

Ch 13

Accountability of the Governor - General

Governor General

- Powers (legislative + executive)
 - ↳ granted + limited by the Constitution
 - ↳ outlined by convention
- Still has potential to wield significant power.
- Mechanisms of accountability must be in place

Accountability through appointment

- Office established Ch 1, s2 outlines appointment by the 'Queen's pleasure'
 - ↳ also allows Queen to grant powers to GG.
 - ↳ Queen is formal mode of appointment
 - ↳ initially → appointments by advice of colonial office in Britain → meant GGs often ill-suited eg. Lord Hopetoun (1901-1903) had position recalled. Sir Isaac Isaacs (1931-36) first Australian-born GG.
- Since 1930s → appt has been on advice of Prime Minister
 - ↳ in theory, monarch can reject advice of PM - never happened
 - ↳ Statute of Westminster 1931 enshrined in law the right of Prime Ministers to advise the monarch and expect that their advice is taken.
 - ↳ by convention, Monarch bound to accept PM's advice
- Govt (PM) can appoint GGs who uphold the gov't's values
 - ↳ eg. Tony Abbott discussed Sir Peter Cosgrove's long military service - conservative values.
- Oaths of Office + Allegiance
 - ↳ overseen by most senior officers of 3 arms of gov't: PM, Chief Justice, President Senate/Speaker HoR
 - ↳ reinforces importance of accountability

Accountability through tenure and removal

- Tenure: at Queen's discretion, typically 5 years.
 - ↳ can recall/dismiss a GG on PM's advice
 - ↳ has never occurred - Sir John Kerr resigned 1977 to accept Australian Ambassador to UNESCO in Paris but was under immense public pressure to resign. Peter Holliworth also resigned to protect integrity of GG position, Lord John Adrian Louis Hope resigned - no public pressure

GG appoints/
dismisses EXCO

Circular
Accountability

PM recommends
appt of GG

- GGs' held to account most effectively by public pressure

↳ CASE STUDY: 1975 Crisis

- John Kerr argued that he had to uphold constitution
- 11 November: Kerr provided Whitlam with letter outlining reasons for dismissal → including his refusal to call election or resign. Given the stagnant state of parliament, the GG Kerr saw it his duty to dismiss Whitlam.
- Kerr believed a PM should be able to deliver supply - if not, should call election or resign
- Kerr sought advice from Chief Justice Sir Garfield Barwick - break convention of seeking advice from EXO
- Kerr felt it necessary to justify his decision to the public - own accountability → letter release
- Whitlam argued Kerr broke convention of Responsible Government that GG should only act on advice of government of the day
- Use of reserve powers highly controversial
- House had expressed confidence in Whitlam - Speaker Gordon Scholes said this meant that GG's use of reserve powers was unjustified and unconstitutional (in letter to Queen)
- Scholes also concerned that until supply Bills were passed, House was unaware of Fraser's tenure as caretaker PM → meant that Fraser was installed by royal prerogative → threat to parliamentary democracy.
- Queen's secretary responded by expressing that only GG had constitutional power to install/dismiss or Prime Minister - few accountability mechanisms for GG
- Kerr held accountable by the people: in months leading up to election, was denigrated by ALP supporters, forced angry public protests eg. booed whilst giving drunk Melbourne Cup speech in 1977
- Dec 1977 - resigned as GG, 3 years into his 5 year term. Moved to London to avoid continued harassment in Australia.

↳ Peter Hollingworth

- Previously Archbishop of Brisbane
- GC 2001 under PM Howard
- 2003 allegations of covering up child sex abuse in the church - denied
- PM refused to withdraw support for Hollingworth
- Campaign for his resignation led by Hetty Johnston
- Confessed, saying excuse was he lacked experience as an archbishop to handle the matter, appeared to blame victim on ABC report saying 'my belief is that this is not child abuse'
- Apologised + condemned paedophile priests.
- Forced to step down as patron of Bonardos, Kids First Foundation, National Association for the Prevention of Abuse and Neglect.
- 2003: report of his handling of allegations was tabled in parliament.
- 2003: allegations rose that he had raped a woman during the 1960s.
- Senior ministers suggested he step down to uphold integrity of his office
- 25 May 2003: resigned (public pressure)

Accountability of the office of Governor-General

- Official Secretary to the GC established 1901
- ↳ became statutory office under amendments to Governor General Act 1974 (in 1984)
- ↳ employees of the Secretariat are appointed by Governor-General-in-Council eg Sir David Smith 1973-90
- ↳ role to provide GC with support to carry out duties
- ↳ held to account by annual report tabled in both houses of parliament - presents outcome + program of office, budget details etc
- eg Annual Report 2014/2015 revealed 11 FOI requests of which 7 were denied, annual appropriation \$17.6 mill
- Courts can hold Office to account
- ↳ Kline v Official Secretary to the GC (2013)
- Ms Kline requested to access docs from Office w.r.t Order of Australia. FOI Act s6A(1) 'administrative matters' - Office said requested docs weren't. HC upheld Office's decision - not administrative, also already widely available to public.

Ch 14

Accountability of the Judiciary

*Judiciary must be independent under RoL - but a truly independent judiciary cannot be held accountable by the other arms of government - paradox (or the people)
 ↳ judges appointed by executive, removed by the parliament for 'proven misconduct or incapacity'
 ↳ appointment rather than election ensures judges do not become politicised → confidence.

Why appoint judges?

Describe internal accountability measures of courts

Internal Accountability measures: processes and procedures used within the court system.

Accountability of the courts:

Transparency.
 Appeals
 Parliament.
 72: s72 dismissal, pay, appt.

List + explain 3 ways that the doctrine of precedent holds courts to account

List + explain 5 ways that the appeals system holds courts to account

Overruling Precedent:
 2017 Aubrey v The Queen overruled 1858 English precedent that a man could not be prosecuted for 'inflicting harm' for giving partner STI (HIV).
 Aubrey convicted ^{of} ^{serious} ^{bodily} ^{harm}

- Doctrine of Precedent, court hierarchies
 - ↳ High court: unifies state, federal and territory court hierarchies, decisions binding on all courts.
 - ↳ doctrine of precedent imposes accountability
 - ↳ stare decisis: decisions of higher courts are followed by lower courts in similar cases
 - ↳ ensuring lower courts follow decisions of higher courts = subordinate courts stay accountable to superior courts.
 - ↳ persuasive precedent → also strong guiding force
 - ↳ judge who goes against/avoids precedent must give strong case for doing so in their ratio decidendi
 - if reasoning wrong → grounds for appeal.
 - ↳ appellate courts may overrule an incorrect precedent: hold the court which made the precedent accountable
- Appeals.
 - ↳ provide a way to check the decisions of courts.
 - ↳ appeals impose the scrutiny of a more experienced judge of a higher court onto a subordinate court
 - ↳ ratio decidendi of all judges are published
 - can result in public or media scrutiny.
 - available to appeals courts - check decision's validity
 - ↳ judges whose decisions are regularly overturned may lose promotional opportunities - incentive
 - ↳ grounds for appeal are multifiduous → incentive
 - law, fact (evidence), handling of trial
 - if judges misapply statute/precedent, give incorrect weight to evidence, have improper management → appeal
 - ↳ lower courts whose decisions regularly overturned → scrutinised by Attorney General: Minister with responsibility for court/judicial systems. Cannot directly interfere w/court processes, but can make recommendations for judicial appt, direct resources to issues, instruct Chief Justice to investigate

Why is the High Court a significant check on accountability?

Explain the Mallard and Cesan/Rivadavia cases, and how they held the courts to account.

Explain the principles of *nemo iudex in causa sua* and *audi alteram partem* and how they ensure judicial accountability.

Describe how both sides of a case are given equal opportunity in criminal and civil trials

CASE STUDY:
Juror on murder trial in 2016 used Facebook to post 'At Perth District Court, guilty' - judge said wasn't confident in her fairness dismissed - bias.

High Court: final court of appeal

- granted ultimate appellate jurisdiction s73.
- ability to uncover miscarriages of justice
- Mallard Case: Andrew Mallard convicted of murder 1994 in Supreme Court. Lost appeal at full bench of Supreme Court, spent 12 yrs in prison. HC quashed conviction 2005. Resulted in reform to appeals process, establishment of Court of Criminal Appeal in WA.
- Rafael Cesan and Ruben Mas Rivadavia - found guilty of drug trafficking 2004. Judge in NSW District Court fell asleep, snored loudly during trial: Justice Ian Dodd, suffered from sleep apnoea. Appealed to HC: miscarriage of justice occurred as judge's snoring had disrupted jury and cross-examination of evidence. HC agreed, ordered retrial - Justice Dodd held to account.

- Trial processes + procedures: Natural Justice

- ↳ *nemo iudex in causa sua*: impartial judges/juries
 - judges and juries must remove themselves in the case of a conflict of interest, i.e. 'recuse' themselves.
 - biased jury can be grounds for appeal → accountability
- ↳ *audi alteram partem*: hear both sides.
 - ensured by pre-trial and trial processes
 - civil pre-trial: plaintiffs make statements of claim, defendants respond with statements of defence. Both sides pursue evidence in further and better particulars, interrogatories, discovery of documents
 - criminal pre-trial: accused has right to know their charges and the evidence against them. Right to silence ensures accused doesn't have to contribute to the case against them.
 - trial processes: each party calls own witnesses, put through examination-in-chief/cross-examination/re-examination. Both parties can make objections to an impartial judge.
 - procedural fairness: responsibility of judge to uphold due process in court
 - failure to uphold = grounds for appeal → accountability

CASE STUDY: Bias/Conflict of interest in the jury/judges.

2013 Case of Union's NSW

- Gogeler J recused by counsel to have provided prior advice on the constitutional validity of one of the provisions at hand
- Gogeler J recused himself from the case as a 'perception of bias' existed now that the question had been raised.

Describe how evidence can hold courts to account.

- Evidence-based decisions:
 - ↳ rules of evidence → feature of adversarial trial
 - ↳ inadmissible evidence: hearsay, opinion, irrelevant, circumstantial evidence
 - ↳ both parties present evidence
 - ↳ other party may test evidence
 - ↳ if falls outside rules of evidence, may make an objection, judge will rule on admissibility
 - ↳ only admissible evidence may be used in making a decision
 - ↳ before sending a jury away to deliberate, the judge will 'charge the jury': instruct on what evidence they may take into account, which to reject, what law to apply etc.
 - ↳ failure to correctly charge jury = grounds for appeal
 - ↳ failure to apply rules of evidence = grounds for appeal.

How does transparency ensure accountability?

- Public hearings
 - ↳ all court proceedings open to the public and media
 - ↳ exceptions: judges decide to hold a trial 'in camera' (out of public sight) if:
 - there are vulnerable witnesses eg. children to protect
 - sensitive information must be withheld
 - ↳ media reports on trials
 - ↳ court reports published in media and online
 - ↳ members of the public may enter to view a trial
 - ↳ open courts = accountability and public confidence in the judicial system.

In Camera Trials:
- for potential breaches of confidence
- victims of blackmail
- vulnerable witnesses

- Public trust in the courts.
 - ↳ apolitical nature: no 'policy' or party loyalty
 - ↳ appointed: don't have to appeal to populism to keep jobs.
 - ↳ security of tenure assured by s72 Constitution. No need to compete with other judges for security - not adversarial

External Accountability measures: traditional and newly evolved bodies separate from the judicial system which check accountability and power.

- Parliamentary statute limiting, overruling, and clarifying common law.

↳ parliamentary sovereignty: statute law has democratic legitimacy, and thus overrides common law.

• argued that courts making law incrementally over time through ratio decidendi etc → is violating the SoP (legislature makes law)

• also argued that parliament limiting judicial power is violating the SoP

↳ parliament can place statutory limits on common law

• eg. awards of damages for negligence. Ipp Report 2002 found courts were awarding damages for negligence too often, and too highly - standard of proof was too low. State parliaments enacted legislation limiting amount of damages payable for negligence eg. WA Civil Liability Act

• eg. Native Title: Mabo Case (1992) recognised native title, concerns raised about status of people's property, since terra nullius had been abolished. To clarify the common law, parliament created Native Title Act 1993. Act extinguished native title where freehold title exists, established Native Title Tribunal to hear claims and create a strict test for proving native title

↳ parliament can abrogate (override) a common law principle

• eg. Trigwell v State Government Insurance Commission 1979. Fatal road accident occurred as a result of livestock wandering onto road. Owner of livestock, and SGIIC (insurance company of deceased driver) were sued.

High Court found owner not liable, in accordance with Searle v Wallbank. Parliament of Victoria passed Wrongs (Animals Straying on Highways) Act 1984 to abrogate Searle v Wallbank, and Trigwell v SGIIC, and establish liability for owners of escaped animals.

↳ parliaments create laws that restrict the courts

• eg. Judiciary Act 1903, Crimes Act 1914

• State Criminal Codes and Sentencing Acts determine minimum and maximum sentences, factors that must be taken into account in sentencing

• mandatory sentencing limits judicial discretion (previous criminal history, mitigating factors, nature of offence)

Describe how the negligence and native title cases demonstrate the ability of the parliament to hold the courts to account.

Describe what it means to abrogate or clarify, and give one example of each

Discuss the implications of mandatory sentencing

Discuss the impact of parliamentary interference in the courts on accountability and the SoP

Discuss the extent to which s72 holds the courts to account

- Aspects of s72
- Executive appoints judges
 - Parliament (both houses) must approve removal of a judge
 - Executive cannot reduce judges' pay.

Describe the examples of how Justice Lionel Murphy and Justice Angelo Vasta were held to account

- Attorney General: Cabinet Minister whose portfolio is the courts
 - ↳ involved in judicial appointments
 - ↳ role to provide court infrastructure, payment of judges and court officials, depending independence of courts
 - ↳ cannot interfere with or reduce pay or fire a judge - ensure separation of govt and judiciary.
- Constitutional accountability: s72 *only applies to federal judges
 - ↳ enables parliament to expel a judge:
 - ultimate sanction - never on federal level
 - threatens independence of judiciary.
 - ↳ broad terms protect independence
 - can only remove a judge on 'proven misbehaviour or incapacity'
 - 'misbehaviour' not prescribed or defined
 - 'incapacity' doesn't refer to an extent of physical or mental impairment
 - 'proven' doesn't specify: by a court etc.
 - lack of clarity allows for reflection and debate in the parliament re: those who wish to remove a judge. Would have to be interpreted by H.C
 - ↳ eg. Justice Lionel Murphy: not expelled, but may have been
 - appointed by Whitlam govt to HC
 - accused of perverting the course of justice 1984
 - Senate committee established, recommended that Murphy be prosecuted
 - Supreme Court of NSW found him guilty of attempting to pervert the course of justice, decision was reversed by NSW Court of Criminal Appeal
 - After appeal → Parliamentary Commission of Inquiry established to investigate Murphy's fitness to be a justice
 - 14 allegations were marked for further investigation
 - Murphy diagnosed with terminal cancer - died Oct 1986, Parliamentary Commission of Inquiry disbanded.
 - Would have recommended debate of 'proven misbehaviour'
 - ↳ eg. Justice Angelo Vasta: expelled by QLD parliament
 - QLD Parliament est. Commission of Inquiry to investigate allegations of Justice Vasta's wrongdoing in regards to a company with which his family was associated.
 - wrongdoing, although it did not affect his decisions in court, was found to be 'misconduct'
 - removed by QLD Parliament in June 1989.

- Parliamentary Commissions

↳ 2012: Cwth passed Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act - enabled parliaments to establish parliamentary commissions to investigate specific allegations of misbehaviour/incapacity

- requires appointment of 3 commissioners: at least one must be former Cwth judicial officer / former judge of state or Territory Supreme Court

- requires commission to report to parliament.

- enables the investigation of a judge to be independent of parliamentarians who would, under s72, have to vote for the judge's dismissal - separation of powers.

Thus, commission is apolitical, parliament acts on its recommendations

↳ QLD's ad hoc commission

- Angelo Vasta case - QLD Parliament passed Official Misconduct Division of the State Criminal Justice Commission to investigate complaints against judicial officers.

- acts as ad hoc commission when a complaint is made

↳ NSW permanent Commission.

- Judicial Officers Act 1985 (NSW) est. permanent commission to investigate complaints made against judicial officers

- none have been removed from office by the commission, but some have resigned after complaint was made.

- developed by Judicial Commissions Act 1994 - led to discussion in parliament re: removal of Justice

- Vince Bruce. Bruce made statement about his suffering from depression - parliament voted not to remove him.

- Bruce resigned from Supreme Court shortly afterwards.

- Chief Justices

↳ Australia's 9 court hierarchies each have a Chief Justice at the top as head of that jurisdiction

↳ has responsibility for monitoring performance of judges, may counsel underperforming judges

- Codes of Conduct: voluntary self-accountability

↳ Australian Institute of Judicial Administration, non-govt organisation of 30 legal representatives: has considered a judicial code of conduct - not yet adopted.

4eq. QLD Chief Justice Tim Carmody. 2013-2016.

- was supporter of several policies of the Newman Govt after being appointed by Premier Campbell Newman eg. outspoken for anti-motorcycle gang laws.
- shortly after expressing support, was promoted from Chief Magistrate to Chief Justice of Supreme Court by Newman govt - raised questions regarding independence of the judiciary
- embattled QLD Attorney-General, Jarrod Bleijie, under pressure to resign after releasing confidential conversations with judges → Carmody supported him
- seen that Carmody's promotion was a result of his support of the QLD government, not experience
- forced to defend himself against criticism from the judiciary and media - loss of respect.
- accused of bias: met with Hetty Johnston, founder of child protection group Bravehearts, while adjudicating appeal of an accused child murderer.
- emails revealed he had not read previous judgements on the case - expected of an appeals judge
- resigned as Chief Justice due to public/media pressure - still judge on Supreme Court of QLD

4eq. NSW Magistrate Roger Prowse

- during day of a minor assault case, police arrested accused for criminal offence of influencing a witness, after writing a threatening note to the victim
- Magistrate Prowse became irritated that trial could not go ahead - ordered police to 'un-arrest' accused
- accused police of 'interference with a court hearing'
- after prosecutor requested that Prowse step aside from case, Prowse 'threw the case out of court'
- DPP sought a judicial review of Prowse's case.
- Supreme Court Justice Helen Wilson of the review said that Prowse had committed an injustice, and 'fell into error' by undermining the proper administration of justice
- Wilson quashed Prowse's ruling, ordered retrial with a different magistrate