Canadian Judicial Council, a variation of this model operates in the Canadian federal courts, where the court administration is managed by a central Courts Administration Service under the authority of a Chief Administrator.¹²²

The principal objectives of the Courts Administration Service are to "facilitate coordination and cooperation among the Canadian Federal Courts and to ensure effective and efficient provision of administrative services to those courts".¹²³ The Chief Administrator is a Governor-in-Council appointee who is accountable to Parliament through an annual report to be tabled by the Minister of Justice.¹²⁴ The Chief Administrator also acts as the Chief Executive Officer of the Courts Administration Service and has supervision over its staff. In exercising his duties under the *Courts Administration Service Act SC 2002 c 8* (Can), the Chief Administrator has all the powers necessary for the overall effective and efficient management and administration of the Courts Administration Service, including court facilities, libraries, corporate services and human resources.¹²⁵ The Courts Administration Service has been set up to operate at arm's length from the government.¹²⁶

The *Courts Administration Service Act* makes provision for the roles and responsibilities of the chief justices in the management of the courts.¹²⁷ Specifically, the Act provides that the chief justices of the participating courts are responsible for the judicial functions of their courts, including the direction and supervision over court sittings and the assignment of judicial duties.¹²⁸ In the exercise of their responsibilities, the chief justices of any of the four participating federal courts may issue binding directions in writing to the Chief Administrator with respect to any matter falling within the Chief Administrator's authority.¹²⁹

The Canadian Judicial Council points out that this model does not adequately address the efficiency problems inherent in the executive model, because judges are not involved in understanding the business operations of their courts.¹³⁰ Chief judges can issue operational directions; however, they are missing the appropriate level of analytical infrastructure to undertake the data collection, research, consultation and analysis required to properly address the questions that must be asked in order to make more effective operational decisions:

¹²² Baar C et al, n 17, p 102.

¹²³ *Courts Administration Service Act SC 2002 c 8* (Can), s 2.

¹²⁴ *Courts Administration Service Act SC 2002 c 8* (Can), s 12.

¹²⁵ *Courts Administration Service Act SC 2002 c 8* (Can), s 7.

¹²⁶ *Courts Administration Service Act SC 2002 c 8* (Can), s 2(b).

¹²⁷ *Courts Administration Service Act SC 2002 c 8* (Can), s 2(b).

¹²⁸ *Courts Administration Service Act SC 2002 c 8* (Can), s 8 outlines the judicial functions and powers of the chief judges.

¹²⁹ *Courts Administration Service Act SC 2002 c 8* (Can), s 9(1).

¹³⁰ Baar C et al, n 17, pp 102-103.



The court is in effect being given responsibility for ordering that some other party [ie the Courts Administration Service] perform or not perform actions necessary to achieve a level of performance that that other party has agreed beforehand to be accountable. This requires that both the judiciary and the [Courts Administration Service] are provided with current, ongoing and relevant information on all key aspects of court administration, and the extent to which the goals are being achieved. Otherwise the court has no mechanism for formulating policies or identifying whether any intervention is actually required.¹³¹

As a consequence, it appears that the most significant feature of the Canadian federal model is the existence of an administrative agency which has been set up by the Executive to operate at arm's length from the Executive. The Victorian chief judges have commented favourably on this model because it ensures a degree of institutional separation from the Executive and potentially increases the self-responsibility of the participating courts.¹³² However, in practice, the formal duties and functions of this agency are not very extensive, and there are few formal mechanisms in place to assist the judges in improving their understanding of the business operations of their courts, or to provide the courts with auxiliary capabilities that are typically provided through the Attorney-General's departments. From the legislative provisions, it is difficult to argue that the Courts Administration Service was intended to have a broad reform mandate to contribute to future improvements in the quality of justice, responsiveness or innovation in the federal courts, within the broader meaning of quality development advocated for in the first part of this article.¹³³

According to Professor Carl Baar, one of the authors of the Canadian Judicial Council study, a number of factors have resulted in the marginalisation of this model thus far.¹³⁴ First, the Canadian federal courts are highly specialised and relatively small tribunals. Members of the Canadian Judicial Council formed the view that administration of the larger Canadian provincial court systems, covering at least three levels of courts and numerous permanent court locations, required a more complex model, both internally and in relation to the Executive.¹³⁵ Second, there were initial setbacks in the implementation of the model that made the Canadian judiciary reluctant to support this institutional arrangement.¹³⁶ The third factor which resulted in the marginalisation of this model is the absence of any means of resolving disputes between the Chief Justices and the Chief Administrator in the event that the Chief Administrator receives conflicting directions from the Chief Justices within the federal system.¹³⁷ While the legislative scheme does provide a mechanism for addressing disputes between the Executive and the judiciary, it still represents an executive model of court administration, which the Canadian Judicial Council found to be, on the whole, less efficient and effective than the more autonomous models.¹³⁸

DUTCH JUDICIAL COUNCIL MODEL

The discussion of the models of court governance is concluded now with a more detailed analysis of the Dutch Judicial Council. It is argued that this model incorporates the most significant features of the other models outlined in this article, and that it is the only model that allows the individual courts to fully develop their own internal capabilities and responsibilities.

When analysing the Dutch Judicial Council model, it must be kept in mind that the Netherlands is a civil law country, with a different legal culture and very different judicial hierarchy and career

¹³¹ Baar C et al, n 17, p 103.

¹³² Supreme Court of Victoria, n 1, p 79. It is noted that the Chief Administrator is a Governor-in-Council appointee which gives him a measure of independence.

¹³³ *Courts Administration Service Act SC 2002 c 8* (Can), s 7(3). The formal duties of the Courts Administration Service include the "maintenance of the registries of the courts and the preparation of budgetary submissions for the requirements of the courts".

¹³⁴ Carl Baar, e-mail correspondence with the author, 24 March 2009.

¹³⁵ Carl Baar, e-mail correspondence with the author, 24 March 2009.

¹³⁶ Carl Baar, e-mail correspondence with the author, 24 March 2009.

¹³⁷ Carl Baar, e-mail correspondence with the author, 24 March 2009.

¹³⁸ *Courts Administration Service Act SC 2002 c 8* (Can), s 7(4) provides that the powers of the Chief Administrator do not extend to any matter assigned by law to the judiciary.



progression to that of any common law country. Nevertheless, there are many reasons why elements of this model should be taken into account for the purposes of this article. First, both CEPEJ and the Canadian Judicial Council have highlighted this model in their discussions of the models of court governance in Western Europe.¹³⁹ Second, the administration, financing and organisation of the courts' working methods are not necessarily affected by the legal tradition in the same way that decision-making and judicial training may be affected.¹⁴⁰ Third, the Dutch model that was in existence prior to the recent reforms was essentially an executive model of court governance. The internal management of the courts had been vested in the court's presidency and the council of judges, while court operations had been separately managed by an administrative arm of the Ministry of Justice.¹⁴¹ The fourth, and the most important reason, is that the Dutch institutional reforms had been designed to create the preconditions for systematic improvements in the quality of the administration of justice, unity of functioning of the judiciary and client orientation of the courts.¹⁴² To achieve these aims, the courts were expected to develop their own financial and managerial capabilities and to improve their legal and organisational quality frameworks.¹⁴³ The changes were designed to equip the entire judicial organisation to deal more effectively with the much larger staff of the "new-style" courts and, ultimately, to respond to the multitude of emerging legal, technological and societal challenges that were impacting upon the courts' functioning.¹⁴⁴

Since 1 January 2002, the court administration in the Netherlands has been supervised, facilitated and coordinated by the Judicial Council. There are two judicial officers on the four-member governing board of the Judicial Council (including the President), with the remaining two members being experts in finance and management.¹⁴⁵ In organisational terms, the Judicial Council can be described as a non-departmental public body that operates at arm's length from the Minister of Justice.¹⁴⁶

There are a number of important differences between the other intermediary institutions described in this article and the Dutch Judicial Council. Arguably, the most significant difference is that the Dutch Judicial Council is primarily concerned with supporting, improving and coordinating the courts' working *methods*, rather than directly managing the court administration or employing court staff.¹⁴⁷ The Dutch Judicial Council is also responsible for preparing the budget for the Judicial Council and the courts jointly, allocating budgets from the central government budget to the courts, supporting operations at the courts, supervising the implementation of the budget by the courts, supervising operations at the courts, as well as undertaking nationwide activities relating to the recruitment,

¹³⁹ Baar C et al, n 17, p 106. See generally also Voermans and Albers, n 12, Ch 10.

¹⁴⁰ Voermans and Albers, n 12, Ch 10. The CEPEJ study identified numerous similarities between the Irish, Dutch, Swedish and Danish models of court governance.

¹⁴¹ Voermans and Albers, n 12, p 100 and related footnote 145.

¹⁴² See generally Langbroek P, "Organization Development of the Dutch Judiciary, between Accountability and Judicial Independence" (2010) *International Journal for Court Administration* 1. For a detailed overview see Boone M, Kramer P, Olthof S, van Ravesteyn J, *Het functioneren van de rechterlijke organisatie in beeld: Breedteststudie evaluatie Wet organisatie an bestuur gerechten en Wet Raad voor de rechtspraak* (Amstelveen, KPMG Business Advisory Services, University of Utrecht, 2006), p 2 ("Evaluation of the Organisation and Administration of Courts Act and the Judiciary (Organisation) Act")

¹⁴³ Ng G, "Quality and Justice in the Netherlands" in Fabri M et al (eds) *The Administration of Justice in Europe: Towards the Development of Quality Standards* (IRSiG, CNR Italy, 2003) p 321.

¹⁴⁴ See generally Langbroek, n 7.

¹⁴⁵ *Judiciary (Organisation) Act* (Nld), s 84. Pursuant to the *Judiciary (Organisation) Act*, all members of the Judicial Council are appointed on a six-year term by Royal Decree, following recommendations by the Minister and an independent nominating Committee headed by a presiding judge. Board members are eligible for reappointment once for a term of three years. See also Langbroek, n 142, p 5.

¹⁴⁶ Langbroek, n 7, p 16.

¹⁴⁷ *Judiciary (Organisation) Act* (Nld), s 91(2). See Committee for the Evaluation of the Modernisation of the Dutch Judiciary, *Judiciary is Quality* (The Hague, December 2006), p 29.



selection, appointment and training of court staff.¹⁴⁸ Importantly, the individual courts operate independently of the Judicial Council and have no direct relationship with the Executive.

The second distinguishing feature of the Dutch Judicial Council is that it has a legislative mandate to modernise and continuously improve the quality of the administration of justice. The Judicial Council is a robust institution. It is well equipped, financially and organisationally, to provide professional, general and technical support for activities of the courts that are aimed at promoting their organisational excellence, as well as advising the government on regulation and policy to be pursued in relation to the administration of justice in the courts.¹⁴⁹

The third distinguishing feature is that the Judicial Council has a mandate to systematically promote the legal quality in the courts, by conducting research, activities and programs that are designed to improve the quality of legal outcomes and achieve more uniform application of the law.¹⁵⁰ However, in performing any of these tasks, the Judicial Council is not permitted to involve itself in the procedural aspects or substantive assessment of a decision in a specific case, or a category of cases, or to provide a qualitative assessment of an individual judgment or a judge.¹⁵¹

Notably, the Dutch Judicial Council also has responsibility for maintaining an organisational quality framework (called “RechtspraakQ”) that aims to promote organisational improvements in the courts, in a planned manner, via “quality statutes”, which the individual courts can adapt to their own situation.¹⁵² According to Albers, the Judicial Council has developed quality statutes to measure the quality of court organisation by looking at the financial area, the work processes area, the learning and growth area (“the knowledge and personnel of the organisation”) and the customer area.¹⁵³ The quality “statutes” are essentially guidelines that are designed to assist the governing boards of the courts to systematically implement self-improvements, such as to adopt policies to improve the expertise of judges or to facilitate the sharing, customisation and better coordination of jurisprudence via ICT.¹⁵⁴ The basic premise of all of these organisational programs is that courts are “learning organisations”.¹⁵⁵

Therefore, the Dutch Judicial Council can be best described as a central service organisation for the courts, being responsible for developing projects for quality management, professional support, provision of research and information by the courts to the public, administrative support, press

¹⁴⁸ *Judiciary (Organisation) Act* (Nld), s 91(1). See Langbroek, n 142, pp 5 and 8. The management boards of the courts and the Judicial Council had gone through a learning phase during which they developed accurate production and financial registries and learned how to deal with the annual planning and control processes.

¹⁴⁹ *Judiciary (Organisation) Act* (Nld), ss 94 and 95. For example, the Judicial Council provides opinion and advice in relation to proposed legislation.

¹⁵⁰ *Judiciary (Organisation) Act* (Nld), s 94. See also Council for the Judiciary, *Quality in the Judicial System in the Netherlands* (2008) p 4, available at <http://www.rechtspraak.nl/Gerechten/RvdR/Publicaties/Research+Memoranda.htm> viewed 9 March 2011. For example in 2009 and 2010 the Judicial Council completed or commissioned research on decisions involving adjustment problems in children, updated international research on minimum sentences, assessed the practices of single and multiple judge decisions, the issues involved in court sequestration, the quality of specialised commercial courts, the complexity of (statistical) information in judicial decisions, the financing and turnaround in mediation as well as a pilot study on the enforcement of civil judgments.

¹⁵¹ *Judiciary (Organisation) Act* (Nld), s 96. See generally also, Council for the Judiciary (Netherlands), *Agenda for the Judiciary 2008-2011: Independent and Committed* (2007), p 3. The Judicial Council develops programs in consultation with the courts to improve the reasoning of judgments, encourage second-reading of judgments, devote more time to preliminary inquiries, encourage continuous education, procedural improvements, peer review, intervention, consultations between courts of appeal and district courts, self-assessment procedures, case differentiation, customer appreciation in combination with a mentoring system.

¹⁵² Council for the Judiciary, n 150, pp 6-8.

¹⁵³ Albers, n 42, p 11.

¹⁵⁴ Albers, n 42, p 11.

¹⁵⁵ Council for the Judiciary, n 150, p 13. The RechtspraakQ quality system for the courts is based on the Dutch version of the European Framework for Quality Management. Elements of this framework have been incorporated in the *International Framework for Court Excellence*, which was developed by a consortium involving the Australasian Institute for Judicial Administration. The framework is available at <http://www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf> viewed 9 March 2011. Notably, however, the RechtspraakQ is also linked to the courts’ budgeting system called Lamicie.



policies, automation, etc. At the same time, the Judicial Council acts as a monitoring agency that distributes the budget and calls the courts to account for their expenditures and organisational functioning.¹⁵⁶ The information received from customers is systematically collated and analysed so that the focus of the projects is not only on “efficiency” and “productivity”, but also on legal and organisational “quality”.¹⁵⁷

Integrated internal governance model

As foreshadowed, the Dutch courts themselves operate independently of the Dutch Judicial Council and the Executive, much like the Australian federal courts. They have extensive responsibilities and powers in financial and personnel matters. To assist the courts adapt to the new organisational framework, the *Judiciary (Organisation) Act* (Nld) introduced a number of changes in relation to the courts’ internal governance framework. The changes were intended to integrate the judicial and administrative operations of the courts in a clearly defined organisational and functional framework.

Under the new arrangements, judges and clerical staff alike are formally subject to the decisions of the court governing board, which is set up as a board of *executive* directors.¹⁵⁸ The board consists of a chairperson (President), up to four divisional (“sector”) chairpersons and one non-judicial member who is a director of operations.¹⁵⁹ All members of the governing board, including the President, are appointed by Royal Decree on a six-year term.¹⁶⁰ This internal governance model replaces the former dual (executive) administrative structure in which the council of judges performed judicial responsibilities, while employees of the Ministry of Justice separately performed various supporting duties and administrative tasks.¹⁶¹

The governing board is accountable to the Judicial Council for the budgeting, planning and control cycle, as well as the overall functioning of the courts, including personnel matters, the quality of the administrative and organisational procedures in the courts and information and management systems.¹⁶² The governing board is also responsible for promoting legal quality and the uniform application of the law (in coordination with the Judicial Council), insofar as these activities do not concern aspects of a specific case or decision.¹⁶³

Notably, each of the court divisions has its own judicial, administrative and even financial responsibilities. This has been done with the intention that each division should be managed more independently and efficiently, by integrating all of the judicial and administrative powers at the divisional level, without the need to refer day-to-day administrative matters to the director of court

¹⁵⁶ Langbroek, n 142.

¹⁵⁷ Langbroek, n 142, p 11.

¹⁵⁸ *Judiciary (Organisation) Act* (Nld), ss 24 and 25.

¹⁵⁹ *Judiciary (Organisation) Act* (Nld), s 15. The president represents the court. See also s 19. Like the board of the Judicial Council, the governing board of the court is required by law to draw up transparent organisational rules, in the form of regulations, governing its procedure, decision-making and division of responsibilities, organisational structure, complaints procedure, delegation, replacement of members in the event of sickness or other inability to act, the division of cases between the divisions, etc.

¹⁶⁰ *Judiciary (Organisation) Act* (Nld), s 15. The members of the management board may be reappointed. See also s 16. The judicial administrators are entitled to an allowance in addition to their salary for the work performed in their administrative capacity.

¹⁶¹ Langbroek, n 142. In the new organisational setting, the council of judges performs an advisory role to the management board.

¹⁶² *Judiciary (Organisation) Act* (Nld), s 23.

¹⁶³ *Judiciary (Organisation) Act* (Nld), s 23(2) and (3). See also Malleon, n 4, p 71. This framework appears to be consistent with Professor Kate Malleon’s proposal to increase the transparency of the organisational conditions for the effective and efficient delivery of justice, in so far as such measures do not affect the freedom from improper interference which would undermine party impartiality.



administration at the board level.¹⁶⁴ Because the divisional chairpersons are also members of the governing board of the courts, the framework provides a significant degree of balance, collegiality and horizontality at the policy-making level (involving the chairpersons of all divisions, as well as the director of operations and the president).¹⁶⁵ At the same time, the policy-making function and administration have been separated. The policy-making function rests solely with the governing board, while the responsibility for administration has been largely delegated to the organisational units, which are the closest to and most familiar with the judicial work.¹⁶⁶ The collegiate set-up of the Dutch governing board and the divisional arrangements potentially address one of the key criticisms of the Chief Justices' administrative dominance in the Australian federal courts.

The Dutch Judicial Council and the Minister of Justice

The Minister of Justice's relationship with the Dutch Judicial Council has been carefully regulated, using a system of multiple checks and balances that are designed to ensure the Judicial Council's institutional autonomy and the Minister's overall responsibility for the administration of justice. The basic idea is that the Minister of Justice maintains broad political responsibility for the operation of the Judicial Council while the Judicial Council continues to operate at arm's length from the Minister. The Judicial Council has a legal duty to provide the Ministry of Justice with adequate information relating to finances and the organisational functioning of the courts and of the Judicial Council itself. The Minister may not interfere in the Judicial Council's specific organisational strategies or policies, except in exceptional circumstances where the Judicial Council makes decisions that are "manifestly contrary to the law or prejudicial to the proper operation of the courts".¹⁶⁷ However, in exercising that power, according to s 109 of the *Judiciary (Organisation) Act*, the Minister may not involve himself or herself in the procedural aspects or substantive assessment of a specific case or category of case.¹⁶⁸

The Minister is also entitled to issue general directions to the Judicial Council in so far as they may be necessary with a view to the proper operation of the courts.¹⁶⁹ However, if the Judicial Council takes the view that a Minister's direction would infringe s 109, the direction must not be issued.¹⁷⁰ Finally, the Minister retains the power to recommend to the Crown to suspend or dismiss one or more members of the Judicial Council for reasons of "unsuitability".¹⁷¹ However, an interested party may appeal to the Dutch Supreme Court to assess whether the Crown could have reasonably concluded that there was unsuitability or a good reason to suspect unsuitability.¹⁷²

Arguably, the Dutch model incorporates the most important features of the models outlined above, which include:

1. integrated court management including finances, planning and human resources (Australian federal courts);
2. remote coordination, support and servicing (the South Australian Judicial Council);
3. the Judicial Council operates at arm's length from the Executive (Canadian federal courts);

¹⁶⁴ Ng, n 24, p 110. See also Franssen J, Mein A and Verberk S, *Gerechtsbesturen, integral management en md-beleid*, (B&A Groep, WODC 2006), pp 2 and 4 ("The Functioning of Court Administrations, Integral Management and Management Development Policy").

¹⁶⁵ Committee for the Evaluation of the Modernisation of the Dutch Judiciary, n 147, p 22.

¹⁶⁶ Franssen et al, n 164, p 6. The authors also conclude: "The definitions of tasks, powers and responsibilities are clear. The court administrative boards are currently better able to manage their own organisations as a result of the transparency of the spending budgets. At sector level in particular, integral management has been effectively implemented. In that sense the introduction of the integral management concept has provided a solution to the aforementioned lack of clarity regarding the division of tasks, powers and responsibilities (formerly referred to as the 'double dual structure' [in the executive model])."

¹⁶⁷ *Judiciary (Organisation) Act* (Nld), s 106. The Minister makes a recommendation and the decision is made by Royal Decree.

¹⁶⁸ *Judiciary (Organisation) Act* (Nld), s 109.

¹⁶⁹ *Judiciary (Organisation) Act* (Nld), s 93.

¹⁷⁰ *Judiciary (Organisation) Act* (Nld), s 93(4).

¹⁷¹ *Judiciary (Organisation) Act* (Nld), s 107.

¹⁷² *Judiciary (Organisation) Act* (Nld), s 108(2).



4. there is a separation of the judicial function from the judges' administrative function (England and Wales); and
5. significant judicial representation on the board of the Judicial Council (Ireland, England and Wales).

One of the remarkable features of the Dutch model is the clear separation between the "management" and "ownership" of the governing boards of the courts and the board of the Judicial Council. All judicial appointments are made primarily on the basis of the judicial officers' professionalism and experience in administration, in recognition of the fact that only judicial administrators are able to improve the judicial side of the courts' business and that professional administrators do not have sufficient understanding of, or access to, the judicial side of the courts' business.

Most importantly, the Dutch Judicial Council is a robust, well-equipped professional institution, designed to perform a broad monitoring, servicing and coordinating role in this process. It encourages the institutional independence of the courts and the judiciary, while at the same time expanding the self-responsibility and accountability of the courts in the areas of administration, management, personnel, finances and budgeting.¹⁷³ A particular emphasis is placed on supporting programs aimed at improving the quality of working methods in courts and introducing measures and frameworks for improving the quality of jurisprudence, research, client orientation and legal unity.

TOWARDS A JUDICIAL COUNCIL OF VICTORIA

One of the principal aims of this article was to identify the factors that are impeding the authority, efficiency and responsiveness of the Victorian courts. It has been argued that the most serious obstacle to greater responsiveness and institutional accountability of the courts lies in the "faulty" institutional design which is inherent in the executive model of court administration. The suggested solution is to adopt the autonomous federal courts model, with some internal modifications, because it would allow the courts and judges to develop more integrated internal management solutions and more opportunities to drive the essential processes from intake to judgment. Accordingly, this article has argued strongly against any model of court governance that would maintain administrative or financial separation between the courts and court administration and dual chains of command.

It has also been argued that overworked and overburdened individual judges are not in an effective position to initiate systematic improvements to the quality of the administration of justice without more robust and sophisticated organisational and supporting mechanisms, which would enable these important public institutions to achieve a greater degree of organisational transparency, efficiency, responsiveness and unity. The Dutch model appears to be the closest to having the desired institutional and functional architecture, because it integrates the most significant features of the other models outlined in this article. It is also the only institution that has a broad mandate to improve the quality of the administration of justice while at the same time expanding the self-responsibility of the courts and ensuring their full institutional separation from the Executive.

In these concluding remarks, it is suggested that the Judicial College of Victoria may be well placed as an institution to form part of a future Judicial Council of Victoria, although further and specific research should be conducted to evaluate this option. The Judicial College of Victoria is already responsible for some of the quality-related functions performed by the Dutch Judicial Council, particularly in the areas of judicial education and legal unity. The Judicial College of Victoria is well known for developing high-quality programs and projects that are designed to keep judicial officers in touch with the community, aware of pressing social issues, in tune with technology and up-to-date with latest developments in the law.¹⁷⁴ The basic philosophy of the Judicial College of Victoria is that courts are learning organisations, which is consistent with the general aims for a judicial council

¹⁷³ Voermans and Albers, n 12, p 103.

¹⁷⁴ Judicial College of Victoria at <http://www.judicialcollege.vic.edu.au/about-us> viewed 9 March 2011; see also *Judicial College of Victoria Act 2001* (Vic), s 5.



outlined in the first part of this article.¹⁷⁵ Furthermore, the Judicial College of Victoria already enjoys broad stakeholder support from within the ranks of the judiciary as well as the government. Its board of directors is a compact and diverse governing body comprising the chief judicial officers of the Victorian courts and Victorian Civil and Administrative Tribunal (or their nominees), as well as two experts nominated by the Attorney-General who have relevant experience in the areas of education and community issues affecting the courts.¹⁷⁶ This set-up appears to work well in practice to ensure majority judicial participation on the board, while at the same time importing a degree of external expertise and social perspective.

The courts and the government should nevertheless investigate the possibility of limiting the term of all board members, nominees and appointees to a period of four to six years, as this would lead to further professionalisation and de-politicisation of the Judicial Council and greater separation of the “ownership” from “management” of the institution. The compact, professional and, above all, apolitical membership of the board of the Dutch Judicial Council is an example of a good working model.¹⁷⁷

The main political challenge for the new Judicial Council of Victoria will be to secure a permanent commitment to expand and equip this new organisation with sufficient operational, administrative and technical resources, which are currently offered by the Department of Justice. A robust “general and technical” organisation can serve as an institutional buffer between the courts and the Executive, while at the same time promoting the institutional competence and self-responsibility of each of the courts’ tiers for their own organisational functioning.

Indeed, one of the practical lessons from Ireland, England and the Netherlands is that the business of reforming and modernising the system of the administration of justice requires significant and permanent investments in the courts and the judicial organisation as a whole. Finally, as noted earlier in the context of the Irish and English institutional reforms, the courts must be ready to work in tandem with other government agencies and embrace the new philosophy of the court system, which requires that the courts and judges take into account the concepts of quality, service competitiveness and transparency that were previously associated primarily with the private sector.¹⁷⁸ The Judicial Council of Victoria can provide the necessary impetus for such reforms by assisting the courts develop quality frameworks aimed at systematically improving their client orientation, efficiency, quality and transparency.

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¹⁷⁵ According to the Judicial College of Victoria’s website, the institution symbolises a “continuum of life-long learning”.

¹⁷⁶ *Judicial College of Victoria Act 2001* (Vic), s 8.

¹⁷⁷ Initially the board had consisted of five members (including three judicial members); however, following a recommendation by the Committee for the Evaluation of the Modernisation of the Dutch Judiciary, it was decided that the board would be reduced to four members (and possibly three over time).

¹⁷⁸ Finnegan, n 83, p 4.



4 BEYOND INDEPENDENCE *

The second article in the series was published in December 2011. It was based on a conference paper I had presented at the bi-annual Australasian Court Administrators' Group's Conference in Sydney, which was co-organised by the Australasian Institute for Judicial Administration.²⁷⁵

At the time of the publication I was working as a legal policy adviser to the Attorney-General at the Courts division of the Victorian Department of Justice. I was invited to the conference by Mr Gary Thompson, CEO of the South Australian Courts Administration Authority, to outline my original proposal for a Judicial Council of Victoria and also to take part in a panel discussion with him and the CEOs of the High Court of Australia, the Federal Court of Australia and the Deputy Director of the Attorney-General's Department of NSW.

I later forwarded a copy of the conference presentation to Professor Phillip Langbroek from the University of Utrecht in the Netherlands, who is a world-renowned expert in judicial administration and was also at the time the editor-in-chief of the *International Journal for Court Administration*. He urged me to submit a suitable version of the conference paper for publication in the journal, because he deemed it to be relevant for a wider international audience. The journal version of the article was then independently refereed by two anonymous referees before acceptance for publication.

The article has been well-received following the publication. It was cited in a court reform policy document prepared by the Belgian Ministry of Justice and was also

* Tin Bunjevac, 'Court Governance in Context: Beyond Independence' (2011) 4(1) *International Journal for Court Administration* 35.

²⁷⁵ Bunjevac, above n 47.

included on the list of resources for the *Court Governance Curriculum Design* of the National Association for Court Management in the US.²⁷⁶

All of the described events and achievements demonstrate that the article has made a significant contribution to policy development in court governance.

KEY CONTRIBUTIONS OF CHAPTER 4

The article in Chapter 4 is significant because it offers a high-level contextual articulation of the issues presented in the first article, together with a more detailed examination of the northern European judicial councils, including the Dutch Judicial Council and the Swedish SNCA. While the first article is especially significant for the extent of the comparative analysis of each jurisdiction, the second article offers a broad panoramic vista of the policy issues that informed the development of the original framework, but without discussing all the nuances or specifics of each jurisdiction.

4.1 Northern European judicial councils and the Swedish model of public administration

The second article is also significant because it substantially expands the scope of the comparative research, by introducing several new themes and jurisdictions to the earlier analysis. The addition of Sweden is especially significant in this context, because the Swedish SNCA was the first judicial council established in the northern European jurisdictions in 1975 and was later used as a benchmark model for similar developments in other jurisdictions, such as Denmark, Norway, Ireland and the Netherlands.

The article explains that Sweden has a unique system of public administration, which is characterised by functional decentralisation and devolution of executive responsibilities from government departments to Independent Administrative Organs ('IAOs'), which are classified as Non-Departmental Public Bodies

²⁷⁶ National Association for Court Management, *Curriculum Design: Court Governance* (NACM, 2015) 44.

(‘NDPBs’) in public administration. A peculiar feature of this system is that the Swedish government departments are relatively small offices, which are only responsible for formulating broad policy and operational objectives, while the IAOs are large public organisations that are separately responsible for executing government policy and implementing legislation.²⁷⁷

Most importantly, the Swedish IAOs are constitutionally protected against ministerial interference in the performance of their functions, which made it a natural choice for Sweden to establish a judicial council in the form of an NDPB.²⁷⁸

The article analyses the Swedish model of public administration to identify the key features of NDPBs in general public administration theory and also to examine the reasons for their suitability in court governance. This is an example of how the thesis contributes to existing knowledge by transplanting concepts from other disciplines and applies it to court governance.²⁷⁹ It will be recalled that this enquiry was initiated in the first article, which pointed out that the Dutch Judicial Council was also classified as a special type of NDPB. As a result, it was deemed prudent to investigate further the potential regulatory and governance implications of this classification in the second article.

To explore these issues in more detail, the article proceeds to identify the salient features and benefits of NDPBs in the general public sector, which made these entities an attractive organisational form for the purposes of the northern European judicial councils. In general, NDPBs are used in the circumstances where the traditional departmental model of public administration is seen to be deficient, such as where there is an identified need to improve the efficiency, independence, specialisation or client-orientation of public organisations.²⁸⁰ As we have seen,

²⁷⁷ Bunjevaca, above n 160, 43.

²⁷⁸ See generally Levin, above n 236.

²⁷⁹ Other authors have also analysed SNCA and the Swedish system of public administration, but without resorting to further analysis of the general public administration theory underpinning the concept of NDPB and related regulatory consequences. See generally Albers and Voermans, above n 60. Levin, above n 236.

²⁸⁰ Organisation for Economic Co-operation Development (OECD), ‘Organizing the Central State Administration: Policies and Instruments’ (OECD, 2007) <<http://dx.doi.org/10.1787/5kml60q2n27c-en>>; Organisation for Economic Co-operation Development (OECD), *Distributed Public Governance: Agencies, Authorities and Other*

most of the identified deficiencies also happen to correspond to the areas of concern associated with the executive model of court administration.

4.2 Benefits of the northern European model

The article points out a number of benefits of having NDPBs in the specific setting of court administration that have been reported in the northern European jurisdictions.

1. They insulate the individual courts from the executive government, because they serve as an institutional buffer between them.
2. They promote the institutional development of the judiciary at the systemic level, by providing assistance and performing strategic oversight in areas such as the finances, shared services, administrative resources and common facilities.
3. They promote the organisational development in the courts themselves, by offering assistance in administrative, organisational and even legal areas.

Importantly, many of these benefits have been attributed to the clear division of responsibilities between the council and the courts in court administration. The council is primarily tasked with the provision of general and technical services, while the courts continue to be managed independently of the council using the system of integrated management, which improves their efficiency.

4.3 Key governance features of the northern European judicial councils

The remainder of the article examines the essential governance characteristics of the northern European judicial councils, such as their composition, terms of reference, and relationship with the executive government and other stakeholders.

Government Bodies (OECD, 2002); For an analysis of the use of NDPBs in Australia, see generally also Uhrig, above n 102.

4.3.1 Broad stakeholder representation and fixed term membership on the board

The first distinguishing feature of the northern European judicial councils is that they have broad stakeholder representation on the governing board, which sets them apart from the ‘chief judge’ governance model in jurisdictions such as South Australia and US. It was pointed out earlier that the inclusion of non-judicial stakeholders on the board is regarded as a significant advantage of this model, because it brings an external perspective and expertise into the judicial organisation and also serves to promote the internal transparency and social accountability of the judiciary.

A related feature of the ‘stakeholder board’ model is that, in many cases, the judicial councils rely on fixed term appointments based on merit, which is regarded as an advantage in the governance theory, because it can lead to greater professionalization and depoliticisation of court administration, due to the separation between ‘ownership’ and ‘management’ of the institution. From a practical perspective, this feature can be particularly useful, because a non-performing board member can be replaced at the end of the fixed term. The judiciary’s legitimate concerns about the processes of nomination and replacement of members in such cases can be effectively addressed by carefully drafted statutory procedures that require the judiciary’s involvement and approval at every stage of the process.²⁸¹

Having identified the essential characteristics of the stakeholder board model, the article makes the observation that the classification of the council as an independent public body suggests a different philosophical conception of the judiciary’s administrative responsibility for the court system, one which is shared with other justice system stakeholders.²⁸² Namely, it appears that the northern European judicial councils have been conceived of as independent public entities *sui generis*,

²⁸¹ Bunjevack, above n 160, 43. The article gives the example of the nomination procedure specified in the *Judiciary (Organisation) Act* (Netherlands), Art 85.

²⁸² See also Sallmann and Wright, above n 152, 9. Philips, above n 208, 7; 16.

that do not, strictly speaking, belong to the judiciary, although they typically have substantial or majority judicial participation on the governing (supervisory) board.

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While it was not deemed necessary to explore this issue in greater detail in the thesis (in view of the ‘chief-judge’-dominated board of CSV), it will become apparent that the distinction between a judiciary-controlled independent public entity and a ‘chief-judge’-owned judicial council is not insignificant. This is because the ministerial powers happen to be generally more established and better defined in the cases of independent public sector entities, as opposed to those involving the ‘chief judge’ councils in South Australia or indeed Victoria.²⁸⁴ This issue will be briefly revisited in the final article which analyses the legislative framework of the *CSV Act*. That article identifies the division of responsibility for court administration between the judiciary and the Attorney-General as a potential area of ambiguity in the Victorian model.

4.3.2 Minister’s powers in court administration

As foreshadowed, the second article examines the relationship between the minister of justice and the judicial council in some detail.

One of the most significant features of the northern European judicial councils is that there has been an overall reduction in the minister’s responsibility for the court system. This feature was strongly influenced by the Swedish public administration tradition, according to which ministers cannot be held responsible for the activities of IAOs that are beyond their actual power of intervention. Instead, the new relationship between the executive government and the judiciary has been

²⁸³ Committee for the Evaluation of the Modernisation of the Dutch Judiciary, above n 140, 29. It is pointed out that the Dutch Council for the Judiciary is a *Sui Generis* public sector entity because it is a new institution that is broadly positioned within the judiciary, but also exists within the general realm of the public law. Secondly, as a public sector institution it is uniquely devoted to the development of the judiciary as an arm of government.

²⁸⁴ Uhrig, above n 102, 33-45. The Uhrig Report pointed out that a minister’s involvement in the management of independent statutory authorities in the Commonwealth jurisdiction is either extremely limited (as in the case of the Australian National Audit Office), partially restricted to allow operational independence, or high, where the authority’s principal activity is service delivery.

formalised through a series of horizontal mechanisms that are designed to increase the transparency of the judicial organisation and provide the government, parliament and other interested parties with an objective picture of the judiciary's stewardship of the courts.

Some of the identified measures include the introduction of transparent administrative rules and hierarchies in the courts, diverse composition of the board, publication of detailed strategic plans and annual reports, extremely liberal application of FOI legislation, the development of multilateral institutional relationships (such as those between the courts and the Parliamentary Ombudsman) and so on.

Notably, however, the minister's powers have not been fully circumscribed in this model, particularly where the board of the judicial council acts in a manner that severely compromises the operations of the council or the courts, such as, for example, in cases of gross negligence or demonstrated financial mismanagement. In such cases, the minister is still entitled to suspend or dismiss the board of the council, which was only made possible because of the non-permanent composition of the board. Furthermore, in Sweden, Ireland and the Netherlands, the legislation also requires the judicial councils to observe or take into account the government's general directions that are relevant for the proper operations of the courts.

4.3.3 Functions and tasks of the judicial council

The final part of the article describes the common functions and tasks of the northern European judicial councils, which include some or all of the following:

- maintenance of common technical systems and administrative services
- allocation and supervision of funding to the courts
- provision of administrative and developmental support
- management training and education of judges and court staff.

In addition, it was noted earlier, the Dutch Judicial Council in particular has been given a broad statutory mandate to improve the quality of justice in the court system and to promote more uniform application of the law. The examples of the projects

and activities undertaken by the Dutch Judicial Council in this area broadly correspond to the courts-related research and analyses produced in Victoria by agencies such as the Victorian Law Reform Commission and the Sentencing Advisory Council. As a result, the article points out that the Dutch Judicial Council can be conceived as a ‘research and development engine’ of the judiciary.

Court Governance In Context: BEYOND INDEPENDENCE

By Tin Bunjevac

Introduction

There is a growing trend in some of the world's most advanced western democracies of entrusting certain "framework" aspects of court administration to independent judicial agencies. This trend was highlighted in my recent study of the models of court administration, in which I examined court governance systems in seven Australian and international jurisdictions.¹

This article will focus on the reasons behind the establishment of such agencies and the need for judges and policy makers to clearly identify the problems, aims and drivers for reform before embarking on a mission to adopt a particular "model." At first, this may seem like an obvious proposition; however, recent experience in overseas jurisdictions demonstrates that it is not easy to reach a consensus on even the most basic issues affecting the administration of justice in courts.

The difficulty of reaching a consensus, especially among judges, is symptomatic of an underlying organizational "atrophy" that needs to be better understood by judges and policy makers, because it highlights the fact that judges and courts, while representing the third arm of government, have practically no common institutional or analytical infrastructure to assist them to develop policy, or present a unified position on behalf of the "judicial organization" as a whole.

The key findings in my study mirror the conclusions of three seminal reports commissioned by the Australasian Institute for Judicial Administration (2004), the Canadian Judicial Council (2006) and the Council of Europe's Commission for the Efficiency of Justice (2003), that there is a *structural deficiency* in the organizational design of the executive model of court administration, which represents a significant obstacle to the strategic long-term planning of the courts' activities and is not optimal for judicial independence, efficiency and quality.²

This leads to the next key finding, that without some common organizational infrastructure and radical changes in the manner in which courts are managed internally, it is difficult to see how judges and courts will be able to respond to the ever-growing challenges of today (such as exponentially growing demand, client expectations, legal complexity, stakeholder criticism, workplace stresses and systemic delay), let alone contemplate some systematic *improvements* in the quality of the administration of justice in the future.

The focus of the court governance debate has shifted from theoretical concerns about the potential threats to judicial independence from the executive branch, to attempts to identify urgently-needed institutional solutions that are capable of better organizing and protecting judges and courts from multiple external, real and existential threats to judicial independence, authority and relevance.³

In the next section of this paper, I will explore each of the introductory themes in more detail. I will firstly outline some of the key challenges and problems facing the judicial organization in Australia and the consequences that those challenges are likely to have for the work of judges and courts. I will then describe the key aims, competences and composition of the proposed independent judicial agency, which is based on the so-called "Northern European Model." The proposed model is largely inspired by the Swedish and Dutch judicial agencies, although I will also make references to the relevant features of the South Australian, Irish, English and other models that are described in more detail in my study.

¹ Bunjevac, "Court Governance: the Challenge of Change" (2011) 20 (4) Journal of Judicial Administration 201. The study examined the Victorian, South Australian, Australian Federal, Irish, English, Canadian and Dutch models of court administration.

² Alford, Gustavson and Williams, *The Governance of Australia's Courts: A Managerial Perspective*, (AIJA, 2004); Professors Carl Baar, Lorne Sossin et al, *Alternative Models of Court Administration*, (Canadian Judicial Council, 2006) (CJC). Council of Europe, Commission for the Efficiency of Justice (CEPEJ), *Councils for Judiciary in EU Countries*, (Strasbourg, 2003).

³ See Fabri M and Langbroek P (eds) *The Challenge of Change for Judicial Systems* (IOS Press, Amsterdam, 2003). For a Graphic illustration of this problem see "Non-Muslims Turning to Sharia Courts to Resolve Civil Disputes", *The Times Online* (21 July 2009), <http://business.timesonline.co.uk/tol/business/law/article6721158.ece> (viewed 9 March 2011). The UK-based Muslim Arbitration Tribunal (MAT) states that 5% of its cases involve non-Muslims who are using the tribunal because "they are less cumbersome and more informal than the English legal system".

Problems, Aims and Drivers for Reform

Realization of the need for change

The operational and external challenges that courts and judges are facing are significant, if not extraordinary, when compared to the operational challenges that other large organizations are facing. Judges and court staff are overworked, stressed and under increasing pressure to improve court performance from litigants, politicians, the media and other stakeholders.

In most of the jurisdictions that have gone through the painful process of structural reforms, there was a growing realization that the society had become increasingly diverse, more demanding and more complex, and that the problems could no longer be addressed by utilising the traditional, passive approaches to court administration, with which judges were most familiar and comfortable.⁴ Eventually, many judges realized that, they too, needed to organize themselves better and rely on others in the performance of their duties. However, they also realized that, in order to achieve those goals effectively, they needed the support of an organization.

The realization that the traditional (judicial) approaches to court administration require a thorough reassessment ought to be placed in the broader institutional context of the administration of justice. The legislature has already exhausted most of the options available in its arsenal: record amounts of money have been invested in the courts; many more judges have been appointed; additional new tribunals have been established, numerous procedural and substantive law reforms have been introduced; yet the problems have continued to grow in scope, intensity and complexity.

I will illustrate this briefly by reference to the contemporary problems of delay in the two largest Australian states of New South Wales (NSW) and Victoria, which have a combined population of 13 million inhabitants.

Pressures, Delays and Backlogs

A recent landmark comparative study of the civil litigation systems in NSW and Germany found that the median case processing time from filing to disposition was 7.68 months in the Regional Court of Stuttgart compared with almost two years (23.44 months) in the NSW District Court and almost three years (35.12 months) in the NSW Supreme Court. The authors of this “most comprehensive and interesting comparative study in a generation” examined 240 broadly comparable cases in terms of the causes of action, remedies sought, complexity of the evidence and quantum of damage.⁵

The differences between the two jurisdictions were just as significant in relation to other aspects of litigation:

- number of appearances required to resolve the matter
- cost of legal representation
- accessibility of the courts
- user satisfaction surveys of legal practitioners which indicated that:

100 aspects of civil litigation were judged to be “in need of reform” by solicitors in NSW

Only 16 aspects of civil litigation were judged to be “in need of reform” by practitioners in the German state of Baden-Württemberg.⁶

The situation is similar in Victoria, where many litigants (and their families) have to wait up to three years to have their dispute finally resolved by the courts.⁷

⁴ On the phenomenon of judicial individuality and administrative passivity see McGarvie R, “The Foundations of Judicial Independence in a Modern Democracy” (1991) 1 JJA 3. See generally also Friesen E, Gallas E and Gallas N, Managing the Courts (Bobbs-Merrill, 1971), p 140; Pammer W and Kramer J, “A Pygmalion in Judicial Responsibility: Toward a Management Ethos Among Judges” in Hays S and Graham Jr C (eds) Handbook of Court Administration and Management (Marcel Dekker, 1993), 205; For a more recent comparative study see Ng, GY, Quality of Judicial Organization and Checks and Balances (2007, Intersentia, Antwerpen - Oxford)

⁵ Marfording A, and Eyland A, “Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany” [2010] UNSWLRS 28. See Richard Ackland, “We should look to Germany for Justice” (Sydney Morning Herald, 1 October 2010) at <http://www.smh.com.au/opinion/society-and-culture/we-should-look-to-germany-for-justice-20100930-15zcz.html>

⁶ Marfording, above n. 5. The study identified numerous organizational and procedural shortcomings, particularly in pre-trial procedures, which caused the majority of the delay, due to excessive adversarialism, lack of pre-trial judicial preparation, issues associated with document management systems, problems associated with the master calendaring procedures, as well as a lack of early preparation by the parties’ lawyers. This resulted in fewer opportunities for early settlement, multiple amendments to pleadings, proliferation of issues, excessive delay and increased cost to parties.

Based on these two examples alone, it is fair to say that the quality of justice has declined. Or to paraphrase Professor Phillip Langbroek, the speed of work in the courts is not the speed of today's Australian society.⁸

So what are the main causes for this situation?

Increasing Litigiousness and Complexity of Society and the Law

The latest Report on Government Services shows an enormous increase (>30%) in annual lodgements since 2003 and persistent delays across all court tiers in state jurisdictions.

The law itself has become much more complex, leading to greater specialization among practitioners. This also means that judges require specialised training to keep up with the new developments.

The Australian society is one of the most multi-cultural societies in the world, which is a great asset to this country. However, this also means that courts constantly require the services of translators and interpreters, which is very expensive and time consuming.

The increase in the uses of modern technology, such as listening devices, has added significantly to the complexity and length of trials.⁹ For example, the average length of higher criminal court trials in Victoria has increased from one week in the 1980s to three weeks in more recent times.¹⁰

Higher Service and Quality Expectations

There are also much higher service and quality expectations by litigants and other justice system stakeholders (eg government agencies, repeat-players, media and politicians). Modern-day litigants are demanding that their matters should be handled in a more efficient, "client-friendly manner," with greater precision, cost-effectiveness and transparency, in plain and understandable language and with greater legal uniformity across all jurisdictions.

Modern Organizational Quality Expectations

The 2003 study by CEPEJ identified new organizational expectations of the judges and courts:

- more efficient streamlining and integration of the working processes in courts
- judicial precision during procedures
- permanent training of judges and administrative staff
- uniformity in applying substantive and procedural law
- better coordination between courts and other justice system stakeholders
- greater transparency and client orientation
- correct treatment of parties (deportment)
- better functional integration of judges and administrative staff
- avoidance of long waiting periods.

Demands for Greater Organizational Transparency and Accountability

Professor Kate Malleson argues that judges have extended their influence into areas previously considered "political", with the paradoxical effect that the political life has become more "judicialized."¹¹ Malleson calls this transformation a "new judiciary." She argues that additional new forms of "soft" accountability must be offered by the judiciary to counter its growing influence in public policy.¹²

⁷ See Robert Clark MP, "Coalition to Slash Court Delays," 23 November 2010, at <http://www.robertclark.net/news/coalition-to-slash-court-delays>. According to the Attorney-General, "it is no secret that Victoria has the longest waiting lists in Australia when it comes to: Supreme Court appeals, County Court trials, Children's Court matters; and Magistrates' Court matters."

⁸ Langbroek P, "Two Cases of Changing the Judiciary and the Judicial Administration: The Netherlands and Guatemala" (Paper presented at the World Bank Conference on Empowerment through Law and Justice in St Petersburg, Russia, 8-11 July 2001)

⁹ Supreme Court of Victoria, Courts' Strategic Directions (2004), at pp 52.

¹⁰ See State of Victoria, The Attorney-General's Justice Statement, (2004) at 46.

¹¹ Voermans W., "Judicial transparency furthering public accountability for new judiciaries" (2007) 3 (1) Utrecht Law Review 148

¹² Kate Malleson, The New Judiciary: the Effects of Expansion and Activism, (Ashgate, 1999). The "soft accountability" methods are to be contrasted with the traditional "hard accountability" methods such as the availability of appellate review, scrutiny of judicial decisions by the media and the public nature of proceedings in courts.

Accountability in court administration has been described as a two-way channel of communication between the court and its stakeholders. It includes “those systems and strategies [employed by the courts] that instil the values and interests of the appropriate stakeholders within organizational behaviour.”¹³

Examples of the soft accountability mechanisms include greater internal administrative transparency, more diverse representation of the judiciary, as well as sensitivity towards stakeholder interests and the needs of a changing social environment.¹⁴

Judicial Individuality and Administrative Passivity

Judicial individuality may be regarded as a strong attribute for the purposes of judicial independence, but when it comes to preparing courts - large and complex organizations - to adapt themselves to societal changes, judicial individuality can be considered a weakness.¹⁵

Remarkably, according to a recent study, judicial individuality became especially pronounced when courts started to experience a steady rise in caseloads and increasing complexity in the law. Despite this, most judges showed little inclination to coordinate their work activities with other judges and professional court staff. One of the reasons for this was that there was simply too much “individuality and loyalty to the smallest unit within the organization”.¹⁶

While judicial individuality has very deep cultural and intellectual origins in all western countries, the situation is made worse by the poorly defined rules of internal administrative organization in courts.

Poorly Defined Rules of Internal Administrative Organization

A number of Australian state courts have developed their own internal administrative divisions, in order to achieve more efficient and functional delegation of responsibilities among judges. In some jurisdictions there are judicial administrators or “judges-in-charge” who are responsible for “steering” the internal lists and divisions in a more business-like manner.

However, in most cases, there are no formal rules that facilitate or clarify the powers and functions of the chief judges or judges-in-charge, in relation to other judges or in relation to the court administration as a whole. This stands in sharp contrast with other, especially American, jurisdictions in which the responsibilities, powers and functions of the various judicial officers, bodies or committees are very clearly and transparently set out.¹⁷

Some courts, such as those in Victoria, are still governed by Councils of Judges, which were established in the 19th Century, and consist of up to 100 judges. This runs contrary to the modern court administration and public administration theories according to which any governing organ with more than 15 members “inevitably gives rise to serious problems of administration and of internal operation.”¹⁸

Structural Governance Issues Affecting Court Performance and Strategic Planning

There is also a far-reaching management separation between the administrative and judicial functions in courts that affects their efficiency and their ability to better integrate internal working processes.¹⁹ The judicial governance arrangements operate in relative isolation from the court administration, which is controlled by the executive. Similarly, court CEOs and administrators typically have very little input in judicial governance.

¹³ See Francesco Contini and Richard Mohr, “Reconciling Independence and Accountability in Judicial Systems” 3(2) (2007) Utrecht Law Review 26.

¹⁴ See e.g. the 245 pages of the rules of judicial administration of the Judicial Council of California:

http://www.courts.ca.gov/documents/title_10.pdf. Rule 10.6 serves as an illustration of the general principle of internal administrative transparency: Business meetings of the Judicial Council are open to the public except in certain circumstances.

¹⁵ See Langbroek, above n.8; Friesen et al, above n.4.

¹⁶ Ng GY, “Quality of Judicial Organization and Checks and Balances” above n.4.

¹⁷ See the detailed rules of judicial administration of the Judicial Council of California: http://www.courts.ca.gov/documents/title_10.pdf.

¹⁸ Church T, “Administration of an Appellate Leviathan: Court Management in the Ninth Circuit Court of Appeals” in Hellman A (ed), *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts*, 229. The author refers to the findings of the Hruska Commission Report of 1973. In relation to the boards of public entities, see the Commonwealth of Australia, *Review of Corporate Governance of Statutory Authorities and Office Holders*, (“Uhrig Report”) (2003) at 96. “...[A] board of between six and nine members (including a managing director if there is one) represents a reasonable size. Boards with members within this range seem to be more easily able to create an environment for the active participation in meetings by all directors.”

¹⁹ Alford et al, above n.2; CJC, above n.2; CEPEJ, above n.2.

One of the consequences of this bifurcated arrangement is that judges are not adequately involved in court administration planning, due to a lack of access to analytical and business infrastructure that would enable them to undertake data collection, research, analysis and planning that is required in order to meaningfully participate in such activities.²⁰ Furthermore, courts do not have a set budget or sufficient discretion over expenditures or management of court personnel. Funding requests often require approvals from officers who are embedded in an external bureaucracy that is physically separated from the courts and often has its own internal priorities.

As a result, there is a “misalignment” between policy and operational needs in the areas of court administration, budgeting, human resources, judicial management and case management.²¹ Judges are not in a position to strategically plan the operations of the organizations in which they control the most critical “outputs.” Arguably, this makes it difficult for judges to assess whether the existing judicial administrative structures, arrangements and operations are the most effective and appropriate for the court as a whole.

Essentially, neither judges nor court administrators have the required degree of authority as to be fully responsible for the outcomes.

In sum, there are significant organizational obstacles for the strategic long-term planning of the courts’ activities in the executive model of court administration.

Rethinking Judicial Independence, Efficiency and Quality of Justice²²

According to CEPEJ, the problems identified above raise two distinct types of questions.

1. Are the existing management arrangements appropriate?

Based on the above discussion, the answer to this question is overwhelmingly negative.

Not only is there an inherent structural and operational divide in the traditional executive model; there is also a significant functional and interpersonal divide between the judicial and non-judicial officers in courts. This greatly reduces the opportunities for the creation of deeper delegation patterns, workflow integration and meaningful professional support for judges in their legal work.

To achieve these aims, more integrated and hierarchical administrative arrangements are needed to give the courts more internal possibilities – particularly in financial and personnel matters – to “drive the essential processes more effectively and efficiently from intake to judgment.”²³

The answer to this problem is the system of “integrated management,” which means that the judicial, administrative, human resources and financial operations should be integrally managed by the courts’ themselves (or, depending on their size, the individual court tiers). For, this system “brings judges into an appropriate working relationship with professional administrators.”²⁴

Integrated management allows the courts to strategically plan their operations and thus provides an effective answer to the identified structural deficiencies inherent in the traditional departmental model of court governance, which is characterised by a misalignment between authority and responsibility, and a bifurcated and diffused system of internal organization.²⁵

Integrated courts are more capable of evolving into professional organizations, which are generally characterised by a more vertical and central command of all administrative processes. On the judicial side, this organizational arrangement promotes innovation, leads to better internal workflow integration and the creation of deeper patterns of work delegation.²⁶ These processes can be contrasted with the traditional judicial arrangements in the executive model, which operate like organizations of professionals, that are mainly based on the individual professionalism of judges and weak horizontal

²⁰ CJC above n 2, at pp 15.

²¹ Alford et al, n 2, at pp 85. The authors call this a misalignment between authority and responsibility.

²² See in more detail, Bunjevack above n 1, at pp 206 and CEPEJ above n 2, at pp 100-102.

²³ CEPEJ, above n 2, at pp 101. Bunjevack, above n 1, at pp 206.

²⁴ Black M, “The Federal Court of Australia: The First 30 Years – A Survey on the Occasion of Two Anniversaries” (2007) MULR 37

²⁵ Alford et al, above n 2.

²⁶ See Sage C, Wright T, Morris C, Case Management Reform: A Study of the Federal Court’s Individual Docket System (Law and Justice Foundation NSW, 2002)

administrative arrangements that are aimed at reaching a consensus among judges on all aspects of court administration.²⁷

We have a highly successful example of “integrated management” in the Australian Federal Courts (which are managed by the chief judges), although in my study I proposed a small collegiate board of administrative judges together with a chief court administrator. In corporate governance theory, that arrangement would be the equivalent of a board of executive directors.

There is little doubt that the system of integrated management is more flexible, responsive and organizationally superior to a model where an external bureaucracy (including a judge-led one) is involved in the day-to-day operational decision-making for the courts (such as the UK or the Irish models).

2. How can the quality of justice be improved in the future?

The second series of questions relates more broadly to the courts' capacity to innovate and effect future improvements in the quality of the administration of justice in a more demanding social, technological and legal environment. “How can judges and courts respond to the increasing complexity of the law, clients' new demands, large backlogs of cases, politicians and the media, and remain polite, responsive, transparent, user-friendly, and still continue to contemplate improvements in the quality of the administration of justice?”²⁸

Based on the above discussion, the answer to this question is that judges and courts require the systematic support of a dedicated service organization – an independent judicial agency – which can contribute to the expansion of the judiciary's own organizational capacity, and promote the efficiency, client-orientation and quality of courts as important public institutions.

An Independent Agency for the Judiciary

A non-departmental public body within the judicial arm of government

Indeed, there is a growing trend in some of the most advanced western democracies, such as Sweden, the Netherlands, Denmark, Norway (as well as Ireland, England, South Australia and Canada) of entrusting key framework aspects of court administration to independent (judicial) agencies that operate at arm's length from the Minister of Justice.

An independent judicial agency is a new kind of public body (*sui generis*), because it operates broadly within the judicial arm of government, but is not necessarily dominated by the most senior judges. It is the judicial arm of government's equivalent of a “non-departmental public body.”

The proliferation of such agencies based on the so-called “Northern European Model”²⁹ is not merely a coincidence; it is believed that this type of intermediary institution is best-positioned to protect the independence of the judiciary, and improve the efficiency and ability of the courts to serve their clients and respond to the external challenges.

The principal tasks of the proposed judicial agency are to provide courts with the necessary funding, support, know-how and infrastructure in areas in which the courts themselves may be lacking the necessary organizational, technical or even professional expertise.

At the same time, as the successful examples of Sweden and the Netherlands demonstrate, the proposed judicial agency should not be centrally managing the court administration for the courts, especially not their internal personnel and financial operations. This is an important feature of the proposed model, although the division of responsibilities between the courts and the judicial agency must be carefully structured to suit the needs of the courts in each particular jurisdiction.³⁰

The judicial agency that I have proposed, which is based on the Dutch model, would also perform an important role in supporting the judiciary's professional and organizational needs, as well as assisting the courts achieve greater

²⁷ See Bunjevack, above n, 1, pp 206. Also Albers P et al, Geïntegreerde rechtbanken: het vervolg, evaluatierapport herziening rechterlijke organisatie (onderdeel 2), IVA, (1994), pp 72-73 and pp 90-92 (“Integrated Courts - Evaluation Report Part II”)

²⁸ See Bunjevack n 1, at pp 206 and CEPEJ, above n 2, at pp 100-102.

²⁹ Voermans W, “Councils for the Judiciary in Europe,” (2000) 8 Tilburg Foreign Law Review - Constitutional Law 121

³⁰ This issue was identified 20 years ago by Church T and Sallmann P, in *Governing Australia's Courts* (1991), at pp 73.

organizational excellence. This is in recognition of the fact that the judicial task in particular has become much more complex in recent times, as noted above.³¹

Independent Agencies in the General Public Sector

Differences between independent public bodies and government departments

While independent authorities exist in many shapes and forms, and can even operate inside government departments,³² they also share a number of common characteristics that clearly distinguish them from the departments:³³

- First, they usually have (complete) managerial autonomy due to a differentiated governance structure from that of the traditional vertically integrated ministries. (“differentiated governance structure”)
- Secondly, independent agencies provide an effective answer to any constitutional or political concerns, especially in areas in which there is a pronounced need for independence from the executive. (“independence from executive”)
- Thirdly, the agencies often have a different internal “control environment”, due to available relaxations or modifications of the legal rules that apply to ministries (such as in relation to personnel, finances, reporting or management).³⁴ (“different control environment”)

Taken together, these three key characteristics of institutional and managerial autonomy are said to add to the “legitimacy, transparency and expertise of decision-making,” and have the potential to achieve greater “coherence between function, form and managerial autonomy.”³⁵

According to the OECD, independent agencies may be established in appropriate areas to address some of the problems identified with the traditional “departmental model” of public administration, including a lack of efficiency, political interference, a need for functional specialisation, a lack of innovation and a lack of focus on the citizen and service delivery.³⁶

Independent judicial agencies based on the Northern European model

Reasons for establishing an independent agency for the judiciary

One can immediately notice that most of the above-mentioned concerns correspond to the identified problem areas in the traditional departmental model of court administration, such as the need to protect judicial independence, the need to achieve reasonable efficiency and the need to improve the quality of the administration of justice through greater client orientation, responsiveness, organizational specialisation, innovation and legal quality.

Indeed, the reasons behind the establishment of independent judicial agencies in the northern European countries are mainly pragmatic:

- First, it is believed that an independent and specialised agency that is broadly responsible for budgetary affairs, developmental, and operational support of the courts, promotes the self-responsibility, unity and quality of the judiciary at a systemic level, while at the same time acting as a protective “buffer” between the courts and the executive.
- Secondly, it is believed that this organizational arrangement promotes the self-responsibility, efficiency and quality in the courts themselves, due to the expertise and support offered by a dedicated “general and

³¹ See Bunjevack, above n. 1. It has been suggested that judicial governance is an emerging scholarly discipline intersecting the fields of law, sociology, organizational science, public administration and economics. See Ng, GY, “A Discipline of Judicial Governance?” (2011) 7(1) Utrecht Law Review 102.

³² OECD, Distributed Public Governance, (2002), at 12-16. Over the past two decades, the UK and the Netherlands in particular have implemented a systematic policy of changing the organizational structure of central ministries and introducing semi-independent agencies, but without creating separate legal bodies in most cases. The English approach is exemplified by Her Majesty’s Courts and Tribunals Service, which is a semi-autonomous “next steps” agency within the Ministry of Justice.

³³ OECD (2002) above n 32; OECD (2007), “Organizing the Central State Administration: Policies & Instruments”, Sigma Papers, No. 43, at pp 12-14.; and pp 16-35; OECD Global Forum on Governance Public Governance, The Governance of the Wider State Sector: Definitions and Issues (2001).

³⁴ OECD (2007), above n 33, at pp 41; OECD (2002), above n 32, at pp 12-15.

³⁵ OECD (2007), above n 33, at pp 21. OECD (2002), above n 32, at pp 14.

³⁶ OECD (2007), above n 33, at pp 40. Other identified weaknesses include “a possible lack of core competency, excessive risk aversion, limited innovation and limited implementation of performance management, a culture of managing down with little focus on citizens, and political interference.” See also the Uhrig Report, above n 18, at pp. 7 and pp 31: Statutory authorities are usually created where there is sufficient need for efficiency and independence.

technical" organization that is responsible for creating the appropriate organizational conditions in which the individual courts can improve their own administrative capacity.

- Thirdly, it is believed that the overall increase in the judiciary's self-responsibility, efficiency and quality in the Northern European model is attributable to the clear division of responsibilities between the agency and the courts themselves. The agency actually has very few responsibilities vis-a-vis the courts' internal operational management, because the courts, for the most part, continue to operate independently of the judicial agency using the system of integrated management.³⁷

Differences between the Northern European and South Australian Models

On initial inspection, the South Australian Judicial Council model, with its central Courts Administration Authority could be classified as a variant of the Northern European model, due to the Authority's corresponding role in the budgetary, management and administration affairs of the courts. However, upon closer analysis, that institutional comparison may be somewhat misleading, for a number of reasons.

First, the South Australian Judicial Council is essentially a judicial governing body, rather than a Sui Generis independent agency that is positioned within the judicial arm of government.³⁸ This is clearly reflected in the composition of the Judicial Council, which is essentially of a "governmental" character.

The second distinction is that the South Australian Courts Administration Authority in practice plays a more central and direct role in the operational management of the individual courts, than is the case of Sweden or the Netherlands.³⁹

Historical Origins - Sweden

Sweden was the first Northern European country that introduced an independent courts administration authority, the Swedish National Courts Administration (SNCA) in 1975. Sweden has a unique system of public administration, which is characterised by a constitutional tradition of functional decentralisation and devolution of responsibilities from government ministries to independent administrative agencies.

The Swedish government is primarily responsible for allocating budgets and defining basic operational objectives for the agencies, while the agencies are independently responsible for implementing government policy and legislation in their area of responsibility. As a result of this constitutional arrangement, Sweden has relatively small ministries and large independent administrative agencies.⁴⁰ Importantly, the agencies' independence is protected by the constitution against any interference by the ministries in their operations.⁴¹

Against this background, it should come as no surprise to learn that Sweden was the first Northern European country that decided to entrust the organization of court administration to an independent administrative agency.

Governance Elements of an Independent Agency for the Judiciary

The essential governance elements of the Northern European agency for the judiciary include:

- Broad stakeholder representation at the governing (supervisory) board level
- fixed term appointments on merit
- exceptionally high level of organizational transparency and public accountability to compensate for diminished ministerial responsibility
- broadly and flexibly defined tasks and powers.

³⁷ CEPEJ, above n 2 at pp 108.

³⁸ From a purely theoretical perspective, it can be argued that the choice of an independent judicial agency based on the Northern European Model was motivated by a desire to create more favorable organizational conditions for the courts independently of any "arm of government." This is certainly the rationale for establishing other independent non-departmental public bodies that are designed to perform discrete functions at arm's length from the executive arm of government. For these reasons the South Australian model appears to be conceptually much closer to the American model, rather than the Northern European model.

³⁹ See generally, Bunjevack, above n 1. This is perhaps an unfair comparison of the models, because of the differences in size of the respective jurisdictions. The entire South Australian courts administration system, with less than 800 employees, is smaller than the Magistrates' Court of Victoria. It is therefore understandable that the Authority performs a central role in the operational management of the courts.

⁴⁰ Levin, P. T. "The Swedish Model of Public Administration: Separation of Powers – The Swedish Style", (2009) 4(1) JOAAG 38. See also Torbjörn Larsson, "Sweden" in OECD (2002), above n 32, 181, at pp 184. A related feature of this arrangement is that the significant investigatory and preparatory work which is required to pass a government bill is not performed by the ministries themselves, but by "commissions of inquiry" that are established by the government. According to the author, approximately 250-300 such commissions are initiated every year.

⁴¹ OECD (2002) above n 32 at pp 30 and pp 181ff; See also Levin above n 40.

Diverse Representation on the Board

Diverse representation on the governing board of an independent judicial agency is an important feature in practically all of the Northern European countries, because it serves to promote the “public accountability” of those institutions. For example, in Norway, the board has nine members, including four judges, one court executive and two lawyers who are appointed by government, together with two representatives of the public, who are appointed by Parliament.⁴² In Ireland there are 17 members on the board of the Irish Courts Service, including nine judicial members and eight representatives from the government, trade unions, members of parliament, lawyers’ associations, etc.⁴³

In contrast, the board of the Dutch Judicial Council is more compact. When it was established, the board had five members on the governing board, including three judges, but this number has been reduced to four, as it was considered to be more effective to have a smaller governing organ.⁴⁴

The practice of having non-judicial or government-appointed members on the board is considered to be an advantage in practically all of the jurisdictions, because of its potential to offer greater legitimacy, external expertise and social perspective to the decision making processes of the organization. It is also reflective of the modern philosophy of the court system, according to which “the courts are by their very nature a shared responsibility between the judiciary and government.”⁴⁵

Fixed Term Board Appointments

Fixed term board appointments are also considered to be an advantage, because they are based upon candidates’ professional expertise and merit. If a board member is not performing well, that person can be replaced at the end of the term.

From the point of view of institutional governance theory, fixed term appointments are used where it is desired to achieve a separation between “ownership” and “management” of an institution. In the long term, this can lead to greater professionalization and depoliticization of court administration.

In contrast, permanent or extensive factional appointments, are not considered to be ideal, because the appointees may not have the required skills, legitimacy and authority. Such arrangements may even be “susceptible to politicisation and syndicalism.”⁴⁶

There are a number of mechanisms available to ensure that the appointments and nominations processes remain transparent and generally attuned to the needs of the courts and judiciary. For example in the Netherlands, the legislation prescribes a nomination procedure by which a Committee of Recommendations, which comprises a number of judicial members and is presided over by a judge, recommends candidates from a list of up to 6 nominees that had been initially proposed by the Minister of Justice and agreed to by the Judicial Council.⁴⁷

⁴² See Rosseland A, Presentation of the National Courts Administration and the Norwegian Court Reforms of 2002, (Stockholm Institute for Scandinavian Law, 2010), 608 at 612. The current Chairperson is a Supreme Court judge. See <http://www.domstol.no/en/Domstoladministrasjonenno/About-the-National-Courts-Administration-/The-Board/>

⁴³ See s 11 of the Courts Service Act 1998 (Irl). The principles of public accountability are clearly reflected in the broad stakeholder composition of the board of the Irish Courts Service, which represented a major departure from the South Australian model on which it was originally based

⁴⁴ Notably, however, the Dutch Board is supported in its function by a statutory “Board of Delegates,” whose membership includes representatives of the courts. Sweden has recently introduced a similar governance structure, which includes a “Supervisory Council” with eight members, including two heads of court. See Operational Plan 2010-2012 (SNCA, 2009), below at 56. The Supervisory Council reviews the operations of the SNCA and advises the Director-General, who is now solely responsible for its operations. In Denmark, there is a “Board of Governors” with 11 members, eight of whom are representatives of the courts. See The Danish Courts - An Organization in Development, (Stockholm Institute for Scandinavian Law, 2010), 581. In England and Wales, where the court administration is managed by a semi-autonomous government agency, there is a board of 10-11 members, which includes three judges. See Her Majesty’s Courts and Tribunals Service Framework Document (April, 2011), at <http://www.official-documents.gov.uk/document/cm80/8043/8043.pdf>

⁴⁵ Lord Chief Justice Phillips of Worth Matravers, The Lord Chief Justice’s Review of the Operation of the Courts, (2008) at pp 7 and pp 16.

⁴⁶ CEPEJ (2003), above n 2, at pp 110; See the Uhrig Report, above n 14, at pp 100.

⁴⁷ See s 85 of the Judiciary (Organization) Act (Nld)

Ministerial Responsibility, Public Accountability and Organizational Transparency

One of the most striking characteristics of the Northern European model is that public control over judicial agencies is no longer primarily or exclusively achieved by means of direct Ministerial responsibility.⁴⁸ In most cases, the operational responsibility for the agency rests solely with the board of the agency, or, alternatively, its chief executive officer.

One of the reasons for the removal of direct ministerial responsibility is the expectation that judicial agencies should operate at arm's length from the minister and independently from any government interference. As we have seen, this principle has its roots in the Swedish constitutional tradition, according to which ministers are not responsible for the activities of independent agencies if those activities fall beyond their power of intervention.⁴⁹

The principle of diminished ministerial responsibility also applies in Denmark, Ireland and the Netherlands, although the minister's responsibility for certain broad, particularly budgetary, matters affecting the operations of the agency, has not been removed in its entirety.

For example, in clearly defined exceptional circumstances, the minister may be entitled to dismiss the board of an agency where it has made decisions that are manifestly contrary to the law,⁵⁰ or where the Auditor-General advises the minister that there are significant financial irregularities in the management of the agency's budget.⁵¹ However, other than in most exceptional circumstances, ministerial responsibility for court administration may be exercised only indirectly, through the general budgetary cycle and a robust exchange of information about the operations of the courts with the public and parliament. The minister has no other input into the internal operational matters of the agency.

New forms of public accountability and institutional transparency have been developed in order to compensate for the loss of direct ministerial responsibility. The traditional, vertical forms of accountability between the ministry and the public service have been replaced by a series of horizontal mechanisms of openness and transparency that permeate through the relationship between the agency and the government (or parliament) on the one side, and the agency and the public on the other.⁵²

One of the key mechanisms of public accountability is the publication of detailed annual reports and strategic operational plans. In the Nordic countries, the principle of official publicity has been taken to an even higher level. For example, in Sweden, the freedom of information laws give members of the public (and the media) far-reaching rights of access to information in relation to practically all aspects of independent authorities' internal operations and decision-making processes. Once an official decision is made by an authority, the decision itself, together with all the materials and correspondence that are associated with the decision, automatically become publicly available.⁵³

In addition, there is the protection available through the institution of the Parliamentary Ombudsman, who is responsible for monitoring the work of public agencies and investigating complaints (and in some cases, initiating prosecutions) from members of the public if they believe that they have been mistreated by a public authority.

As we have seen above, diverse composition of the board of an independent authority (which typically includes members of parliament and key stakeholder representatives), also serves as an important accountability mechanism in most jurisdictions.⁵⁴

Finally, there are independent financial audits performed by the Auditor-General, as well as the government's general instructions that accompany the budget bills. Both the financial audits and the operational directives are publicly available

⁴⁸ See CEPEJ (2003) above n 2, at pp 111-112. This is primarily the case of Sweden and Norway, as well as Ireland.

⁴⁹ See CEPEJ (2003), above n 2, at pp 20.

⁵⁰ s 106 of the Judiciary (Organization) Act (Nld). In the Netherlands, the minister makes a recommendation, but the decision is made by Royal Decree.

⁵¹ See Jesper Wittrup, Poul Sorensen, "Quality of Justice in Denmark" in Marco Fabri et al (eds), *The Administration of Justice in Europe: Towards the Development of Quality Standards* (2003), 119, at pp 125. In Denmark, the minister of justice may, if the agency has received such a negative assessment from the Auditor-General, instruct the agency to take measures that the minister and the Auditor-General have agreed upon, failing which the minister may be entitled to dismiss the board of the agency; CEPEJ (2003), above n 2, pp 43.

⁵² See e.g. Langbroek P, "Quality Management and Autonomy for Court-Organizations; or Creating public trust by developing quality standards for court services", EGPA Paper Study Group on Management and Delivery of Justice, 2001, at pp 6. OECD (2007), above n 33, at pp 14.

⁵³ Levin, above n 40.

⁵⁴ See CEPEJ (2003), above n 2, at p 21.

documents, providing important information to the public about the operational results and expected achievements of their agencies.⁵⁵

For example, the Swedish government included the following basic operational directives to the SNCA in the appropriations directions for 2010:

With respect for the respective roles of the courts, the SNCA and other relevant public authorities, the SNCA shall create conditions for the Courts of Sweden to achieve its operational targets by:

- ensuring an appropriate allocation of resources
- providing administrative support and service
- acting as a driving and supporting force in developmental and quality- enhancement measures
- striving to improve access and provide information about the work of the Courts of Sweden
- working to promoting greater co-operation within the Courts of Sweden
- working to improve co-operation between the courts and other concerned authorities.⁵⁶

Broadly Defined Functions and Tasks

As can be discerned from the general appropriations directions for the SNCA, the principal task of the Judicial Agency is to allocate the budget and to provide administrative support and service to the courts, while also acting as a driving force for their developmental activities.

One of the striking features of the Swedish system is that the Agency does not have a major say in the internal operations of the courts. It is only responsible for creating the optimal operational conditions for the courts “from a distance”.⁵⁷ To achieve these aims, the agency is required to maintain a very clear delineation between its own activities and those of the courts that it serves.

Nevertheless, the Judicial Agency's principal role is to familiarise itself with the conditions in which the courts operate, coordinate activities between the courts and other authorities where appropriate, as well as provide and maintain a number of common systems that are used by all of the courts.⁵⁸ In this regard, the agency is primarily responsible for the provision and maintenance of common administrative systems, such as IT, security, financial administration and staff administration systems, as well as various ancillary tasks such as recruitment, archiving and procurement.

Where additional operational support is required by the courts, the agency can provide the necessary expertise to the presidents of the courts to assist them develop appropriate structures, tools or systems based on the best-practice models developed in consultation with the courts. In that sense, the SNCA can be described as a central service organization for the courts, because it can provide significant professional expertise in areas such as organizational competence design, court design, staff training, technology, and informational platforms.⁵⁹

In addition to providing operational and administrative support, the agency is also responsible for performing certain legal and policy functions, such as evaluating proposed legislative amendments and drawing up proposals for legislative reform, in close consultation with the courts and other relevant stakeholders.⁶⁰

In the Netherlands, the Council for the Judiciary has an even more ambitious agenda. In addition to the tasks performed by the Swedish SNCA, the Council for the Judiciary has a broad mandate to systematically promote the legal quality in the courts by conducting research, analyses and programs that are designed to improve the quality of legal outcomes and achieve more uniform application of the law.⁶¹ It also has responsibility for maintaining a quality organizational framework

⁵⁵ See Torbjörn Larsson, in OECD (2002), above n 32, at pp 181ff.

⁵⁶ Domstolsverket (SNCA), Operational Plan 2010-2012, (2009) at pp 8, referring to the Swedish Government's Appropriation directions for the 2011 budget year in respect of the Courts of Sweden, at pp 3, available at http://www.domstol.se/Publikationer/Informationsmaterial/appropriationsdirections_2011.pdf. See also s 13 of the Courts Service Act 1998 (Irl). The board of the Irish Courts Service is required by law to take into account any “policy or objective of the Government or a Minister of the Government insofar as it may affect or relate to the functions of the Service.”

⁵⁷ CEPEJ (2003)

⁵⁸ SNCA, above n 56, at pp 12.

⁵⁹ SNCA, above n 56.

⁶⁰ SNCA, above n 56.

⁶¹ Bunjevac, above n 1, at pp 220. See Judiciary (Organization) Act (Nld), s 94. See also Council for the Judiciary, Quality in the Judicial System in the Netherlands (2008), p 4. available at: <http://www.rechtspraak.nl/Gerechten/RvdR/Publicaties/Research+Memoranda.htm> (viewed 9 March 2011). For example in 2009 and 2010 the Council completed or commissioned research on decisions involving adjustment problems with children, updated international

that aims to promote organizational improvements in the courts in the financial area, work processes area, the learning area and the customer area.⁶² In that sense, therefore, the Agency acts as a powerful research and development engine for the courts and the judiciary.

Conclusion

There are significant internal and external challenges impacting on the courts' operations and they are growing in scope, intensity and complexity. This trend is unlikely to be reversed.

The executive model of court governance makes it difficult for courts to strategically plan their operations, due to the identified structural problems that are inherent in its organizational design.

As a result, more integrated and vertical administrative arrangements are required to give the courts more internal possibilities, particularly in financial and personnel matters (integrated management).

An independent judicial agency inspired by the Northern European model can provide the necessary support to the courts by promoting their self-responsibility, independence, quality and efficiency. Ideally, an independent judicial agency should be managed by a professional board consisting of fixed-term appointees, but with significant (majority) judicial participation.

To compensate for the reduction in ministerial responsibility, additional new forms of public accountability should be offered.



research on minimum sentences, assessed the practices of single and multiple judge decisions, the issues involved in court sequestration, the quality of specialized commercial courts, the complexity of (statistical) information in judicial decisions, the financing and turnaround in mediation as well as a pilot study on the enforcement of civil judgments. See generally also, Council for the Judiciary (Netherlands), Agenda for the Judiciary 2008-2011: Independent and Committed (2007), p 3. The Council develops programs in consultation with the courts to improve the reasoning of judgments, encourage second-reading of judgments, devote more time to preliminary inquiries, encourage continuous education, procedural improvements, peer review, consultations between courts of appeal and district courts, self-assessment procedures, case differentiation, as well as a customer appreciation survey in combination with a mentoring system.

⁶² See Albers, "Performance Indicators and Evaluation for Judges and Courts" at: http://www.coe.int/t/dghl/cooperation/cepej/events/onenparle/MoscowPA250507_en.pdf at pp 11. The Dutch RechtspraakQ organizational quality system was partly based on the European Foundation for Quality Management.

5 A JUDICIAL BOARD OF EXECUTIVE DIRECTORS*

The third article is chronologically the most recent one in the series, but will be examined in more detail now, because it completes the original policy framework for a Judicial Council of Victoria that was proposed in 2011. In particular, the article focuses on the internal governance arrangements in the courts, which have not been substantively altered by the *CSV Act*.

KEY CONTRIBUTIONS OF CHAPTER 5

The key contribution of the third article is that it further elaborates on the earlier articles' proposals to establish a small board of executive judges in each jurisdiction with full responsibility for court administration. Secondly, the article analyses the internal governance arrangements in the Victorian courts following the CSV reform and questions the policy rationale for retaining the original system of court governance in the courts legislation. Finally, the article provides an original theoretical component, seeking to reconcile the corporate governance theory of board design with the unique internal characteristics of court governance. Thus, the thesis contributes to existing knowledge by introducing and applying concepts from other disciplines and adapting them to the unique institutional context of court governance.

* Tin Bunjevac, 'The Corporate Transformation of the Courts: Towards A Judicial Board of Executive Directors' (2016) 25(4) *Journal of Judicial Administration* 197.

5.1 Board of judicial executives

The article identifies the main court governance concepts underpinning the corporate transformation of the courts in the Australian federal jurisdictions, Queensland, US, UK and the Netherlands, where the internal court administration rules are more transparent and judicial powers are better defined than in Victoria.

The article points out that the Victorian courts are still formally governed by all judges sitting collectively on the statutory Councils of Judges and Magistrates. This model is not regarded favourably in the court governance literature, because it furthers administrative ambiguity and promotes weak and inefficient decision-making.

The Victorian courts legislation also does not sufficiently clarify the administrative relationships between the councils of judges, court administration and other formal and informal administrative structures in the courts (such as the internal committees, divisions, lists and so on). A further problem with this practice is that there are too many individual judges sitting on the various committees and lists with the result that there is insufficient coordination between them. Another shortcoming is that the courts legislation does not sufficiently specify the functions and powers of the Chief Judges and divisional Chief Judges, especially in the higher courts, thus promoting administrative ambiguity. Finally, the article notes that the existing administrative structures had been designed in the executive system of court administration where judges have very limited exposure to court management, with the result that their focus is primarily on issues related to the legal procedure, rather than court management.

Overall, the article questions the rationale for retaining the original statutory framework of internal court governance in the courts legislation following the introduction of the CSV Act.²⁸⁵

²⁸⁵ Notably, the article also states that, at the time of the writing, the Victorian County and Supreme Courts had announced the establishment of 'Boards of Management.' However, at that time there was no information publicly available about the membership, structure and powers of the Boards of Management, other than the fact that they were non-statutory and separate from existing governance structures. The significance of these developments will be addressed further below in Chapter 6.

In contrast to Victoria, the analysis of the internal governance arrangements in the Australian federal courts, Queensland and early American models shows that concerted efforts had been made in each jurisdiction to clearly define and formalise the administrative structures and relationships within the judiciary. This was initially achieved by introducing formal statutory powers requiring all judges to comply with the administrative decisions and ‘orders’ issued by the Chief Judges, administrative judges and federal circuit councils, respectively. In addition, there was also a shift away from a culture based on individualism towards more hierarchical and formal administrative arrangements, which substantially improved the judiciary’s administrative accountability and reinforced judicial independence.

The analysis of the international models is supported by examples of transparent internal court governance structures and rules that properly define the administrative duties and powers of the judicial executives. For example, the Ninth Circuit Court of Appeal in the US established the office of ‘administrative chief judge,’ which assumed a central position on the court’s executive committee once the court size had grown from 15 to almost 30 judges. The article points out that the executive committee is in reality a precursor to a board of executive directors, because the committee was authorised by the council of judges to make autonomous decisions on all matters it deemed appropriate, without having to refer those matters to the council of judges.

In Queensland, the District and Supreme Court legislation formally vested sweeping administrative powers in the administrative judges, who were administratively made senior to all judges apart from the Chief Judges. The example of Queensland is important because the responsibility for court administration was effectively vested in a small ‘executive team’ comprising the Chief Judges and administrative judges, rather than the council of judges. Nevertheless, the article points out that the Queensland courts belong to the executive model of court administration, where the executive government remains in charge of the court administration. As a result, the comparison with a true ‘board of executives’ may

be somewhat misleading in this context, because the administrative functions of the executive teams in Queensland are limited to aspects of procedure and case management, rather than wider operational aspects of court administration.

By contrast, a proper executive board of judges has been established in the Netherlands, where the legislation specifies that the governing board is fully responsible for the budgeting, planning and the overall functioning of the courts, including personnel matters, organisational procedures and information and management systems.²⁸⁶ In addition, the board is required to draft detailed internal court regulations that govern its own procedure, decision-making, division of responsibilities, organisational structure, complaints procedure, delegation, replacement of members in the event of illness and the jurisdictional allocation of cases between the divisions.

The article highlights the advantages of the Dutch system of integrated management, which involves a small judicial management board acting as a single executive court authority governed by the Chief Judge, up to four divisional Chief Judges and the court CEO. The system is characterised by a more hierarchical management style in the court divisions. The management of each court division is allocated to a divisional team comprising the divisional chief judge and a professional court administrator, which effectively integrates all of the judicial, administrative and even financial responsibilities in the court divisions themselves, without the need to refer day-to-day administrative matters to the board. At the same time, the divisional Chief Judges act as members of the policy-making board, which provides a substantial degree of balance and collegiality at the policy-making level. It is noted that the Dutch divisional arrangements in particular have provided an ‘effective solution to the aforementioned lack of clarity regarding the division of tasks, powers and responsibilities,’ which had previously impeded the court administration in the executive model.²⁸⁷

²⁸⁶ *Judiciary (Organisation) Act 1827* (Netherlands), Art 23.

²⁸⁷ Joost Franssen, Arnt Mein and Suzan Verberk, *Gerechtsbesturen, Integral Management en MD-Beleid* (B&A Groep, WODC, 2006) (‘The Functioning of Court Administrations, Integral Management and Management Development Policy’) 2-4.

Ultimately, the article contends that all of the examples and developments highlighted above show a clear trend towards the establishment of new policy-making and governance structures in the courts that are increasingly influenced by their modern corporate equivalents. The article concludes that the Dutch board of judicial executives best exemplifies this trend and that it should be used as a model for other jurisdictions, including Victoria.

5.2 Corporate governance theory of board design and the courts

As foreshadowed, the second original contribution of the article in Chapter 5 is that it seeks to reconcile the corporate governance theory of board design with court governance. It is argued that a board of judicial executives should have full responsibility for the judicial and administrative operations of the courts, independently of the councils of judges. The article points out that the corporate law theory favours a clear structural separation of the function of the board of directors from that of equity holders in a corporation, because this facilitates more expert and efficient management of the organisation. Accordingly, the article argues that the councils of judges can only be regarded as ‘equity holders’ in court administration, because they are not in a position to act as a proper policy-making organ, due to their large membership.²⁸⁸

The article contends that it is possible to reconcile the corporate governance theory of board design with court governance and that the Dutch model represents a working example of this practice in the courts. It was already noted in the first article that the internal management arrangements in the Dutch courts resembled a board of *executive* directors in a corporation, because each of the judicial members on the board was also responsible for the management of the separate court divisions, such as the criminal, civil and administrative divisions that are also commonly found in the Australian state courts. Secondly, and most importantly, the

²⁸⁸ Tin Bunjevac, 'The Corporate Transformation of the Courts: Towards A Judicial Board of Executive Directors' (2016) 25(4) *Journal of Judicial Administration* 197, 205; See also Hill, above n 111, 85.

Dutch legislation makes it clear that the councils of judges no longer have a formal say in court management, although they continue to facilitate that process in an advisory function.

One of the key contributions of the article is the analysis of the corporate governance theory of board design and the way it affects the internal structures and relationships of organisations that are not commercial in character. The article points out that the corporate governance theory has traditionally viewed the internal organisational dynamics of commercial enterprises through the prism of the so-called ‘agency theory’ of corporate governance, which seeks to resolve an inherent conflict of interests between the shareholders, board and management within organisations. As a result, the corporate board of directors is usually structured in such a way as to better align the inherently conflicting interests of the principals (owners) and agents (board and management), typically by having a majority of independent non-executive directors on the board, in order to minimise the management’s influence on the board of directors.²⁸⁹

The analysis suggests that it would be difficult to apply the agency theory of board design to the courts, because the internal organisational dynamics and relationships within the courts are fundamentally different than those in the commercial enterprises, for a number of reasons.²⁹⁰ First, judges have a more immediate and personal interest in the management of the courts than do shareholders in a corporation. Secondly, shareholders are usually not involved in the management, whereas judges are directly involved as policy-makers, managers as well as ‘workers’ in the courts, because they are also responsible for the primary process of the organisation. Most importantly, there appears to be no inherent conflict of interests between the judges sitting on the councils of judges (principals) and those sitting on the board as managers (agents).

The article contends that an alternative theory of corporate governance is capable of reconciling the unique internal characteristics of the courts with the modern

²⁸⁹ Australian Securities Exchange Corporate Governance Council, *ASX Corporate Governance Principles and Recommendations* (ASX, 3rd ed, 2014) 16. The ASX recommendation 2.1 recommends that ‘a majority of the board should be independent directors.’

²⁹⁰ Bunjevaca, above n 288, 206.

corporate governance theory of board design. The so-called ‘Stewardship theory’ of corporate governance has been developed since the 1980s in order to explain the situations where the underlying interests of the organisational principals and agents are better aligned.²⁹¹ It points out that the Stewardship theory applies to organisations where the organisational actors are not driven by their personal interest, but instead are seeking to achieve non-financial ‘intrinsic satisfaction’ by acting in line with the broader organisational objectives of the entity.

The Stewardship theory specifically identifies loosely-coupled organisations, such as the courts, as ones where the organisational actors are more likely to be motivated to act in the interests of the group as a whole, rather than their own self-interest.²⁹² As a result, it is hypothesised that a group of executive judges acting in charge of court operations can be characterised as the judicial ‘stewards’ under the Stewardship theory of corporate governance, because their intrinsic motivations are fundamentally aligned with those of the judicial principals on the councils of judges.

The article explains that the Stewardship theory also has a number of practical prescriptions regarding the composition and elements of the board design, which stem from its more positive interpretation of the internal organisational dynamics between principals and agents. First, it agrees with the general corporate law theory that the separation between ownership and control is an effective device to ensure better management of large organisations.²⁹³ In the specific setting of the courts, this means that the large councils of judges can only be characterised as equity-

²⁹¹ Ibid 206-7. See also generally James H. Davis, F. David Schoorman and Lex Donaldson, 'Toward a Stewardship Theory of Management' (1997) 22(1) *The Academy of Management Review* 20; Lex Donaldson and James H Davis, 'Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns' (1991) 16(1) *Australian Journal of management* 49.

²⁹² Mary Campbell McQueen, *Governance: The Final Frontier Perspectives on State Court Leadership*, Executive Session for State Court Leaders in the 21st Century 2008-2011 (NCSC, 2013); Herbert Jacob, 'The Governance of Trial Judges' (1997) 31 *Law and Society Review* 3, 6. See also Héctor Fix-Fierro, *Courts, Justice, and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Bloomsbury Publishing, 2004) 175.

²⁹³ Gregory Francesco Maassen and Erasmus University. Rotterdam School of Management, *An International Comparison of Corporate Governance Models: A Study On the Formal Independence and Convergence of One-tier and Two-tier Corporate Boards of Directors in the United States of America, the United Kingdom and the Netherlands* (PhD Thesis, S. Stuart, 1999) 63-4.

holders and therefore should not be involved in the policy-making. Secondly, the Stewardship theory favours an internal governance architecture that better integrates policy-making and management, in order to give the stewards the best opportunity to act in the interests of the organisation as a whole.

According to the Stewardship theory, that internal governance architecture is best approximated by a small board of *executive* directors,²⁹⁴ who will thereby be more empowered to influence the strategic direction of the courts on behalf of the council of judges. The article concludes that the Dutch board of executive judges aligns itself well with the Stewardship theory and represents a good working example of the corporate board design in the courts.

²⁹⁴ Melinda Muth and Lex Donaldson, 'Stewardship Theory and Board Structure: a contingency approach' (1998) 6(1) *Corporate Governance: An International Review* 5, 6; 10.

The corporate transformation of the courts: Towards a judicial board of executive directors

Tin Bunjevac*

This article seeks to advance the policy debate about court governance by reference to recent developments in Australia and other countries. It is argued that a corporate-style management board should be responsible for the judicial and administrative operations of the courts, with administrative judges and the CEO acting on the board as executive directors. It is contended that such an arrangement would be capable of achieving greater structural separation between “ownership” and “management” in the courts, which is regarded as an essential postulate of modern corporate law, because it promotes more expert and efficient management of large organisations. This article also seeks to resolve the inherent conceptual difficulties involved in applying the corporate law theory to the courts, by arguing that the so-called “stewardship” theory of corporate governance is capable of reconciling the key principles of modern corporate board design with the unique institutional character of the judicial organisation.

INTRODUCTION

Good corporate governance lies at the heart of all successful organisations. In the private sector, it has long been recognised that effective corporate governance can positively influence the way in which companies seek to achieve their objectives, monitor risk and optimise performance.¹ Over the last 20 years, successive governments in Australia and other countries have recognised the benefits of good corporate governance by actively promoting and implementing best-practice governance standards in government-owned corporations and areas of the public service.²

In contrast, the corporate transformation of the third arm of government – the courts – has been much slower and more sporadic, particularly outside the US, due to a range of constitutional, cultural, organisational and procedural impediments.³ It is also well-documented in the literature that judges are resistant to organisational change and that they often take a sceptical view of the management solutions that have been developed in the commercial world. As recently as 2006, the Chief Justice of New South Wales forcefully argued that management evaluation frameworks for the courts belonged to the “autistic school of management”.⁴

Nevertheless, in the last 10 years, a consensus developed, both in Australia and internationally, that the traditional management arrangements in the courts have had a negative impact on the strategic long-term planning of court operations and overall performance. A landmark comparative study of the civil litigation systems of NSW and Germany revealed that the German courts were “light years

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¹ Australian Securities Exchange Corporate Governance Council, *ASX Corporate Governance Principles and Recommendations* (ASX, 3rd ed, 2014) 3.

² See, eg Victorian Public Sector Commission Board, “Welcome to the Board: Directors’ Guide to Public Entity Governance” (March 2015) <<http://vpssc.vic.gov.au/html-resources/welcome-to-the-board>>; see also generally, John Uhrig, “Review of the Corporate Governance of Statutory Authorities and Office Holders” (Commonwealth of Australia, 2003).

³ See generally Graham Gee et al, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge University Press, 2015) Ch 10.

⁴ J Spiegelman, *Measuring Court Performance Address* (Paper presented at the 24th AIJA Conference, Adelaide, South Australia, 15-17 September 2006).



ahead”⁵ in terms of work organisation, procedure, litigation costs, timeliness, access to justice and client satisfaction.⁶ An influential management study commissioned by the Australasian Institute for Judicial Administration found that a vast majority of the Australian State courts operated an ineffective organisational framework that was considered to be outdated in the management literature.⁷ In particular, the study found that there were two separate and disjointed management systems operating inside the courts, whereby judges were responsible for the dispensation of justice, while court administrators were separately responsible for the courts’ operational management, on behalf of the Department of Justice. The main problem with this arrangement was that the judges had assumed the responsibility for improving court performance, while having insufficient authority over court operations.⁸

Around the same time, two international studies in the EU and Canada pointed to the possibility that the problems of organisational misalignment would likely persist even where the responsibility for court administration is transferred from the executive government to an independent courts administration authority.⁹ One of the reasons for this finding was that judges were not sufficiently involved in the strategic planning of court operations due to ongoing reliance on the central authority that replaced the executive government.¹⁰ To address this issue, the EU study suggested that an integrated management board inside each individual court might be better placed to coordinate the judicial and administrative operations and transform the courts from “organisations of professionals” into “professional organisations”.¹¹

The Victorian County and Supreme Courts have recently established non-statutory internal management boards in each court with responsibility for court administration, although no information is publicly available about their structure, powers and functions. This article seeks to advance the policy debate in this area by identifying a number of principles of good corporate governance that would be useful in considering the structure and powers of court management boards. The principal focus will be on the courts in Victoria, although the administrative principles would equally apply to other jurisdictions where the statutory responsibility for court administration is formally vested in large collegiate boards of judges or divided between the judiciary and a centralised courts administration authority.

It is argued that a single management board should be responsible for all of the judicial and administrative operations in each court, with judges and the court CEO acting on the board as executive directors. It is contended that such an arrangement would be capable of safeguarding the unique institutional character of the courts, while also achieving greater structural separation between “ownership” and “management”, which is regarded as an essential postulate of modern corporate law, because it promotes more efficient and expert management of large organisations.¹² *A posteriori*, this article seeks to resolve the inherent conceptual difficulties involved in applying the corporate law

⁵ Richard Ackland, “We Should Look to Germany for Justice”, *The Age* (Melbourne), 1 October 2010 <<http://www.theage.com.au/it-pro/we-should-look-to-germany-for-justice-20100930-15zcz.html>>.

⁶ A Marfording and A Eyland, *Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany* (UNSW Law Research Paper No 2010-28, 15 July 2010).

⁷ J Alford et al, *The Governance of Australia’s Courts: A Managerial Perspective* (Australian Institute of Judicial Administration, 2004).

⁸ Alford, n 7, 86.

⁹ Carl Baar et al, *Alternative Models of Court Administration* (Ottawa: Canadian Judicial Council, 2006) 102-103; Wim Voermans and Pim Albers, *Councils for the Judiciary in EU Countries* (CEPEJ, 2003) 37.

¹⁰ Baar et al, n 9, 102-103; Voermans and Albers, n 9, 112.

¹¹ Voermans and Albers, n 9, 101, referring to Voermans et al, *Geïntegreerde Rechtbanken: Het Vervolg, Evaluatierapport Herziening Rechtelijke Organisatie (Onderdeel II)* (1994) 90-91.

¹² Elizabeth J Boros and John Duns, *Corporate Law* (Oxford University Press, 3rd ed, 2013) 90; Klaus Hopt and Patrick Leyens, “Board Models in Europe – Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France and Italy” (2004) 1(2) *European Company & Financial Law Review* 135, 136. The authors note that since the establishment of the Dutch East India Company in 1602, the corporate law has tried to solve the problem of the separation of ownership and control; see also *Salomon v A Salomon & Co Ltd* [1896] UKHL 1.

theory to the courts, by arguing that the so-called “stewardship” theory of corporate governance is capable of reconciling the key principles of corporate board design with the unique institutional character of the judicial organisation.

First the article provides an overview of the court governance systems in Australia and the problems associated with the existing frameworks of court administration. Next, the article identifies the principles underpinning the corporate transformation of the judiciaries in the US, UK and the Netherlands, where the court administration frameworks are transparent and much more clearly defined. Then the article seeks to reconcile the theory of modern corporate board design with the unique characteristics of court governance. It proposes a small board of executive judges that would functionally integrate the management and policy-making functions in a single administrative court authority, while also ensuring more effective collegiate decision-making on behalf of the court as a whole. Finally, the article seeks to anchor the proposed theoretical model in practice, by highlighting the emerging contours of the executive board model in the courts of the US, Australia and the Netherlands.

OVERVIEW OF THE COURT GOVERNANCE SYSTEMS IN AUSTRALIA

Even a cursory look at the landscape of the Australian court system must distinguish between the federal and State courts, because there are vastly different governance arrangements in place between the courts and the executive government, and also among the courts themselves. In a majority of the States, the court operations, budgeting, administrative policy and infrastructure are managed by the executive government, while judges principally remain in charge of the judicial aspects of court administration, which include judicial management, case management, adjudication and procedure.¹³ In some States, such as Queensland, the statutory authority over the judicial administrative arrangements is vested in the chief judges alone, while in others, such as Victoria, all judges exercise their administrative powers collectively through the so-called councils of judges.

In contrast, the Australian federal courts were granted full administrative independence from the executive government in the late 1970s and 1980s, because the federal government considered that there was “little systemic incentive to efficiency” in the executive model and also because of the concerns about its impact on judicial independence.¹⁴ As a result, the full administrative authority over court operations in the High Court of Australia was vested in a collegiate board comprising all seven justices of that court, while the administration of the much larger federal courts was vested in the Chief Justices of those courts alone.¹⁵

In 2014, the government of Victoria decided to transfer its operational control over court administration to an independent statutory entity called Court Services Victoria (CSV), which was modelled on the South Australian Judicial Council.¹⁶ The main function of CSV is to provide the shared administrative services and operational facilities to the courts under a judicial umbrella, but without substantially affecting the existing internal governance arrangements in the courts themselves.¹⁷

The brief outline of the existing models of court administration in Australia indicates that there are two basic systems of organisation of work in the courts. The first is a vertical system of governance, where the responsibility for both policy-making and administration is formally vested in

¹³ Supreme Court of Victoria, *Courts’ Strategic Directions Project* (2004) 71.

¹⁴ Stephen Skehill, “Comment on Court Governance” (1994) 4 JJA 29.

¹⁵ See generally, Peter Sallmann and Tim Smith, “Constitutionalism and Managerial Effectiveness: Revisiting Australian Courts’ Governance” in Australasian Institute of Judicial Administration, *Australian Courts: Serving Democracy and Its Publics* (2013) 265.

¹⁶ *Court Services Victoria Act 2014* (Vic). Notably, the South Australian Judicial Council itself was modelled on the Judicial Conference of the US.

¹⁷ At the time of the writing, the Victorian County Court and the Supreme Court were considering the introduction of non-statutory court management boards, but these arrangements are subject to the existing statutory authority of the Councils of Judges. No public information is presently available about the proposed initiative.

the chief judges. This is the model that operates in the federal courts and, on the judicial side alone, in Queensland.¹⁸ In contrast, a horizontal, collegiate approach to court governance is found in the High Court of Australia and most State jurisdictions, including Victoria.

Advantages and disadvantages of the federal courts' vertical model

According to Church and Sallmann, the key advantage of vesting the sole operational authority in the Chief Justices in the federal courts is that administrative accountability and authority are vested in specific individuals, which means that responses to problems can be "swift and consistent".¹⁹ This framework places clear lines of administrative accountability and responsibility in the Chief Justices, which is particularly important in the federal courts, because the Chief Justices are also responsible for the financial and operational affairs of the courts.²⁰

Notably, the Chief Justices' formal statutory powers have been further expanded in recent years to also include full responsibility for the administration of the intra-curial arrangements in the distribution and execution of the judicial business of those courts.²¹ This point is best illustrated by s 15 of the *Federal Court of Australia Act 1976* (Cth), which gives the Chief Justice the responsibility to ensure the "effective, orderly and expeditious" discharge of the business of the court, together with the corresponding powers to assign cases and caseloads to particular judges, and even to temporarily restrict judges to non-sitting duties. The Chief Justices are assisted in the exercise of their duties by the court CEOs, who are responsible for implementing high-level policy and may also act on behalf of the Chief Justice in the administrative affairs of the courts.²²

Critics of the federal court system of governance point to the fact that the sole organisational responsibility for both policy-making and management of the courts is formally vested in the one individual. According to Church and Sallmann, that arrangement has the potential to "retard" the development of administrative capacity and involvement of other judicial officers of the court.²³ Furthermore, the assignment of the sole policy-making responsibility to the Chief Justices has been criticised from a traditional management perspective on the basis that it does not sufficiently separate "management" from "policy making" of the institution and therefore does not comply with modern corporate governance practices.²⁴ Alford et al illustrate this problem by discussing a hypothetical example of an incompetent, inefficient or even "tyrannical" Chief Justice who is able to dominate the court's affairs in a manner contrary to the ideal of judicial independence.²⁵

The collegiate governance model in Victoria

The Chief Justices' administrative supremacy in the federal courts stands in sharp contrast to the traditional collegiate model of judicial court governance in Victoria, which is embodied in the

¹⁸ Under *Federal Court of Australia Act 1976* (Cth) s 15, the Chief Justice is responsible for ensuring the orderly and expeditious discharge of the business of the court. By s 18A of the Act, the Chief Justice is also responsible for managing the administrative affairs of the court. In Queensland, the executive government continues to manage the administrative side of court operations, but the Chief Justice is in charge of the judicial administrative policy.

¹⁹ Thomas Church and Peter Sallmann, *Governing Australia's Courts* (Australian Institute of Judicial Administration, 1991) 68.

²⁰ See Michael Black, "The Federal Court of Australia: The First 30 Years – A Survey on the Occasion of Two Anniversaries" (2007) 31(3) MULR 1017, Ch XII. See Peter Sallmann and Richard T Wright, *Going to Court: A Discussion Paper on Civil Justice in Victoria* (Department of Justice, Victoria, 2000) 10. Federal judges stress that "self-administration" is the golden key" to operational effectiveness and accountability.

²¹ *Federal Court Act 1976* (Cth) s 15.

²² See, eg *Family Law Act 1975* (Cth) s 38D.

²³ Church and Sallmann, n 19, 68. See also Justice RE McGarvie, "The Foundations of Judicial Independence in a Modern Democracy" (1991) 1 JJA 24. Justice McGarvie highlights the risk of the development of an informal "kitchen cabinet". See also Edward C Gallas, Nesta M Gallas and Ernest Friesen Jr, *Managing the Courts* (Indianapolis, Bobbs-Merrill, 1971) 140.

²⁴ See Lou Hill, *Constitutional and Managerial Principles of Judicial Court Governance: Implementation in the State of Victoria* (LLM Thesis, University of Melbourne, 1995) 82-83.

²⁵ See Alford et al, n 7, 74. Reference is also made to Sir Garfield Barwick CJ's dominant role in the High Court of Australia, which led to the changes to the High Court's internal governance model. See Neil Andrews, "Vinegar Free – Sir Garfield Barwick's Recipe for Judicial Salad" (1996) 3 Canberra L Rev 175, 189.

statutory councils of judges in each of the court tiers.²⁶ The administrative authority of the councils was entrenched in the original legislation that established the Supreme Court in the 19th century, when only a handful of judges were appointed to the bench.²⁷ According to the Victorian Chief Justice Marilyn Warren, the original legislation had contemplated a Council of only four judges to be responsible for administering the court in 1852. She contrasts this with the more recent situation, when there were almost 40 judicial officers on the Council of Judges in the Supreme Court alone.²⁸ The Chief Justice's comments suggest that the existing judicial administrative arrangements have become unwieldy because, "as courts and tribunals become larger, the traditional structures of internal management and leadership become more cumbersome and provide a poor fit."²⁹

One of the criticisms of the "all justices" collegiate model is that it furthers administrative ambiguity. The European Council for the Efficiency of Justice (CEPEJ) points out that large collegiate assemblies of judges tend to promote weak and inefficient policy-making, because they are primarily aimed at reaching a consensus on all aspects of the judges' work in the courts.³⁰ This issue had been noted much earlier in the US, where the Hruska Commission in 1973 examined the collegiate governance structures in the courts of California and concluded that any court governing organ with more than 15 members "inevitably gives rise to serious problems of administration and of internal operation."³¹

In Victoria, this problem is further compounded by the fact that, apart from the generic provisions in the courts legislation that establish the councils of judges,³² there are few other provisions in the legislation itself that clarify the relationship between the judiciary and the administrative structures in the courts.³³ Unlike the Australian federal courts legislation, which confers specific administrative powers on the Chief Justices and the CEOs, the Victorian legislation is practically silent on this issue. That does not mean that the Victorian courts have not developed any administrative arrangements. As former Supreme Court Justice Richard McGarvie pointed out more than 20 years ago, the courts have developed relatively sophisticated non-statutory internal administrative divisions, which were assigned to specific judges-in-charge.³⁴ Such arrangements were found to facilitate more efficient and functional delegation of work among judges, because they were characterised by a degree of administrative autonomy and judicial specialisation.³⁵ However, the internal divisional arrangements were insufficiently clear as they were not recorded in any court regulations or statute and therefore lacked the legal imprimatur of formal legal obligations. Furthermore, the judicial arrangements were

²⁶ See *Supreme Court Act 1986* (Vic) s 28; *County Court Act 1958* (Vic) s 87; *Magistrates' Court Act 1989* (Vic) s 15.

²⁷ Civil Justice Committee, *Report to the Honourable Attorney-General Concerning the Administration of Justice in Victoria* (1984) 341. The Committee also noted that the court staff had at first not been under the control of the executive government, even though some of them had been paid out of public funds.

²⁸ Marilyn Warren, *State of the Victorian Judicature* (Paper presented at Banco Court, Supreme Court of Victoria, 22 May 2007) 36.

²⁹ Warren, n 28, 35.

³⁰ Voermans and Albers, n 9, 100-101.

³¹ Thomas Church Jr, "Administration of an Appellate Leviathan: Court Management in the Ninth Circuit Court of Appeals" in Arthur D Hellman (ed), *The Innovations of the Ninth Circuit and the Future of the Federal Courts* (Cornell University Press, 1990) 226, 229.

³² See *Magistrates' Court Act 1989* (Vic) s 15; *County Court Act 1958* (Vic) s 87; *Supreme Court Act 1986* (Vic) s 28.

³³ There are notable exceptions. For example, *Magistrates' Court Act 1989* (Vic) ss 6 and 13 confer on the Chief Magistrate the powers to assign duties to magistrates and to ensure their attendances in court. Similarly, there are provisions in each of the Courts Acts that make the chief judicial officers responsible for directing the professional development and training of other judicial officers (*Supreme Court Act 1986* (Vic) s 28A; *Magistrates' Court Act 1989*, s 13B; *County Court Act 1958* (Vic) s 17AAA). In the Court of Appeal, the President is responsible for ensuring the "orderly and expeditious exercise of the jurisdiction and powers of the Court of Appeal": *Supreme Court Act 1986*, s 16. In addition, the chief judicial officers of the County and Supreme Courts have certain controlling competences in relation to the business of the Associate Judges and Judicial Registrars: see, eg *Supreme Court Act 1986*, ss 17E, 109A; *County Court Act 1958*, s 17ABA.

³⁴ See generally, R McGarvie, "Judicial Responsibility for the Operation of the Court System" (1989) 63(2) ALJ 79.

³⁵ McGarvie, n 34, 91-92.

designed for the executive system of governance, where judges primarily debated issues relevant to the legal procedure while court operations were being separately managed by the Department of Justice.

As a result of that legacy, there are today practically no provisions in the Victorian courts legislation that facilitate or clarify the functions and powers of the judges-in-charge of the internal divisions, either in relation to other judges, or in relation to the court administration as a whole. Neither the chief judges nor the divisional chief judges (principal judges) in the County or the Supreme Courts have any formal legislative authority or management tools to administer their courts and divisions.³⁶ It is also unclear what formal or informal arrangements are available to the CEOs in the higher courts to coordinate their activities with the councils of judges, executive committees or divisions. The overall perception is one of disunity and a lack of coordination between the formal and informal administrative structures in the courts.

The recent transfer of responsibility for court administration from the executive government to CSV has not materially resolved these issues, because one of the key features of the reform was to retain the existing provisions in the courts legislation, ostensibly to ensure that each jurisdiction would continue to be administered autonomously.³⁷ In fact, the *Court Services Victoria Act 2014* (Vic) has arguably created additional uncertainty about the internal administrative arrangements in the courts, because the individual court CEOs are now also subject to central directions by the CEO of CSV, as well as the chief judges of their courts.³⁸

In an attempt to resolve these issues, the Victorian County and Supreme Courts have recently established an internal management board to be responsible for court administration, although little information is publicly available about these initiatives. The following section seeks to contextualise the developments in Victoria by analysing the corporate transformation of the courts in the US, the UK and the Netherlands, in order to identify key principles of good corporate governance that ought to be taken into account in considering the structure and powers of an integrated court management board.

CORPORATE TRANSFORMATION OF THE JUDICIARY IN OTHER COUNTRIES

The process of modern corporate transformation of the judiciary can be traced back to Roscoe Pound's address to the annual convention of the American Bar Association in 1906.³⁹ It is worth recalling that two of the four "causes of popular dissatisfaction with the administration of justice" that were identified by Pound were closely associated with the problems of court administration; namely, "judicial organisation and procedure" and the "environment of judicial administration".⁴⁰ The establishment of the Conference of Circuit Judges and the Circuit Councils in 1922 heralded the birth of the "American model"⁴¹ of court administration, which was characterised by full judicial control of court operations, with administrators reporting directly to judges rather than the executive government.⁴²

From the Victorian perspective, one of the most remarkable features of the American model was the desire to formalise the administrative structures and relationships within the judiciary in the form

³⁶ Warren, n 28, 36.

³⁷ Supreme Court of Victoria, Submission to the Productivity Commission, *Access to Justice Arrangements* (2014) 12.

³⁸ *Court Services Victoria Act 2014* (Vic) s 33. For a detailed examination of the *Court Services Victoria Act 2014*, see Tin Bunjevaca, "Court Services Victoria and the New Politics of Judicial Independence: A Critical Analysis of the Court Services Victoria Act 2014 (Vic)" (2016) 41(2) Mon LR 299.

³⁹ Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) 14 *American Lawyer* 445.

⁴⁰ Pound, n 39, 448-449.

⁴¹ Perry S Miller and Carl Baar, *Judicial Administration in Canada* (Montreal, McGill, 1981) 63.

⁴² Baar et al, n 9, 61. In 1939, the Congress transferred the administrative control of the Federal Courts from the Department of Justice to the judiciary.

of highly transparent rules and regulations.⁴³ For example, as Wheeler pointed out, the Circuit Councils had been given formal statutory powers to ensure the “expeditious and efficient” disposition of cases and to issue administrative “orders” that individual judges had to comply with.⁴⁴ Second, the American court reformers also recognised the importance of preserving individual courts’ operational autonomy, leaving basic decisions about case processing, staff selection and management in most cases to the courts themselves.⁴⁵ This practice allowed individual jurisdictions and Circuits to develop innovative administrative rules and practices that were remarkably transparent and functional at the same time.⁴⁶

Most importantly, for present purposes, there was recognition that certain management concepts drawn from the commercial world and management theory could be readily adapted to the court environment. Over a period of several decades, the National Center for State Courts, the National Association for Court Management, the Federal Judicial Center and other bodies have developed an impressive array of policies and techniques that introduced some of the best practices from the commercial world to the unique organisational environment of the courts. Today this philosophy is reflected in a range of managerial approaches pioneered by the US courts that have entered the essential vocabulary of judges and court administrators throughout the world. It is no exaggeration to state that the concepts of weighted caseloads,⁴⁷ case-flow management,⁴⁸ total quality management⁴⁹ and, more recently, judicial governance principles⁵⁰ and organisational quality frameworks⁵¹ have truly revolutionised the “art and practice” of court administration in many countries, including Australia.⁵² The Australian federal courts, for example, have successfully adopted the individual docket system⁵³ and experimented with workload measurement systems for the judiciary,⁵⁴ which were largely inspired by the concepts and practices developed by the American courts.⁵⁵

⁴³ See, generally Russell R Wheeler, *Origins of the Elements of Federal Court Governance* (Federal Judicial Center, 1992). Examples of this practice can be found at all levels of the judicial organisation and across different State and Federal Circuits. See, eg National Center for State Courts, *Key Elements of an Effective Rule of Court on the Role of the Presiding Judge in the Trial Courts* (National Center for State Courts, 2006). See also the detailed *Judicial Administration Rules of the Judicial Council of California* <<http://www.courts.ca.gov/cms/rules/index.cfm?title=ten>> For a critique of judicial corporatisation, see Wolf V Heydebrand and Carroll Seron, *Rationalizing Justice: The Political Economy of Federal District Courts* (State University of New York Press, 1990) 14.

⁴⁴ Wheeler, n 43, 18-19; Church and Sallmann, n 19, 73.

⁴⁵ Church and Sallmann, above n 19, 73.

⁴⁶ For example, s 6 of the *Omnibus Judgeship Act of 1978* allowed courts of appeal with more than 15 judges to experiment with internal administrative units. The administrative innovations of the Ninth Circuit Court of Appeal, in particular, have been well-documented and studied around the world: see, eg Church Jr, n 31; see also McGarvie, n 23, 30.

⁴⁷ VE Flango, BJ Ostrom and National Center for State Courts, *Assessing the Need for Judges and Court Support Staff* (National Center for State Courts, 1996).

⁴⁸ DC Steelman et al, *Caseflow Management: The Heart of Court Management in the New Millennium* (National Center for State Courts, 2004).

⁴⁹ Alexander B Aikman, *TQM Total Quality Management in the Courts: A Handbook for Judicial Policy Makers and Administrators* (National Center for State Courts, 1994).

⁵⁰ National Center for State Courts, *Principles for Judicial Administration* (2012); Christine Durham and Daniel Becker, *Perspectives on State Court Leadership: A Case for Court Governance Principles* (Harvard Kennedy School, 2010).

⁵¹ National Center for State Courts, *Courtools: Trial Court Performance Measures* (2005).

⁵² Alexander B Aikman, *The Art and Practice of Court Administration* (CRC Press, 2007).

⁵³ Caroline Sage et al, *Case Management Reform: A Study of the Federal Court’s Individual Docket System* (Law and Justice Foundation of NSW, 2002).

⁵⁴ Tony Landsell and Stephen O’Ryan, “Benchmarking and Productivity for the Judiciary” (2000) 10(1) JJA 25.

⁵⁵ Anthony North, *My Court Car is a Helicopter* (Paper presented at the Canadian Judicial Council Conference, Inside the Administration of Justice: Toward a New Model of Court Administration, Victoria, British Columbia, 31 January 2007). Justice North points out that the Federal Court of Australia engaged Maureen Solomon, a leading US case management expert, to assist with the introduction of the individual docket system.

Outside the US, a similar evolutionary process has been underway in England, following the introduction of the *Constitutional Reform Act 2005* (UK), where it appears that the English judiciary is following firmly in the footsteps of 20th century American court reformers. A landmark study by leading English constitutional academics recently concluded that the English judiciary's "shift away from a culture of individualism towards one of corporatism"⁵⁶ has significantly improved its accountability and enhanced its institutional capacity to protect judicial independence.⁵⁷ According to Gee et al, the constitutional reforms necessitated the creation of more formal relationships both within the judiciary and between the judiciary and the other branches of government.⁵⁸ This is reflected not only in the detailed procedures laid down in the framework agreements that regulate the management of the courts, but also in the creation of a modern judicial bureaucracy, headed by the Judicial Executive Board, which now effectively operates as a "form of judicial Cabinet".⁵⁹

In other EU countries, arguably the most comprehensive court system reforms have been introduced in the Netherlands, where the "executive" system of court administration has been replaced by modern corporate board structures inside the courts themselves. A court management board now fully integrates the judicial and administrative functions of court administration under a single executive court authority, thus replacing two separate management systems that were previously in place in the courts.⁶⁰ According to Voermans and Albers, the system of integrated management, which is modelled on a small corporate board of executive directors, facilitates effective collegiate decision-making on the board, while also introducing a more hierarchical management style in the internal court divisions, focusing on the management aspects of the work of divisional chief judges.⁶¹

These developments suggest that the process of modern institutional transformation of the judiciary is evolving from mere adaptation of good management practices imposed upon existing court structures, towards the establishment of new policy-making and management frameworks in the courts that are also modelled on their modern corporate equivalents. As Voermans and Albers point out, new governance arrangements are required in order to give the courts more internal possibilities to improve their operations.⁶² This is because the operational and interpersonal divide between the judicial and non-judicial officers in the traditional model had substantially reduced the possibilities for greater workflow integration and the creation of deeper patterns of work delegation between judges and professional court staff.⁶³ In their view, these problems can best be resolved by the introduction of a central management board, in which the administrative judges, acting as the "executives of courts", would be given greater "responsibility and powers in financial and personnel matters".⁶⁴

The following section explores these issues in more detail, by seeking to reconcile the corporate law theory of board design with the unique institutional characteristics of the courts. It is argued that a small board of management, modelled on a corporate board of executive directors, should be responsible for the judicial and administrative operations of the courts, with judges acting on the board as executive directors together with the court CEO. It is contended that such an arrangement would be capable of safeguarding the unique institutional character of the courts, while also achieving greater structural separation between "ownership" and "management" of the organisation, which is regarded as an essential postulate of modern corporate law.

⁵⁶ Gee et al, n 3, 126.

⁵⁷ Gee et al, n 3, 101, 112. See also, generally Kate Maleson, *The New Judiciary: The Effects of Expansion and Activism* (Ashgate, 1999).

⁵⁸ Gee et al, n 3, 252-253.

⁵⁹ Gee et al, n 3, 253-254; see also Ch 6.

⁶⁰ Tin Bunjevaca, "Court Governance: The Challenge of Change" (2011) 20 JJA 201, 221.

⁶¹ Voermans and Albers, n 11, 90-91.

⁶² Voermans and Albers, n 9, 101.

⁶³ See Voermans and Albers, n 11, 70-77, 90-92.

⁶⁴ Wim Voermans, "Councils for the Judiciary in Europe: Trends and Models" in Francisco Fernandez Segado (ed), *The Spanish Constitution in the European Constitutional Context* (Dykinson, 2003) 2133; Voermans and Albers, n 11, 100-101.

CORPORATE GOVERNANCE THEORY AND THE COURTS

The modern corporate law principles of board design have occasionally influenced the thinking of court reformers in the US, Australia and other countries. As early as the 1970s, Friesen et al proposed a small board of judges that would sit as a policy board and function as an “intervening element between the judicial environment and the court organisation”.⁶⁵ In their view, the policy-making function of the board was to provide a “structural pattern for judicial administration concurrently with high quality court management”.⁶⁶ In Australia, a similar view was espoused by Hill, who analysed the internal governance structures in the Victorian courts and concluded that the division of administrative responsibilities inside the courts was insufficiently clear and that the “opportunity for judges to exercise meaningful control over court administration [w]as also slight”.⁶⁷ Hill’s principal contention was that the courts should draw upon the corporate governance business model, “one which separates management from equity holders and from final policy determination”.⁶⁸ According to this view, the judges sitting on the councils of judges can only be characterised as “equity holders”, because they are not in an effective position to act as a true policy-making organ, such as a board of directors in a corporation.⁶⁹ This characterisation is significant, because it supports the proposition that the large collegiate assemblies of judges should not have a direct role in the management of the courts, because they tend to promote weak and inefficient decision-making that is primarily aimed at reaching a consensus among judges on all aspects of their work in the courts.⁷⁰

Hill’s thesis was strongly influenced by established corporate governance principles, which require greater *structural separation* of the function of the board of directors from that of the shareholders’ meeting in a corporation. This corporate law device is designed primarily to facilitate “more expert and efficient management of the corporation”,⁷¹ although it also serves to attract capital and allow shareholders to exercise indirect control over corporate management through the supervisory function of the board. In practical terms, this means that the dispersed corporate shareholders have very limited input in the board’s policy deliberations, apart from being entitled to participate and vote in annual general meetings and to take a “positive interest” in the composition and performance of the board.⁷² Most importantly, the corporate board is considered to be an *independent* organ of the company, rather than merely being an agent of the shareholders’ meeting.⁷³

In operational terms, the board is mainly concerned with the strategic policy, while corporate managers have the authority to deal with matters of operational performance of the company. The policy rationale behind these principles is to avoid a situation where the board is tempted to step into

⁶⁵ Gallas, Gallas and Friesen Jr, n 23, 134, 138.

⁶⁶ Gallas, Gallas and Friesen Jr, n 23, 135. The authors refer to the seminal work of Peter F Drucker, *The Practice of Management* (Harper & Row, 1954).

⁶⁷ Hill, n 24, 84.

⁶⁸ Hill, n 24, 83-84.

⁶⁹ Hill, n 24, 85.

⁷⁰ Voermans and Albers, n 9, 100-101.

⁷¹ Boros and Duns, n 12, 90.

⁷² Hill, n 24, 85. See also the *Corporations Act 2001* (Cth), which requires that certain powers of the corporation must be exercised by the general meeting of members, such as voting on the composition of the board (s 203D), changes to company constitution (s 136) and changes to company capital structure (s 254H).

⁷³ *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113. See also *Corporations Act 2001* (Cth) s 198A, which provides that “the business of a company is to be managed by or under the direction of the directors”. In practice, the Board may confer its powers on a managing director (s 198C) or delegate to a committee of directors (s 198D). The ASX Listing Rules may also require some specific matters to be approved by the company general meeting; see ASX Listing Rules 7.1, 10.1, 10.11, 11.1, 11.2.

the operational side of the company's business, while also preventing the company management or the CEO from usurping the policy-making function that properly rests with the board elected by the shareholders.⁷⁴

The agency theory of corporate governance and the courts

Although the corporate board model is generally regarded as being effective in facilitating more expert and efficient management of the corporation, until more recently the corporate governance theory could not properly reconcile the underlying organisational dynamics of commercial enterprises with the unique internal demands and characteristics of certain types of organisations, such as the courts. Namely, the corporate law has predominantly viewed the interests and stakeholder relationships within organisations through the prism of the so-called "agency theory" of corporate governance. According to this theory, corporate governance seeks to resolve an inherent conflict of interests between the corporate owners, the board and management, with the view to achieving profit maximisation through commercial activity.⁷⁵ As Kraakman and Hansmann point out, the problem lies in ensuring that the board and management (agents) remain responsive to the owners' interests (principals), rather than their own personal interests.⁷⁶ The agency theory seeks to resolve these conflicts by introducing a range of *constraining devices*, such as executive compensation schemes, regulatory disclosure requirements and internal board structures, which are specifically designed to better align the inherently conflicting interests of the agents and the principals.⁷⁷ In theory, that task is best achieved by fully separating the functions of the board and management, and by having a majority of independent non-executive directors on the board, in order to reduce the management's potential influence on the board of directors.⁷⁸

Admittedly, it is almost impossible to apply the agency theory's organisational prescriptions to the unique internal characteristics of the judicial organisation. The administration of justice in the courts is quintessentially a non-commercial undertaking, because the judicial organisation is centred around the utilitarian and altruistic goals of fairness, impartiality, justice and equality before the law. As Hill points out, a judge's interest in the internal affairs of the court is much more immediate, long-term and personal than the shareholders' interest in the internal affairs of the company.⁷⁹ Second, shareholders typically do not participate in company management, whereas judges' input in court operations is both essential and direct. Third, shareholders are usually not employed by their company, whereas judges act as policy-makers, administrators, as well as "employees" of the courts – in the sense that they are ultimately responsible for the primary process of the organisation. As a result, it can be said that judges, as "tenured shareholders", have a much more tangible interest in the management of their courts than do ordinary shareholders in the management of their company. Moreover, the interests of the judicial "principals" and management appear to be fundamentally aligned, because there is no inherent conflict of interest between the principals and agents, which is a defining characteristic of most commercial enterprises.

The stewardship theory of corporate governance and the courts

Since the late 1980s and early 1990s, a complementary theory of corporate governance with roots in psychology and sociology has been developed in order to explain the situations where the organisational interests of the principals and agents appear to be more aligned. The so-called

⁷⁴ Thomas Clark, *International Corporate Governance: A Comparative Approach* (Routledge, 2007) 36-38.

⁷⁵ See generally, Hansmann H and Kraakman R, "Agency Problems and Legal Strategies" in Kraakman R et al (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2004) 21-31.

⁷⁶ Hansmann and Kraakman, n 75, 22.

⁷⁷ Hansmann and Kraakman, n 75, 23-27. See also Lex Donaldson and James H Davis, "Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns" (1991) 16(1) *Australian Journal of Management* 49, 51.

⁷⁸ James H Davis, F David Schoorman and Lex Donaldson, "Toward a Stewardship Theory of Management" (1997) 22(1) *The Academy of Management Review* 20, 23. See also Australian Securities Exchange Corporate Governance Council, n 1, 16. The ASX Recommendation 2.1 recommends that "a majority of the board should be independent directors".

⁷⁹ Hill, n 24, 86.

“stewardship theory” of corporate governance takes a decidedly positive view of the personal attributes of, and interactions between, the shareholders, the board members and management in specific organisational environments. According to a seminal paper by Davis and Donaldson, the organisational actors in the stewardship model feel personally motivated to act as the corporate stewards, by seeking to achieve non-financial, “intrinsic satisfaction” and by acting responsibly and in line with the broader organisational objectives of the entity.⁸⁰ In a follow-up study, Davies et al specifically identified loosely coupled, heterogeneous organisations (such as the courts),⁸¹ as ones where the corporate stewards were likely to be “motivated to make decisions that are in the best interests of the group”.⁸² The authors drew upon a wealth of organisational literature to identify the typical profile of a corporate steward as someone who self-identifies with the organisation and is motivated by non-financial, “higher order” needs.⁸³ Unlike the corporate agent, who favours “control-oriented mechanisms” and “high-power distance culture”, the steward has a strong preference for organisational structures and mechanisms that are “involvement-oriented”, “trust-based” and foster “value-commitment”.⁸⁴

Based on the above, it is reasonable to hypothesise that judges in charge of the court operations can be characterised as the judicial “stewards” under the stewardship theory of corporate governance. This is because the courts’ internal organisational dynamics are very much centred upon the intrinsic values of justice and the rule of law, while the stewards’ personal motivations are not profit-related, but rather are informed by strong value-commitments, trust-based relationships and peer-respect. Above all, the intrinsic motivations of the judicial stewards appear to be fundamentally aligned with those of the judicial principals sitting on the councils of judges.

Importantly, the stewardship theory also has a number of practical prescriptions in areas such as the board design, which stem from its more positive interpretation of the organisational separation between ownership and control. According to Maassen, stewardship theorists ostensibly agree with the agency theory notion that the separation between ownership and control is an effective and efficient means of managing large organisations.⁸⁵ However, unlike the agency theory, which sees goal-conflict as an inevitable consequence of the diverging interests of the corporate owners and corporate managers, the stewardship theory’s preference for goal-alignment holds that the principals can expect much better results where the internal organisational structure facilitates greater control by those in charge of the management.⁸⁶ Therefore, the stewardship theory has a strong preference for an internal governance architecture that better integrates policy-making and management, such as a small board of executive directors,⁸⁷ because the corporate stewards will thereby be more likely to be empowered to influence the strategic direction of the corporation.⁸⁸

BOARD OF EXECUTIVE JUDGES IN THE COURTS

As the analysis of the Australian models of court governance above demonstrates, the policy debate about the internal governance architecture of the courts is not purely academic in nature, but rather

⁸⁰ Donaldson and Davis, n 77, 51.

⁸¹ Mary Campbell McQueen, *Governance: The Final Frontier, Perspectives on State Court Leadership* (NCSC, 2013).

⁸² Davis, Schoorman and Donaldson, n 78, 25.

⁸³ Davis, Schoorman and Donaldson, n 78, 29-30.

⁸⁴ Davis, Schoorman and Donaldson, n 78, 30-31.

⁸⁵ GF Maassen, *An International Comparison of Corporate Governance Models* (SpencerStuart, 1999) 63-64.

⁸⁶ Melinda Muth and Lex Donaldson, “Stewardship Theory and Board Structure: A Contingency Approach” (1998) 6(1) *Corporate Governance: An International Review* 5, 6 and 10.

⁸⁷ Muth and Donaldson, n 86.

⁸⁸ Maassen, n 85, 65. Interestingly, the stewardship theory also sees benefits in integrating the roles of the President of the board with that of the CEO, an arrangement that is not viewed favourably by the agency theory, due to concerns about the management’s dominance over the Board. See, eg Australian Securities Exchange Corporate Governance Council, n 1, 18. The ASX Recommendation 2.5 states that the “chair of the board of a listed entity should be an independent director and, in particular, should not be the same person as the CEO of the entity”.

involves issues of great practical significance for the courts in most Australian jurisdictions. We have seen that in the federal courts there is no effective separation between ownership, management and control, because the policy-making and management functions are formally vested in the Chief Justices alone (although, in practice, their policy-making function tends to be exercised in a more collegiate manner).⁸⁹ The opposite problem was identified in the Victorian courts, where the large councils of judges were unable to effectively perform the policy-making function of a board of directors, while the court management function was awkwardly divided between the councils and their judicial committees, court divisions and the rest of the court administration headed by the court CEO. Arguably, therefore, this organisational architecture also suffers from a lack of clarity regarding the internal division of responsibilities between the existing administrative structures and officers-in-charge.⁹⁰

The analysis of the stewardship theory suggests that a small board of executive judges could potentially resolve some of these problems, because it would integrate the management and policy-making functions in the one administrative organ, while also ensuring more effective collegiate decision-making on behalf of the court as a whole. This following discussion seeks to anchor the theoretical model in practice, by analysing the emerging contours of the proposed judicial board model in the courts of the US, Australia and the Netherlands.

Early precursors: Ninth Circuit Court of Appeal and Queensland courts

According to Church, one of the pioneers in this area was the Ninth Circuit Court of Appeal under the leadership of Chief Judge Browning. One of the court's early innovations was the appointment and inclusion of "Administrative Chief Judges" on the court's executive committee, which assumed a central role in managing the court's business once its size had grown from 13 to almost 30 judges.⁹¹ Notably, from 1981, the committee was authorised by the judges to make autonomous decisions on *all* matters that were deemed by the committee itself to be of insufficient importance to require action by all of the judges.⁹² Thus it can be said that the executive committee of the Ninth Circuit Court of Appeal was an early precursor to a board of executive directors, because it effectively removed the policy-making and management aspects of the court's business from the Council of Judges in practically all cases. At the same time, the inclusion of the administrative chief judges demonstrated a desire to achieve a more functional division of responsibilities on the committee itself, based on the judges' operational responsibilities (rather than their seniority, regional representation or policy-making expertise alone), which corresponds with the operational foci of boards of executive directors. In other words, the executive committee effectively integrated its policy-making function with operational management to the extent that the chief judge and the administrative chief judges were also actively involved in the operational aspects of court administration.⁹³

In Australia, Queensland was the first jurisdiction to have formally vested sweeping administrative powers in the administrative judges. The District Court and Supreme Court legislation gives the administrative judges the powers to do "all things necessary or convenient to be done" for the administration of the courts and makes them responsible to the chief judges for ensuring the

⁸⁹ Diana Bryant, *The Autonomous Model – Not All Beer and Skittles* (Paper presented at the Judicial Conference of Australia Colloquium, Hyatt Hotel, Canberra, 6-8 October 2006) 5. The Chief Justice states that she is guided in her policy-making role by a Policy Advisory Committee and also the twice-yearly plenary meetings of judges.

⁹⁰ Hill, n 24, 83.

⁹¹ Church Jr, n 31, 244.

⁹² Church Jr, n 31, 243.

⁹³ Church Jr, n 31, 245. However, Church also notes that the Ninth Circuit Court of Appeal Executive Committee included non-executive judges who served as representatives from the geographical regions and circuits.

“orderly and expeditious exercise of the jurisdiction” of those courts.⁹⁴ These powers were inserted in the legislation more recently in order to clarify that the administrative judge is “senior to all other judges of the court apart from the Chief Judge”.⁹⁵

The Queensland example is significant because the legislation clearly separates the judges’ administrative position from their judicial office and therefore creates a dedicated judicial executive function solely responsible for court administration. Indeed, according to the Parliamentary debates leading to the appointment of the administrative judges, the intended role for these judicial officers was to ensure that “modern case flow management techniques and other needed reforms could be put into place to improve the efficiency and responsiveness” of the court.⁹⁶

The Queensland model is also significant in that it keeps the responsibility for court administration away from the councils of judges. However, it should be kept in mind that the functions conferred on the chief judges and administrative judges in Queensland are confined to matters of judicial administration, because court operations in that jurisdiction are separately managed by the executive arm of government. Therefore, although the functions and powers of the administrative judges in Queensland appear to closely resemble a corporate board of judicial executives, in reality their contribution to wider court administration policy and strategic planning of court operations remains limited. Nevertheless, the Queensland legislation represents a good example of a judicial management framework where the administrative duties, functions and powers of the judicial executives are transparent, functional and well-defined.

The Court Management Board in the Netherlands

In the EU countries, as foreshadowed, the most significant example of the corporate board design has been introduced in the Netherlands, where the internal governance architecture of the courts is centred around their internal legal-administrative divisions (sectors), such as the administrative, criminal and civil law divisions that are also commonly found in most Australian State courts. In 2002, the Dutch legislation established an executive board for each court other than the Supreme Court of the Netherlands. According to the *Judiciary (Organisation) Act 1827* (Netherlands), all judges and administrative officers are formally subordinated to the decisions of the executive board.⁹⁷ In order to ensure individual judicial independence, the governing board is not permitted to interfere in any procedural aspects, substantive assessment or the decision in a specific case or category of cases.⁹⁸

One of the striking features of the Dutch model of court governance is that it fully separates the court management from the judicial “equity holders”, something that even the early American court reformers had never sought to accomplish. As a result, the councils of judges in the Netherlands no longer have a formal say in the court operations, although they continue to perform an advisory role to the governing board.⁹⁹ The composition of the governing board itself has been faithfully modelled upon a corporate board of executive directors. Under the *Judiciary (Organisation) Act*, the governing board consists of a chairperson (the court president), up to four divisional chief judges, and one non-judicial member who is the CEO.¹⁰⁰ The governing board is under a legal obligation to establish within the court up to four organisational divisions,¹⁰¹ with each division having its own judicial, administrative, and even financial responsibilities.¹⁰² A further notable feature of the Dutch governing board is that all of the divisional chief judges, including the court president, are appointed by Royal

⁹⁴ *Supreme Court of Queensland Act 1991* (Qld) s 51 and *District Court of Queensland Act 1967* (Qld) s 28F.

⁹⁵ *Justice and Other Information Disclosure Bill 2008* (Qld), Explanatory Memorandum, 11-12.

⁹⁶ See Queensland, *Parliamentary Debates*, Legislative Assembly, 10 October 1991, 1713.

⁹⁷ *Judiciary (Organisation) Act 1827* (Netherlands) ss 24, 25.

⁹⁸ *Judiciary (Organisation) Act 1827* (Netherlands) s 23(2).

⁹⁹ Bunjevack, n 60, 220-221.

¹⁰⁰ *Judiciary (Organisation) Act 1827* (Netherlands) s 15. The President represents the court.

¹⁰¹ *Judiciary (Organisation) Act 1827* (Netherlands) s 20(1).

¹⁰² The governing board allocates funding from the court’s budget to each of the divisions.

Decree for a six-year term.¹⁰³ The idea behind this requirement is that the judicial representatives on the board should be chosen based on their administrative competence, rather than their seniority or position in the judicial hierarchy, which has been identified in the literature as one of the key principles of good judicial governance.¹⁰⁴

The management of each court division is allocated to a divisional team, which consists of the divisional chief judge and a professional court administrator. The divisional judge chairs the divisional meetings and is responsible for the day-to-day management of the division, while the coordinator manages the administrative staff in consultation with the divisional judge.¹⁰⁵ This arrangement seeks to ensure that each division is managed more independently and efficiently, by integrating the judicial and administrative powers in the court divisions, without the need to refer day-to-day operational matters to the board itself.¹⁰⁶ The divisional planning is coordinated between the management board and the divisions based on a quarterly cycle.

Because the divisional judges are also members of the governing board of the court, the framework provides balance and collegiality at the policy-making level. At the same time, the policy-making function and management have been integrated, by allowing the divisional judges to actively participate in policy formulation at the board level. Overall, however, the policy-making function rests solely with the management board, while the responsibility for operational management has been delegated to the organisational units that are most familiar with the judicial work in the divisions themselves.

Significantly, the Dutch legislation also takes into account the general principles of internal administrative transparency that were identified in Part 2. For example, the Act prescribes the governing board's duties and responsibilities in some detail, while also imposing on the board further administrative requirements that must be addressed in internal court "regulations".¹⁰⁷ Thus according to s 23 of the *Judiciary (Organisation) Act*, the board is responsible for the budgeting, planning and control cycle, as well as the overall functioning of the courts, including personnel matters, organisational procedures and information and management systems.¹⁰⁸ Furthermore, the governing board is required to create transparent court regulations that govern its procedure, decision-making, division of responsibilities, organisational structure, complaints procedure, delegation, replacement of members in the event of illness and the jurisdictional allocation of cases between the divisions.¹⁰⁹

Based on the discussion above, it appears that the Dutch board model meets the key requirements of modern corporate board design that have been identified in this article. One of the unique achievements of the Dutch model is that it fully separates the court management from the judicial "principals", which is regarded in corporate governance theory as the key to achieving more effective and efficient management of large organisations. Similarly, the establishment of the divisional teams, which are centred upon the courts' existing legal-administrative divisions, serves to promote better integration of the operational and policy-making functions at the board, by fostering greater involvement of the divisional chief judges in the divisional administration and policy-making of the board. An independent review of the Dutch courts concluded that the divisional arrangements, in particular, had been effectively implemented in that they provided a "solution to the aforementioned

¹⁰³ *Judiciary (Organisation) Act 1827* (Netherlands) s 15. The members of the management board may be reappointed. See also s 16. The judge-managers are entitled to an allowance in addition to their salary for the work performed in their managerial capacity.

¹⁰⁴ See National Center for State Courts, n 50, 4. See also Durham and Becker, n 50, 5.

¹⁰⁵ *Judiciary (Organisation) Act 1827* (Netherlands) s 21.

¹⁰⁶ Gar Yein Ng, *Quality of Judicial Organisation and Checks and Balances* (PhD Thesis, Utrecht University, 2007) 110.

¹⁰⁷ *Judiciary (Organisation) Act 1827* (Netherlands) s 19.

¹⁰⁸ *Judiciary (Organisation) Act 1827* (Netherlands) s 23.

¹⁰⁹ *Judiciary (Organisation) Act 1827* (Netherlands) s 19.

lack of clarity regarding the division of tasks, powers and responsibilities” which had previously impeded court administration in the executive model.¹¹⁰

CONCLUSION

This article has sought to identify a number of principles of good corporate governance that would be useful in considering the structure and powers of the proposed court management board. The experiences from the US and Europe demonstrate that the process of modern corporate transformation of the courts is evolving from mere adaptation of corporate management practices imposed upon existing court structures, towards the establishment of modern court governance frameworks that are modelled on their corporate world equivalents.

This article proposes the establishment of a small board of executive judges, which would structurally separate the court management from the councils of judges. That organisational framework would offer an effective answer to the problems of misalignment of the administrative responsibilities in many Australian courts. It would also provide a functional collegiate forum for policy-making, thus addressing the problems associated with the Chief Justices’ administrative dominance in the Australian federal courts.

The proposed model is theoretically underpinned by the “stewardship” theory of corporate governance, which sees benefits in integrating the policy-making and operational functions in a small board of executive directors, in situations where the interests of the board members (judicial “stewards”) appear to be fundamentally aligned with those of the principals (councils of judges).

The experiences from other jurisdictions show that the vesting of formal legislative powers in the chief and administrative judges is the key to resolving any problems of administrative ambiguity. The courts legislation in the Netherlands, in particular, provides an excellent example of a transparent normative framework with clearly identified structures, duties and responsibilities of the management board and the divisional teams. This should be contrasted with the existing legislation in Victoria, which is deficient in that it does not facilitate or clarify the functions and powers of the internal administrative structures either in relation to individual judges, or in relation to the court administration as a whole.

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¹¹⁰ J Franssen, A Mein and S Verberk, *Gerechtsbesturen, Integral Management En Md-Beleid* (B&A Groep, WODC, 2006) 2-4. (“The Functioning of Court Administrations, Integral Management and Management Development Policy”).

6 A CRITICAL ANALYSIS OF THE *COURT SERVICES* *VICTORIA ACT 2014* (VIC)*

6.1 The framework in motion

The answers to the first research question and the basic contours of the proposed court governance policy framework are now starting to emerge from the analysis presented in the preceding chapters. The centrepiece of the proposed policy framework is a service-oriented judicial council with a broad statutory responsibility for improving the quality of the administration of justice in the courts. The council should have a small governing board composed of judges and non-judicial representatives, who should ideally be appointed for a fixed term based on merit. Next, the council should principally be tasked with the provision of shared corporate services to the courts, rather than be involved in the operational aspects of court administration. At the same time, however, the council should have the capacity to perform a wide range of developmental functions in the court system, such as to assist the courts improve their internal administrative arrangements and working methods, and to promote strategies that are designed to improve the quality

* Tin Bunjevac, 'Court Services Victoria and the New Politics of Judicial Independence: A Critical Analysis of the *Court Services Victoria Act 2014* (Vic)' (2015) 41(2) *Monash University Law Review* 299.

of the administration of justice. The Judicial College of Victoria is also included in the proposed framework because it plays a vital role in promoting the quality of the administration of justice in the court system by keeping judges abreast of the latest developments in the law and examining some social issues that are relevant to their work.

At the court level, the proposed model envisages the establishment of a single executive board of judges under the system of integrated management, which would assume full responsibility for the management of the courts. The relationship between the judicial council and the courts should be characterised by transparent and well-defined internal administrative arrangements and clearly defined duties, tasks and powers. Likewise, the relationship between the judiciary and the executive government should be characterised by transparent mechanisms of accountability and openness that permeate through the relationship between the courts and the government on the one hand and the courts and other stakeholders on the other. The Attorney-General should have no say in the operational management of the courts, but there should be adequate mechanisms left in place to allow for the effective coordination of the essential public services between the courts and other justice sector entities. Finally, the minister may also retain a set of specific residual functions in the court system to be used in situations of well-defined emergency.

Having outlined the proposed policy benchmarks for a Judicial Council of Victoria, it is now time to examine the legislative and institutional framework established by the *CSV Act* in order to address the principal research question for the thesis: Does the legislative and institutional framework of the *CSV Act* meet the proposed policy benchmarks identified above?

This question is examined in detail in the final article, which brings together the separate pieces of the analytical framework from the preceding chapters in order to provide a critical examination of the Victorian court system reform. The article was peer-reviewed by two anonymous referees who were described by the editors of the *Monash University Law Review* as ‘eminent leaders in this field.’ The referees commented favourably on the research, with one referee noting that the ‘breadth of the comparative work is impressive and highly relevant’ and the other stating that

the article makes ‘an important contribution to the advancement of the policy debate in the area of court governance.’

KEY CONTRIBUTIONS OF CHAPTER 6

The most important contribution of the article is that it provides a detailed comparative analysis of the legal and institutional frameworks established by the *CSV Act* against the policy benchmarks developed in the earlier chapters. In doing so, the chapter also identifies a number of perceived strengths and weaknesses of the Victorian court governance framework and puts forward proposals for future study and reform.

6.2 The CSV policy framework

The analysis of the *CSV Act* shows that the Victorian legislative framework was strongly influenced by the South Australian Judicial Council, because it incorporates many of the key features of that model. Nevertheless, there are a number of subtle differences between the two institutional models which suggest that CSV is better aligned with the model policy framework than its South Australian equivalent.

6.2.1 Membership and composition of the council

The first similarity between the two jurisdictions is that CSV was established as an independent statutory entity governed by the Chief Judges of the individual court tiers and the president of VCAT, but with the added inclusion of up to two non-judicial experts on the board of the Courts Council. The potential inclusion of non-judicial members on the Council can be regarded as a welcome point of departure from the South Australian model, because it brings external expertise and social accountability into the judicial organisation. Nevertheless, non-judicial membership is not guaranteed, while the Chief Judges’ membership is subject to the same grounds of criticism that were expressed earlier in respect of the South Australian model; namely, that it can lead to factional disputes, politicisation of

court administration and unfair competition for resources, especially because the Chief Justice wields a power of veto. It is also noted that the permanent judicial membership on the Courts Council could potentially represent a reputational risk in cases of serious financial irregularities and other cases of proven mismanagement of the courts.

6.2.2 Key competencies of CSV

The second point of similarity between South Australia and Victoria is that CSV has been tasked with the provision of shared ‘administrative services and facilities’ to the courts, that are placed under the control of its CEO. In practice, this means that CSV will be principally in charge of the shared corporate services such as financial administration, payroll, statistics, security, IT, archiving, human resources and so on. This aspect of the South Australian model was criticised in the first article on the basis that it focuses primarily on the administrative and technical side of the court system’s operations, rather than the broader contributions that the Judicial Council could make to improve the quality of justice as the peak administrative body of the third arm of government.

It will be recalled that the Dutch Judicial Council and the Swedish SNCA have assumed a much broader developmental mandate to improve the quality of justice in the court system by offering a wide range of professional, legal and non-technical services to the courts. The examples given included the development of modern workload measurement systems, management training of judges and staff, provision of developmental support for the courts, as well as the undertaking of wide-ranging interdisciplinary research that is relevant to the activities of the courts.

Although the article proposes a broadening of CSV’s formal legislative mandate to include the areas identified above, it is also noted that the statutory framework of CSV is not purely administrative in nature, because it is strengthened by the inclusion of the Judicial College of Victoria under the umbrella of the *CSV Act*. This represents another qualitative point of differentiation between CSV and the South Australian Judicial Council. In this regard, it is also noted that the *CSV Act* vests in the CEO of CSV the power to do ‘all things necessary or convenient to be

done' in the exercise of his functions, which could potentially be interpreted in a broader sense, thus allowing CSV to assume a much broader developmental function in the court system in the future.

6.2.3 Relationship between CSV and the courts

The analysis of CSV's relationship with the individual court tiers shows that this issue is again more nuanced in Victoria than in South Australia, because of the sheer differences in size between the two jurisdictions. The South Australian Courts Administration Authority ('CAA') has in practice assumed a somewhat central position in the court system's operations, because it is directly involved in many aspects of court management, such as the maintenance of court registries, transfer of funds and staff across different court tiers, and other internal court functions.²⁹⁵ All of these activities indicate that the South Australian courts are strongly reliant on CAA in their day-to-day operations, which is perhaps understandable given that the entire South Australian court system is broadly comparable in size to the Magistrates' Court of Victoria.

In contrast, it would be difficult to imagine CSV performing the same function in Victoria across six much larger court tiers and multiple levels of the courts' organisational hierarchy. In this regard, the article recalls the negative experiences from the Canadian federal jurisdictions, which showed that the courts' over-reliance on CAS rendered that model in practice a variant of the executive model, because CAS had merely replicated the centralised management patterns that were established in the executive system. This outcome would be clearly undesirable in Victoria, because it could potentially stymie the internal organisational development of the courts and lead to renewed operational inefficiencies.

While it may be difficult to imagine CSV replicating the management patterns from the executive model, the analysis of the *CSV Act* shows that there are striking parallels between the powers held by the CEO of CSV and those previously held by the Executive Director of Courts from the Department of Justice. For example,

²⁹⁵ Hill, above n 111, 50.

the CEO of CSV has been vested with the administrative powers to ‘direct’ the CEOs of the individual courts and also to ‘appoint and manage’ their staff, which arguably place this official in a position that is comparable to that of the Executive Director of Courts or the Chief Administrator of CAS in the Canadian federal jurisdictions.²⁹⁶

Despite the existence of the formal administrative powers vested in the CEO, the article points out that a range of factors militate against CSV taking an active role in court administration, such as the size of the jurisdiction, the declared emphasis on autonomous administration in each jurisdiction,²⁹⁷ as well as the negative experiences associated with the executive model. This line of argument is further supported by recent statements by the Chief Justice, who explains that although CSV has formal statutory authority over court administration, in practice it would primarily act as a ‘service agency’ to the courts.²⁹⁸

6.2.4 How are the courts managed internally?

It was noted in Chapter 5 that the *CSV Act* had made no changes to the existing governance provisions in the courts legislation and that this could be regarded as a serious impediment to future organisational development of the courts.

The article in Chapter 6 similarly identifies at least four reasons why the legacy statutory provisions in the courts legislation can be regarded as inadequate:

²⁹⁶ *Court Services Victoria Act 2014* (Vic), ss 25 and 33.

²⁹⁷ Supreme Court of Victoria, 'Supreme Court of Victoria, Submission to the Productivity Commission: *Access to Justice Arrangements*' (Supreme Court of Victoria, June 2014). See also Attorney-General Robert Clark, *Speech at the Launch of Court Services Victoria* <<http://www.robertclark.com.au/speeches/other-speeches/speech-at-the-launch-of-court-services-victoria/>>. According to the Attorney-General, ‘each court remains as a separate entity and its governing council, internal arrangements and rule-making responsibilities remain unchanged.’

²⁹⁸ Chief Justice Marilyn Warren, 'Court Governance in the State of Victoria' (Paper presented at the International Organisation for Court Administration, Sheraton Hotel, Sydney NSW, 24 September 2014) 11.

- the courts are still formally governed by all judicial officers sitting on the statutory Councils of Judges and Magistrates, an arrangement that promotes weak and inefficient decision-making
- the legislation does not clarify the administrative powers and relationships between the existing administrative structures in the courts
- the legislation does not sufficiently specify the functions and powers of the Chief Judges, divisional judges and other court officials
- the existing administrative arrangements had been designed in the executive system of court administration, with the result that their focus is primarily on issues related to the legal procedure, rather than court management.

Overall, therefore, the article questions the policy rationale for retaining the ‘legacy’ statutory framework of internal court governance in the courts legislation following the introduction of the *CSV Act*. To address this issue, the article proposes the establishment of a single executive court authority with full responsibility for court administration, which would be modelled on the Dutch executive board.²⁹⁹ The analysis of the Dutch model shows that the board should be conceived as a single executive court authority centred around the court divisions. It is also noted that the Dutch model is viewed very favourably because it is characterised by well-defined functions and powers that are enshrined in the legislation and internal court regulations.

6.2.5 Post-scriptum developments: Boards of Management

Following the submission of the article to publication, the Victorian County and Supreme Courts announced the establishment of non-statutory ‘Management Boards’ with responsibility for court administration.³⁰⁰ Until very recently, there was no information publicly available about the structure, duties, powers or composition of the newly-established Management Boards in either jurisdiction, other than the fact that they were non-statutory creations. However, the latest

²⁹⁹ Bunjevaca, above n 43, 316-7.

³⁰⁰ Ibid 328.

County Court Annual Report provides important additional information about the Court's Board of Management with divisional arrangements that strongly resemble the Dutch model.³⁰¹ This new development is highly significant, because it signals the introduction of integrated management in the higher courts and therefore suggests that CSV will be more likely to assume a non-operational function in the court system, as was ultimately predicted in the fourth article. Therefore, the establishment of the Management Boards can be characterised as a significant step in the right direction for the Victorian judiciary, subject to a number of important qualifications that are addressed further below.

According to the Annual Report, the Board of Management has been designed to strengthen the roles and responsibilities of the Heads of Divisions and Circuits, who are appointed to the Board by the Chief Judge.³⁰² Most importantly, the Board comprises the Chief Judge, Divisional Head Judges, Circuit Head Judges, as well as the CEO. The stated objective of the Board of Management is to 'set the Court's direction and manage its resources under the leadership of the Chief Judge and subject to regular reporting to the Council of Judges.'³⁰³

Based on the information from the Annual Report, it appears that the County Court's Board of Management meets the essential criteria for a board of executive judges that have been proposed in the thesis. In particular, it can be observed that the Board of Management shares the essential features of the Dutch executive board model, because it establishes a central management authority that focuses on the work of the Divisional Head judges. At the same time, the Board functions as a collegiate policy-making forum and therefore provides a substantial degree of balance and collegiality at the decision-making level. Finally, the inclusion of the court's CEO on the Board of Management is arguably the most significant feature of this model, because it strongly suggests that the court has introduced a system of integrated management with a single executive authority that will be responsible for all aspects of the court operations – judicial as well as administrative.

³⁰¹ County Court of Victoria, 'Annual Report 2014-15' (County Court of Victoria, 2016) 9.

³⁰² Ibid.

³⁰³ Ibid 9.

Nevertheless, it is far too early to assess the effectiveness of the County Court's Board of Management, because its duties, functions and powers are not derived from the legislation, which has been identified as one of the most important requirements for effective court governance in the previous chapter. The lack of legislative guidance on this issue raises the question whether the Board will be regarded by all judges as having the required legal imprimatur to act as the ultimate court authority, or whether it will operate concurrently with the Council of Judges and other administrative structures in the court.

Secondly, it is not clear on what basis has the Chief Judge been authorised to appoint the Divisional Heads and whether *puisne* judges will have the opportunity to get nominated to the Board, and on what terms. This is an important issue, because neither the *CSV Act* nor the courts legislation defines the powers of the Chief Judge, Divisional judges, or in the case of the Supreme Court - the Chief Justice, in court administration. This problem was identified in the previous chapter as a key source of administrative ambiguity in the executive model and it would appear that no changes have been contemplated to address this issue in the future.

Thirdly, based on the available information it is also unclear whether the Council of Judges will continue to perform an active role in formulating the court administration policy, which could arguably result in the second-guessing of decisions made by the Board of Management. The information from the County Court's annual report suggests that the Board of Management will be subject to 'regular reporting' to the Council of Judges, but from that information alone it is difficult to determine the extent of the Council's involvement in court administration, or indeed the nature of its relationship with the Board of Management. The problem is again compounded by the fact that the courts legislation has not been amended to clarify the functions and powers of the Councils of Judges in court administration following the establishment of CSV.

The analysis of the court administration systems in the USA, Queensland and the Netherlands in Chapter 5 shows that the involvement of large collegiate bodies in court administration is not regarded well in the court administration theory and that there is a clear trend towards more compact and autonomous management structures in the courts. As a result, the councils of judges in many jurisdictions no

longer have a formal say in the court operations, although they may continue to be involved in an advisory capacity. An alternative option was highlighted in the analyses of the US and Swedish courts, where the councils of judges retained the power to elect the board of management, but with the latter acting independently from the council of judges during its term.

In contrast, the information from the County Court's Annual Report suggests that the Chief Judge alone will be responsible for determining the composition of the Board, while the Board itself will be subject to regular reporting to the Council of Judges. This arrangement raises legitimate questions about the processes of appointment and removal to and from the Board and the Council's wider role in the court administration policy. The lack of publicly available information about these issues is in itself a cause for concern, because the thesis has identified the need for greater internal administrative transparency of the judiciary as one of the most important requirements of modern court governance.

Overall, however, the establishment of the Management Boards can be characterised as a significant and positive development, especially when compared to the earlier situation which involved two separate management systems for judges and court staff within the courts. The new arrangements clearly demonstrate a desire by the judiciary to integrate the judicial and administrative operations of the courts under a single executive court authority, rather than relying on CSV to centrally manage their operations. Nevertheless, at present, the specific powers, tasks and duties of the Management Boards appear to be largely informal and insufficiently defined, and, as a result, these issues will undoubtedly be the subject of future study and analysis.

6.2.6 Relationship between CSV and the Minister

One of the most remarkable features of the *CSV Act* is that it says very little about the Attorney-General's powers and responsibilities in court administration, which has been identified as a key area of legislative ambiguity. The legislative provisions only require CSV to keep the Attorney-General periodically informed about the budgetary and operational requirements of the courts, but there are no provisions in

the *CSV Act* itself to suggest that the Minister has any non-financial mechanisms left at his disposal to respond to any urgent matters affecting the administration of justice in the courts.

The article contrasts this situation with the northern European jurisdictions, where the minister's responsibility for certain threshold questions affecting the operations of the courts was not removed in its entirety. It will be recalled that the legislation in Ireland identified the need for the court system to align its policies with other justice sector organisations and for the Irish Courts Service to 'have regard' to government policies in this area. Similarly, the legislation in Sweden and the Netherlands allows the government to issue broad general directions to the judicial councils in order to ensure the proper operation of the court system, while the legislation in Denmark and the Netherlands also vests in the minister the residual powers to dismiss the board of the judicial council in cases of proven mismanagement or other emergencies.

In contrast, the Victorian legislation confers a central responsibility for the operation of CSV on its CEO. The article sounds a note of caution regarding the practice of vesting primary statutory responsibility in the CEO, because when politically sensitive incidents involving the courts do arise, the Attorney-General will be under enormous political pressure to find an immediate solution to the problem in order to appease the government and the electorate. Therefore, it can be said that the Attorney-General will remain *de facto* politically responsible for the operation of the courts, but the legislation does not vest in him the power to dismiss the CEO of CSV nor does it include any other provisions that would help define the exact scope and boundaries of his responsibility in cases of emergency.

Notably, however, the *CSV Act* contemplates that the CEO of CSV may be removed by the Courts Council, in cases of misconduct, neglect of duty or other inability to perform his duties. Arguably, this statutory solution is also unsatisfactory and creates a responsibility vacuum, because the Courts Council itself is responsible for formulating policies for the CEO to implement. As a result, this could lead to the paradoxical situation where the Courts Council dismisses the CEO for the conduct that the Courts Council itself may have authorised. The underlying problem is that the judicial membership on the Courts Council is permanent, which carries

significant reputational risks for CSV should the Courts Council issue directions to the CEO that are either unlawful or result in serious financial irregularities. This issue could have been resolved by adopting the proposed elements of the northern European board design, which rely on fixed term judicial appointments to the board and carefully drafted statutory provisions that protect the judiciary's legitimate interests in the composition, removal and nominations to the Council. In contrast, it appears that the underlying policy of the *CSV Act* was primarily influenced by the 'proven' experiences of the South Australian Judicial Council, which reflects a different philosophy of the court system, one that places an emphasis on the Chief Judges' ownership of the Council.

The overall assessment of this issue is that the division of responsibilities for court administration between the Courts Council, the CEO and the Attorney-General has not been adequately defined by the *CSV Act*, with the result that the relationship between the judiciary and the executive may be open to future interpretation and negotiation. Furthermore, the absence of clearer legislative expectations about the Minister's responsibility for court administration potentially also carries the risk that the courts will be left to their own devices and may struggle to secure sufficient institutional visibility in the competitive political arena.

6.2.7 Judicial corporatism, accountability and transparency

The final part of the article analyses the wider institutional, political and social ramifications of the CSV reform by reference to recent developments in other comparable jurisdictions. In particular, the article examines the recent experiences from England and Wales, where the judiciary's very survival in an era characterised by the 'retreat of the politicians' required much greater institutional corporatisation, more political astuteness and deeper strategic engagement by the judiciary with a range of political actors and public sector entities.³⁰⁴ The article points out that the development of a formal judicial bureaucracy, with clearly defined internal administrative structures and powers, was the key to meeting the new challenges

³⁰⁴ Gee et al, above n 29, 253-4; 263.

and enhancing the judiciary's institutional capacity to protect judicial independence in those circumstances.³⁰⁵

The article argues that the Victorian judiciary may also find itself in a similar situation, following the withdrawal of the executive government from the administration of the court system. It is pointed out, by reference to the UK experiences, that the establishment of structured institutional relationships with the other branches of government and public sector entities is the key to securing sufficient institutional 'visibility' for the judiciary in those circumstances. However, the article also points out that the establishment of new institutional relationships would firstly necessitate the development of a more clearly defined internal organisational structure within the Victorian judiciary itself.

The article concludes that the absence of clearly-defined and transparent administrative powers in court administration is an area that will require ongoing attention from the Victorian judiciary in the future. The experiences from the UK, the Netherlands and the US point to the emergence of a new elaboration of judicial accountability in court administration, one which is characterised by greater organisational openness and an emerging culture of judicial corporatism and administrative accountability. Greater administrative transparency and accountability of the judiciary is particularly important in the new institutional environment, because it serves to compensate for the substantial reduction in ministerial responsibility for court administration and therefore provides the government, parliament and other stakeholders with a more objective picture of the judiciary's stewardship of the court system.

³⁰⁵ Ibid 262.

COURT SERVICES VICTORIA AND THE NEW POLITICS OF JUDICIAL INDEPENDENCE: A CRITICAL ANALYSIS OF THE COURT SERVICES VICTORIA ACT 2014 (VIC)

TIN BUNJEVAC*

This article critically analyses the landmark reform of the Victorian court system from a comparative international perspective. It is argued that the institutional design of Court Services Victoria ('CSV') was largely driven by a desire to protect judicial independence from the executive government and partly also to enhance the institutional capacity of the judiciary to effectively respond to the emerging social, political and legal challenges. Despite the establishment of CSV, the legislation preserves certain legacy administrative arrangements that impeded court administration in the past, such as the internal governance arrangements in the courts and the absence of clearly defined lines of administrative responsibility. The article also argues that the legislation confers too narrow a function on CSV that focuses on the provision of basic technical and administrative support to the courts. The proposed alternative would be for CSV to assume a much broader developmental mandate in the court system in order to improve the quality of the administration of justice. The article also argues that greater 'corporatisation' of the judiciary will be necessary in order to protect its hard-fought independence and visibility in the political arena. The article concludes that greater judicial independence requires more, rather than less, political astuteness and engagement by the judiciary with the other branches of government and the public.

I INTRODUCTION

On 11 February 2014, the *Court Services Victoria Act 2014* (Vic) ('CSV Act') received royal assent and commenced operation on 1 July 2014. The CSV Act established an independent public sector entity called Court Services Victoria ('CSV') with a statutory responsibility to 'support judicial independence in the administration of justice in Victoria'.¹ According to s 4 of the CSV Act, the new entity is designed to provide the courts with the 'administrative services and facilities' that were previously provided and managed by the executive arm of government.

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¹ *Court Services Victoria Act 2014* (Vic) s 4.

CSV is governed by the Courts Council, which comprises the chief judicial officers of the Victorian courts and the Victorian Civil and Administrative Tribunal ('VCAT'), and up to two non-judicial members with relevant expertise in finance, administration or management.² The Courts Council is presided over by the Chief Justice, who retains the power of veto over any decisions of the Council that are deemed to be 'incompatible with ... the institutional integrity of a jurisdiction' or 'the capacity of the Supreme Court to function as the Supreme Court of the State'.³ The Courts Council has broadly-defined powers to 'direct the strategy, governance and risk management' of CSV, and to appoint the Chief Executive Officers ('CEOs') of CSV and the individual courts.⁴ In turn, the CEO of CSV is tasked with the 'appointment and management' of court staff,⁵ and 'direction' of the individual court CEOs, who are also subject to directions by the Chief Judges of their courts.⁶

The need to protect judicial independence strongly permeates through the Act and appears to have been the driving force behind the Victorian reforms.⁷ In practice, this means that the individual courts will no longer have a direct institutional connection with the executive government, although CSV itself (and, by extension, the courts) will receive funding in accordance with an expenditure review procedure that must ultimately be approved, 'with or without modification,' by the Attorney-General.⁸

The primary objective of this article is to offer an introductory analysis of the Victorian court system reform, which has been described as 'one of the most significant developments in Victoria's legal history'.⁹ It will be argued that the institutional design of CSV was largely driven by a desire to protect judicial independence from the executive government and partly also to enhance the institutional capacity of the courts to effectively respond to emerging social, technological and legal challenges.

Despite the establishment of the new entity, however, the Victorian legislation does not seek to alter the 'legacy' governance arrangements in the individual courts, which may arguably be regarded as an oversight. This was purportedly done out of a desire to retain a strong emphasis on separate court administration

2 Ibid s 14.

3 Ibid ss 12(3), 16(1).

4 Ibid s 11(a)–(b); see also ss 9, 25(2). The Courts Council and the CEO are empowered to do 'all things necessary or convenient to be done' for the performance of their statutory functions.

5 Ibid s 25(1)(b).

6 Ibid s 33(2).

7 See Attorney-General Robert Clark, 'Speech at the Launch of Court Services Victoria' (1 July 2014) <<http://www.robertclark.com.au/speeches/other-speeches/speech-at-the-launch-of-court-services-victoria/>>.

8 See *Court Services Victoria Act 2014* (Vic) pt 5, especially s 41(4).

9 Marilyn Warren, 'A Better Way to Manage the Courts', *The Age* (online), 4 November 2013 <<http://www.theage.com.au/comment/the-age-editorial/a-better-way-to-manage-the-courts-20131103-2wup8.html#ixzz2sPsWdcmp>>.

in each jurisdiction,¹⁰ but could ultimately impede the development of greater administrative capacity in the individual courts. At the same time, it will be argued that the declared emphasis on autonomous administration in each jurisdiction is an important distinguishing feature of the Victorian model and one that suggests that the main focus of the reform and future organisational development will be the courts themselves. As a result, this article argues that the primary focus of CSV should be to assist the courts in each jurisdiction to develop their own internal organisational competencies as fully integrated and autonomous units, rather than be involved in the day-to-day planning and resource allocation processes across multiple jurisdictions and court tiers. In other words, it is argued that CSV's 'main mission' should be developmental and technical, rather than operational. To achieve these aims in practice, it is argued that CSV's overall approach to its relationship with the individual court tiers should be inspired by the so-called northern European judicial councils, which have assumed an impressive array of supporting functions in court administration, while also assisting the courts to develop their own internal administrative capacity using the system of integrated management. Ultimately, it is argued that the potential combination of fully integrated management in the courts, together with the developmental and technical support offered by CSV is — in principle — a most promising feature of the Victorian model. Nevertheless, it will be necessary to consider whether the existing legislative provisions in the *CSV Act* and — especially — the legacy administrative arrangements in the courts themselves, might in practice impede the effectiveness of the reform. Victorian judges have had limited experience in managing such large organisations on their own and there may be a natural inclination to rely on a 'central' administration service, instead of seeking to develop and better integrate the internal managerial and operational competences within the courts themselves.

Part II of this article offers a historical and contextual analysis of the developments that led to the introduction of the *CSV Act* in Victoria, against the background of similar developments in other jurisdictions, such as the Australian federal courts and South Australia.

Part III highlights the organisational legacy of the executive model of court governance and its potential impact on CSV. The analysis of the *CSV Act* suggests that certain distinctive features of the previous model may have been replicated in the new structure, although the actual relationships between CSV and the courts appear to be developing in a different, and potentially more effective, direction in practice.

Part IV discusses the internal working arrangements in the courts. It points to the continuing administrative divisions and the absence of clearly defined lines of responsibility that have been inherited from the executive model. It is argued that

10 Supreme Court of Victoria, Submission to the Productivity Commission, *Access to Justice Arrangements*, June 2014, 12 [69]–[72]. See also Clark, above n 7. According to the Attorney-General, '[e]ach court remains as a separate entity and its governing council, internal arrangements and rule-making responsibilities remain unchanged'.

further reforms may be required to better define and integrate the administrative powers of court executives and judicial administrators in the courts themselves.

Part V describes the key features of the northern European judicial councils, which have assumed an important developmental function not only in court administration, but also in promoting the ‘quality of the administration of justice’ in a broader sense. It is argued that CSV’s future approach to such issues should be guided by the northern European experiences.

Part VI reflects on the broader political and institutional ramifications of the Victorian court system reform. It is argued that greater judicial independence requires more, rather than less, political astuteness and engagement by the judiciary with the other branches of government and the public. Greater public accountability and institutional ‘corporatisation’ of the judiciary may be necessary in order to protect its hard-fought independence — and visibility — in the crowded political arena.

II EARLY HISTORY OF COURT GOVERNANCE REFORMS: THE FEDERAL COURTS AND SOUTH AUSTRALIA

In this part of the article it is argued that the early court governance reforms of the 1980s and 1990s demonstrated that the judiciary was more than capable of managing the courts, when given the opportunity to do so.¹¹ The experience of South Australia highlighted the benefits of having a judicial umbrella organisation to protect the individual courts from executive interference, while the federal courts’ system of integrated management demonstrated that the courts were not only capable of producing high-quality judgments, but that they could also be innovative, efficient and well managed. The following analysis demonstrates that the early reforms were groundbreaking in many respects and that they served as an inspiration for reformers both in Victoria and overseas.¹²

A Australian Federal Courts

According to Sallmann and Smith, the movement towards greater judicial self-governance in Australia started in 1979, when the High Court of Australia achieved full operational independence from the executive government.¹³ This was a significant milestone, because the Commonwealth Parliament conferred on the High Court judges full administrative control and responsibility over

11 Peter A Sallmann and Tim Smith, ‘Constitutionalism and Managerial Effectiveness: Revisiting Australian Courts’ Governance’ in *Australian Courts: Serving Democracy and Its Publics* (Australasian Institute of Judicial Administration, 2013) 265, 265–7.

12 See, eg, Working Group on a Courts Commission, ‘Third Report: Towards the Court Service’ (Government of Ireland, 1996) 10–11 (‘Denham Group’). The report makes it clear that the structure of the Irish Courts Service was largely inspired by the South Australian Judicial Council.

13 Sallmann and Smith, above n 11, 267.

the court's staff, finances and operations.¹⁴ As a result, the Court was, for the first time, fully independent and able to make a 'wide variety of administrative decisions on an independent collegial basis'.¹⁵

In 1989, the Commonwealth Parliament introduced similar changes to the governance arrangements in the federal courts. However, in sharp contrast to the collegiate judicial arrangements in the High Court, the legislation conferred all of the administrative powers and responsibilities on the Chief Justices alone.¹⁶ According to Church and Sallmann, the key motivation for placing the sole administrative authority in the Chief Judges of the larger federal courts was that responsibility and authority would be vested in specific individuals, which meant that responses to problems could be 'swift and consistent'.¹⁷

Despite occasional criticism that the Chief Justice's administrative powers could infringe upon individual adjudicative independence of other judges,¹⁸ the federal courts' administrative model has proved to be highly effective in practice. Notably, the Chief Justices' powers have been further expanded over time to also include full responsibility for the administration of the intra-curial arrangements in the distribution and execution of the judicial business of those courts.¹⁹ This point is best illustrated by s 15 of the *Federal Court of Australia Act 1976* (Cth), which gives the Chief Justice the responsibility to ensure the 'effective, orderly and expeditious' discharge of the business of the court, together with the corresponding powers to assign cases and caseloads to particular judges, or even to temporarily restrict judges to non-sitting duties.

Proponents of the federal courts' integrated management model argue that the integration of the administrative, financial, operational and judicial responsibilities under the courts' own umbrella has allowed them to develop business-like, strategic planning and judicial administrative capabilities,²⁰ while at the same time bringing judges into an 'appropriate working relationship with professional administrators'.²¹ This is an important point that ought to be highlighted, because the federal courts (including the Family Court) have made some outstanding achievements in areas as diverse as strategic planning, judicial

14 Ibid. The authors note that the Court still ultimately depends on Parliament for its annual budget: at 268.

15 Ibid 267. See also *High Court of Australia Act 1979* (Cth) s 17.

16 See *Federal Court of Australia Act 1976* (Cth) s 18A. Notably, however, the power is also 'subject ... to such consultation with Judges as is appropriate and practicable': s 15(1AA)(a). In addition, the Chief Judicial Officers are assisted by Chief Executive Officers and Registrars, who operate under their direction.

17 Thomas W Church and Peter A Sallmann, *Governing Australia's Courts* (Australasian Institute of Judicial Administration, 1991) 68.

18 Lou Hill, *Constitutional and Managerial Principles of Judicial Court Governance: Implementation in the State of Victoria* (LLM Thesis, The University of Melbourne, 1995) 94–6.

19 *Federal Court Act 1976* (Cth) s 15.

20 Warwick Soden, 'The Application of International Court Excellence Framework within the Federal Court of Australia with a Special Look at Strategic Planning to Achieve Excellence' (Paper presented at the Asia-Pacific Courts Conference, Singapore, 4–6 October 2010) 4–5.

21 Michael Black, 'The Federal Court of Australia: The First 30 Years — A Survey on the Occasion of Two Anniversaries' (2007) 31 *Melbourne University Law Review* 1017, 1047. See also Soden, above n 20.

innovation, benchmarking and productivity for the judiciary,²² case management reform and even the development of international outreach projects for overseas judiciaries.²³

For example, under the leadership of Chief Justice Michael Black, the Federal Court was the first court in Australia to establish the individual docket system, which revolutionised the judicial approach to case management in Australia.²⁴ Justice Anthony North described the operation of the system and pointed to a sense of greater judicial involvement and responsibility for the operation of the Court as a whole.²⁵ Notably, he also highlighted the significant expansion of the administrative and case management functions performed by the judges' chambers, where judges' associates and court staff had assumed a central role in ensuring the efficient disposition of cases in individual judges' dockets.²⁶ Thus, it can be said that the very conception of the judges' 'chambers,' which had traditionally consisted of a single desk and a library, assumed an expanded meaning in the Federal Court, because many judges were managing an 'office' staffed by a small team of legal and registry officers. This example illustrates the importance of the integration of the judicial and administrative processes in the courts, which led to the development of deeper patterns of work delegation as well as other procedural innovations.²⁷

Critics of the federal courts model point out that the federal courts' governance arrangements may be unsuitable for an entire state court 'system,' because each federal court operates within a single tier of the court system's hierarchy.²⁸ In addition, the federal courts are to a certain extent still vulnerable to direct executive interference, due to the fact that they must each directly negotiate their budget with the executive government. Occasional budgetary overruns may even create a perception that judges are poorly equipped to manage such

22 Justice Stephen O'Ryan and Tony Landsell, 'Benchmarking and Productivity for the Judiciary' (2000) 10 *Journal of Judicial Administration* 25.

23 See Soden, above n 20, 4. See also Anthony North, 'My Court Car Is a Helicopter' (Speech delivered at the Canadian Judicial Council Conference: Inside the Administration of Justice: Toward a New Model of Court Administration, Victoria, British Columbia, 31 January 2007).

24 Caroline Sage, Ted Wright and Carolyn Morris, *Case Management Reform: A Study of the Federal Court's Individual Docket System* (Law and Justice Foundation of NSW, 2002). Other unique procedural innovations include the establishment of appellate benches with specialist panels, and procedures for sequential and concurrent expert evidence.

25 North, above n 23.

26 Ibid. Similarly, the author of this article is aware of initiatives in the former Federal Magistrates Court, where the supporting legal officers were encouraged to draft judgments and even created template paragraphs for complex judgments in particular types of cases, such as Child Support for example.

27 Black, above n 21, 1048; Soden above n 20, 17.

28 Stephen Skehill, 'Comment on Court Governance' (1994) 4 *Journal of Judicial Administration* 28, 29. The author states that the federal courts' jurisdictions do not reflect 'true complementarity'.

large organisations, which could diminish public confidence in the judiciary as a whole.²⁹

Regardless of the perceived deficiencies, the key strengths of the federal courts model lie in its overall operational effectiveness and the development of a sense of institutional confidence in many areas of the courts' activity. It cannot be overstated that such attributes are a direct result of the judicial control over both the judicial and administrative operations of the courts and — just as importantly — the existence of clearly defined lines of administrative responsibility vested in the Chief Justices.³⁰

B The South Australian Judicial Council

The next phase of the Australian court governance reforms began with the establishment of the South Australian State Courts Administration Council and its central administrative arm, the Courts Administration Authority, in 1993. The South Australian institutional framework is especially significant in the Victorian context, because it established an independent system of judicial court governance across an entire court system comprising several tiers of the court hierarchy in that state.

Indeed, there are numerous parallels between the South Australian and Victorian models of court governance, which is not surprising given the historical connections between the two jurisdictions, and the fact that the South Australian model has been the subject of 'much favourable comment and attention' both in Australia and overseas.³¹ First, the South Australian Judicial Council is an independent statutory entity, which is governed by the Chief Judges of the individual court tiers.³² Secondly, the South Australian Chief Justice wields the power of veto over any decisions of the Judicial Council.³³ Thirdly, the Council's main responsibility is to provide 'the administrative facilities and services for participating courts'.³⁴ In practice, as in Victoria, that responsibility is delegated to a CEO of the council, who also has the power to 'control and manag[e]' the court staff.³⁵

29 See Nicola Berkovic, 'Diana Bryant Calls for Federal Overseer', *The Australian* (online), 26 September 2014 <<http://www.theaustralian.com.au/business/legal-affairs/diana-bryant-backs-calls-for-federal-overseer/news-story/880b04bca65bd3ec22ed2e4bd26e8c19>>. The article states that the Chief Justice of the Family Court of Australia expressed support for an independent body to oversee the federal courts, following a report by KPMG which found that the federal courts were on track to have a budget deficit of \$75 million by 2017–18.

30 Black, above n 21. See also *Federal Court of Australia Act 1976* (Cth) s 18B. In the management of the administrative affairs of the court, the Chief Justice is assisted by the Registrar. Under s 18D, the Registrar has the power to do 'all things necessary or convenient to be done for the purpose of assisting the Chief Justice' and 'may act on behalf of the Chief Justice in relation to the administrative affairs of the Court.'

31 Sallmann and Smith, above n 11, 271. See also Denham Group, above n 12, 10.

32 *Courts Administration Act 1993* (SA) s 7.

33 *Ibid* s 9(3).

34 *Ibid* s 10. This duty is expressed in almost identical terms in the Victorian legislation.

35 *Ibid* s 17(2).

The most important feature of the South Australian Judicial Council is that the courts are effectively shielded from direct executive interference in their day-to-day operational management. Unlike the federal courts, the individual courts in South Australia do not have to negotiate their budgets with the Attorney-General's department, because they each receive their funding from the Judicial Council in the form of a one-line budget.³⁶ Nevertheless, as a recent review has suggested, the South Australian courts may still be vulnerable to a different type of competition for resources — from within the Judicial Council itself — partly because the Chief Justice has the power of veto over the Council's decisions.³⁷ Clearly, this is an issue that could also arise in the Victorian context which was duly noted during the parliamentary debates leading to the introduction of the *CSV Act*.³⁸ The key concern is that the Victorian Courts Council may similarly become gridlocked should an argument arise about the distribution of funding or other competing court priorities and the Chief Justice opts to utilise her power of veto.

Proponents of the South Australian model point out that the South Australian Judicial Council is in a stronger position than the federal courts to take a broader systemic view of court operations, because it is tasked with central oversight of the judicial and administrative processes across multiple court tiers and different levels of the courts hierarchy.³⁹ This is regarded as a significant advantage of the South Australian model, although critics have pointed out that the composition of the Council is somewhat static and 'inward-oriented,' with no external members being represented on the governing board.⁴⁰ The much broader composition of the Courts Council in Victoria, which includes up to two non-judicial experts, arguably represents a key area of departure from the South Australian model. This may well be regarded as an advantage, because it introduces an element of 'social accountability' and outside expertise into the judicial organisation.

C The Road to Reforms in Victoria

Despite the successes of the earlier reforms instituted by the Commonwealth government and South Australia, the movement towards greater judicial self-governance in Victoria gained momentum much later.⁴¹ In 2004, the Chief Judges of the Victorian courts issued a report that outlined their joint vision for the future

36 Ibid s 24. See Chief Justice Len King, 'A Judiciary-Based State Courts Administration — the South Australian Experience' (1993) 3 *Journal of Judicial Administration* 133, 139.

37 Des Semple et al, 'Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance' (Attorney-General's Department, 2008) 25, 48–51. See *Courts Administration Act 1993* (SA) s 9(3).

38 See Victoria, *Parliamentary Debates*, Legislative Council, 4 February 2014, 17 (Jenny Mikakos).

39 Sallmann and Smith, above n 11, 271. See also Denham Group, above n 12, 10; Carl Baar et al, 'Alternative Models of Court Administration' (Research Report, Canadian Judicial Council, September 2006) 27 ('*CJC Report*').

40 Laurie Glanfield, 'Governing the Courts — Issues of Governance Beyond Structure' (Paper presented at the 18th Australasian Institute of Judicial Administration Annual Conference, Darwin, 14–16 July 2000). See also Church and Sallmann, above n 17, 9.

41 For a useful chronology of earlier reform proposals in Victoria see Hill, above n 18, ch 2.

strategic directions of the Victorian court system.⁴² They identified a series of newly emerging challenges that had a negative impact on judicial independence and court performance, such as the increasing political and budgetary pressures, unprecedented delays and backlogs, the growing litigiousness of society, greater complexity of the law, as well as stakeholders' demands that the courts deliver more justice in less time and for less money.⁴³ A closer analysis of the identified challenges suggests that the focus of the court governance debate in Victoria had shifted somewhat from the need to protect the courts from executive interference alone to the need to protect the judiciary from multiple threats to judicial independence, authority and relevance.

The Victorian Chief Judges were unanimous in their view that the key obstacle to addressing those challenges was the existing model of court administration.⁴⁴ Under the so-called 'executive' model of court administration in Victoria, there was a far-reaching organisational separation between the administrative and judicial functions in the courts. Judges operated in administrative isolation from the court administrators, because the court staff, infrastructure and operations were separately managed and funded by the executive arm of government.

One of the consequences of this bifurcated arrangement was that judges were lacking the appropriate level of managerial capacity and authority to strategically plan the operations of their courts.⁴⁵ Similarly, the civil servants who were in charge of court operations were also not in the best position to make effective decisions about competing court priorities, because they were answerable to an external bureaucracy that was physically removed from the courts and often had its own organisational demands and priorities.⁴⁶

Unlike other large organisations, the Victorian courts did not even have a stable budget or sufficient discretion over already-allocated funding. According to former Supreme Court Justice Tim Smith, the courts constantly had to compete for funding with other entities from the Attorney-General's portfolio, such as police, gaming or racing.⁴⁷ As a consequence, the courts regularly found themselves in a situation where, '[a]t unpredictable intervals during the financial year, amounts [were] moved around within the budget, or sometimes even removed from the budget, by the aforementioned civil servants'.⁴⁸

Following publication of the *Courts Strategic Directions Project*, a consensus developed, both in Victoria and overseas, that the executive model of court

42 Supreme Court of Victoria, *Courts Strategic Directions Project* (2004) 77–81.

43 Ibid 51–63.

44 Ibid 75.

45 John Alford, Royston Gustavson and Philip Williams, *The Governance of Australia's Courts: A Managerial Perspective* (Australian Institute of Judicial Administration, 2004) 86 ('*AIJA Study*').

46 Tim Smith, 'Court Governance and the Executive Model' (Paper presented at the Judicial Conference of Australia Colloquium, Canberra, 6–8 October 2006), 4.

47 Ibid 8–9, 15–16. See also Church and Sallmann, above n 17, 23. According to the authors, officers in the Attorney-General's department first ranked court-related proposals in relation to each other and then compared the court requirements relative to other areas of departmental responsibility, such as prosecution, legal aid and government legal services.

48 *AIJA Study*, above n 45, vii, 85.

administration represented an obstacle to the strategic long-term planning of court operations, and was also not optimal for judicial independence, efficiency and quality of justice.⁴⁹ An expert managerial study commissioned by the Australasian Institute for Judicial Administration ('AIJA') found the executive model to be fundamentally flawed, because it was characterised by an organisational misalignment between 'authority' and 'responsibility,' an arrangement that is considered sub-optimal in the management literature.⁵⁰ Professor Philip Williams et al pointed out that, while judges in Victoria had the responsibility to improve court performance and deliver more 'justice' each year, they had insufficient authority over their own staff and financial resources because most operational matters had been controlled by an external government bureaucracy.⁵¹

III COURT SERVICES VICTORIA AND THE ORGANISATIONAL LEGACY OF THE EXECUTIVE MODEL

The authors of the AIJA Study ultimately expressed support for a model that would give greater administrative independence to the judiciary, which was largely inspired by the South Australian Judicial Council and a Canadian federal courts model.⁵² The earlier discussion of the South Australian Judicial Council shows that the institutional design of CSV had been strongly influenced by the South Australian entity. However, a closer analysis of that jurisdiction also reveals that the South Australian Courts Administration Authority has in practice assumed a somewhat central function in the courts' financial and operational management. For example, the Authority itself is involved in the maintenance and support of registry operations, planning and allocation of staff and resources, and other internal court functions, although the individual courts retain some degree of internal administrative autonomy in their day-to-day operations.⁵³ The question arises, then, whether that level of administrative centrality could in practice impede the work of individual courts in a jurisdiction that is as large and diverse as Victoria? This is the context in which it is necessary to consider the organisational legacy of the executive model in Victoria against the Canadian federal courts model.

A Canadian Federal Courts and the Executive Model

In the Canadian federal jurisdictions, the central responsibility for court administration was also transferred from the executive government to an

49 Ibid, 85–6.

50 Ibid 86.

51 Ibid.

52 Ibid 89.

53 Hill, above n 18, 50. Hill points out that the South Australian Courts Administration Authority transfers staff and funding from one court to another. See also *Courts Administration Act 1993* (SA) ss 10(2)–(3). See also King, above n 36, 139.

independent statutory entity, which is governed and managed by a central Administrator.⁵⁴ In 2004, the Victorian Chief Judges expressed strong support for that arrangement, partly because the very existence of an independent entity had given the Administrator a ‘measure of independence’ from the executive government.⁵⁵ In addition, the Canadian legislation empowered the Chief Judges of the federal courts to issue binding operational ‘directions’ to the Administrator where that was deemed necessary by them.⁵⁶ This distinctive feature of the Canadian federal model has been replicated in s 33 of the *CSV Act* (in a modified form), which requires the court CEOs to follow any ‘directions’ issued by the Chief Judges, while also being subject to the direction of the CEO of CSV ‘in relation to all other matters.’⁵⁷

This is an unusual provision, because its wording strongly suggests that a broad residual authority over court operations is now vested in the CEO of CSV, as well as the Chief Judges. That arrangement is strongly reminiscent of the earlier situation in the executive model, where the court CEOs had been responsible to the Chief Judges in relation to basic administrative tasks, while also remaining responsible to the Executive Director of Courts from the Department of Justice in relation to ‘broader business management reporting activities’ and ‘resource planning and allocation’.⁵⁸

The equivalent Canadian provision was considered in the seminal study *Alternative Models of Court Administration* commissioned by the Canadian Judicial Council (‘CJC’) in 2006.⁵⁹ In sharp contrast to the views earlier expressed by the AIJA experts and Victorian Chief Judges, the CJC Report considered the Canadian federal courts model to be merely a *variant* of the executive model, despite the fact that the court administration was formally separated from the executive government and was also subject to the Chief Judges’ administrative directions.⁶⁰ The Canadian experts formed the view that the newly established statutory entity had merely taken over the responsibility for administering the courts from the executive government. In effect, one externally run court administration was replaced with another one, while judges in the individual courts continued to operate in accordance with their traditional judicial administrative arrangements that they had inherited from the executive model. In other words, judges continued to work in relative isolation from the essential business processes that were impacting their immediate working environment.

This is an important point that needs to be further expanded upon, particularly in light of s 25 of the *CSV Act*, which also confers on the CEO of CSV the

54 *Courts Administration Service Act*, SC 2002, c 8, s 7.

55 Supreme Court of Victoria, above n 42, 79–80.

56 Ibid 138; *Courts Administration Service Act*, SC 2002, c 8, s 9.

57 *Court Services Victoria Act 2014* (Vic) s 33(2).

58 *AIJA Study*, above n 45, 203. See also R E McGarvie, ‘Judicial Responsibility for the Operation of the Court System’ (1989) 63 *Australian Law Journal* 79, 92. The CEO was historically subject to directions of the Chief Justice, who was the only person entitled to give directions to the CEO.

59 *CJC Report*, above n 39.

60 Ibid 102–3.

administrative powers to appoint and *manage* court staff, in addition to his residual power to *direct* individual court CEOs.⁶¹ This provision strongly suggests that the CEO of CSV has assumed a central role in the courts' operational management, which would place him in a position that is similar to that of the Chief Administrator in the Canadian federal courts.⁶² However, the problem with the Canadian arrangement was that the Chief Judges were not adequately involved in the strategic planning processes affecting their courts, which made it difficult for them to determine whether a direction to the Administrator was needed in the first place.⁶³ Against that background, the authors of the Canadian report concluded that court performance largely depended on relationships of trust and goodwill between the central court Administrator and the judiciary, and their ability to foster an ongoing and detailed exchange of information on all aspects of court administration.⁶⁴ In their view, this was a key characteristic of the executive model and, as such, represented a 'fragile and unsatisfactory basis for court administration'.⁶⁵

B CSV and Court Autonomy

At this point it must be acknowledged that the perceived deficiencies of the Canadian model are not equally applicable in the Victorian context, because the Victorian Chief Judges are, after all, represented on the Courts Council, which is responsible for setting out the strategic policy for CSV and, ultimately, its CEO.⁶⁶ This is an important substantive difference between the Canadian Courts Administration Service and CSV, and one that should not be underestimated. Secondly, each court in Victoria has its own CEO, although these officers have been placed in an uncomfortable position because they are subject to directions by both the CEO of CSV and the Chief Judge.⁶⁷ The third substantive difference between the Canadian and Victorian situations is that the Courts Council and the CEO of CSV have been entrusted with remarkably broad statutory powers to do 'all things necessary or convenient to be done' in the exercise of their functions.⁶⁸ Therefore, it can be argued that the powers conferred by those provisions are sufficiently flexible to allow the CEOs of CSV and the individual courts to fine-tune their relationship and determine the 'correct' balance between the need for CSV to maintain a general oversight of the court system and the individual courts' need for greater operational autonomy.

61 *Court Services Victoria Act 2014* (Vic) s 25.

62 *CJC Report*, above n 39, 103.

63 *Ibid.*

64 *Ibid.*

65 *Ibid* 15.

66 *Court Services Victoria Act 2014* (Vic) s 11.

67 Victoria, *Parliamentary Debates*, Legislative Council, 4 February 2014, 17 (Jenny Mikakos). According to Ms Mikakos, '[a] further potential for conflict arises when Court Services Victoria appoints a court CEO nominated by the head of the jurisdiction. In this case the court CEO would be answerable to both the head of the jurisdiction and Court Services Victoria and, by extension, ultimately the chief justice.'

68 *Court Services Victoria Act 2014* (Vic) ss 9, 25.

The argument that the courts require far greater administrative autonomy than they had under the executive model is compelling, because the Courts Council and CSV have a limited capacity to be involved in the resource planning and operational management processes of the individual jurisdictions. First, the Courts Council is primarily a policy-making body that only meets a few times each year and as such is not likely to be in a position to consider the operational and resourcing issues as and when they arise. Similarly, CSV itself may have a limited capacity to respond to the different organisational priorities across six different court tiers and multiple levels of the courts' organisational hierarchy.⁶⁹ This point is best illustrated by the fact that the Magistrates' Court of Victoria alone is almost as large as the entire South Australian court system.⁷⁰ Thirdly, even if CSV and the Courts Council were in a position to respond to all of the competing courts' priorities, they would risk becoming entangled in the operational decision-making processes of the individual jurisdictions. This could possibly also result in a 'competition for resources' between the jurisdictions, an issue that was noted earlier in the South Australian context.⁷¹

C A Broader Developmental Function for CSV?

In view of the issues identified above, it is difficult to escape the conclusion that CSV will not be able to manage court operations by replicating the 'legacy' governance arrangements and lines of accountability that were inherited from the executive model or adapted from the South Australian model. As the analysis of the Canadian federal courts model demonstrates, the re-emergence of an 'executive' system of court administration could potentially simply replace one ineffective and inefficient organisation with another. Not only would this outcome be undesirable from a systemic point of view; it would also be likely to stymie the internal organisational development in the individual jurisdictions and lead to

69 See *AJJA Study*, above n 45, 62–3, 66–7. The study noted the limits to any 'economies of scale' that may be achieved through the centralisation of court administration in Victoria. The authors suggested that joint administration may be more appropriate in South Australia, Tasmania and Western Australia than in the larger state jurisdictions such as Victoria and New South Wales.

70 Courts Administration Authority of South Australia, 'Annual Report' (2012–13), 77; the State Courts Administration Authority employed 803 persons in the reporting period. See also The Magistrates' Court of Victoria, 'Annual Report' (2012–13), 8. The Magistrates' Court employed 684 judges and staff in the reporting period.

71 Semple et al, above n 37, 49 [137].

further inefficiencies.⁷² Instead, it is argued that CSV will be more likely to assume a broader developmental and supporting function in court administration. This approach would require CSV to offer general and technical support to the courts in order to assist them to develop their own internal administrative capacity. In other words, CSV will be more likely to focus on activities that are aimed at improving the courts' internal working *methods*, rather than directly involving itself in their operational management. This will be an important and challenging task, because the courts have also inherited 'legacy' issues from the executive model that could impede their internal reform processes. The central issue appears to be a lack of clearly-defined lines of formal administrative responsibility, as the analysis in the following part suggests.

IV THE COURTS AND THE LEGACY OF THE EXECUTIVE MODEL

The AIJA Study and CJC Report pointed to an inherent structural deficiency in the executive model that resulted in the development of two parallel governance structures inside the courts: judicial and administrative. That framework implied a formal separation of tasks and functions, whereby judges were responsible for the dispensation of justice, while court CEOs were responsible for the courts' operational management on behalf of the Department of Justice. Furthermore, the old structure also implied a formal division of the administrative responsibilities in relation to judges and court staff between the Councils of Judges and the Department of Justice, respectively.

The impact of the organisational arrangements within courts on the work of judges was considered in an international study that was commissioned by the European Commission for the Efficiency of Justice ('CEPEJ') in 2003.⁷³ The Commission's report included a detailed comparative overview of the court administration systems of several European countries, which was based on a substantial body of academic and empirical research undertaken by leading

72 See Judge Michael Forde, *What Model of Court Governance Would Optimize the Expeditious Delivery of Justice, Judicial Independence and the Accountability of Queensland's Court System?* (Master of Public Sector Management Thesis, Griffith University, 2000) 60–1. The academic thesis written by Queensland District Court Chief Judge Michael Forde compared the District Courts of South Australia, New South Wales and Queensland and concluded that the South Australian results 'do not reflect a more efficient system.' A similar situation has been reported in Ireland, where the Irish Courts Service was modelled on the South Australian Judicial Council. After a period of initial successes, extraordinary delays started to accumulate across all tiers of the Irish court hierarchy to a point where litigants had to wait up to three years to have simple summary cases heard by the courts. See Tin Bunjevica, 'Court Governance: The Challenge of Change' (2011) 20 *Journal of Judicial Administration* 201, 214 n 101. For associated problems in England and Wales, see Gar Yein Ng, 'Quality Management in the Justice System in England and Wales' in Philip M Langbroek (ed), *Quality Management in Courts and in the Judicial Organisations in 8 Council of Europe Member States: A Qualitative Inventory to Hypothesise Factors for Success or Failure* (European Commission for the Efficiency of Justice, 2010) 23, 41.

73 Wim Voermans and Pim Albers, 'Councils for the Judiciary in EU Countries' (Report, European Commission for the Efficiency of Justice, February 2003) <https://www.coe.int/t/dghl/cooperation/cepej/textes/CouncilOfJusticeEurope_en.pdf>.

European court administration experts in the preceding 10 years.⁷⁴ The CEPEJ report is particularly significant in the Victorian context, because it endorses the system of ‘integrated management’ for individual courts, while also proposing the establishment of an independent judicial council,⁷⁵ based on the so-called ‘Northern European model’.

According to the authors of the report, Professor Wim Voermans and Dr Pim Albers, the court system reforms that were implemented in many northern European countries initially focused on the internal governance structures in courts in order to determine whether the existing judicial and administrative arrangements were still appropriate to ensure the most efficient and effective processing of cases.⁷⁶ The findings highlighted a series of organisational shortcomings in the executive model that not only impacted on the independence and administration of courts as organisations, but also — notably — on the quality of the *judicial* work of judges.

Voermans and Albers argue that the internal division of responsibilities in the executive model fundamentally impaired the administrative capacity of judges to respond to the challenges posed by the increasing caseloads and greater complexity of modern litigation.⁷⁷ The authors refer to a series of empirical studies they had conducted in the Dutch courts in the 1990s, which found that the *operational* and *interpersonal divide* between the judicial and non-judicial officers, in particular, had substantially reduced the possibilities for greater workflow integration and the creation of deeper patterns of work delegation between judges and professional court staff.⁷⁸ One may recall that these were the key areas of improvement that were identified in the Australian federal courts following the introduction of integrated management and the individual docket system.

Notably, Voermans and Albers also found that the judicial administrative arrangements in the executive model were deficient because they predominantly relied on the individual work ethic of each judge in the distribution and execution of their work, while any new procedural or operational initiatives had to be approved by all judges at the plenary meetings of the Councils of Judges.⁷⁹ This is an important point, because, in Victoria, the administrative responsibility of the Councils of Judges was entrenched in the legislation that established the Supreme Court in the 19th century, when only a handful of judges were appointed to the

74 Wim Voermans, ‘Councils for the Judiciary in Europe’ (2000) 8 *Tilburg Foreign Law Review* 121; Wim Voermans and Pim Albers, ‘Geïntegreerde Rechtbanken: Het Vervolg, Evaluatierapport Herziening Rechtelijke Organisatie (Onderdeel 2)’ [Integrated Courts: Evaluation Report Part Two] (Report, 1994).

75 Voermans and Albers, ‘Councils for the Judiciary in EU Countries’, above n 73, 112.

76 Ibid 100–1.

77 Ibid 100.

78 See Voermans and Albers, ‘Geïntegreerde Rechtbanken’, above n 74, 70–7, 90–2.

79 Voermans and Albers, ‘Councils for the Judiciary in EU Countries’, above n 73, 100–1. See also McGarvie, above n 58, 91.

bench.⁸⁰ According to Chief Justice Marilyn Warren, the original Supreme Court legislation had contemplated a Council of only four judges to be responsible for administering the Court in 1852. She contrasted this with the more recent situation, when there were almost 40 judicial officers on the Council of Judges in the Supreme Court alone.⁸¹ The Chief Justice's comments suggest that the existing judicial administrative arrangements had become unwieldy, because, 'as courts and tribunals become larger the traditional structures of internal management and leadership become more cumbersome and provide a poor fit'.⁸²

A Weak Judicial Administrative Structures

Against this background, it is not surprising to learn from the European experts that there developed fairly weak and horizontal governance structures on the judicial side of court administration, which were primarily aimed at reaching a consensus among judges on all aspects of their work in the courts.⁸³ Voermans and Albers contrast these arrangements with the integrated management system that was introduced in the Dutch courts in the early 2000s and conclude that more centrally integrated and hierarchical administrative structures are essential in order to transition the courts from *organisations of professionals* to *professional organisations*.⁸⁴

The term 'integrated management' in this context refers to a unified responsibility for the management of all administrative, financial as well as judicial aspects of court administration under a single executive court authority, which is broadly comparable to the system that operates in the Australian federal courts.⁸⁵ One of the key benefits of that system is that it allows the court management to assume full administrative responsibility for both judges and court staff, thus giving it

80 Civil Justice Committee, *Report to the Honourable the Attorney-General Concerning the Administration of Civil Justice in Victoria* (1984) vol 1, 341. The Committee also noted that the court staff had at first not been under the control of the executive government, even though some of them had been paid out of public funds.

81 Marilyn Warren, 'State of the Victorian Judicature' (Speech delivered at the Banco Court, Supreme Court of Victoria, 22 May 2007) 36 <<http://assets.justice.vic.gov.au/supreme/resources/4108bbbb-3257-47a9-b3d6-03a3a7844908/inaugural+state+of+judicature+address+may+2007.pdf>>. See also *Supreme Court Act 1986* (Vic) s 28; *County Court Act 1958* (Vic) s 87; *Magistrates' Court Act 1989* (Vic) s 15.

82 Warren, 'State of the Victorian Judicature', above n 81, 35. See also Thomas W Church Jr, 'Administration of an Appellate Leviathan: Court Management in the Ninth Circuit Court of Appeals' in Arthur D Hellman (ed), *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* (Cornell University Press, 1990) 226, 229, quoting Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change* (1973) 1. The author refers to the findings of the Hruska Commission Report in California, which found that any court governing organ with more than 15 members "inevitably" gives rise to "[s]erious problems of administration and of internal operation."

83 Voermans and Albers, 'Councils for the Judiciary in EU Countries', above n 73, 100–1.

84 Ibid 101, 108. See also Voermans and Albers, 'Geïntegreerde Rechtbanken', above n 74, 70–2, 90–1.

85 See J Franssen, A Mein and S Verberk, 'Gerechtsbesturen, Integraal Management En MD-Beleid' [The Functioning of Court Administrations, Integral Management and Management Development Policy] (Study, B&A Groep, WODC, 2006) 1–6.

more internal possibilities to ‘drive the essential processes’ more efficiently and effectively ‘from intake to judgment’.⁸⁶

The described arrangements should be contrasted with the situation that still exists in the Victorian courts, despite the establishment of CSV. Fundamentally, there appears to be a lack of clarity regarding the division of tasks, powers and responsibilities within the courts themselves, in addition to the aforementioned lack of clarity regarding the operational function of CSV in court administration. Apart from the provisions in the courts legislation that establish the Councils of Judges,⁸⁷ there appear to be very few provisions that add to or clarify the relationship between the internal judicial and administrative arrangements in the courts.⁸⁸ That, of course, does not mean that Victorian judges have not developed any administrative arrangements. On the contrary, as former Supreme Court Justice Richard McGarvie pointed out more than two decades ago, judges have developed fairly sophisticated non-statutory internal governance structures, such as the executive committees, divisional arrangements and administrative portfolios that were assigned to specific judges-in-charge.⁸⁹ Such arrangements were found to facilitate more efficient and functional delegation of work among judges because they were characterised by a degree of administrative autonomy and greater judicial and administrative specialisation.⁹⁰

However, the internal administrative structures had been established within the executive model, where judges operated in almost complete administrative isolation from the rest of the court administration. As a result, there are practically no provisions in the courts legislation today that facilitate or clarify the functions of judges-in-charge, either in relation to other judges, or — especially — in relation to the court administration as a whole. Neither the Chief Judges nor the divisional Chief Judges (‘Principal Judges’) in the County or the Supreme Courts have any formal legislative authority or management tools to administer their courts and divisions.⁹¹ With the possible exception of the Magistrates’ Courts’ management committees, which include the Court’s CEO, it is also unclear what formal or informal arrangements are available for the CEOs in the higher courts to coordinate their activities with the Councils of Judges, executive committees or divisions. This should be contrasted with the statutory arrangements in other

86 Voermans and Albers, ‘Councils for the Judiciary in EU Countries’, above n 73, 100–1.

87 *Supreme Court Act 1986* (Vic) s 28; *County Court Act 1958* (Vic) s 87; *Magistrates’ Court Act 1989* (Vic) s 15.

88 There are notable exceptions. For example, *Magistrates’ Court Act 1989* (Vic) ss 6, 13 confer on the Chief Magistrate the powers to assign duties to magistrates and to ensure their attendances in court. Similarly, there are provisions in each of the Courts Acts that make the chief judicial officers responsible for directing the professional development and training of other judicial officers: *Supreme Court Act 1986* (Vic) s 28A; *County Court Act 1958* (Vic) s 17AAA; *Magistrates’ Court Act 1989* (Vic) s 13B. In the Court of Appeal, ‘[t]he President is responsible for ensuring the orderly and expeditious exercise of the jurisdiction and powers of the Court of Appeal’: *Supreme Court Act 1986* (Vic) s 16. In addition, the chief judicial officers of the County and Supreme Courts have certain controlling competences in relation to the business of the associate judges and judicial registrars: *Supreme Court Act 1986* (Vic) ss 17E, 109A; *County Court Act 1958* (Vic) s 17ABA.

89 See generally McGarvie, above n 58.

90 Ibid 91–2.

91 Warren, ‘State of the Victorian Judicature’, above n 81, 36.

jurisdictions, such as the federal courts, Queensland or even VCAT, in which the responsibilities, powers and functions of the relevant officers are much more clearly defined.⁹²

B Integrated Management in the Courts

Despite the fundamental changes that have been brought about by the introduction of the *CSV Act*, the courts are somehow expected to transition to self-governance using the legacy administrative structures and management tools that they inherited from the executive model, when judges only had limited responsibility for court administration. Yet, the transfer of responsibility for court administration to the judiciary is far more complex than a simple handover to a new management team, because the *character* of court governance is fundamentally different to that in the executive model. In the new model, judges are responsible not only for their traditional administrative arrangements that focus on legal procedure; they also have assumed the additional responsibility to act as policy-makers for the administrative, financial and human resources operations of their courts. Undoubtedly, these issues have important ramifications for the structure of the internal governance system and co-ordination of the judicial and administrative processes not only within the individual courts, but also between the courts and CSV.

International experiences are also instructive in this regard. The CEPEJ report issued a set of recommendations to the government of the Czech Republic to consider introducing the system of integrated management in individual courts, based on a model that is broadly comparable to the Australian federal courts.⁹³ The report noted that this system would likely allow the individual courts to integrate their internal processes far more efficiently and effectively while also improving the working relationships between judges and court administrators, just as it did in the Australian federal courts.

The earlier discussion of the federal courts model similarly highlighted the importance of vesting formal administrative authority in specific individuals, such as the Chief Judges, the Principal Registrar or other judicial and non-judicial officers. In Queensland, for example, there are appointed Judge Administrators who are statutorily responsible for overseeing and 'steering' the administration of the courts' internal lists and divisions.⁹⁴ This allows them to better understand the

92 Ibid. For a more detailed discussion of the administrative powers of judges in Australia see Kathy Mack and Sharyn Roach Anleu, 'The Administrative Authority of Chief Judicial Officers in Australia' (2004) 8(1) *Newcastle Law Review* 1.

93 Voermans and Albers, 'Councils for the Judiciary in EU Countries', above n 73, 112.

94 The Senior Judge Administrators are responsible to the Chief Justice. In addition, the chief judicial officers have statutory powers to do 'all things necessary or convenient to be done' for the administration of the courts and they are responsible for ensuring the 'orderly and expeditious exercise' of the jurisdiction and powers of the court: *District Court of Queensland Act 1967* (Qld) s 28A; *Supreme Court of Queensland Act 1991* (Qld) s 15. See Judge Michael Forde, 'Judicial Independence and Court Governance' (Speech delivered at the Magistrates Court Conference, Brisbane, 7 April 2003) <<http://archive.sclqld.org.au/judgepub/2003/forde070403.pdf>>.

legal and administrative requirements of the divisions, coordinate tasks with the Chief Judges and court administrators, and improve overall efficiency.⁹⁵

Arguably, all of the above attributes would place the Chief Judges, the Principal Judges and the court CEOs in an ideal position to act as members of a principal executive organ of the courts. An instructive example can be found in the Netherlands, where the formal responsibility for court governance was transferred from the Council of Judges to a smaller executive board comprising the Chief Judge, up to four divisional judge-administrators and the court CEO.⁹⁶ If such an arrangement were to be adopted in Victoria, it would not only vest formal administrative responsibility in specific individuals, but would also potentially address the criticism of the Chief Justice's administrative dominance in the Australian federal courts. Most importantly, the arrangement would place the court management in a more effective position to respond to competing court priorities and make all strategic and operational decisions for the court as a whole, without relying on an external CEO or vast judicial collegium in that process.

V THE NORTHERN EUROPEAN JUDICIAL COUNCILS

The preceding analysis identifies an organisational legacy of the executive model of court administration in the Victorian courts. While further empirical research ought to be undertaken to assess whether that legacy could continue to impede the work of judges and court administrators in practice, two broad, potentially centrifugal, tendencies have been highlighted. The first concerns the relationship between CSV and the courts, as the initial analysis of the *CSV Act* suggests that CSV could potentially assume a commanding position in the administrative and operational affairs of the courts. The second is that judges are likely to continue to operate in accordance with the administrative arrangements that they inherited from the executive model, which may well be regarded as a significant disadvantage.

The preferred alternative would be for CSV to assume a broader developmental function in court administration, and there are some early indications that it may be positioning itself in that direction.⁹⁷ Namely, the Chief Justice of the Supreme

95 For a discussion of this issue in the USA see Church, above n 82, 244. According to Church, one of the most important early innovations of the US Ninth Circuit Court of Appeal was to provide for extensive formal delegation of administrative duties to administrative Chief Judges and their inclusion as members on the Court's Executive Committee.

96 *Judiciary Organisation Act 1827* (Netherlands) s 23 <https://www.rechtspraak.nl/English/Legislation/Documents/WetopdeRechterlijkeOrganisatie_EN_.pdf>. The Council of Judges retains an important advisory function in this process, just as it does in the Australian federal courts. See also W J Deetman et al, 'Judiciary Is Quality' (Report, Committee for the Evaluation of the Modernisation of the Dutch Judiciary, December 2006) 22. To carry out its duties, the board has the power to give general or special instructions to all officials working in the court, including judges, although the instructions may not relate to the procedural handling, substantive appraisal or the decision of a case or category of case: *Judicial Organisation Act 1827* (Netherlands) s 27.

97 Marilyn Warren, 'Court Governance in the State of Victoria' (Speech delivered at the International Association for Court Administration, Sydney, 24 September 2014) 11.

Court of Victoria recently pointed out that although CSV had formal statutory authority over jurisdiction administration, in the majority of areas it would only act as a ‘service agency’ to the courts.⁹⁸ This suggests that CSV will be likely to assume a less operational function in court administration, although it is not yet clear whether the services to be provided to the courts will be purely technical or of a broader developmental character. A broader developmental approach would require CSV to rely on its broadly-defined statutory powers in order to assist the courts in strengthening their internal administrative capacity and improving their internal working methods under a system of ‘integrated management’. To achieve these aims, it is argued that CSV’s organisational competencies should be modeled on the experiences of the northern European judicial councils.

A Provision of Technical and Developmental Support

According to Voermans, the proliferation of independent judicial councils in the northern European countries, such as Sweden, Denmark and the Netherlands, was not merely a coincidence.⁹⁹ They were established to address a myriad of challenges that were inherited from the almost complete administrative dominance of the executive government in the operation of the court system. First, as in Victoria, judges felt that they needed a protective ‘buffer’ between the courts and the executive, primarily as a means of safeguarding judicial independence. Secondly, the European reformers were also driven by a desire to strengthen the capacity of the court system as a whole, to enable it to operate in a more challenging social, technological, political and legal environment.¹⁰⁰ In some respects, this issue highlights perhaps the most fundamental flaw in the executive model: the executive control of court operations and policy had left judges without a common institutional framework — a supporting organisation — that would enable them to adequately respond to emerging challenges or develop a unified position on behalf of the third arm of government as a whole.¹⁰¹ The solution to such problems was seen in the establishment of independent and dedicated ‘judicial councils’ that were entrusted with tasks such as supervising the courts, supporting the development of the court system and creating the appropriate organisational conditions for the courts to improve their operations.¹⁰²

Upon initial inspection, the statutory functions performed by CSV in Victoria broadly correspond to the technical tasks that have been entrusted to the northern European judicial councils. For example, in Sweden, the principal tasks of the Swedish National Courts Administration (‘SNCA’) are, among others, to ensure ‘an appropriate allocation of resources’ and provide ‘administrative support and

98 Ibid.

99 Wim Voermans, ‘Councils for the Judiciary in Europe: Trends and Models’ in F F Segado (ed), *The Spanish Constitution in the European Constitutional Context* (S L Dykinson, 2003) 2133, 2139.

100 Philip M Langbroek, ‘Organization Development of the Dutch Judiciary, between Accountability and Judicial Independence’ (2010) 2(2) *International Journal for Court Administration* 21, 21.

101 Ibid 24.

102 Voermans, ‘Trends and Models’, above n 99, 2138.

service' to the courts.¹⁰³ In performing these tasks, SNCA is similarly responsible for maintaining the common administrative systems and shared services for the courts, such as ICT, financial administration, payroll, statistics, security, archiving and procurement.¹⁰⁴

However, upon closer analysis, it becomes clear that the northern European judicial councils have also assumed a much broader developmental function in the court system, because they are also responsible for supporting and improving the courts' internal working *methods*, rather than providing purely technical support, or being directly concerned with the courts' operational management.¹⁰⁵ As seen in the example of the Netherlands, the courts were expected to develop substantial new capabilities in their administrative and financial affairs and to introduce transparent internal organisational rules under the system of 'integrated management'.¹⁰⁶

As a result, the development of greater managerial competence in court administration was identified as a key area of responsibility for the judicial councils. From the outset it was recognised that judges were lacking the managerial tools to independently run large organisations that employed thousands of people.¹⁰⁷ To address these issues, the northern European judicial councils invested heavily in education and training of court staff and judicial administrators.¹⁰⁸ For example, in Sweden, the SNCA had been instrumental in the development of a Courts Academy, which offers management training courses for judicial administrators and court staff. The SNCA also provides other forms of training and support to the courts, in areas such as competence design, financial and auditing support, recruitment and personnel management.¹⁰⁹ Similarly, in the Netherlands, the Council for the Judiciary was given a statutory responsibility to develop and maintain an organisational quality framework and an objective workload measurement system for the courts, which were designed to assist the management of the courts to measure and improve various aspects of court

103 SNCA, 'Operational Plan 2010–2012' (Domstolsverket, 2009) 8. The report refers to the Swedish Government's Appropriation Directions for the 2011 budget year in respect of the Courts of Sweden.

104 Ibid 26–7.

105 Gar Yein Ng, *Quality of Judicial Organisation and Checks and Balances* (PhD Thesis, Utrecht University, 2007) 79. See also Gar Yein Ng, 'Quality and Justice in the Netherlands' in Marco Fabri, Philip M Langbroek and Hélène Pauliat (eds), *The Administration of Justice in Europe: Towards the Development of Quality Standards* (Lo Scarabeo, 2003) 304, 321. See also Bunjevack, 'Court Governance: The Challenge of Change', above n 72, 219.

106 Voermans and Albers, 'Councils for the Judiciary in EU Countries', above n 73, 22–3. See the *Judiciary (Organisation) Act 1827* (Netherlands) art 19. The legislation also requires the governing boards in each court to draw up transparent organisational rules in the form of court regulations, detailing procedure, decision-making, division of responsibilities, organisational structure, the jurisdictional allocation of cases between divisions, complaints and delegation procedures, etc. The governing board is centrally responsible for the general management of the courts, including all judicial and personnel matters, budgeting, planning and control cycle, the quality of the administrative and organisational procedures and information and management systems.

107 See Franssen, Mein and Verberk, above n 85.

108 Ibid 5. For example, in the Netherlands, the Council for the Judiciary developed a 'Management Development Policy' to assist members of the courts' executive boards perform their administrative functions.

109 SNCA, 'Operational Plan 2011–2013' (Domstolsverket, 2011).

operations, such as the work processes area, the finance area, the learning and development area and the customer service area.¹¹⁰

B The Responsibility for Improving the Quality of Justice

The Council for the Judiciary in the Netherlands has adopted an even more ambitious agenda. This body has a broad legislative mandate to improve the *quality of the administration of justice* in the court system.¹¹¹ This was seen as an important function for the peak body of the third arm of government, in order to compensate for the withdrawal of the executive from the administration and management of the court system. In performing that function, the Council conducts training courses nationally, provides various forms of organisational and legal assistance to the courts, maintains customised ICT and legal databases, undertakes expert analyses of the economic, social, procedural and legal trends affecting the courts, and conducts multi-disciplinary academic research in close consultation with the courts and agencies that work with the courts.¹¹²

In contrast, the formal legislative mandate of CSV appears to be rather modest, given its responsibility to provide ‘administrative services and facilities’ to the courts, which implies a relatively narrow technical function in the court system that is centered on the provision of shared services.¹¹³ An important developmental function in the Victorian court system is currently performed by the Judicial College of Victoria (‘JCV’), which is a well known and respected provider of judicial education and forms an integral part of the statutory framework that was established by the *CSV Act*. However, the focus of the programs offered by JCV is on keeping judicial officers abreast of the latest developments in the law and some social issues, rather than promoting the organisational development of the courts as organisations, or improving the quality of the administration of justice in the broader sense described above. This is an important area in which CSV could potentially expand its mandate, either on its own, or in cooperation with an external provider.

VI THE POLITICS OF JUDICIAL INDEPENDENCE

The introductory analysis of the Victorian court system reform would be incomplete without a discussion of its wider institutional, political and social ramifications. There is little doubt that the establishment of CSV represents a significant, if not

110 Netherlands Council for the Judiciary, ‘Quality in the Judicial System in the Netherlands’ (2008) 13.

111 *Judiciary (Organisation) Act 1827* (Netherlands) art 94.

112 See The Council for the Judiciary, *Other Duties and Responsibilities* (2014) De Rechtspraak <<http://www.rechtspraak.nl/English/The-Council-for-the-Judiciary/Duties-and-responsibilities/Pages/Other-duties-and-responsibilities.aspx>>.

113 *Court Services Victoria Act 2014* (Vic) s 4. See Warren, ‘Court Governance’, above n 97, 13: the organisational chart of ‘Jurisdiction Services’ of CSV reveals the existence of four internal divisions that are purely technical in nature, such as Financial Analysis, Information Technology, Asset Planning & Management and People & Business Services.

monumental, victory for the constitutional doctrine of the separation of powers and judicial independence in this state. Victoria has joined an enviable group of jurisdictions in which courts are entitled to receive their funding directly from Parliament and have almost no direct institutional connection with the executive government.¹¹⁴

A A Reduction in Ministerial Responsibility and Interest

At the same time, one of the most striking features of the Victorian reform is the near-abandonment of the principle of general ministerial responsibility for the courts. Namely, apart from the provisions in the *CSV Act* that require CSV to keep the Attorney-General periodically informed of the budgetary and operational requirements of the courts,¹¹⁵ there are few provisions in the Act itself to suggest that the Minister has any other (non-financial) mechanisms left at his disposal to respond to any urgent matters affecting the administration of justice in the courts.¹¹⁶ This issue has received surprisingly little academic or professional scrutiny in Victoria, in stark contrast with other jurisdictions that have introduced similar reforms in recent years.¹¹⁷

Whilst the principle of diminished ministerial responsibility for the courts was ultimately adopted in Sweden, Norway, Ireland, Denmark and the Netherlands, the Minister's responsibility for certain threshold questions affecting the operations of the courts was not removed in its entirety.¹¹⁸ First, in relation to justice policy, the legislation identifies the need for the court system to align its policies with other justice sector organisations in order to promote greater systems integration and pool all available resources for the benefit of court users. To achieve these aims, the legislation in Ireland, for example, specifically requires the Board of the Courts Service to submit for the Minister's approval ('with or without amendment') a strategic plan for each ensuing three-year period.¹¹⁹ Furthermore, the Courts Service is required by law to *have regard* to 'any policy or objective of

114 Ibid 6.

115 *CSV Act* ss 41–2.

116 In practice, the Attorney-General retains the power to approve the courts' budget, 'with or without modification': *CSV Act* s 41. See also s 40, which makes it clear that additional reporting requirements apply under *Financial Management Act 1994* (Vic) pt 7.

117 The absence of academic and professional commentary is partly due to the closed nature of the consultations between the government and the judiciary that led to the introduction of the *CSV Act*. One of the reasons for this situation also lies in the successes of the federal courts and the South Australian Judicial Councils, as described in Part II. In contrast, the court reforms in Scandinavia, the Netherlands and Ireland have been well documented and were the subject of detailed academic and professional analyses over a period of several years. Most of the overseas resources are freely available on the internet and typically include full English translations of the original documents. See, eg, the full collection of the Denham Group Reports from Ireland (Denham Group, above n 12), available at <<http://www.courts.ie/courts.ie/library3.nsf/pagecurrent/5D12A39F06827AD080256DA60033FE87?opendocument&l=en>>. For the Netherlands, see the collection of reports that are available at <<http://www.rechtspraak.nl/Organisatie/Publicaties-En-Brochures/Pages/Kwaliteit-van-de-Rechtspraak.aspx>>.

118 Tin Bunjevica, 'Court Governance in Context: Beyond Independence' (2011) 4(1) *International Journal for Court Administration* 35, 44.

119 *Courts Service Act 1998* (Ireland) s 7.

the Government or a Minister of the Government insofar as it may affect or relate to the functions of the Service’.¹²⁰

Secondly, in certain clearly defined exceptional circumstances, the Minister may be entitled to set aside decisions or even dismiss members of the Courts Council where they have made decisions that are ‘manifestly contrary to the law’, or the Auditor-General advises the Minister that there are significant financial irregularities in the management of the Council’s budget.¹²¹ This solution was only made possible due to the introduction of *fixed term* appointments to the boards of the Council, which is considered to be an advantage in institutional governance theory, because of the perceived benefits that flow from greater separation between ‘ownership’ and ‘management’ of an entity.¹²²

In contrast, the Victorian legislation confers a central responsibility for the operation of CSV on its CEO,¹²³ who is also classified in public sector law as a Public Service Body Head and Accountable Officer of the entity.¹²⁴ Presumably then, it is the CEO who will be called upon, together with the Minister, to give account to a Parliamentary Accounts and Estimates Committee in relation to any operational problems that may arise in practice.¹²⁵ In extreme cases, the *CSV Act* also contemplates that the CEO may be removed — *by the Courts Council* — on the basis of ‘misconduct’, ‘neglect of duty’, ‘inability to perform the duties of

120 Ibid s 13. Similarly, in the Netherlands, the Minister is entitled to issue general directions to the Judicial Council insofar as they may be necessary to ensure proper operations of the courts. See *Judiciary (Organisation) Act 1827* (Netherlands) art 93. For Sweden, see the appropriation directions in SNCA, above n 103, 8. However, see *CSV Act* s 18(2), which states that the Courts Council ‘must take into account any business, corporate or strategic plan when making decisions in respect of the provision of administrative services and facilities to each jurisdiction’. It appears that this provision is referring to individual jurisdictions’ operational and business plans, rather than government policies.

121 *Judiciary (Organisation) Act 1827* (Netherlands), arts 106, 107. The Minister makes the recommendation, but the decision is made by Royal Decree and there are corresponding avenues of appeal to the Supreme Court under art 108. For Denmark, see Jesper Wittrup and Poul Sørensen, ‘Quality and Justice in Denmark’ in Marco Fabri, Phillip M Langbroek and Hélène Pauliat (eds), *The Administration of Justice in Europe: Towards the Development of Quality Standards* (Lo Scarabeo, 2003) 119, 125.

122 Bunjevack, ‘Court Governance in Context: Beyond Independence’, above n 118, 43. There are statutory mechanisms available to ensure that the judicial appointments to the Courts Council remain transparent and attuned to the needs of the courts and judiciary. See, eg, *Judiciary (Organisation) Act 1827* (Netherlands), s 85 which prescribes a nomination procedure whereby a Committee of Recommendations, which comprises a number of judicial members and is presided over by a judge, recommends candidates from a list of several nominees that have been initially proposed by the Minister of Justice and agreed to by the Judicial Council.

123 See also *Courts Service Act 1998* (Ireland) s 20; *Courts Administration Act 1993* (SA) s 17.

124 *CSV Act* ss 25–7. In practice, this means that the appointment of the CEO is also governed by the *Public Administration Act 2004* (Vic) pt 3 and the *Financial Management Act 1994* (Vic) s 42.

125 Unlike the South Australian legislation, there is no provision in the *CSV Act* that clarifies the relationship between CSV and parliamentary committees, which means that the relationship is governed by the general public sector legislation, such as the *Parliamentary Committees Act 2003* (Vic), the *Public Administration Act 2004* (Vic) and the *Financial Management Act 1994* (Vic). See *Courts Administration Act 1993* (SA) s 29, which provides that ‘[a] member of the Council, or the Administrator, must, at the request of a parliamentary committee, attend before the committee to answer questions’.

the office', or 'any other ground on which the Courts Council is satisfied that the Chief Executive Officer is unfit to hold office'.¹²⁶

Based on the above, it appears that an overarching statutory responsibility for the 'general direction and superintendence' of CSV now also rests with the Courts Council,¹²⁷ whose members have a duty to act 'with appropriate care, diligence and integrity'.¹²⁸ However, in view of the Chief Judges' *permanent* stewardship of the Council, it is unclear what reputational or legal consequences would follow should this organ issue general directions to the CEO that are unlawful or result in unintended but nevertheless serious financial or operational irregularities.¹²⁹

The authors of the CEPEJ report sounded a note of caution regarding the practice of vesting of primary statutory responsibility in the CEOs and the ostensible reduction in ministerial responsibility.¹³⁰ According to Voermans and Albers, '[t]he line of a Minister's political responsibility to Parliament has different dynamics than that of the much slower and less direct line of responsibility that the [Courts have] with Parliament'.¹³¹ In other words, when politically sensitive incidents involving the courts do arise, the Attorney-General will be under tremendous political pressure to respond and find an immediate solution in order to appease the government and the electorate. Therefore, it can be said that the Minister's general political responsibility will nevertheless continue to play an important role in the new institutional environment, particularly at times of crises.¹³² However, the exact scope and boundaries of the Minister's responsibility have not been clearly defined in the *CSV Act*, which suggests that it may be open to future interpretation and negotiation.

126 *CSV Act* s 24.

127 *Ibid* s 10.

128 *Ibid* s 17.

129 Arguably, the Courts Council's power to dismiss the CEO for conduct that the Council itself may have authorised creates a conceptual problem within the existing public sector legislation that may not have been anticipated at the time of the drafting of the *CSV Act*. This stems from the fact that CSV is a public sector body *sui generis*, because it is uniquely positioned within the *judicial* arm of government, whereas the adopted legislative framework of the *Public Administration Act 2004* (Vic) and the *Financial Management Act 1994* (Vic) was designed for public sector entities that are broadly positioned within the legislative or executive arm of government's areas of responsibility. In such cases, the Minister or the Governor is often entitled to dismiss the principal officers in cases of serious misconduct (see, eg, *Victorian Law Reform Commission Act 2000* (Vic) s 10; *Victorian Inspectorate Act 2011* (Vic) s 23). The solution adopted by the *CSV Act* is anomalous, because it denies the politically responsible Minister the ability to dismiss the CEO, while conferring on the Courts Council the power to dismiss the CEO for conduct that the Council itself may have authorised, which evidently creates a responsibility vacuum.

130 Voermans and Albers, 'Councils for the Judiciary in EU Countries', above n 73, 38.

131 *Ibid* 33.

132 See John Uhrig, 'Review of the Corporate Governance of Statutory Authorities and Office Holders' (Commonwealth of Australia, 2003) 42. The review gives the example of the Civil Aviation Safety Authority ('CASA'), which had previously been managed by an independent board that was fully responsible for its operations. However, despite the existence of the board, and following a number of aviation safety incidents, the 'community expected the Minister to be accountable for the performance of the authority'. This prompted the government to remove the board and take a greater role in the operation of CASA. See also Voermans and Albers, 'Councils for the Judiciary in EU Countries', above n 73, 38.

The absence of clearer legislative expectations in this area also carries the risk that the courts will be left to their own devices, which in some respects may be considered a disadvantage. The management of courts is hardly a burning political issue in Australia and other developed countries,¹³³ which raises the question of whether the new judiciary will be able to secure sufficient *visibility* in the crowded political arena. This is an issue of considerable importance to the judiciary and one that will necessitate further study and analysis, as the following discussion demonstrates.

B Increasing Judicial Visibility through Greater Engagement

A recent landmark study of ‘the politics of judicial independence’ in the UK identified the ‘retreat of the politicians’ as being a *primary challenge* for the new judiciary.¹³⁴ The authors of the study, Professors Graham Gee, Robert Hazell, Kate Maleson and Patrick O’Brien interviewed more than 150 senior judges, politicians, parliamentarians and public servants over a three-year period in order to understand the interactions and processes of consultation and negotiation that occurred between the various constituencies following the introduction of the *Constitutional Reform Act 2005* (UK). The central contention of the study is that judicial independence is a political, rather than legal achievement.¹³⁵ Accordingly, the authors argue that judicial independence depends on the way in which judges, politicians, civil servants and others ‘negotiate the meaning, content and limits of judicial independence and accountability in the UK.’¹³⁶

While there are significant institutional and historical differences between the UK and Victorian court system reforms, it is instructive to note that the authors found the ‘new’ politics of judicial independence in the UK to be much more dispersed, fragmented, politicised, formal, open and accountable than before.¹³⁷ One of the key reasons for this situation is that a much wider range of political actors, relationships and bodies are now involved in the processes that define the scope and nature of judicial independence, while some of the more traditional figures, such as the Lord Chancellor, no longer command the same degree of power, respect or influence as before.¹³⁸ These findings lead the authors to the important — if paradoxical — conclusion, that greater institutional independence of the judiciary requires more, rather than less, political astuteness and engagement by judges with the other branches of government and the public.¹³⁹

If one provisionally accepts the findings of the UK study for the purposes of the present analysis, there are some important lessons to be learnt, particularly

133 Voermans and Albers, ‘Councils for the Judiciary in EU Countries’, above n 73, 112.

134 Graham Gee et al, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge University Press, 2015) 262.

135 Ibid 252.

136 Ibid 9.

137 Ibid ch 10.

138 Ibid 253–4. On the position of the Lord Chancellor, see also 35.

139 Ibid 263.

in areas where judges, politicians and public servants are regularly called upon to ‘negotiate’ the meaning and scope of judicial independence. If judicial independence can be considered a political achievement, it depends on the strength of the formal, institutional, as well as the informal, personal, relationships between the judiciary and the other branches of government. This issue is perhaps most obvious when it comes to the funding arrangements for the courts. Thus, despite the fact that the courts now formally receive their budgetary appropriations directly from Parliament, in reality it is the Attorney-General who approves their budget and represents their interests at Cabinet in order to secure a majority support in government and Parliament.

Additionally, the *CSV Act* has established a complex web of new institutional relationships, such as those between CSV and Parliament, and those within the judiciary itself, which will take time to develop in a consistent and systematic fashion. The authors of the UK study particularly highlighted the depth and importance of the newly-formed institutional connections between the judiciary and Parliament, where judges now regularly participate in and give evidence to Parliamentary Committees in order to ventilate their concerns, hold Ministers to account, demonstrate the judiciary’s own accountability and monitor the workings of the new institutional architecture of the court system.¹⁴⁰ Remarkably, the authors of the study go so far as to suggest that the new institutional relationships between the judiciary and Parliament have not only acquired a central role in promoting greater judicial accountability and visibility; they also have developed into ‘key guardians of judicial independence’.¹⁴¹

C Judicial Corporatism and Accountability

Based on the discussion above, it is quite conceivable that the Victorian judiciary may also find it necessary to develop deeper institutional connections with Parliament and other public sector entities (such as the Ombudsman and the Auditor-General, for example), partly in order to enhance the courts’ ‘visibility’ in the political arena. However, the establishment of structured institutional relationships with other public sector entities will also necessitate the development of a more clearly defined internal organisational structure within the judiciary itself. If the British and northern European experiences are anything to go by, the judiciary’s new administrative structures and internal arrangements will be increasingly characterised by greater organisational openness and an emerging culture of ‘judicial corporatism’.¹⁴²

According to Professor Kate Maleson, the traditional forms of judicial accountability — such as the open nature of court proceedings, publication of judgments and availability of the appellate process — are no longer sufficient to

140 Ibid 99–101, 113.

141 Ibid 112.

142 See ibid 155.

maintain the public's confidence in the independent judiciary.¹⁴³ She argues that additional new forms of 'soft' accountability must be developed by judges in order to counter their growing independence and influence in public life.¹⁴⁴ Examples of the soft accountability mechanisms given by Malleeson include greater internal administrative transparency, more diverse representation of the judiciary, a more transparent judicial appointments process, greater openness to academic scrutiny and even the introduction of a formal system of performance appraisals.¹⁴⁵

Similarly, Professor Phillip Langbroek argues that the absence of direct ('vertical') ministerial insight into court operations must somehow be compensated via alternative ('horizontal') mechanisms of accountability that demonstrate greater institutional openness in the relationship between the judiciary and the politicians on the one side, and the judiciary and the public on the other.¹⁴⁶ Courts in some jurisdictions have already developed modern forms of 'corporate accountability' in order to compensate for the reduction in ministerial responsibility.¹⁴⁷ As we have seen, in the Netherlands, the courts have introduced a transparent workload budgeting system and detailed 'court regulations' that govern all aspects of court administration, including decision-making at the executive board level, divisional structures and powers, complaints procedures, delegation of duties, replacement of members in the event of sickness, and the jurisdictional allocation of cases between divisions.¹⁴⁸

Similarly, in the USA, there are very detailed rules in many state jurisdictions that formally govern key aspects of court administration. They typically include provisions in respect of the functions and powers of the Chief and Administrative Judges, coordination of judicial schedules, court organisation and operations, appointments of court committees, and so on.¹⁴⁹ In some states, such as California, there are also remarkably detailed rules that govern the proceedings of the Judicial Council itself.¹⁵⁰ Rule 10.6 of the *Judicial Administration Rules* (California) embodies the general principle of the internal administrative transparency of the Californian judiciary: business meetings of the Judicial Council are open to the public, subject to a few exceptions.

These examples illustrate Mohr and Contini's contention that corporate accountability of the judiciary is a two-way channel of communication between

143 See generally, Kate Malleeson, *The New Judiciary: The Effects of Expansion and Activism* (Ashgate, 1999).

144 Ibid 37–74.

145 Ibid 199–202.

146 See Philip M Langbroek, 'Quality Management and Autonomy for Court-Organisations' (2001) *EGPA paper 2001 Studygroup on Management and Delivery of Justice*, 6. See also Bunjevack, 'Court Governance in Context: Beyond Independence', above n 118, 44.

147 Bunjevack, 'Court Governance in Context: Beyond Independence', above n 118, 44.

148 See *Judiciary (Organisation) Act 1827* (Netherlands) art 19.

149 National Center for State Courts, *Key Elements of an Effective Rule of Court on the Role of the Presiding Judge in the Trial Courts* (National Center for State Courts, Virginia, 2006) 2.

150 See *Judicial Administration Rules (California)* <http://www.courts.ca.gov/documents/title_10.pdf>.

the courts and their stakeholders.¹⁵¹ Firstly, an accountable judiciary should establish processes and strategies that convey information about the internal culture and workings of the judicial organisation to those having the right to know.¹⁵² Secondly, those strategies should also include transparent mechanisms that demonstrate how members of the organisation act consistently with the organisational values and interests that are embedded in their organisational culture.¹⁵³

D Towards Judicial Corporatism in Victoria?

In Victoria, much has been done to establish a sound basis for improving the quality of the administration of justice in a relatively short period of time. The establishment of CSV has given the judiciary an opportunity to act with one voice in relation to any and all matters that affect the operations of the courts. Most importantly, the new organisational structure has removed the inherent structural barriers that had plagued court administration in the executive model, thus giving the courts a suite of new opportunities to improve the effectiveness, efficiency and, ultimately, quality of justice.

The possibilities are many. They include the potential development of internal administrative structures and mechanisms that will enhance the judiciary's 'corporatisation', public accountability and visibility in the public and political arenas.¹⁵⁴ While a number of potential teething problems have been identified in this article, they must be placed in appropriate context, given that the process of organisational development of the judiciary in Victoria is still only in its infancy. Experiences from other jurisdictions that have introduced similar reforms are generally positive and there is no reason to fear that Victorian judges will not be up to the challenge.

However, the challenges are many and there is no place for complacency. First, as the discussion in Parts IV and V demonstrates, a key focus should be placed on the issue of management development, by introducing training programs and activities that are aimed at improving the courts' internal governance structures and enhancing their managerial capabilities. This will be an important and challenging task, because, as we have seen, the courts have inherited certain 'legacy' administrative arrangements from the executive model that have the potential to impede the reform processes in the courts themselves.

In addition, CSV should investigate the possibility of broadening its mandate (legislatively or otherwise), in order to assume the responsibility for improving the quality of the administration of justice in the courts, as discussed in Part V.

151 Franceseo Contini and Richard Mohr, 'Reconciling Independence and Accountability in Judicial Systems' (2007) 3(2) *Utrecht Law Review* 26, 30.

152 Ibid.

153 Ibid.

154 Indeed, the Victorian courts have already piloted some notable initiatives such as the International Framework for Court Excellence. See, eg, County Court of Victoria, *2012–2013 Annual Report* (2013) 4.

A broader mandate would also enable CSV to take a much more proactive and systematic approach to issues such as research and development, organisational quality, justice policy, legal policy, judicial ‘corporatisation’, public accountability and the ‘politics’ of judicial independence. The proposed broadening of CSV’s organisational competencies would likely also assist the judiciary to improve its institutional confidence, secure greater visibility in the political process and protect judicial independence.

VII CONCLUSION

The introductory analysis of the *CSV Act* shows that the institutional design of Court Services Victoria was largely inspired by the South Australian Judicial Council and driven by a desire to protect judicial independence from the executive government. In that respect, the reforms can be considered a great success, given that CSV effectively shields the courts from any direct interference by the executive government.

Despite the establishment of the new entity, however, the Victorian legislative framework preserves certain administrative features that were inherited from the executive model, both within CSV and the individual courts. This in some respects may be regarded as an oversight, although there are early indications that the actual relationships between the courts and CSV may take a different and more effective direction in practice. In particular, it is contended that CSV’s ‘main mission’ is likely to be more developmental and technical, as opposed to operational. To achieve these aims in practice, CSV’s overall approach to its relationship with the individual court tiers should be guided by the experiences of the northern European judicial councils, which offer not only organisational support to the courts, but have also assumed a robust mandate to improve the quality of the administration of justice in a broader sense.

A broader conception of CSV’s mandate would likely also result in greater institutional confidence and ‘corporatisation’ of the judiciary, which may be necessary in order to protect its hard-fought independence and visibility in the political arena.

Postscript: *Following the submission of this article, the Victorian County and Supreme Courts have proposed and announced the establishment of non-statutory management boards with responsibility for court administration.*

CONCLUSION

This thesis was motivated by the need to identify a new organisational solution for the Victorian courts. The research began at a time when it became clear to many judges and policy makers that traditional government responses to the problems of delay, cost and complexity in litigation were no longer sufficient to address the contemporary challenges impacting the courts. As the research into the experiences of other jurisdictions progressed, it became clear that judicial control of court administration was the key to any organisational reform, since no meaningful organisational improvements in the courts could be contemplated without judicial participation and leadership in that process. However, the research also showed that judge-controlled systems of court administration had problems of their own, because judges had little time, management experience or inclination to work as part of a large court bureaucracy. It was clear that judges and courts needed a dedicated supporting institution and that the very concept of judicial accountability in court administration required new elaboration.

With these issues in mind, the overriding objective of the thesis was to develop a model policy framework of court governance that would address the challenges of judge-controlled court administration. Although the research initially focused on Victoria, many of the challenges and problems experienced by the Victorian courts have also been experienced by judges and courts elsewhere. As a result, the governance principles underpinning the policy framework in this thesis are intended to have broad application; they are designed to assist judges, academics and policy makers devise more effective structural organisational solutions to the contemporary challenges of court administration in many jurisdictions around the world.

The first challenge for the thesis was to reassess the theory and principles of judicial administrative accountability. The research shows that the answer to this challenge lies in introducing formal and transparent administrative relationships in courts, in order to improve court performance, enhance the social legitimacy of the judiciary and reinforce judicial independence. Recent experiences from the UK and other jurisdictions demonstrate that greater institutional independence of the judiciary requires deep strategic engagement by judges with a range of court system stakeholders, and that the development of greater administrative capacity is the key to facilitating each of those objectives.

Several examples of judicial administrative transparency have been identified throughout the thesis, with the Dutch model being probably the most significant one in many respects. We have seen that the Dutch courts are governed by an executive board of divisional judges, which is modelled on a corporate board of executive directors. The courts legislation in the Netherlands clearly specifies the duties, tasks and powers of the executive board, including its duty to draw up detailed and transparent regulations governing its business. Therefore, the Dutch court regulations in reality can be conceived as a court equivalent of the corporate constitution. Furthermore, the legislation itself purposefully adopts a qualified definition of judicial independence in court administration, by making it clear that all judges must comply with administrative decisions of the executive board, except where this would undermine party impartiality. Other notable innovations of the Dutch courts in this area include the development of a quality management system and a ‘casemix’ funding model that introduces an objective workload measurement system across all courts that is legislatively tied to the courts’ annual budget appropriations.

The next task for the thesis was to address the principal research questions. The first research question was to develop a policy framework for a judicial council and courts that is accountable, responsive and capable of supporting future development of the court system. To achieve these aims, the thesis conducted comparative research into the court administration systems of more than ten carefully selected jurisdictions in order to identify the key aims, competencies and other essential terms of reference for a modern judicial council and the courts.

The centrepiece of the framework is the proposed Judicial Council of Victoria with a broad developmental mandate to improve the quality of justice in the court system. The council incorporates a mixture of features from the northern European judicial councils that are vested with broad powers to act as a research and development engine for the courts, while also safeguarding their independence from the executive. The council is governed by a small board of elected judges and non-judicial members, who are all appointed for a fixed term based on merit. The minister's role in court administration is significantly diminished in this model, in that the minister has no day-to-day insight into the court system operations and no powers to manage the courts, except to intervene in cases of well-defined emergency.

At the court level, the thesis proposes the establishment of an autonomous system of integrated management for each court, which would be governed by a small executive board comprising the court president, the divisional chief judges and the court CEO. The experiences from Europe, USA and the Australian federal courts show that the system of integrated management can greatly improve courts' efficiency, by promoting their self-responsibility as autonomous organisations. Ultimately, the research shows that fully integrated and autonomous court management – supported by the judicial council – can lead to greater institutional responsiveness of the courts and generate improvements in efficiency, innovation, client orientation and quality of justice.

The second research question and principal objective of the thesis was to test and apply the proposed policy framework by examining the Victorian court system reform as a contemporary case study of court governance. The analysis of the *CSV Act* shows that CSV was largely modelled on the South Australian Judicial Council, although there are important qualitative differences between the two institutional frameworks which suggest that CSV has a number of distinct advantages over the South Australian model. In particular, the Victorian legislation contemplates the inclusion of up to two non-judicial members on the Courts Council, alongside the Chief Judges of each court and the president of VCAT. While this feature may be regarded as a positive development overall, the permanent membership of the rest of the Courts Council could potentially impede the development of an effective

system of court administration in the future. To address this issue, the courts and the government should investigate the possibility of broadening the pool of judicial candidates for board membership, as this could potentially lead to greater professionalization and depoliticisation of court administration in the long term.

Another identified deficiency of the Victorian model is that the formal legislative competencies of CSV appear to be narrowly focused on the provision of ‘shared administrative services and facilities,’ rather than conferring a broad mandate on CSV to improve the quality of justice in the court system. To address this issue, the thesis proposes a formal expansion of CSV’s legislative mandate, which would allow it to focus on areas such as organisational development, court system research, and management education and training. While an alternative argument has been advanced that the existing provisions in the *CSV Act* are already capable of broad interpretation, a formal statutory mandate would be preferred for avoidance of doubt. Overall, however, it can be concluded that the Victorian statutory framework is more versatile and robust than the South Australian one in this regard, not least because it also includes the Judicial College of Victoria under the statutory umbrella of the *CSV Act*.

One of the most unusual features of the CSV reform is that the *CSV Act* failed to amend the ‘legacy’ administrative arrangements in the courts legislation, which could potentially impede the courts’ transition to a system of integrated management in the future. The thesis characterises the omission as an oversight, because the existing statutory provisions in the courts legislation had been designed for the executive model of court administration. Furthermore, it was pointed out that there was some ambiguity surrounding CSV’s residual role in court administration, because certain provisions in the *CSV Act* suggest that the CEO of CSV could assume a commanding role in court operations, which could potentially replicate the ineffective management patterns that were developed in the executive model.

Despite the reservations, the thesis contends that the negative tendencies are unlikely to eventuate in practice, based on a range of factors, such as the size of the jurisdiction, the recent statements from the Chief Justice, the introduction of the International Framework for Court Excellence, and – especially – the establishment

of non-statutory Boards of Management in the County and Supreme Courts. While it is too early to assess the effectiveness of the new administrative arrangements, the very formation of the Management Boards strongly suggests that the higher courts are transitioning to a system of integrated management, which is an essential step in the right direction. Further research should be undertaken in this area to clarify the functions and powers of the Boards of Management and their relationship with existing administrative structures in the courts. Presumably the other Victorian courts and VCAT will also be prompted to introduce similar arrangements, which should then also be the subject of future research and analysis.

The thesis also shows that the division of responsibilities between the Courts Council, the CEO and the Attorney-General has not been adequately defined in the *CSV Act*, with the result that the Minister has no formal powers to influence the court administration, even in cases of emergency. The absence of clearer legislative expectations about the Minister's responsibilities carries the risk that the courts will be left to their own devices and may struggle to secure sufficient visibility in the political arena.

The permanent judicial membership on the Courts Council stands in the way of any major changes being made in this area, which suggests that the relationship between CSV and the Minister will most likely be subject to informal arrangements and negotiations. Indeed, CSV has recently entered into a Memorandum of Understanding ('MOU') with the Attorney-General, which sets out how business is to be conducted between the courts and the executive government.³⁰⁶ The MOU is a publicly available document that can be accessed from CSV's website, which is a welcome departure from past practice, because it serves to promote greater institutional openness and public accountability of the Victorian judiciary. Although the MOU is not a legally binding document, the document is nevertheless significant, because it contains the agreed provisions regarding information sharing,

³⁰⁶ Court Services Victoria, 'Memorandum of Understanding Between the Attorney-General, Victoria and Court Services Victoria' (CSV, 2015) 11.

consultation, corporate planning and meeting arrangements between the parties, which have been set out ‘to ensure the maintenance of a successful partnership.’³⁰⁷

Based on the foregoing, the overall assessment of the Victorian reform can be expressed in positive terms, because the CSV framework broadly meets the court governance benchmarks that have been developed in the thesis. The institutional design of CSV in many respects compares favourably with the proposed policy framework for a Judicial Council of Victoria, albeit with some notable deviations from it. While it is still too early to say whether the existing legislative provisions in the *CSV Act* will confine its role to the provision of basic technical services, the establishment of the Management Boards in the higher courts makes it highly unlikely that CSV will be directly involved in the court operations. Instead, it is more likely that CSV will gradually assume a broader developmental function in the court system, alongside JCV, in order to assist the courts improve the quality of the administration of justice in the future.

At the court level, the establishment of the Management Boards in the County and Supreme Courts demonstrates a strong emphasis on autonomous administration in each jurisdiction, which could potentially lead to the development of an effective system of integrated management in each of the court tiers, provided that the tasks and powers of the internal court structures and court executives are properly defined.

Recent events following the submission of the last article to publication are also encouraging. Namely, it was pointed out earlier that the Magistrates’, County and Supreme Courts have trialled and committed to the ongoing use of the International Framework of Court Excellence (‘IFCE’), which aligns well with the proposed ‘new elaboration’ of judicial accountability in court administration. More recently, the courts have negotiated with the Department of the Treasury to use certain performance benchmarks derived from the IFCE in their annual budgetary statements, which may even be a ‘world-first.’³⁰⁸ This is a significant development

³⁰⁷ Ibid.

³⁰⁸ Warren, above n 229, 9. See also Court Services Victoria, ‘Court Services Victoria Annual Report 2014-15’ (CSV, 2015) 4; 25. The benchmarks themselves are published in the annual Budget Paper

because it signals a commitment by the judiciary to provide an objective assessment of court operations and to use that information for the purposes of negotiating its budget in a formal and publicly verifiable manner.

In sum, all of the described developments point to the emergence of a more robust and self-sustaining system of court administration that will be capable of addressing the challenges inherited from the executive system of court governance. Therefore, the thesis concludes that the CSV reform meets the criteria for a modern judicial council, but that the legislation is insufficiently clear in important aspects, requiring a set of amendments to clarify the functions and powers of CSV and those of the judicial executives in the courts.

Looking beyond the institutional landscape of the Victorian court system, the thesis demonstrates the wider importance of court governance as an organisational catalyst for improving the quality of justice. Transparent and effective court management is essential because litigants and governments alike are showing less tolerance for protracted, complex and costly litigation. The closed organisational structures and insular working practices that were the hallmarks of the judiciary in the past can no longer be justified if the courts are to maintain the high levels of public confidence that they enjoyed previously.

There are undoubtedly other factors affecting the quality of justice in the courts, such as the political, legal and social circumstances in which they operate, or even the personal idiosyncrasies of individual judges and politicians. Nevertheless, the research shows that good governance is crucial under all circumstances because it facilitates more effective court management and the creation of structured institutional relationships between the courts, the elected branches of government and other stakeholders. The thesis provides a further contribution to this area of research and presents a framework that can assist court administration scholars, judicial leaders and policy makers in devising more effective organisational solutions to the contemporary challenges of court administration.

3 ('BP 3'). The four measures that will be included in BP 3 are indicators of quantity, quality, timeliness and cost.

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APPENDIX A

The article reproduced in Appendix A is a modified version of Chapter 2 (Literature Review), which was approved for publication in the *University of New South Wales Law Journal* in January 2017. Publication of the Literature Review was not a requirement for the thesis.

From Individual Judge to Judicial Bureaucracy: The Emergence of Judicial Councils and the Changing Nature of Judicial Accountability in Court Administration

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ABSTRACT

This article analyses the emergence of judicial councils and their role in facilitating greater judicial control of court administration in Australia and other countries. The article scrutinises the arguments in favour of greater judicial control of court administration, before moving on to examine the traditional policy challenges of judge-controlled court systems, such as to develop an effective system of administrative accountability and to devise an institutional framework for a judicial council and courts that is effective, relevant and accountable. The article argues that the transfer of responsibility for court administration from the executive government to an independent judicial council has the potential not only to safeguard judicial independence, but also to improve the quality of justice and assist judges adopt new forms of accountability in court administration. It is argued that the introduction of formal and transparent administrative hierarchies within the judiciary is both justified and necessary in order to improve court performance, enhance the social legitimacy of the courts and reinforce judicial independence. The final part of the article outlines the basic institutional contours of a modern judicial council that can assist the courts achieve these goals and respond to the challenges of modern court environment.

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INTRODUCTION

Over the last 20 years, courts in Australia and many developed countries have experienced an exponential increase in the number and complexity of cases coming before them, which was also accompanied by increasing public expectations regarding the cost, timeliness, quality and accessibility of justice.¹ Judges have found themselves under increasing pressure from politicians, prosecutors, lawyers, the media and other stakeholders to share the burden of cost-cutting in the public sector and deliver more justice in less time and for less money.² There is implicit recognition that governments have all but exhausted their regulatory tool kit for combating delay in the justice system: record numbers of judges have been appointed, new tribunals have been established and successive legislative reforms have been implemented in an attempt to simplify the rules of evidence and legal procedure, and encourage alternative ways of resolving disputes.³ And yet, despite all of these efforts, the challenges of complexity, cost and delay in litigation have only continued to grow, threatening a crisis of confidence that could potentially undermine the independence and legitimacy of the judiciary as well.⁴

While many judges have been acutely aware of the emerging challenges in their environment, they found it difficult to initiate meaningful reforms, for a variety of reasons. Traditionally, the executive government had been in charge of court administration, which left judges poorly equipped to manage the courts and ‘unmotivated to do anything strategic about it.’⁵ Furthermore, because of their specific professional training and experience, judges had little inclination to work together as part of a court bureaucracy and assiduously sought to

¹ See generally Stephen John Parker, *Courts and the Public* (Australasian Institute of Judicial Administration, 1998); Marco Fabri and Philip Langbroek, *The Administration of Justice in Europe: Towards The Development of Quality Standards* (Istituto di Ricerca sui Sistemi Giudiziari, Consiglio Nazionale delle Ricerche, 2003); Tania Sourdin, *The Timeliness Project: Background Report* (Australian Centre for Justice Innovation, 2013); Tin Bunjevac, 'Court Governance in Context: Beyond Independence' (2011) 4(1) *International Journal for Court Administration* 35.

² Marco Fabri and Philip M Langbroek, 'Developing a Public Administration Perspective on Judicial Systems in Europe' in Marco Fabri and Philip M Langbroek (eds), *The Challenge of Change for Judicial Systems: Developing a Public Administration Perspective* (IOS Press, 2000) 1.

³ See e.g. Sir Harry Woolf, 'Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' (Department of Constitutional Affairs, 1996); Adrian AS Zuckerman, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, 1999); Victorian Law Reform Commission, 'Civil Justice Review' (Report No 14, Victorian Law Reform Commission, 2008); Tania Sourdin and Naomi Burstyner, 'Justice Delayed is Justice Denied' (2014) 4 *Victoria University Law and Justice Journal* 46, 48-9.

⁴ Sir Gerard Brennan, 'Key Issues in Judicial Administration' (1997) 6 *Journal of Judicial Administration* 138, 139; For a recent analysis of these issues see A. Marfording and A. Eyland, 'Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany' (UNSW Law Research Paper No. 28, 2010).

⁵ Peter Sallmann, 'Courts' Governance: A Thorn in the Crown of Judicial Independence?' (2007) 16(3) *Journal of Judicial Administration* 139, 141-2.

protect their individual independence, even in the performance of basic administrative tasks. Over time, however, all of these factors contributed to the sense of a deepening 'organisational atrophy,'⁶ which fostered a growing realisation among judicial leaders and policy makers that structural organisational change was one of the few remaining options left to transform the courts into modern, thriving and, above all, responsive institutions.⁷

This article analyses the recent structural reforms of court governance that have led to the establishment of judicial councils in Australia, Canada, Ireland, the Netherlands, Sweden, the UK, the USA and other countries, which have been implemented largely in response to the identified challenges.⁸ It will be argued that the transfer of responsibility for court administration from the executive government to an independent judicial council has the potential not only to safeguard judicial independence, but also to improve the quality of justice and assist judges to redefine the principles of judicial accountability in court administration.

The article begins with an analysis of the arguments in favour of greater judicial control of court administration, before moving on to examine two traditional policy challenges of judge-controlled court systems that have been identified in the literature. The first challenge is to develop an effective system of judicial administrative accountability and the second is to devise a policy framework for a judicial council and courts that is effective, relevant and accountable. In response to the first challenge, it will be argued that the introduction of formal and transparent administrative hierarchies within the judiciary is both justified and necessary in order to improve court performance, enhance the social legitimacy of the courts and reinforce judicial independence.

The analysis of the second challenge will then be used to outline the basic institutional contours of a judicial council, which is based on a synthesis of Australian and international best practices. In particular, the analysis will be used to identify the key aims, competencies and other essential terms of reference for a modern judicial council, and to clarify its relationship with the courts, executive government and other stakeholders. It will be argued that the transfer of responsibility for court administration from the executive government to the judicial council has the potential not only to safeguard judicial independence, but also to improve the quality of justice and assist judges adopt new forms of accountability in court administration.

I. JUDICIAL CONTROL OF COURT ADMINISTRATION

The arguments in favour of greater judicial control of court administration have been traditionally advanced with reference to the

⁶ Bunjevac, above n 1, 35.

⁷ Gar Yein Ng, 'A Discipline of Judicial Governance?' (2011) 7 *Utrecht Law Review* 102. Ng argues that all of identified trends call for a new scientific discipline of judicial governance. For a Victorian perspective on these issues, see Supreme Court of Victoria, *Courts' Strategic Directions Project* (State of Victoria, 2004).

⁸ See for example, Tin Bunjevac, 'Court Governance: The Challenge of Change' (2011) 20 *Journal of Judicial Administration* 201.

doctrine of the separation of powers and the need to protect the collective independence of the judiciary. Justice Robert Nicholson argues that the very existence of judicial independence 'cannot be separated from adequate and proper judicial administration,' because the latter requires that both policy making and policy administration are controlled by the judiciary.⁹ A similar view was expressed by former South Australian Chief Justice Len King, who regarded it as the 'essential principle [...] that the judiciary has the constitutional responsibility for the administration of justice,' and therefore should also be responsible for the administration of the courts.¹⁰ In the Chief Justice's view, the establishment of the South Australian Judicial Council in 1993 represented the clearest expression of that principle in practice, because the South Australian judiciary had assumed full responsibility for court administration in that state.¹¹

The arguments for greater judicial control of court administration also find support in the international 'soft law' jurisprudence on judicial independence, such as the Montreal Universal Declaration on the Independence of Justice, which expressly provides that the responsibility for court administration should vest in the judiciary.¹² However, there is no general agreement on this issue in public international law, constitutional theory or the academic literature. For example, the United Nations Basic Principles on the Independence of the Judiciary address certain aspects of court administration in general terms, but ultimately leave it to the discretion of the member states to provide the 'adequate resources to enable the judiciary to properly perform its functions.'¹³ The Bangalore Principles of Judicial Conduct also express the need to protect the 'institutional independence of the judiciary,' but stop short of endorsing a specific model of court administration.¹⁴ The same general theme is reiterated in the Commonwealth Principles on the Three Branches of Government ('Latimer House Principles'), which call for the 'adequate resources' to be provided to the judiciary to allow it to operate effectively and independently.¹⁵

Church and Sallmann make a useful distinction between the adjudicatory and administrative independence of the judiciary in this

⁹ Robert Nicholson, 'Judicial Independence and Accountability: Can They Co-exist?' (1993) 67 *Australian Law Journal* 404, 422.

¹⁰ Chief Justice Leonard King, 'A Judiciary-based State Courts Administration – the South Australian Experience' (1993) 3 *Journal of Judicial Administration* 133, 136. See generally also Chief Justice Leonard King, 'Minimum Standards of Judicial Independence' (1984) 58 *Australian Law Journal* 340.

¹¹ Ibid. See also Guy Green, 'The Rationale and Some Aspects of Judicial Independence' (1985) 59 *Australian Law Journal* 135, 143-148.

¹² The Montreal Universal Declaration on the Independence of Justice (1983), Art 2.4.

¹³ The United Nations Basic Principles on the Independence of the Judiciary (1985), Art 7.

¹⁴ The Bangalore Principles of Judicial Conduct (2002), Para 1.5.

¹⁵ The Commonwealth Principles on the Three Branches of Government (2003), Principle 4(c).

context.¹⁶ They point out that there is disagreement in the literature as to whether judicial control over court administration is *sensu stricto* necessary to ensure the impartial decision-making by individual judges.¹⁷ A study by Gee et al recently examined a wealth of constitutional literature from the UK and other countries and concluded that ‘there is no settled relationship between structures and behaviour – or what is sometimes called “de jure” and “de facto” independence.’¹⁸ They pointed out that judges in the UK traditionally behaved impartially, even in the absence of formal structures that were in theory deemed necessary to ensure the administrative independence of the judiciary.¹⁹ Nevertheless, the authors noted that there was an increasing awareness of the need to ensure that there were adequate formal mechanisms available to promote the collective judicial independence in the UK.²⁰

While there is disagreement in the literature about the impact of formal governance structures on judicial independence, it is difficult to deny that the executive control of court administration impacts court performance, which – in turn – can potentially also affect judicial independence.²¹ The interdependence in the relationship between court performance and judicial independence was highlighted by Baar et al in an important study of the *Alternative Models of Court Administration*, which was commissioned by the Canadian Judicial Council (‘CJC’) in 2006.²² The authors pointed out that judges in the executive system had little fiscal and operational authority, which made it difficult for them to operate outside of broader government directives and, therefore, potentially represented a ‘significant threat to the independence of the judiciary.’²³ An Australian court management study commissioned by the Australasian Institute for Judicial Administration (‘AIJA study’) further illustrated this problem in practice by highlighting certain budgetary patterns in the state courts that were managed by the executive government. Alford et al found it unusual that the executive

¹⁶ Thomas Church and Peter Sallmann, *Governing Australia's Courts* (Australian Institute of Judicial Administration, 1991) 7.

¹⁷ See for example Richard McGarvie, ‘The Foundations of Judicial Independence in a Modern Democracy’ (1991) 1 *Journal of Judicial Administration* 36. Justice McGarvie argues that judicial independence requires only ‘independence in making decisions in court cases between litigants.’ This approach has been characterised as ‘minimalist’. See also Sallmann, above n 5, 142.

¹⁸ Graham Gee et al, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press, 2015) 12. For a US perspective, see also Gordon Bermant and Russell Wheeler, ‘Federal Judges and the Judicial Branch: Their Independence and Accountability’ (1995) 46 *Mercer Law Review* 835, 852-853. The authors note that ‘compared to the matter of decisional independence, the claim for branch independence has a much more tenuous grounding in constitutional history.’

¹⁹ Gee et al, above n 18, 13.

²⁰ Ibid.

²¹ Sallmann, above n 5, 141.

²² Carl Baar et al, *Alternative Models of Court Administration* (Canadian Judicial Council, 2006).

²³ Ibid 15. See generally also Justice Tim Smith, ‘Court Governance and the Executive Model’ (Paper presented at the Judicial Conference of Australia Colloquium, Canberra, 6-8 October 2006) 6-7. Justice Smith points out that the Victorian courts constantly had to compete for funding with other agencies within the Attorney-General’s ‘departmental behemoth.’

government could – ‘at unpredictable intervals’ – transfer funds from the courts’ agreed annual budget to other areas within the Department of Justice, which made it very difficult for the courts to plan ahead and achieve annual outputs mandated by the Treasury.²⁴

The AIJA study also examined the internal division of administrative responsibilities between judges and court staff and concluded that the executive control of court operations was ‘problematic both for judicial independence on the one hand and for the efficiency and effectiveness of the courts on the other.’²⁵ Alford et al explain that the internal management separation between the judiciary and court administration was considered to be sub-optimal in the management literature and was also a potential cause of organisational delay, because more steps were involved in the internal decision-making processes.²⁶ They pointed out that modern principles of organisational design assume a far greater degree of alignment between ‘authority’ and ‘responsibility’ within an organisation, so that those individuals who have responsibility to achieve certain outcomes should also have authority over the necessary resources to achieve those outcomes.²⁷ The authors concluded that this was clearly not the case in most Australian state courts, where judges had the responsibility to improve court performance, while having insufficient authority over the courts’ administrative and financial resources.²⁸

The findings of the AIJA study did not come as a surprise to the judiciary, as they had first-hand experience of the problems impacting the court operations. In 2004, the Chief Judges of the Victorian courts prepared a report that painted a grim picture of the state of the Victorian judicature and put forward compelling arguments in favour of greater judicial control of court administration.²⁹ They highlighted a series of newly emerging internal and external challenges that were impacting on the functioning of the courts.³⁰ These challenges included ongoing political and budgetary pressures, unprecedented delays and backlogs, growing litigiousness of the society, greater complexity of the law, higher service and quality expectations and constant demands that the courts deliver more justice in less time and for less money.³¹ A careful analysis of the issues outlined in the document suggests that the focus of the court governance debate in Victoria had shifted somewhat from the need to protect judicial independence from the executive government alone, towards an urgent need to protect the courts and

²⁴ John Alford et al, *The Governance of Australia's Courts: A Managerial Perspective* (Australasian Institute of Judicial Administration, 2004) vii.

²⁵ Ibid 85.

²⁶ Ibid 23.

²⁷ Ibid 20; 85-86.

²⁸ Ibid 85-86.

²⁹ Supreme Court of Victoria, above n 7, 51-63.

³⁰ Ibid.

³¹ Ibid.

judges from multiple internal and external threats to judicial independence, integrity and relevance.³²

The Victorian Chief Judges were also unanimous in their assessment that the key obstacle to responding to the identified challenges was the executive system of court administration.³³ In particular, they contended that judges were lacking the managerial authority to strategically plan the operations of their courts. At the same time, the executive officers in charge of court operations were not best-placed to make effective decisions about competing court priorities, because they were embedded in an external government bureaucracy that was physically separated from the courts and had its own organisational demands and priorities.³⁴ According to Church and Sallmann, this situation perpetuated a far-reaching interpersonal divide between judges and court administration, to the point that even the courts' own CEOs were routinely not invited to meetings that discussed essential court processes, because judges regarded them as 'executive officers,' rather than 'court people.'³⁵

Following the publication of the *Courts' Strategic Directions* document, it became clear even to government policy makers that the courts simply could not cope with surging demands.³⁶ By 2010, the government had exhausted practically all of its options, having implemented extensive procedural reforms and appointed many new judges.³⁷ However, despite record levels of funding flowing into the court system, the Victorian courts' performance continued to lag far behind all other Australian jurisdictions.³⁸ The magnitude of the problem is illustrated in Table 1 below, which shows an exponential increase in case lodgements and pending cases backlogs that occurred in the five years *following* the publication of the *Courts Strategic Directions* document:³⁹

³² Tin Bunjevaca, 'Court Services Victoria and the New Politics of Judicial Independence: A Critical Analysis the Court Services Victoria Act 2014 (Vic)' (2015) 41(2) *Monash University Law Review* 299, 307.

³³ Supreme Court of Victoria, above n 7, 75.

³⁴ Ibid 75-79; See also Stephen Skehill, 'Comment on Court Governance' (1994) *Journal of Judicial Administration* 28.

³⁵ Church and Sallmann, above n 16, 25.

³⁶ Tin Bunjevaca, 'Beyond Independence: Court Governance in Context' (Paper presented at the The Australasian Court Administrators' Group's Conference, Sydney, 7 October 2011) 1-5. See also Attorney-General Robert Clark, *Coalition to Slash Court Delays* <<http://www.robertclark.com.au/feature/ideas-and-solutions/coalition-to-slash-court-delays/>>

³⁷ See the Civil Procedure Act 2010 (Vic), the Criminal Procedure Act 2008 (Vic) and the Evidence Act 2008 (Vic).

³⁸ Attorney-General Robert Clark, above n 36. By 2010 Victorian courts had 'the longest waiting lists in Australia when it comes to Supreme Court appeals, County Court trials, Children's Court matters and Magistrates' Court matters.'

³⁹ Bunjevaca, above n 36.

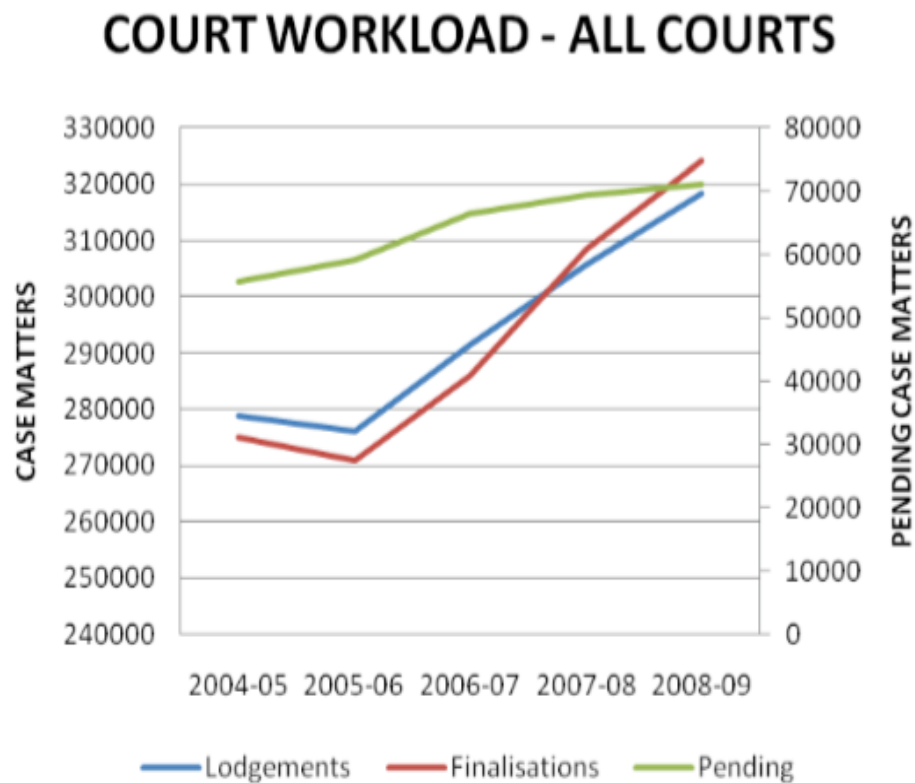


Table 1 - Victorian courts' workload 2005-2009

The Victorian data shown in Table 1 is striking and deserves fuller explanation. It shows that the number of pending cases continued to rise despite marked improvement in the case finalisations between 2005 and 2009 (which was primarily achieved through new judicial appointments).⁴⁰ Under normal conditions, an increase in the rate of case finalisations would reduce the pending cases backlog, but this did not occur in Victoria, where the backlog continued to rise. In the circumstances, the continuing rise in the pending cases backlog was a sign that the courts' resources were still insufficient to meet the increasing demand, or – alternatively – that they were simply not being used in an optimal way.⁴¹ This was certainly the conclusion reached by the incoming Victorian Liberal Nationals Coalition government, which promised to 'slash court delays with a comprehensive package of

⁴⁰ Notably, the data in Table 1 does not capture the full story, as it does not take into account the increases in the volume in the previous 5-year period. For example, in 2000-01 there were 92,294 criminal cases initiated in the Magistrates' Court of Victoria compared to 167,359 in 2008-09, an increase of 90%. See Magistrates' Court of Victoria, 'Annual Report 2000-2001' (Magistrates' Court of Victoria, 2002) 22; Magistrates' Court of Victoria, 'Annual Report 2008-2009' (Magistrates' Court of Victoria, 2010) 23.

⁴¹ Bunjevica, above n 36. By 2008-9, Victoria's 'backlog index' had reached 22.3%, which was by far the worst performance in Australia. See also Steering Committee for the Review of Government Service Provision, 'Report on Government Services: Court Administration' (Australian Government Productivity Commission, 2010) [7.2.7]. The Report sets the national standard of not more than 10% of pending cases on the 'backlog index.'

reforms,' and establish an independent judicial council to be run by the judges themselves.⁴²

A. Problems associated with judicial control of court administration

The analysis so far suggests that a judge-controlled system of court administration would likely lead to greater institutional independence of the judiciary and improvements to court performance, through better organisational alignment between authority and responsibility within the courts.⁴³ Alford et al also pointed out that greater involvement of judges in court administration would lead to an increase in judicial interest in, and responsibility for, the management affairs of the courts.⁴⁴ However, an increase in judicial interest and responsibility for court administration does not automatically translate into a better court system or more effective court organisation. This point was illustrated by former Queensland District Court Chief Judge Michael Forde, who analysed a range of court performance data from the District Courts of New South Wales, Queensland and South Australia in the late 1990s.⁴⁵ His study concluded that the South Australian courts were less productive than the Queensland courts, despite the fact that they were managed by the judiciary and the Queensland courts were managed by the executive government.⁴⁶

While the South Australian court system has been the subject of 'much favourable comment and attention' both in Australia and internationally,⁴⁷ the example given by Chief Judge Forde clearly demonstrates the potential dangers facing any jurisdiction seeking to transfer the responsibility for court administration from the executive government to the judiciary. Indeed, experiences from other jurisdictions show that the problems of organisational misalignment can persist in judge-controlled court systems as well. For example, this issue can potentially arise if judges fail to engage with the rest of the court administration, due to ongoing reliance on their traditional judicial administrative arrangements,⁴⁸ or where a new court administration authority merely replicates the management patterns that were

⁴² Attorney-General Robert Clark, above n 36.

⁴³ Alford et al, above n 24, 85-6.

⁴⁴ Ibid 89-92.

⁴⁵ Michael William Forde, *What Model of Court Governance Would Optimize the Expeditious Delivery of Justice, Judicial Independence and the Accountability of Queensland's Court System?* (LLM Thesis, Griffith University, 2000).

⁴⁶ Ibid 61-2. Notably, Judge Forde also found that the South Australian courts were the most expensive courts to litigate in across the three jurisdictions under review. See also Laurie Glanfield, 'Governing the Courts: Issues of Governance Beyond Structure' (Paper presented at the 18th AIJA Annual Conference, Darwin, 14-16 July 2000) 4. According to Glanfield, in 1997-8 South Australia ranked last on the timeliness criteria published in the Report on the Government Services.

⁴⁷ Peter Sallmann and Tim Smith, 'Constitutionalism and Managerial Effectiveness: Revisiting Australian Courts' Governance' in *Australian Courts: Serving Democracy and its Publics* (Australasian Institute of Judicial Administration, 2013) 265, 271. Sallmann, above n 5, 143.

⁴⁸ Pim Albers and Wim Voermans, 'Councils for the Judiciary in EU Countries' (CEPEJ, 2003) 37; 112.

established under the executive model.⁴⁹ At the more extreme end of the spectrum, a poorly-designed institutional framework can potentially turn the judicial council into a 'structure of intra-judicial oppression, run in the name of judicial independence,' as was recently pointed out by Bobek and Kosar in a damning assessment of the newly-established eastern European judicial councils.⁵⁰

A picture emerges that the transfer of responsibility for court administration to the judiciary is far more complex than a simple handover from the Department of Justice to an independent judicial council, because the character of court governance is fundamentally different than that under the executive model. In the new organisational paradigm, judges are responsible not only for their traditional administrative arrangements that focus on the legal procedure; they also have assumed the responsibility to act as managers and policy-makers for the administrative, financial and human resources operations of the courts. Undoubtedly, these issues have important ramifications for the structure of court governance and co-ordination of the judicial and administrative processes across the entire court system.

Against this background, it becomes clear that the primary challenge for judges and policy makers lies in devising the appropriate institutional and policy frameworks that are capable of sustaining an effective system of judge-controlled court administration. As Millar and Baar put it in their seminal work *Judicial Administration in Canada*, judge-controlled court systems 'must evolve from the present non-systems.'⁵¹ Drawing upon their extensive experiences from the north American court system reforms, Millar and Baar highlighted two common policy challenges of judge-controlled systems of court administration. The first challenge is for the judiciary to develop an effective system of internal administrative accountability, while the second is to establish a supporting judicial council that is relevant, responsive and effective in practice.⁵²

II. POLICY CHALLENGE 1: DEVELOPING AN EFFECTIVE SYSTEM OF JUDICIAL ADMINISTRATIVE ACCOUNTABILITY

The first policy challenge identified by Millar and Baar lies at the heart of modern court administration: How can the judiciary in a mature democracy develop an effective system of administrative accountability that is capable of responding to the identified challenges without undermining judicial independence?⁵³ The article contends that the answer to this question lies in devising a policy framework of court

⁴⁹ Carl Baar et al, *Alternative Models of Court Administration* (Ottawa: Canadian Judicial Council, 2006) 102-103.

⁵⁰ Michal Bobek and David Kosar, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' (2013) 15(7) *German Law Journal* 1257, 1288.

⁵¹ Perry S Millar and Carl Baar, *Judicial Administration in Canada* (Montreal, McGill, 1981) 67-71.

⁵² *Ibid.*

⁵³ See also generally, Andrew Le Sueur, 'Developing Mechanisms for Judicial Accountability in the UK' (2004) 24(1-2) *Legal Studies* 73, 74. Carlo Guarnieri, Patrizia Pederzoli and Cheryl A Thomas, *The Power of Judges* (Oxford University Press, USA, 2002) 156-160.

governance which would help promote greater administrative corporatisation of the judiciary and allow the courts to successfully transition from *organisations of professionals* to *professional organisations*.⁵⁴ According to Langbroek, the difficulty of achieving that transition can be attributed to the fact that the judicial working culture is characterised by individual autonomy and administrative passivity, which is frequently justified by reference to the constitutional doctrine of the separation of powers.⁵⁵ However, while that working culture may be regarded as a strong attribute when it comes to protecting judicial independence, Langbroek sees it as a serious obstacle to achieving future organisational development of the courts, because it is impossible to implement administrative reforms in any large organisation without a more robust system of administrative accountability and discipline.⁵⁶ Langbroek also points out that the courts operate within a broader 'framework of duty' of the public sector, where the work of judges and public servants is intertwined.⁵⁷ As a result, it is evident that the process of organisational development in the courts cannot be successfully carried out by the court staff alone, without active judicial participation and leadership in that process.⁵⁸ This leads Langbroek to conclude that the concept of judicial accountability in court administration requires 'new elaboration.'⁵⁹

A. *Reconceptualising judicial accountability and independence in court administration*

The 'dynamic tension' ⁶⁰ between judicial administrative accountability and independence is a central theme of academic literature in court governance, because it has important implications for the constitutional and organisational aspects of court administration.⁶¹ The constitutional aspect arises when the development of an internal system of administrative accountability starts posing a threat to judicial independence.⁶² A classic formulation of this argument is given by Shetreet and Dechênes, who warn that the creation of 'hierarchical

⁵⁴ Wim Voermans and Pim Albers, 'Geïntegreerde Rechtbanken: Het Vervolg, Evaluatierapport Herziening Rechtelijke Organisatie (onderdeel II)' (Government of the Netherlands, 1994) 70; 90-91.

⁵⁵ Philip Langbroek, 'Quality Management and Autonomy for Court-Organisations' (EGPA Studygroup on Management and Delivery of Justice, 2001) 10.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid. See also Philip Langbroek, 'Two Cases of Changing the Judiciary and the Judicial Administration: The Netherlands and Guatemala' (Paper presented at the Conference on Empowerment, Security and Opportunity through Law and Justice, St Petersburg, Russia, 8-11 July 2001) 10.

⁵⁹ Langbroek, above n 55, 10.

⁶⁰ Shimon Shetreet and Jules Deschênes, *Judicial Independence: The Contemporary Debate* (Nijhoff, 1985) 639.

⁶¹ See generally Le Sueur, above n 53; Nicholson, above n 9; Gee et al, above n 18; Amy B Atchinson, Lawrence Tobe Liebert and Denise K Russell, 'Judicial Independence and Judicial Accountability: A Selected Bibliography' (1998) 72 *Southern California Law Review* 723.

⁶² Richard McGarvie, 'Judicial Responsibility for the Operation of the Court System' (1989) 63(2) *Australian Law Journal* 79, 87.

patterns' within the judiciary might have a 'chilling effect' on judicial independence.⁶³ For example, this issue could potentially arise if a senior judge improperly assigns a junior judge to a remote location to influence his decision-making,⁶⁴ or a dominant Chief Justice improperly uses the power to assign cases to ensure results he personally approves.⁶⁵

At the same time, however, the development of an internal system of judicial accountability is also concerned with the need to maintain the public confidence in the judiciary and improve court performance.⁶⁶ According to Justice Richard McGarvie and Professor Ian Scott, when it comes to court performance, a clear distinction must be made between judicial independence and 'judicial individualism,' which they regarded as a serious obstacle to effective court management.⁶⁷ They separately argue that judicial independence may only be invoked by a judge who is improperly pressured by others in the process of deciding a dispute, but not by a judge who simply refuses to participate in court administration.⁶⁸ This point is also made by Professor Kate Malleson, who sees no inherent conflict between judicial accountability and independence in court administration if a more qualified definition of judicial independence is adopted, that of 'freedom from improper interference which would undermine *party impartiality*.'⁶⁹

Malleson argues that it is party impartiality that must be protected and that collective judicial independence has no justification that is

⁶³ Shetreet and Deschênes, above n 60, 639.

⁶⁴ Gee et al, above n 18, 13.

⁶⁵ Neil Andrews, 'Vinegar Free-Sir Garfield Barwick's Recipe for Judicial Salad' (1996) 3 *Canberra Law Review* 175, 189. The author makes reference to Sir Garfield Barwick's controversial practices during his time as the Chief Justice of the High Court of Australia. Arguably, the problem could potentially also arise where a judicial council imposes financial penalties on judges who fail to meet agreed 'production targets.' See Francesco Contini and Richard Mohr, 'Judicial Evaluation in Context: Principles, Practices and Promise in Nine European Countries' (2007) 1(2) *European Journal of Legal Studies* 1, 22-23. The authors give the example of the Spanish Judicial Council which offered bonuses and imposed financial penalties on judges based on their productivity.

⁶⁶ Nicholson, above n 9, 424. See also Francesco Contini and Richard Mohr, 'Reconciling Independence and Accountability in Judicial Systems' (2007) 3 *Utrecht Law Review* 26. See also Chief Justice Murray Gleeson, 'Public Confidence in the Judiciary' (2002) 76 *Australian Law Journal* 558.

⁶⁷ McGarvie, above n 17, 87, citing Ian Scott, 'The Future of Judicial Administration' in *Responsibilities for the Administration of Justice* (AIJA, 1985) 73, 82. See also Sir Harry Woolf, 'Judicial Independence: Not Judicial Isolation' in Christopher Campbell-Holt (ed), *The Pursuit of Justice* (Oxford University Press, 2008) 167. See also Edward C Gallas, Neta M Gallas and Ernest Friesen Jr, *Managing the Courts* (Indianapolis, Bobbs-Merrill, 1971) 133-4.

⁶⁸ Ibid.

⁶⁹ Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Ashgate, 1999) 71 [emphasis added]. See also Kate Malleson, 'Judicial Training and Performance Appraisal: The Problem of Judicial Independence' (1997) 60(5) *The Modern Law Review* 655, 663-6. See also Mauro Cappelletti, "'Who Watches the Watchmen?'" A Comparative Study on Judicial Responsibility' (1983) 31(1) *American Journal of Comparative Law* 115, 115-116. According to Cappelletti, 'independence, far from being an end in itself, is but an instrumental value, the goal of which is to safeguard another value - [...] the impartiality of the judge.'

separate from its relationship with party impartiality.⁷⁰ Importantly, she also argues that the application of the more qualified definition of judicial independence would allow for the introduction of new forms of administrative accountability by the judiciary, which are needed to improve court performance, maintain public confidence in the courts and counter the judiciary's growing influence in public policy.⁷¹ Examples of the 'soft accountability' mechanisms proposed by Malleson include greater internal organisational transparency, more diverse representation, a more transparent judicial appointments process, greater openness to academic scrutiny and even the introduction of a formal system of performance appraisals.⁷²

Mohr and Contini seek to reconcile the dynamic tension between judicial independence and accountability in court administration by introducing the concept of 'cooperative accountability,' which is similar to Malleson's concept of 'soft accountability' in that it calls for greater administrative transparency within the judiciary.⁷³ They argue that the relationship between judicial independence and accountability is not a 'zero sum game,' whereby an increase in judicial accountability automatically leads to a reduction in judicial independence or vice versa.⁷⁴ For them accountability is a broader 'social relation contract'⁷⁵ that involves a two-way channel of communication between the courts and their stakeholders.⁷⁶ Therefore, an accountable judiciary should strive to establish the appropriate processes and strategies that *explain* the internal culture, values and workings of the judicial organisation to its stakeholders.⁷⁷ Secondly, the courts must also provide appropriate organisational strategies and mechanisms to demonstrate that members of the organisation act in accordance with those values.⁷⁸ If conceived in this way, Mohr and Contini conclude, accountability in judicial systems is not limited to promoting court performance, but also serves to reinforce the essential values that the courts seek to uphold, such as the rule of law, equality, independence and impartiality.⁷⁹

B. Administrative accountability and court performance

The relationship between judicial administrative accountability and court performance is also dynamic and must be placed into the broader social context of the administration of justice as an essential public service.

Gar Yein Ng classified the court environment as a 'professional bureaucracy,' based on the organisational typology developed by

⁷⁰ Malleson, above n 69, 63.

⁷¹ Ibid 38 and 70.

⁷² Ibid 199–202.

⁷³ Contini and Mohr, above n 66.

⁷⁴ Ibid, 45.

⁷⁵ Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447, 450.

⁷⁶ Contini and Mohr, above n 66, 30.

⁷⁷ Ibid. See also Gee et al, above n 18, 18–21. Gee et al refer to this process as the 'explanatory accountability' of the judiciary.

⁷⁸ Ibid.

⁷⁹ Ibid 31. See also Contini and Mohr, above n 65, 11–12.

Professor Henry Mintzberg.⁸⁰ According to Mintzberg's typology, a professional bureaucracy is an organisational system that is centred around professional experts who perform highly complex and individualised work that cannot be easily standardised, measured or simplified.⁸¹ What is, in effect, being said, according to Ng, is that 'judges are difficult to manage,' because they regard themselves as independent actors even when they are performing routine administrative tasks, and this creates substantial difficulties when it comes to evaluating, monitoring and improving court performance.⁸²

Ng also points out that the problem of judicial administrative accountability became especially pronounced when the courts started to experience a steady rise in caseloads and judges realised that they were unable to accommodate the additional workload within their individual work routines.⁸³ What was remarkable, according to Ng, was that judges showed little inclination to coordinate their work activities with other judges and court staff, preferring instead to work alone, within the 'smallest unit within the organisation'.⁸⁴ They persistently argued that they were not responsible for the growing social uncertainty that was caused by the accumulating delays, because they were not in charge of court administration.⁸⁵ While there was truth in those arguments, for Ng this was an indication that judges and courts, as public institutions, failed to address the problem of organisational delay in accordance with their basic constitutional and human rights mandate.⁸⁶ She concludes that the traditional mechanisms of ('hard') judicial accountability – such as the open nature of court proceedings, publication of reasoned judgments, availability of appellate review and scrutiny by the media – have all proved inadequate to respond to the public's demands of the courts.⁸⁷

The impact of the traditional judicial administrative style on court performance was also considered in an international study commissioned by the European Commission for the Efficiency of Justice in 2003 ('CEPEJ').⁸⁸ Professor Wim Voermans and Dr Pim Albers argue that courts are traditionally characterised by poorly defined, collegiate ('horizontal') administrative structures that are primarily aimed at reaching a consensus among judges on all aspects of court

⁸⁰ Ng, above n 7, 107, citing Henry Mintzberg, 'Structure in 5's: A synthesis of the Research on Organization Design' (2008) 26 *Management Science* 322, 333.

⁸¹ Mintzberg, above n 80, 334 as cited in Ng, above n 80, 107-8.

⁸² Ng, above n 80, 108.

⁸³ Gar Yein Ng, *Quality of Judicial Organisation and Checks and Balances* (PhD Thesis, Utrecht University, 2007) 24.

⁸⁴ Ibid 30.

⁸⁵ Ibid.

⁸⁶ Ibid 30. Ng refers to the issue of organisational delay in the context of the *European Convention for Human Rights* (ECHR), Art 6, which provides that 'everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law.' [emphasis added]; See also s 25(2)(c) of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic), which provides that a person charged with a criminal offence 'is to be tried without an unreasonable delay.'

⁸⁷ Ibid 30-1. See also Langbroek, above n 55, 10.

⁸⁸ Albers and Voermans, above n 48.

administration.⁸⁹ An illustrative example are the principal governing organs in the Victorian courts, which originated in the 19th century and today consist of up to 100 judicial officers on the Council of Magistrates. Such large membership runs contrary to modern court administration and public administration theory according to which any governing organ with more than 15 members ‘inevitably gives rise to serious problems of administration and of internal operation.’⁹⁰

Voermans and Albers also point out that the far-reaching organisational and inter-personal divide between judges and court staff contributes to organisational delay, by limiting the possibilities for workflow integration and the creation of deeper patterns of work delegation.⁹¹ As a result, court performance in this environment depends primarily on the personal commitment and individual professionalism of judges in the distribution and execution of their work, which is ‘lacking on different fronts to provide an appropriate answer to the challenges of the increased caseloads.’⁹² The authors conclude, by reference to a series of empirical studies they had conducted in the Dutch courts in the 1990s, that more internally integrated and hierarchical (‘vertical’) judicial administrative structures are essential in order to improve court performance and transform the courts from the traditional ‘organisations of professionals’ to modern ‘professional organisations.’⁹³

C. *From ‘organisations of professionals’ to ‘professional organisations’*

Historically, the introduction of formal administrative hierarchies within courts has been primarily associated with the so-called ‘American model’ of court administration,⁹⁴ although the practice has been successfully adopted by the Australian federal courts and some European jurisdictions.⁹⁵ One of the most remarkable features of the American model was the desire to formalise the administrative

⁸⁹ Ibid 100.

⁹⁰ Thomas Church Jr, ‘Administration of an Appellate Leviathan: Court Management in the Ninth Circuit Court of Appeals’ in Arthur D Hellman (ed), *The innovations of the Ninth Circuit and the future of the federal courts* (Cornell University Press, 1990) 226, 229. See also John Uhrig, ‘Review Of The Corporate Governance Of Statutory Authorities And Office Holders’ (Commonwealth of Australia, 2003) 96. The report points out that a board of between six and nine members represents a reasonable size in public entities.

⁹¹ Voermans and Albers, above n 54, 72.

⁹² Albers and Voermans, above n 48, 100–1.

⁹³ Ibid 101; 108. See also Voermans and Albers, ‘Geïntegreerde Rechtbanken’, above n 54, 70–2, 90–1.

⁹⁴ Millar and Baar, above n 51, 54–55; 63.

⁹⁵ In the US, the process of modern corporate transformation of the judiciary can be traced back to Roscoe Pound’s address to the annual convention of the American Bar Association in 1906. It is worth recalling that two of the four “causes of popular dissatisfaction with the administration of justice” that were identified by Pound were essentially problems of court administration; namely, “judicial organisation and procedure” and the “environment of judicial administration”. See Roscoe Pound, ‘The Causes of Popular Dissatisfaction With the Administration of Justice’ (1906) 14 *American Lawyer* 445, 448–449.

structures and relationships within the judiciary in the form of highly transparent rules and regulations.⁹⁶ For example, according to Wheeler, the Federal Circuit Councils in the USA had been given formal statutory powers to ensure the ‘expeditious and efficient’ disposition of cases and to issue administrative ‘orders’ that all individual judges had to comply with.⁹⁷ Similarly, in the Australian federal courts, the legislation vested in the Chief Justices the administrative powers to ensure the ‘effective, orderly and expeditious’ discharge of the business of their courts, together with the corresponding powers to assign cases to particular judges and to temporarily restrict judges to non-sitting duties.⁹⁸ According to Church and Sallmann, the key advantage of this approach to court management is that administrative accountability and authority are formally assigned to specific individuals, which means that responses to problems can be ‘swift and consistent.’⁹⁹

The most significant recent study that scrutinises the emergence of formal administrative hierarchies within the judiciary was completed in the UK in 2015. Gee et al examined the establishment of a formal judicial bureaucracy headed by the Lord Chief Justice and concluded that the corporatisation of the English and Welsh judiciaries was beneficial not only because it improved the judiciary’s administrative capacity, but also because it had the effect of *reinforcing* judicial independence.¹⁰⁰ According to the authors, the *Constitutional Reform Act 2005* (UK) necessitated the creation of formal administrative relationships both within the judiciary and between the judiciary and the other branches of government.¹⁰¹ This process was primarily influenced by the exponential growth of the professional judiciary and partly also by a broader political drive to remodel the court system as a public service.¹⁰² In addition, there was a growing realisation among senior members of the judiciary that the ‘mantra of judicial independence’ had at times served to mask poor performance.¹⁰³ Having interviewed more than 150 senior judges, parliamentarians, bureaucrats and ministers over a three year period, Gee et al concluded that the institutional reform had been largely successful and that the senior judiciary in England and Wales managed to ‘pull off a difficult trick’ of preserving the essence of judicial independence, while also bringing about a genuine cultural shift

⁹⁶ See, generally Russell R Wheeler, *Origins of the Elements of Federal Court Governance* (Federal Judicial Center, 1992). Examples of this practice can be found at all levels of the judicial organisation and across different State and Federal Circuits. See, National Center for State Courts, *Key Elements of an Effective Rule of Court on the Role of the Presiding Judge in the Trial Courts* (National Center for State Courts, 2006). See also the detailed *Judicial Administration Rules of the Judicial Council of California* <<http://www.courts.ca.gov/cms/rules/index.cfm?title=ten>>.

⁹⁷ Wheeler, above n 96, 18-19; Church and Sallmann, above n 16, 73.

⁹⁸ Federal Court of Australia Act 1976 (Cth), s 15.

⁹⁹ Church and Sallmann, above n 16, 68; See also Lou Hill, *Constitutional and Managerial Principles of Judicial Court Governance: Implementation in the State of Victoria* (LLM Thesis, The University of Melbourne, 1995).

¹⁰⁰ See generally Gee et al, above n 18, Chapters 6 and 10.

¹⁰¹ Ibid 252-253.

¹⁰² Ibid 126.

¹⁰³ Ibid 129-130.

towards greater institutional corporatism.¹⁰⁴ Ultimately, the study found that the ‘shift away from a culture of individualism towards one of corporatism’¹⁰⁵ had significantly improved the judiciary’s accountability and enhanced its institutional capacity to protect judicial independence.¹⁰⁶

D. Towards a ‘new elaboration’ of judicial administrative accountability

The foregoing analysis provides the basis for a ‘new elaboration’ of judicial accountability in court administration. The analysis shows that the introduction of formal administrative hierarchies in courts can be justified in order to improve court performance, enhance the social legitimacy of the courts and reinforce judicial independence.

The remaining challenge for judges and policy makers is to devise a model policy framework for a judicial council and courts that would be capable of achieving these aims in practice. This issue will be considered next in the context of Millar and Baar’s second policy challenge of judge-controlled systems of court administration.

III. POLICY CHALLENGE 2: ESTABLISHING A JUDICIAL COUNCIL THAT IS ACCOUNTABLE, RESPONSIVE AND EFFECTIVE

The second policy challenge identified by Millar and Baar is to develop a policy framework for a judicial council and the courts that is not only independent and accountable, but also effective and capable of supporting the future development of the court system.¹⁰⁷ In practical terms, the challenge is to identify the appropriate aims, competencies, composition, resources and other essential terms of reference for the judicial council, as well as to define its relationship with the courts and other branches of government.¹⁰⁸ Each of the essential terms of reference will now be elaborated upon in more detail.

A. What should be the aims and competencies of the judicial council?

Recent history of justice sector reform shows that there is an emerging global trend of entrusting certain framework aspects of court governance to independent judicial councils, especially in countries that had previously relied on the executive government to manage the courts. Examples of this practice can be found across Europe,¹⁰⁹ South

¹⁰⁴ Ibid 155.

¹⁰⁵ Ibid 126.

¹⁰⁶ Ibid 101; 112. See also, generally, Malleson, above n 69.

¹⁰⁷ Millar and Baar, above n 51, 70-71.

¹⁰⁸ Ibid. They pointed out that many judicial councils in the US had been unable to establish ‘any sort of accountability or to develop adequate planning and policy development functions,’ because of unclear terms of reference or the absence of permanent administrative staff.

¹⁰⁹ Ibid. The examples given by Voermans include Italy, France, Sweden, Ireland, Denmark, Norway, the Netherlands. For central and eastern European judicial councils see also Michal Bobek and David Kosar, ‘Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe’ (2014) 15(7) *German Law Journal* 1257.

America,¹¹⁰ North America,¹¹¹ Asia,¹¹² as well as Australia.¹¹³ According to Voermans, practically all judicial councils have been designed to operate as an 'institutional buffer' between the executive government and the courts, with the primary aim being that of safeguarding judicial independence.¹¹⁴ At the same time, the councils can also perform a wide range of operational and supervisory functions in the court system, such as supporting the administrative management of the courts and providing general oversight of their budget and other resources.¹¹⁵

Autheman and Elena conducted a comparative review of the judicial councils in more than 20 countries and found that the need to protect judicial independence was especially pronounced in Italy, France and several Latin American countries that had a long history of executive interference in the court system.¹¹⁶ As a result, the aims and competencies of the judicial councils in those countries have tended to focus primarily on matters impacting the judicial tenure, such as the appointment, assignment and promotion of judges, and the conduct of disciplinary proceedings against judges.¹¹⁷ The same reasons were ostensibly behind the establishment of the judicial councils in the former communist states in eastern Europe, which were largely modelled upon the Italian *Consiglio Superiore della Magistratura*.¹¹⁸ According to Bobek and Kosar, the defining characteristic of this model is a very robust, often constitutional, separation of the judicial council from the elected branches of government and other justice system stakeholders.¹¹⁹ Although some of these councils are also involved in court administration, the primary mission of each institution is to serve as a supreme judicial authority with controlling competencies over all aspects of the judicial career.¹²⁰

In contrast, the judicial councils that operate in countries with a more established tradition of judicial independence usually place a far greater

¹¹⁰ Linn A Hammergren, 'Do Judicial Councils Further Judicial Reform? Lessons From Latin America' (Carnegie Endowment for International Peace, Democracy and Rule of Law Project, 2002). The examples given by Hammergren include El Salvador, Peru, Mexico and Colombia.

¹¹¹ Millar and Baar, above n 51, 70-71. The authors give the examples of Ontario, Canada, the Judicial Conference of the USA and several states in the USA.

¹¹² For example, the Judicial Commission of Indonesia was established in 2001.

¹¹³ See King, above n 10. Chief Justice King gives the example of the South Australian Judicial Council. See also Vince Morabito, 'The Judicial Officers Act 1986 (NSW): A Dangerous Precedent or a Model to Be Followed' (1993) 16 *UNSWLJ* 481. The example given by Morabito is the Judicial Commission of NSW. The most recent example is Court Services Victoria; See the *Court Services Victoria Act 2014* (Vic).

¹¹⁴ Wim Voermans, 'Councils for the Judiciary in Europe: Trends and Models' in Francisco Fernández Segado (ed), *The Spanish Constitution in the European Constitutional context* (Dykinson, 2003) 2133.

¹¹⁵ Violaine Autheman and Sandra Elena, 'Global Best Practices: Judicial Councils' (International Foundation for Electoral Systems, 2004) 3.

¹¹⁶ *Ibid* 2.

¹¹⁷ *Ibid* 2; 28-29. The authors give the examples of Italy, France, Bolivia, Argentina, Mexico, Peru and other countries.

¹¹⁸ Bobek and Kosar, above n 50, 1268.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid*.

emphasis on the practical aspects of court administration, such as budget management,¹²¹ court management,¹²² policy advice,¹²³ data collection¹²⁴ and judicial education and training.¹²⁵ Bobek and Kosar broadly classify these types of councils as belonging to the ‘court service model,’ while Voermans refers to them as the ‘northern European model.’¹²⁶ Indeed, the preference for a service-oriented council has been particularly pronounced in the northern European countries, following the establishment of the judicial councils in Sweden (1975), Ireland (1998), Denmark (1999), Norway (2002) and the Netherlands (2002).¹²⁷ In each of these countries, the primary concern was not only to protect judicial independence, but also to improve court performance, achieve greater customer focus in the court system and bring about an institutional renewal of the judiciary as a whole.¹²⁸ As Byrne and McCutcheon point out in their analysis of the Irish Courts Service, there was a ‘fundamental shift in the “philosophy” of the court system, requiring it to take account of the concepts of quality, service and competitiveness more associated theretofore with the private sector ... [T]here can be no doubt of a move from the “courts system” to “courts service.”’¹²⁹

Another important requirement for a service-oriented judicial council is to have the necessary organisational competencies to support the future development of the court system, in order to compensate for the withdrawal of the executive government from that area of responsibility.¹³⁰ According to Voermans and Albers, this issue essentially refers to the court system’s capacity to innovate and effect systematic improvements in the quality of the administration of justice

¹²¹ The examples include the judicial councils in Ireland, Norway, Sweden and the USA.

¹²² The examples include the judicial councils in the USA, Ireland and South Australia.

¹²³ The examples include the judicial councils in the USA, the Netherlands, Denmark, Sweden and South Australia.

¹²⁴ The examples include the judicial councils in Ireland, South Australia and the USA.

¹²⁵ Autheman and Elena, above n 115, 2; 28-29. The examples include the councils in Sweden and the Netherlands.

¹²⁶ Bobek and Kosar, above n 50, 1264; Wim Voermans, ‘Councils for the Judiciary in Europe’ (2000) 8 *Tilburg Foreign Law Review - Constitutional Law* 121; see also Nuno Garoupa and Tom Ginsburg, ‘The Economics of Judicial Councils’ (University of California, ALACDE Annual Paper No. 050207-02, 2007). Notably, Bobek and Kosar and Garoupa and Ginsburg reject Voermans’ classification as being unhelpful, because some of the judicial councils come from the USA and other non-European countries.

¹²⁷ See, generally, Albers and Voermans, above n 48.

¹²⁸ Committee for the Evaluation of the Modernisation of the Dutch Judiciary, ‘Judiciary is Quality’ (Government of the Netherlands, 2006) 8.

¹²⁹ Raymond Byrne and J Paul McCutcheon, *The Irish Legal System* (Butterworth, 4 ed, 2001) 156. Notably, many of these issues had also been highlighted in Australia in the Parker Report, which identified the need for the courts to become ‘learning organisations’ and to ‘improve the level of two-way communication they enjoy with their public.’ See Parker, above n 1, v.

¹³⁰ Millar and Baar, above n 51, 70-1.

in a far more demanding social, technological, political and legal environment:¹³¹

These new quality requirements call for efficient streamlining of the working processes within the courts, judicial precision during procedures, permanent training of judges and auxiliary staff, uniformity in applying substantive and procedural law, correct treatment, avoidance of long waiting periods, guarantees concerning the speed of settlement, etc.¹³²

Professor Gio Ten Berge explains how a service-oriented judicial council can contribute to the expansion of the judiciary's administrative capacity in each of these areas by promoting the efficiency, client-orientation and quality of courts as important public institutions.¹³³ First, the council can offer technical assistance to the courts in devising new approaches to case management, procedural and organisational accessibility. Second, it can provide various forms of professional support, such as advanced legal research, in order to improve the quality of legal outcomes in individual cases or categories of cases. Third, the council can offer management support by assisting the courts devise best-practice organisational policies and competencies for judges and court staff. Fourth, it can promote greater use of ICT platforms to improve business and legal process analytics and develop more systematic approaches to training, education and professional development for judges and staff. Fifth, from a customer service point of view, the courts would benefit from more uniform policies on customer service and other organisational solutions that place a greater focus on the needs of their customers. Finally, at a broader systemic and political level, the council can establish the necessary legislative and policy proposals on issues impacting the courts and develop appropriate institutional relationships with the government and other justice system stakeholders.¹³⁴

B. Who should be represented on the council?

In their analysis of the eastern European judicial councils, Bobek and Kosar identified the 'problem of representation' as a major objection to any council that relies exclusively on a narrow group of chief judges and court presidents.¹³⁵ They describe the negative experiences of the Slovak Judicial Council and warn that the very concept of judicial self-governance can quickly turn into 'unbounded administration by senior judicial officials.'¹³⁶ Their views are consistent with the findings of Linn Hammergren's comparative study of the Latin American judicial councils, which identified a series of shortcomings of this model, such

¹³¹ Albers and Voermans, above n 48, 100-1.

¹³² Ibid 102.

¹³³ JBJM Ten Berge, 'Contouren van Een Kwaliteitsbeleid voor de Rechtspraak' in Langbroek P, Lahuis K and Ten Berge JBJM (eds), *Kwaliteit van rechtspraak op de weegschaal* (WEJ Tjeenk Willink, Zutphen and GJ Wiarda Instituut, 1998) 21, 31-35, as cited in Ng, above n 83, 30-32.

¹³⁴ Ibid 32-3.

¹³⁵ Bobek and Kosar, above n 50, 1270.

¹³⁶ Ibid 1271.

as the spread of internal political factions, a lack of accountability to the community and concerns about individual judicial independence.¹³⁷ A similar point is also made by Millar and Baar, who chronicled the experiences of a range of judicial councils across the US and Canada. They express strong criticism of the so-called Ontario model, which involved a judicial council made up exclusively of the chief judges of the participating courts, a model which is commonly found in many US jurisdictions, but also in South Australia and, most recently, Victoria.¹³⁸ They particularly highlighted the fact that although the key motivation for establishing the judicial council was to separate court administration from executive control, each chief judge on the council was selected by the executive government, rather than members of the judiciary.¹³⁹

The problem of permanent or exclusive judicial representation on the council also has important management and community aspects that should not be disregarded. First, as Sallmann and Wright have pointed out, chief judges are often appointed for their legal expertise and therefore may not be best-suited to exercise policy making and management functions on the judicial council.¹⁴⁰ Secondly, permanent composition of the council could lead to personality clashes, which are common in environments where people need to work together for long periods of time.¹⁴¹ Thirdly, this type of institutional arrangement could potentially foment ongoing factional disputes and lead to a competition for administrative resources.¹⁴² Finally, Glanfield emphasises the broader community aspect of court administration to argue that community needs and expectations must be built into the organisational framework as a guiding design principle of court governance.¹⁴³ He points out that increasing community expectations lie behind recent advances in governance thinking about the issues such as ethics, efficiency, timeliness and accountability.¹⁴⁴ Arguably, then, a judicial council that is composed solely of the chief judges potentially lacks the necessary community perspective and may also diminish the capacity and responsibility of other judges to be involved in the management affairs of the court system.¹⁴⁵

The recent experiences from the northern European countries should also be noted in this context. The judicial councils in Denmark, Norway,

¹³⁷ Hammergren, above n 110, 3.

¹³⁸ Millar and Baar, above n 51, 70-71. Notably, however, in Victoria, the legislation leaves open the possibility for the Chief Judges to appoint up to two non-judicial members on the Courts Council. See *Court Services Victoria Act 2014* (Vic), s 14(1). For a detailed analysis of the Victorian reform, see Bunjevack, above n 32.

¹³⁹ Ibid.

¹⁴⁰ Peter Sallmann and Richard Wright, 'Governing the Courts: Extract on Courts' Governance From 'Going to Court, A Discussion Paper on Civil Justice in Victoria' (Paper presented at the 18th Conference of the Australasian Institute for Judicial Administration, Darwin, 14-16 July 2000) 9.

¹⁴¹ Ibid.

¹⁴² D. Semple, Attorney-General's Department and Des Semple & Associates, *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance* (Attorney-General's Department, 2008) 25; 48-51.

¹⁴³ Glanfield, above n 46, 5.

¹⁴⁴ Ibid.

¹⁴⁵ Alford et al, above n 24, 91.

Ireland, Sweden and the Netherlands have enshrined broader stakeholder participation at the governing (supervisory) boards that in many cases rely exclusively on fixed term appointments based on merit. For example, in Norway, the board of the National Courts Administration Authority has nine members, including four judges, one court executive and two lawyers appointed by government, together with two representatives of the public, who are appointed by Parliament.¹⁴⁶ In Ireland there are 17 members on the board of the Irish Courts Service, including nine judicial members and eight representatives from the government, trade unions, members of parliament and lawyers' associations.¹⁴⁷ The rationale behind the inclusion of non-judicial members and fixed term appointees on the board lies in the belief that this practice enhances the social accountability of the organisation and leads to greater professionalization and depoliticisation of court administration.¹⁴⁸

C. What function(s) should the judicial council perform in court administration and how should the courts be organised internally?

The establishment of a judicial council also raises important questions about its role in court administration and its relationship with the courts. For example, it is important to define how the new entity should interact with the individual courts, both in terms of their day-to-day operations and also in terms of their policy development and strategic oversight. Alford et al explain that this is a complex question from a management perspective, because the optimal organisational design ultimately depends on factors such as the size of the jurisdiction and the need to better optimise non-judicial resources, such as administration, infrastructure, finances, ICT and other shared services.¹⁴⁹ They suggest that centralised control of staffing, operations and infrastructure would probably work well in smaller jurisdictions, such as South Australia, but not in larger jurisdictions, such as Victoria, because larger organisational units start to exhibit 'diseconomies of scale,' accompanied by lower staff satisfaction and commitment to the organisation.¹⁵⁰ These issues were also noted by Church and Sallmann in their analysis of the Judicial Conference of the United States and its central administrative arm, the Administrative Office of the United States Courts.¹⁵¹ They noted that the early American court reformers recognised the importance of preserving individual courts' operational autonomy, by leaving certain aspects of court administration, such as case processing, staff selection and management, in most cases to the

¹⁴⁶ A Rosseland, 'Presentation of the National Courts Administration and the Norwegian Court Reforms of 2002' (2007) 51 *Scandinavian Studies in Law* 608, 612.

¹⁴⁷ See *Courts Service Act 1998* (Irl), s 11.

¹⁴⁸ Bunjevack, above n 1, 43.

¹⁴⁹ Alford et al, above n 24, 53-67.

¹⁵⁰ Ibid 62-3; 66-7. The authors refer to the writings of the influential management theorists Peters and Waterman, who identified the so-called '1000-staff' rule of thumb, representing the optimum division size in successful companies. See Thomas J Peters, Robert H Waterman and Ian Jones, *In Search of Excellence: Lessons From America's Best-run Companies* (Harper and Row, 1982) 272-3.

¹⁵¹ Church and Sallmann, above n 16, 72-3.

courts themselves.¹⁵² This practice allowed individual jurisdictions and Federal Circuits to develop innovative administrative rules and practices that were remarkably transparent and functional at the same time.¹⁵³

The relationship between the judicial council and courts also has an important *judicial* management dimension that should not be overlooked in allocating the operational responsibilities between the council and the courts. According to Baar et al, great care must be taken to ensure that the new institutional framework does not repeat the ills of the executive system of court administration.¹⁵⁴ They give the example of the Courts Administration Service ('CAS') in the Canadian federal jurisdictions, which merely replicated the ineffective management patterns that had been established earlier by the executive government. Notably, this was the case despite the fact that the CAS administration was independent of the executive government and was also subject to the directions by the Chief Judges of the participating courts.¹⁵⁵ The underlying problem identified by Baar et al was that judges had simply continued to rely on the CAS bureaucracy to centrally plan and manage all aspects of the court operations, which in their view rendered this model in practice a 'variant' of the executive model.¹⁵⁶ As a result, according to Baar et al, the Chief Judges' formal powers to intervene in court administration were of little practical utility in the circumstances, because the judiciary's lack of systematic involvement in court operations had made it difficult to determine whether any direction to CAS was needed in the first place.¹⁵⁷

1. Integrated management in the courts

The importance of greater judicial involvement in court management was also highlighted in the CEPEJ report, which discussed the example of the Swedish National Courts Administration authority (SNCA) and its relationship with the courts. According to Voermans and Albers, the most significant feature of SNCA is that it does not have any operational powers in court administration.¹⁵⁸ Instead, its main task is to support the court operations 'from a distance,' by managing certain shared services and facilities, such as human resources, ICT, auditing and accounting systems, security and so on.¹⁵⁹ In practice, SNCA also offers various forms of professional and developmental support to the courts, such as

¹⁵² Ibid 73.

¹⁵³ For example, s 6 of the *Omnibus Judgeship Act 1978* (US) allowed courts of appeal with more than 15 judges to experiment with internal administrative units. The administrative innovations of the Ninth Circuit Court of Appeal, in particular, have been well-documented and studied around the world: see, e.g. Church Jr, above n 90; see also McGarvie, above n 62, 30.

¹⁵⁴ Baar et al, above n 22, 102-3.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid 103.

¹⁵⁸ Albers and Voermans, above n 48, 22-3.

¹⁵⁹ Ibid.

legal assistance, policy advice and management training for judges and court staff.¹⁶⁰

For their part, the Swedish courts operate largely autonomously, with each court having full responsibility for their own budgetary, financial, administrative and personnel management affairs.¹⁶¹ A key advantage of this system, according to Voermans and Albers, is that it effectively integrates all of the judicial and administrative functions under a single executive court authority, thereby avoiding potential duplication of operational competencies between the courts and the council.¹⁶² Furthermore, the fact that SNCA does not interfere in the courts' operational management effectively forces the courts to become more self-sufficient as organisations, thus promoting more active involvement of judges in court administration.¹⁶³ According to the authors, the Swedish judiciary is strongly attached to the system of integrated management, because it 'promotes self-responsibility for the primary process' and 'increases efficiency.'¹⁶⁴

The Australian federal courts' experiences with the system of integrated management should also be mentioned in this context due to a number of similarities and differences with their Swedish counterparts. The similarities lie in the effective integration of the administrative, financial, operational and judicial responsibilities under the courts' own umbrella, which has allowed the federal courts to develop more business-like strategic planning and operational capabilities.¹⁶⁵ Secondly, according to the former Chief Justice of the Federal Court, Michael Black, integrated management has brought judges into an 'appropriate working relationship with professional administrators.'¹⁶⁶ As a result, the federal courts have made some remarkable achievements in areas such as judicial innovation,¹⁶⁷ benchmarking and productivity

¹⁶⁰ Ibid. See also Domstolsverket (SNCA), 'Operational Plan 2010-2012' (SNCA, 2009) ; see also John Bell, 'Sweden's Contribution to Governance of the Judiciary' (2007) 50 *Scandinavian Studies in Law* 83, 98; Voermans, above n 114, 2139-40.

¹⁶¹ Albers and Voermans, above n 48.

¹⁶² Ibid 24; 108.

¹⁶³ Ibid 108.

¹⁶⁴ Albers and Voermans, above n 48; 108.

¹⁶⁵ Warwick Soden, 'The Application of International Court Excellence Framework within the Federal Court of Australia With a Special Look at Strategic Planning to Achieve Excellence' (Paper presented at the Asia-Pacific Courts Conference, Singapore, 4-6 October 2010) 4-5.

¹⁶⁶ Michael Black, 'The Federal Court of Australia: The First 30 Years—A Survey on the Occasion of Two Anniversaries' (2007) 31(3) *Melbourne University Law Review* 1017, 1047. See also Soden, above n 165.

¹⁶⁷ Ibid.

for the judiciary,¹⁶⁸ case management reform¹⁶⁹ and even the promotion of outreach projects for overseas judiciaries.¹⁷⁰

Nevertheless, there are also a number of potential drawbacks associated with the federal courts' self-management system, which set this model apart from its Swedish counterpart. The most obvious difference is that there is no judicial council interposed between the courts and the executive government, which makes the Australian federal courts arguably much more vulnerable to executive interference. Professor Anne Wallace illustrates this point by reference to the recent centralisation of the federal courts' corporate services under the umbrella of the Federal Court of Australia, which was prompted by ongoing financial and operational difficulties experienced by the Federal Circuit Court and the Family Court of Australia.¹⁷¹ According to Wallace, the initiative was principally 'driven by the executive, rather than the courts, and motivated primarily by reducing costs,' rather than a genuine need to improve services for court users.¹⁷²

This example also demonstrates that there can be significant financial and reputational risks associated with each court having the responsibility for operational management while also having to report directly to the executive government. One of the negative consequences of this situation is that the occasional budget overruns may be interpreted as signs of financial incompetence, thus potentially significantly eroding the public confidence in the judiciary.¹⁷³

¹⁶⁸ Justice Stephen O'Ryan and Tony Landsell, 'Benchmarking and Productivity for the Judiciary' (2000) 10(1) *Journal of Judicial Administration* 25.

¹⁶⁹ Caroline Sage et al, *Case Management Reform: A Study of the Federal Court's Individual Docket System* (Law and Justice Foundation of NSW, 2002); Natacha Vsindilok, *A Comparison of the Case Flow Management and Case Tracking Systems of the Central Administrative Court of Thailand With Those of the Federal Court of Australia, With Reference to Practice in the USA* (LLM Thesis, University of Wollongong, 2007)

¹⁷⁰ See Soden, above n 165, 4. See also Anthony North, 'My Court Car is a Helicopter' (Paper presented at the Canadian Judicial Council Conference Inside the Administration of Justice: Toward a New Model of Court Administration, Victoria, British Columbia, 31 January 2007).

¹⁷¹ Anne Wallace, 'Merging Federal Courts' Administration Won't Improve Services for Those Who Need It', *The Conversation* 4 November 2015 <<http://theconversation.com/merging-federal-courts-administration-wont-improve-services-for-those-who-need-it-49944>>. See also the *Courts Administration Legislation Amendment Act 2016* (Cth). Section 53 of the Act specifies that the corporate services include communications, finance, human resources, information technology, libraries, procurement, contract management, property, risk oversight and management, and statistics. See also Stephen Skehill, 'Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio' (Australian Government, 2012) 27. The review predicted increasing annual deficits in the federal jurisdictions reaching \$19.5m by 2014-15.

¹⁷² Ibid.

¹⁷³ Michael Pelly, 'Federal Magistrates Court Audit Uncovers \$5m Black Hole', *The Australian* 6 March 2009 <<http://www.theaustralian.com.au/business/legal-affairs/courts-5m-budget-blowout/story-e6frg97x-1111119045969>> The article criticises the court for using the MYOB accounting software, which is designed for a small business, rather than the court with a budget of more than \$55m. See also Nicola Berkovic, 'Diana Bryant Calls for Federal Overseer', *The Australian* 26 September 2014 <<http://www.theaustralian.com.au/business/legal-affairs/diana-bryant-backs->

The absence of a judicial council could also have negative ramifications from a wider systemic perspective, because it potentially discourages individual courts from taking a broader view of problems affecting the justice system.¹⁷⁴ Skehill argues that this is not a major concern in the specific context of the federal courts, because each federal court was designed to operate as a stand-alone jurisdiction, rather than as part of a unified 'system' of the administration of justice.¹⁷⁵ In contrast, however, the need for greater systemic oversight would arguably be felt much more strongly in a state jurisdiction such as Victoria, where the separate court tiers do form part of an integrated system of the administration of justice. Accordingly, in that situation, the existence of a judicial council could prove to be instrumental in addressing the identified deficiencies of the federal courts model, by offering an additional layer of protection, expertise and oversight to the courts.

The final point of difference between the Swedish system of integrated management and the Australian federal courts concerns their internal administrative arrangements. Namely, the Swedish courts are governed by a small collegiate *presidium* elected by the councils of judges, which stands in sharp contrast to the Chief Justice governance model that operates in the federal courts.¹⁷⁶ The latter has been the subject of criticism, because it concentrates too much administrative power in the Chief Justices, possibly at the expense of other judicial officers.¹⁷⁷ According to Hill, the arrangement also runs contrary to modern business practices that encourage more collegiate decision-making at the policy-making level.¹⁷⁸

D. What role should the Minister perform in the new institutional framework?

The establishment of a judicial council represents a significant legal and political challenge for the court system as a whole, because it requires a wholesale redefinition of the duties and responsibilities of all three branches of government in the area of court administration. In theory, at least, the redistribution of power is intended to reduce the traditional tensions between the judiciary and other branches of government, because of the corresponding increase in judicial self-

[calls-for-federal-overseer/story-e6frg97x-1227070718146](#)> According to the article, a report by KPMG forecast Family Court and Federal Circuit Court budgetary shortfalls of up to \$75m by 2017, which prompted the executive government to look at reforming the system of court administration in the federal courts.

¹⁷⁴ Church and Sallmann, above n 16, 68-71.

¹⁷⁵ Skehill, above n 34, 29.

¹⁷⁶ Albers and Voermans, above n 48, 23.

¹⁷⁷ Church and Sallmann, above n 16, 68. The authors argue that this arrangement can potentially 'retard' the development of administrative capacity in the courts. However, see Diana Bryant, 'The Autonomous Model - Not All Beer and Skittles' (Paper presented at the The Judicial Conference of Australia Colloquium, Hyatt Hotel, Canberra, 6-8 October 2006). The Chief Justice of the Family Court of Australia explains that in reality the administrative powers are exercised in a collegiate manner.

¹⁷⁸ Hill, above n 99, 74-75; 82-83.

responsibility and independence.¹⁷⁹ However, as Baar et al remind us, the judiciary's autonomy remains a limited one, not least because the courts will always be financially dependent on the elected branches of government.¹⁸⁰ At the same time, the Attorney-General continues to exercise broad political responsibility for the operation of the courts, because under the Westminster system of government there must always be a minister of the Crown who is responsible for the expenditure of public funds.¹⁸¹ In addition, apart from the responsibility for public finances, the government also has other legitimate interests in the proper operations of the court system that may potentially justify some form of ongoing ministerial involvement in court administration. Therefore, one of the key challenges for judges and policy-makers is to define the new limits of ministerial responsibility for the operations of the courts, in the circumstances where the Attorney-General's ability to influence the court administration (and vice versa) is objectively diminished.

1. Minister's reserve powers in court administration

As foreshadowed, there are many legitimate reasons justifying ongoing involvement of the minister in court administration. The first concerns the ability of the government to effectively deliver a suite of justice-sector services to the public that are deeply intertwined with the work of courts, such as public prosecutions, corrections, legal aid and so on. Secondly, as Chief Justice Len King pointed out, the government also has a legitimate interest in the judiciary's decisions about issues such as the locations, openings and closings of court houses.¹⁸² Thirdly, the electorate will always regard the administration of justice in the courts as an essential public service, which means that the government may be held to be politically responsible for the proper operations of the courts, regardless of who is formally in control of court administration.¹⁸³ Arguably, then, when politically sensitive incidents involving the courts do arise, the minister will be under enormous political pressure to respond in order to appease the government and the electorate.¹⁸⁴ This may be the case even if the judicial council is statutorily responsible for the operation of the courts, because, as Voermans and Albers explain in the context of the Irish Courts Service, 'the line of a minister's political responsibility to Parliament has

¹⁷⁹ Bunjevaca, above n , 210.

¹⁸⁰ Baar et al, above n 49, 104.

¹⁸¹ King, above n 10, 142. Chief Justice King points out that the key difference between the Westminster System and the American models is that in the US judges deal directly with Congress, whereas in the Westminster System there must always be a minister who is responsible to Parliament for the expenditure of public money.

¹⁸² Ibid 141-142.

¹⁸³ Uhrig, above n 90, 42. The Uhrig Report gives the example of the Civil Aviation Safety Authority ('CASA'), which was previously managed by a board independent of the Minister. However, following a number of aviation safety incidents, the 'community expected the Minister to be accountable for the performance of the authority'. This prompted the government to take a greater role in the operation of CASA.

¹⁸⁴ Bunjevaca, above n 32, 323.

different dynamics to that of the much slower and less direct line of responsibility that the Courts Service has with Parliament.¹⁸⁵

For reasons identified above, there is an emerging trend in jurisdictions that have recently established a service-oriented judicial council of entrusting a range of residual court administration functions in the minister. One important exception to this trend is South Australia, where the relationship between the Attorney-General and the Judicial Council appears to be tilted conclusively towards the judiciary. According to former Chief Justice King, the Attorney-General is principally responsible for presenting the judiciary's budget to Parliament and is also entitled to receive adequate information about the operations of the courts.¹⁸⁶ Apart from that, however, he has 'no control over the decisions of the Court Administration Authority and consequently no direct responsibility for them.'¹⁸⁷ This position is clearly reflected in the South Australian legislation, which explicitly provides that a member of the Council or the CEO must attend a Parliamentary Estimates Committee to answer questions about the courts' operations and expenditure of money.¹⁸⁸ While at first this may be seen to be inconsistent with the idea of judicial independence, the Chief Justice explains that he would be attending the Estimates hearings in his administrative capacity as the Chairman of the Judicial Council.¹⁸⁹

In contrast to South Australia, however, in the northern European jurisdictions the minister's responsibility for certain threshold questions impacting the operations of the courts has not been removed in its entirety. For example, in Ireland, the legislation implicitly recognises that the government should have a say in the administrative affairs of the court system by requiring the Irish Courts Service to obtain the Minister's approval of its strategic plans.¹⁹⁰ Secondly, the Courts Service is also required by law to 'have regard to any policy or objective of the Government' that may affect the operations of the courts.¹⁹¹ Next, in Sweden and the Netherlands, the government and the Minister, respectively, are also entitled to issue broad general directions to the judicial council with the view to ensuring proper operations of the courts, as long as the judicial council considers them to be compatible with the principle of judicial independence.¹⁹²

In some countries, the justice minister also retains certain 'reserve' powers in court administration that may only be invoked in cases of clearly defined emergency. For example, in Denmark and the

¹⁸⁵ Albers and Voermans, above n 48, 33.

¹⁸⁶ King, above n 10, 142.

¹⁸⁷ Ibid. More recently, Victoria has also opted for a minimalist role for the Attorney-General. See Bunjevack, above n 32, 322-324.

¹⁸⁸ King, above n 10, 140.

¹⁸⁹ Courts Administration Act 1993 (SA), s 29. Victoria has also opted for a minimalist role for the Attorney-General. See Bunjevack, above n 32, 322-324.

¹⁹⁰ King, above n 10, 140.

¹⁹¹ *Courts Service Act 1998* (Ireland), s 7. In addition, there are representatives of the executive government on the Board of the Courts Service.

¹⁹² Ibid, s 13.

¹⁹³ *Judiciary (Organisation) Act 1827* (Netherlands), art 93; See also Domstolsverket (SNCA), above n 160, 8.

Netherlands, the minister may be entitled to suspend decisions or even dismiss the board of the judicial council where the Auditor-General discovers significant financial irregularities in the management of the courts' budget, or the council makes decisions that are 'manifestly contrary to the law.'¹⁹³ Notably, however, this solution is only made possible because of the non-permanent composition of the councils, which clearly highlights the potential reputational risks that would be associated with permanent membership in like circumstances.¹⁹⁴

Another example of the minister's ongoing involvement in court administration is found in England and Wales, where the control over court administration is currently shared between the judiciary and the executive government in accordance with a formal partnership agreement.¹⁹⁵ The policy rationale behind the Lord Chancellor's continuing role in court administration is partly based on an implicit recognition that the 'courts are by their very nature a shared responsibility between the judiciary and government.'¹⁹⁶ Thus under the *Courts Act 2003* (UK) and the partnership agreement, the Lord Chancellor continues to be politically responsible for the courts and also has an important say over the policies of Her Majesty's Courts and Tribunals Service.¹⁹⁷ Remarkably, however, under the partnership agreement he is also entitled to make 'whatever decision he considers appropriate' in the event of disagreement with the Lord Chief Justice.¹⁹⁸ Arguably, the Lord Chancellor's power of intervention in England and Wales is too unconstrained, especially when compared with Denmark or the Netherlands. The problem lies in the fact that the powers of intervention may be invoked arbitrarily and without any reference to specific emergencies or misconduct by the judicial council.¹⁹⁹

2. Influencing and engaging politics through greater corporatisation

A separate issue affecting the relationship between the judicial council and the executive government concerns the ability of the judiciary to maintain sufficient institutional visibility in the political arena, in the circumstances when the Attorney-General's political

¹⁹³ Jesper and Poul Sorensen Wittrup, 'Quality of Justice in Denmark' in Marco Fabri and Phillip Langbroek (ed), *The Administration of Justice in Europe: Towards the Development of Quality Standards* (IRSiG, Consiglio Nazionale delle Ricerche, 2003) 119, 125. See also the *Judiciary (Organisation) Act 1827* (Netherlands), Art 106 and 107. The legislation also provides the rights for appealing the minister's decision to suspend or dismiss members of the council in the Supreme Court. See Art 108.

¹⁹⁴ Bunjevaca, above n 32, 323.

¹⁹⁵ See, however, Lord Chief Justice Igor Judge, 'Letter to the Lord Chancellor the Hon Chris Grayling MP', *The Guardian* 25 June 2013 <<http://www.theguardian.com/law/interactive/2013/jun/25/courts-privatisation-igor-judge-chris-grayling>>. The Lord Chief Justice is proposing the establishment of a new courts and tribunals service that would be independent of executive control.

¹⁹⁶ Lord Chief Justice Philips, 'The Lord Chief Justice's Review of the Administration of Justice in the Courts' (Judiciary of England and Wales, 2008) 7; 16.

¹⁹⁷ *Courts Act 2003* (UK), s 1. See also Lord Chancellor, 'Her Majesty's Courts and Tribunals Service Framework Document' (HMCTS, 2014).

¹⁹⁸ *Ibid* [10.4].

¹⁹⁹ Bunjevaca, above n 8, 216.

priorities and influence at Cabinet have substantially changed.²⁰⁰ According to Kathy Laster, there is a 'real danger' that the courts might find themselves struggling for resources in this environment, because they may be left to their own devices when it comes to securing funds during the highly competitive and often politicised budget bidding processes.²⁰¹ This issue was also highlighted by Gee et al in their landmark study of the politics of judicial independence in the UK, which identified the 'retreat of the politicians' as being a 'primary challenge' for the independent judiciary in that country.²⁰² They pointed out that the nature of the political processes affecting the judiciary had changed substantially following the introduction of the *Constitutional Reform Act 2005* (UK), because the relationships between the judiciary and the other branches of government had become much more dispersed, formal, open and accountable than before.²⁰³ At the same time, the institutional separation of the Lord Chancellor from the judiciary had also meant that he no longer commanded the same degree of political power, prestige or influence as before.²⁰⁴ According to Gee et al, the judiciary's survival in that environment required greater institutional corporatisation, political astuteness and strategic engagement with a much wider range of political actors and institutions, including the Parliament.²⁰⁵ They concluded that the development of a more formal judicial bureaucracy with clearly defined organisational structures and powers had been the key to meeting the new challenges and enhancing the judiciary's institutional capacity to protect judicial independence.²⁰⁶

E. What mechanisms should be introduced to promote transparent and accountable relationships with the executive government and stakeholders?

As Gee et al pointed out, the likely success or otherwise of any court system reform ultimately depends on the quality of the interaction between the courts, government and other justice system stakeholders. The importance of this issue cannot be overstated, because the Attorney-General's department had previously had complete day-to-day (vertical) insight into the court system's operations, human resources and finances - precisely those levers of power that have now been transferred to the judiciary. The question arises, then, what statutory or non-statutory safeguards should be left in place in order to give the government, parliament and other interested parties an objective insight into the internal operations of the judicial organisation that is funded by the taxpayer?

²⁰⁰ Gee et al, above n 18, 35; 253-4; Bunjevack, above n 32, 324.

²⁰¹ Kathy Laster, 'Separation of Powers Through Separation of Administration?' (2011) 36(2) *Alternative Law Journal* 135.

²⁰² Gee et al, above n 18, 262.

²⁰³ Ibid, See generally Chapter 10.

²⁰⁴ Ibid 253-4.

²⁰⁵ Ibid 253-4; 263.

²⁰⁶ Ibid 101; 112. See also, generally Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Ashgate, 1999).

It has been argued throughout the article that future institutional relationships between the judiciary and its stakeholders must be rooted in the concepts of organisational transparency and administrative accountability.²⁰⁷ According to Langbroek, the traditional, vertical, forms of administrative accountability between the courts and government must be transformed into more transparent, horizontal, accountability relationships between the courts and the government on the one hand, and the courts and the public on the other.²⁰⁸ That transformation can take place in many different ways, such as through the adoption of more systematic and robust approaches to internal business processes, the introduction of clearly defined administrative duties and responsibilities, and even the development of modern workload measurement systems for the courts that can be used for the purposes of strategic planning and budget formulation. Arguably, the adoption of these and similar measures by the courts would serve to promote greater institutional corporatisation of the courts and enhance the quality and accountability of court administration.

1. Introduction of quality management systems

Langbroek envisages more widespread adoption of modern quality management systems by the courts as a means of furthering organisational self-improvement, engendering public trust and compensating for reduced central control by the executive government.²⁰⁹ A key feature of quality management systems is that they can give the courts a suite of transparent organisational tools to assist them define their own concepts of organisational excellence and the means by which they can achieve those goals.²¹⁰ According to Gething, the organisations that use quality management systems must also commit to systematically measuring, recording, improving, learning and changing their work practices, in order to meet and expand their own goals of organisational excellence.²¹¹ Importantly, the ongoing process of organisational self-assessment takes place across many different areas of court operations, including the financial area, the work processes area, the learning area and the customer area.²¹²

A growing number of jurisdictions have successfully adopted quality management systems for use in the courts in recent years, including the

²⁰⁷ Langbroek, above n 55, 6.

²⁰⁸ Ibid 6. See also Baar et al, above n 22, 104. According to the authors, 'it is through the provision of timely, accurate and comprehensive information to the Legislature and to the public at large that the [self-administered] Courts ensure real transparency and accountability for their administration decisions and actions.'

²⁰⁹ Ibid 6-7.

²¹⁰ Michael Gething, 'Assessing the Work of a Court: Performance Indicators and Quality' in *Australian Courts: Serving Democracy and its Publics* (Australasian Institute of Judicial Administration, 2013) 325, 333-334.

²¹¹ Ibid.

²¹² Pim Albers, 'Performance Indicators and Evaluation for Judges and Courts' (Paper presented at the Anti-corruption seminar for the Russian Judges, Moscow, Russia, 24-25 May 2007) <http://www.coe.int/t/dghl/cooperation/cepej/events/onenparle/MoscowPA250507_en.pdf> 11.

US, Singapore, Finland and the Netherlands.²¹³ Victoria can also be added to that list, following the recent introduction of the International Framework for Court Excellence ('IFCE') in the Magistrates,' County and Supreme Courts.²¹⁴ According to Vallance, the IFCE framework covers the so-called Seven Areas of Court Excellence, including 'court management and leadership,' 'court planning and policies,' 'court resources (human, material and financial),' 'court proceedings,' 'client needs and satisfaction,' 'affordable and accessible court services' and 'public trust and confidence.'²¹⁵ The framework is used in conjunction with the traditional indicators of court performance, such as case clearance rates, pending cases backlogs and numbers of case initiations and finalisations.²¹⁶ According to the Chief Justice of Victoria, Marilyn Warren, the adoption of the quality management system has many inherent benefits for the courts, because it can be used to demonstrate how the courts are performing at any particular point in time, thus providing a more persuasive basis for funding submissions to the government and the treasury.²¹⁷ Other benefits of the system include 'better identification of strategic priorities,' improved 'cohesion between judiciary and administration' and a 'heightened sense of the courts' independence.'²¹⁸

2. Clearly defined administrative powers, rules and rights of access to information

Another area in which judicial councils and courts can emulate organisational best practices from the business sector is through the introduction of transparent internal administrative 'constitutions' and rules with clearly defined duties and responsibilities of judges and court staff. For example, in many US and European jurisdictions there are comprehensive rules that formally regulate the functions and powers of the chief and administrative judges, court administration, court

²¹³ See e.g. International Consortium for Court Excellence, *International Framework for Court Excellence* (NCSC, AIJA, 2nd ed, 2013), 1; Quality Project of the Courts in the Jurisdiction of the Court of Appeal of Rovaniemi of Finland, *Evaluation of the Quality of Adjudication in Courts of Law: Principles and Proposed Quality Benchmarks* (Court of Appeal of Rovaniemi, 2006); Council for the Judiciary, 'Quality of the Judicial System in the Netherlands' (Council for the Judiciary, 2008).

²¹⁴ Supreme Court of Victoria, *Court Performance* <<http://www.supremecourt.vic.gov.au/home/about+the+court/court+performance/>>.

²¹⁵ Mike Vallance, 'Implementing the IFCE as a "Holistic" Means for Achieving Excellence' (Paper presented at the Asia Pacific Courts Conference 2013 - 'The Pursuit of Excellence and Innovation in Courts and Tribunals', Auckland, New Zealand, 8-9 March 2013). See also International Consortium for Courts Excellence, *Thinking of Implementing the International Framework for Court Excellence?* (NCSC, AIJA, 2011) 3.

²¹⁶ Ibid 13.

²¹⁷ Chief Justice Marilyn Warren, 'Pursuit of Excellence and Innovation Challenges for Implementation' (Paper presented at the Asia Pacific Courts Conference 2013 - 'The Pursuit of Excellence and Innovation in Courts and Tribunals', Auckland, New Zealand, 8-9 March 2013) 6.

²¹⁸ Ibid.

committees, judicial scheduling teams and so on.²¹⁹ Notably, the *Judicial Administration Rules* in California also provide detailed rules that govern the proceedings of the Judicial Council itself, including the basic rule that the business meetings of the Council are open to the public, subject to a few exceptions.²²⁰

The courts legislation in the Netherlands similarly prescribes the judicial administrative duties and responsibilities in some detail, while also imposing on the court management additional administrative requirements that must be addressed in separate court management 'regulations.'²²¹ According to Art 23 of the *Judiciary (Organisation) Act*, the court management board is responsible for the budgeting, planning and control cycle, as well as the overall functioning of the courts, including personnel matters, organisational procedure and information and management systems.²²² The court regulations must separately detail the internal management procedures of the management board, including those relating to the decision-making, division of responsibilities, organisational structure, complaints procedure, delegation of duties, replacement of members in the event of illness and the jurisdictional allocation of cases between the court divisions.²²³

The principle of internal organisational transparency also has strong roots in the Scandinavian judicial systems. For example, according to Levin, the freedom of information laws in Sweden give members of the public and the media extraordinary rights of access to all documents, materials and correspondence that are used by SNCA in its decision-making processes.²²⁴ Secondly, the institution of the Parliamentary Ombudsman is authorised to investigate the conduct of independent agencies, propose legislative solutions to Parliament, and even initiate prosecutions in serious cases.²²⁵ Lastly, it was noted earlier that the internal organisational transparency in the Nordic countries is also furthered by the diverse composition of the board of the judicial council.

3. Transparent budgeting, workload measurement and fiscal management

The final, and perhaps the most contentious, aspect in the relationship between the judiciary and the executive government considered in this article concerns the issue of the court budgeting and the accompanying criteria for the distribution of funds to the courts. In the executive system, there was an expectation that the courts should

²¹⁹ National Center for State Courts, above n 96, 2. See generally also Tin Bunjevack, 'The Corporate Transformation of the Courts: Towards A Judicial Board of Executive Directors' (2016) 25(4) *Journal of Judicial Administration* 197.

²²⁰ See rule 10.6 of the *Judicial Administration Rules* (California) <http://www.courts.ca.gov/documents/title_10.pdf>.

²²¹ Judiciary (Organisation) Act 1827 (Netherlands), art 19.

²²² Judiciary (Organisation) Act 1827 (Netherlands), Art 23.

²²³ Judiciary (Organisation) Act 1827 (Netherlands), Art 19.

²²⁴ See generally, Paul Levin, 'The Swedish Model of Public Administration: Separation of Powers—the Swedish style' (2009) 4(1) *Journal of Administration and Governance* 38, 39-40.

²²⁵ Ibid 41.

deliver a certain number of cases mandated by the Treasury, even though they had insufficient operational and fiscal authority over the resources needed to achieve those outputs.²²⁶ According to Alford et al, this resulted in an anomalous situation whereby executive officials who were located outside the courts were effectively in charge of the allocation of funds within the courts.²²⁷

The transfer of fiscal responsibility to the judicial council partially resolves this anomaly, to the extent that the executive government and parliament have agreed to provide the courts with a global budget, while devolving the responsibility for the allocation of the funds to the judicial council. However, even in this situation the problem remains in specifying the appropriate output targets and attaching a monetary value to them, because the services provided by the courts cannot be easily quantified. For example, as Alford et al pointed out, the agreed 'outputs' are typically expressed in a global number of cases to be resolved over a period of time, which does not take into account the complexity and resources involved in processing those cases, such as the cost of court infrastructure or the number of separate hearings and appeals that may form part of each dispute.²²⁸ The problem of specifying the appropriate outputs is further compounded by the fact that the Australian courts have not yet developed sophisticated systems for workload measurement, while most judges and court administrators appear to be 'relatively unfamiliar' with recent advances in this area in comparable jurisdictions.²²⁹ Kathy Mack et al recently conducted a series of longitudinal empirical studies of courts across Australia and found that there was 'limited availability or use of workload measures,' coupled with 'reliance on somewhat unwieldy manual systems and implicit institutional knowledge.'²³⁰ They noted that even where the statistics about judicial caseloads had been collected on a systematic basis, they did not take into account the differences in weight between different types of cases.²³¹ Mack et al concluded that the 'existing systems appear to be largely inadequate' for the purposes of measuring and allocating workloads in the courts.²³²

²²⁶ Alford et al, above n 24, 43.

²²⁷ Ibid 42-43. They explain that the resulting fiscal discrepancy between 'responsibility' and 'controllability' is viewed unfavourably in accounting theory, because it has the potential to cause 'severe dysfunction within the organisation.'

²²⁸ Ibid 45.

²²⁹ Kathy Mack, Anne Wallace and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (AIJA, 2012) 166; 168. It is pointed out that the Family Court of Australia had previously developed a system of workload benchmarking for judges and staff but have discontinued its use. See Tony Landsell and Stephen O'Ryan, 'Benchmarking and Productivity for the Judiciary' (2000) 10(1) *Journal of Judicial Administration* 25.

²³⁰ Mack, Wallace and Anleu, above n 229, 7.

²³¹ Ibid 164. The authors refer to the collection of data which is regularly published by the Productivity Commission and the Australian Bureau of Statistics. See Australian Bureau of Statistics, '4513.0 Criminal Courts 2009-2010' (ABS, 2011); See also, the Steering Committee for the Review of Government Service Provision, 'Report on Government Services: Court Administration' (Australian Government Productivity Commission, 2011).

²³² Ibid 166.

Mack et al also pointed out that a number of jurisdictions in the US, Canada and Europe have successfully introduced sophisticated systems for measuring weighted caseloads.²³³ They explain that a weighted caseload measurement system has many practical benefits for the courts, because it allows for more accurate estimation of the judicial and administrative staff workloads, which can be used to justify requests for additional resources from the government.²³⁴ According to the National Center for State Courts in the US, a weighted caseload system allows courts to determine the amount of 'judge time' and 'administrative time' that is needed to hear a specific type of case, as well as the amount of time a typical judge has available for hearing cases during a typical year.²³⁵ This allows the courts to develop reasonably accurate projections of 'judgeship' and 'supporting staff' needs to process the anticipated annual caseloads.²³⁶

The accuracy of weighted caseload systems largely depends on the quality of data obtained from empirical studies, expert user estimations and historical analyses of court files. As a result, the process can be administratively burdensome and requires regular follow-up studies to ensure that the benchmarked time standards and resource estimations remain accurate. In Germany, the introduction of the Pebssy workload measurement system in 2002 was based on an empirical court study involving almost 2000 judges and prosecutors in more than 40 courts across seven federal states.²³⁷ The study came up with average processing times for several different types of cases, expressed in minutes, which were then used to calculate the annual workloads for courts in different states. According to Hess, the quality of the data is gradually improving, due to ongoing modernisation to the IT infrastructure that allows more comprehensive data collection of business processes and activities in the court system.²³⁸

The weighted workload measurement system that was introduced in the Netherlands is especially noteworthy in the present context, because the Dutch Judicial Council itself had been the driving force behind the development and implementation of the system.²³⁹ The 'Lamicie' workload model is based on periodic time studies conducted by a commission of judges that calculate the average processing times for 49 different types of cases, which are expressed in the number of minutes of judge and staff time required to process each type of case.²⁴⁰

²³³ Ibid.

²³⁴ Ibid 167-168.

²³⁵ V.E. Flango, B.J. Ostrom and National Center for State Courts, *Assessing the Need for Judges and Court Support Staff* (National Center for State Courts, 1996) 25.

²³⁶ Ibid 41; 59-60.

²³⁷ Burkhard Hess, 'Practical Ways of Combating Delays in the Justice System, Excessive Workloads of Judges and Case Backlogs: German Report' (CEPEJ, 2005) 23.

²³⁸ Ibid.

²³⁹ Council for the Judiciary, *The Financing System of the Netherlands Judiciary* Council for the Judiciary <<https://www.rechtspraak.nl/SiteCollectionDocuments/The-Financing-System-of-the-Netherlands-Judiciary.pdf>>. See also the *Court Sector (Funding) Decree 2005* (Nld), Ars 2 and 3.

²⁴⁰ Pim Albers, 'Practical Ways of Combating Delays in the Justice System, Excessive Workloads of Judges and Case Backlogs: Reducing Delays: Recent

Remarkably, the workload model is used in the annual negotiations between the Judicial Council and government to determine the judiciary's budget appropriations, based on a fixed cost price assigned to each type of case by regulations.²⁴¹

The examples from the foreign jurisdictions should be treated with a degree of caution, however. According to Mack et al, even though the weighted caseload systems are useful in measuring case complexity, they still cannot measure the quality of outcomes, or the experiences of litigants.²⁴² In fact, it has been pointed out that the introduction of output funding and 'casemix' systems such as Lamicie could potentially have negative consequences on the quality of justice if the courts get carried away in emphasising productivity over content quality.²⁴³ Alford et al explain that similar concerns had arisen when a casemix system was initially introduced to improve efficiency in the public health system.²⁴⁴ Hospitals had an incentive to shorten patient stays, because they were funded according to the specific treatment types, rather than the number of days that patients were actually being treated. In addition, the system encouraged hospitals to diagnose patients into categories of cases that attracted higher funding.²⁴⁵

Despite the caveats, Alford et al considered the casemix system to be generally suitable for the courts and did not regard the methodology as an insurmountable problem from a technical point of view.²⁴⁶ They also pointed out that some of the negative tendencies of the casemix system experienced by hospitals would likely be offset in the courts due to the adversarial system of litigation.²⁴⁷ This is because judges have relatively limited capacity to influence the prosecution and defence in criminal cases or lawyers in civil litigation.²⁴⁸ In the Netherlands, the negative tendencies of the Lamicie model have been counterbalanced by a quality management system called RechtspraakQ, which imposes a series of qualitative measures and standards to ensure that the courts maintain their focus on delivering high quality legal outcomes.²⁴⁹ The

Developments in the Netherlands' (CEPEJ, 2005) 11-13. See also Philip Langbroek, 'Organization Development of the Dutch Judiciary: Between Accountability and Judicial Independence' (2010) 2(2) *International Journal for Court Administration* 21, 28.

²⁴¹ Langbroek, above n 240, 28. According to Langbroek, the Council for the Judiciary receives the budget from the Ministry of Justice based on a simplified calculation of 11 broad case types across all courts, while the budget between the Council and the courts is actually based on 49 individual categories of cases.

²⁴² Mack, Wallace and Anleu, above n 229, 170.

²⁴³ Langbroek, above n 240, 38. See also Contini and Mohr, above n 65, 22-23. See also Nina Holvast and Nienke Doornbos, 'Exit, Voice, and Loyalty within the Judiciary: Judges' Responses to New Managerialism in the Netherlands' (2015) 11(2) *Utrecht Law Review* 49. The authors pointed out that '[t]he focus on the new public management principles is of particular concern to the judges, as many of these principles may conflict with their professional values.'

²⁴⁴ Alford et al, above n 24, 48.

²⁴⁵ Ibid 48.

²⁴⁶ Ibid 47-8. They point out that the case-types can be fine-tuned to provide flexible 'outliers' for unexpectedly short or lengthy cases.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Council for the Judiciary, above n .

measures and instruments developed for these purposes include detailed 'quality regulations,' court-wide positioning and peer-review studies, mandatory requirements for periodic second-reading of judgments, guaranteed times for judicial education, client evaluation surveys, staff satisfaction surveys, judicial complaints procedures, visitations and audits, as well as a judicial performance appraisal system.²⁵⁰ All of these measures show that it not impossible to formalise the fiscal relationship between the judiciary and the executive in a transparent and accountable manner, while also maintaining the focus on the quality of justice.

CONCLUSION

The principal aim of this article has been to critically analyse the recent structural reforms of court governance and to identify factors leading to the emergence of judicial councils in many jurisdictions around the world. The need for structural organisational change had arisen because the traditional responses to the problems of delay, cost and complexity in litigation were no longer capable of responding to the contemporary challenges impacting the courts. The analysis shows that judicial control of court administration is the key to any structural reform of the court system, since no major organisational improvements can be contemplated in the courts without more active judicial participation and leadership in that process. However, the analysis also makes it clear that judge-controlled systems of court administration have problems of their own, because most judges have little time, management experience or inclination to work as part of a large court bureaucracy. Indeed, the process of designing and implementing structural organisational change in the judicial environment can be a gargantuan task, because it involves detailed consideration and interplay of key threshold concepts of court administration, such as the independence of the judiciary, administrative transparency and accountability, organisational efficiency and accessibility, as well as the quality of justice. Above all, the transfer of responsibility for court administration to the judiciary requires a thorough reassessment of the judicial role in court administration, because it is difficult to imagine organisational improvements in any large organisation without a robust system of administrative accountability. International experiences strongly suggest that greater internal administrative transparency and administrative 'corporatisation' of the judiciary is essential at all levels of the judicial organisation in order to improve court performance, enhance the social legitimacy of the courts and reinforce judicial independence.

The recent proliferation of the 'court services model' of judicial councils in many developed countries represents an attractive attempt to address the traditional challenges of judge-controlled systems of court administration, because these institutions are vested with remarkably broad powers to act as a supporting and developmental engine for the courts, while also safeguarding their independence from the executive government. The research shows that a judicial council should ideally

²⁵⁰ Ibid 5-10.

be governed by a small board of administrative judges and non-judicial experts, who would be appointed for a fixed term based on merit. At the level of the courts, the experiences from Europe, USA and the Australian federal courts show that the system of integrated management has many inherent benefits for the courts, because it can greatly improve their efficiency, by promoting more active judicial involvement in court administration and by furthering their self-responsibility as autonomous organisations.

The executive government's role appears to be significantly diminished in this model, because the minister no longer has day-to-day insight into the court system operations or any powers to manage the courts, except, perhaps, to intervene in cases of well-defined emergency. To compensate for the lack of ministerial insight and involvement in court administration, the judicial council and the courts should develop new mechanisms of administrative and financial accountability that are transparent, verifiable and more customer-focused.