

THE JUDICIAL COMMISSION OF NEW SOUTH WALES

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1. INTRODUCTION

The Judicial Commission of New South Wales is an independent statutory corporation established under the *Judicial Officers Act 1986*.

The Commission's major functions under the Act are to:

- * assist the courts of New South Wales to achieve consistency in imposing sentences;
- * organise and supervise an appropriate scheme for the continuing education and training of judicial officers; and
- * examine complaints against judicial officers.

The Commission may also:

- * give advice to the Attorney General on such matters as the Commission thinks appropriate; and
- * liaise with persons and organisations in connection with any of its functions.

The objectives of the Commission are to:

- * increase the efficiency and effectiveness of the use of judicial resources by improving the consistency of sentencing, and developing the skills and knowledge of judicial officers; and
- * handle complaints in a timely and appropriate manner.

2. HISTORY OF THE COMMISSION

The original proposal to establish the Commission was unfolded in September 1986 but substantial modifications were made to that proposal prior to the enactment of the *Judicial Officers Act*, which was assented to on 18 November 1986.

The legislation established the Commission as a statutory corporation with its staff wholly independent of Public Service control and receiving its own budget from

Parliament, to which it is required to report annually.

In October 1987, when the first senior staff were appointed, the Commission set in place plans for its work in the areas of judicial education, the provision of sentencing information and the investigation of complaints against judicial officers.

In 24 years of operation the Commission has established a reputation as one of the leading institutions of its kind. Many of its programs, including the computerised Judicial Information Research System (JIRS), its education strategies and the system developed for the examination of complaints, have been recognised as good models both in Australia and overseas.

3. THE COMMISSION

Structure of the Commission

The Commission consists of six Official Members and four members appointed by the Governor of New South Wales. The President of the Commission is the Chief Justice of New South Wales.

The Commission is supported by a staff of 38, and is headed by a Chief Executive. It has an annual budget of approximately 5.2 million Australian dollars.

4. JUDICIAL EDUCATION

The seminars, conferences and publications of the Commission are designed to keep judicial officers up to date with current developments and emerging trends and include areas identified as needing review or involve major changes in the law.

One very important issue for the Commission has been the relationship between judicial education and the maintenance of judicial independence, and this has had a significant impact on the planning and development of the program of judicial education.

To ensure that the Commission's scheme of judicial education and training remains relevant and functional, an on-going process of consultation with judicial officers takes place regarding the most appropriate content and direction of their education programs. Three key factors taken into account in this consultation process and in the development of education and training programs are the:

- professional experience of judicial officers;
- needs of different jurisdictions; and
- education and training requirements of new judicial officers.

The Commission is committed to increasing the interactive element of the judicial education programs in recognition of adult education principles which clearly indicate that learning is enhanced through active participation. The Commission

works with judicial officers who sit on its Education Committees to identify judicial training needs and develop educational activities and materials. (Needs assessments are conducted through surveys, evaluations, meetings etc).

i) Education Committees

In keeping with the obligation to consult, and mindful of the benefit of participant involvement in various stages (including the design of the programs), judicial education committees have been established in each court. These committees meet on a regular basis to discuss the proposed judicial education programs for their particular court. Professional staff from the Judicial Commission attend all Education Committee meetings and provide educational input and support. Additionally, a Standing Advisory Committee on Judicial Education (SAC) was established with a representative from each of the court committees. The SAC provides general guidelines and informs each jurisdiction of the activities in the other courts.

ii) Conferences and Seminars

The Commission offers an extensive conference and seminar program for judicial officers, ranging from induction courses for new appointees to specialist conferences on specific aspects of law, procedure and judicial skills and techniques. The conferences organised by the Commission also frequently cover matters of wider community interest, including social concerns.

The scheme of education presently covers 39 different programs for the five courts of New South Wales, which include pre-bench training for newly appointed magistrates and computer training sessions. Together with the National Judicial College of Australia and the Australasian Institute of Judicial Administration the Commission also conducts a National Judicial Orientation Program for newly appointed judges from across Australia.

Some educational sessions are held during court time; many others are conducted after court hours and on weekends in judicial officers' own time. Approximately 1400 days of continuing judicial education were attended by judges and magistrates between July 2010 and June 2011. Attendance by judicial officers at the Commission's programs is voluntary.

iii) Publications

The conference program is supplemented by an active publishing program. The Commission publishes the following material for judicial officers:

(a) Bench Books

Bench books are reference works designed for use by judicial officers whilst on the bench and also for use in chambers. They are essentially

working aids or practice and procedure manuals provided for judicial officers, particularly for new judges and magistrates. The information contained in the various bench books relates to the relevant jurisdiction of the judicial officer and is available electronically and in hard copy.

The series of bench books include:

- *Local Court Bench Book*
- *Criminal Trial Courts Bench Book*
- *Sentencing Bench Book*
- *Equality Before the Law Bench Book*
- *Civil Trials Bench Book*
- *Sexual Assault Handbook*

(b) *Judicial Officers' Bulletin*

The *Judicial Officers' Bulletin* is a monthly publication written for judicial officers. It includes a digest of significant recent decisions and legislative changes and draws attention to other major developments of interest, including the dissemination of sentencing information. The Bulletin also contains court news, articles, editorial comment, and information about judicial education activities that may be available.

(c) *Judicial Review*

The Judicial Review is a collection of the best papers from the Commission's conference and seminar programs, as well as judicial education seminars delivered further afield. It is published twice a year.

iv) *Computer Training*

The Judicial Commission has been involved in computer training of judicial officers for the past 22 years. The computer training courses are intended to facilitate effective use of computers in the context of the court system, and to enhance the efficiency of judicial officers by enabling them to gain quick and easy access to information stored in electronic form. It also aims to reduce the time spent on judicial research by enabling access to on-line legal databases such as the Commission's Judicial Information Research System.

To assist judicial officers with problem solving in relation to their computers the Commission also provides a Help Desk telephone support service which is available six days per week between the hours of 7.00 a.m. and 9.00 p.m.

5. SENTENCING

A major function of the Commission is assisting courts to achieve consistency in approach in the sentencing of offenders. The Commission's objectives in this area are to reduce unjustified disparities in sentences imposed by the courts, to improve sentencing efficiency generally, and to reduce the number of appeals against sentences, thereby releasing valuable resources which can be redeployed to reduce court delays.

The Commission has two strategies for achieving its objectives in relation to sentencing consistency:

- * by providing judicial officers with access to the Judicial Information Research System (JIRS), which contains a computerised sentencing database developed by the Commission;
- * by undertaking and disseminating original research and statistical analysis on aspects of sentencing and other topics of assistance to sentencers.

i) Judicial Information Research System - JIRS

The JIRS is a computerised database containing legally and statistically relevant information on sentencing. It has been designed by the Commission under the guidance of experienced judicial officers. All judges and magistrates have access to the JIRS on the Commission's host computer through laptop computers.

JIRS is the first of its kind in Australia and is recognized as a world leader in the field of computerised sentencing databases. It is an extensive, interrelated and hypertext linked sentencing resource that provides discrete modules of reference material. The object of the JIRS is not to limit the sentencing discretion of each judicial officer. Its purpose is to provide judicial officers with rapid and easy access to the collective wisdom of the courts in order to assist them with their sentencing decisions.

Components of the JIRS include:

Sentencing Statistics

This component provides statistical information in the form of graphs and tables on the range and frequency of penalties imposed in recent cases of a similar nature. The judicial officer may enter specific details of the offence and the offender (age, prior record, bail status, plea, etc.) and select various displays of penalties, including fines and prison terms. Within seconds the judicial officer is able to read from the screen information on the "going rate" or "tariff" for the offence.

Case Summaries

This component contains brief facts, both objective and subjective, and sentencing outcomes of decisions of the Court of Criminal Appeal. This module makes it possible to quickly locate all cases relating to a particular offence and, from the summary, move to the full text of the judgment.

Judgments

This module contains full text sentencing decisions from the Court of Criminal Appeal and also criminal cases decided by the High Court of Australia.

Sentencing Principles and Practice

Sentencing Principles and Practice contains concise, specially prepared, commentary on sentencing principles, and key passages from judgments that distil the essence of the judge's sentencing rationale. It is a convenient way of discovering the leading cases on sentencing and then calling up the full text of the judgment from the Court of Criminal Appeal or High Court databases. It also provides a description of the sentencing options available to the courts, as well as the form of orders which may be used in respect of these options.

Services Directory

The Services Directory component contains essential information on drug and alcohol services, periodic detention and community service options. Dedicated directories for adult and juvenile facilities, as well as other features, make this a useful resource for locating key rehabilitation facilities that may be of particular relevance to an offender facing sentencing.

Advance Notes

These are summaries of cases decided by the Court of Criminal Appeal and the High Court of Australia. Each "note" contains the main submissions of counsel and a precis of the legal principles or rulings arising from the decision.

Electronic Bench Books

This component contains on-line versions of bench books (referred to earlier). These works are hypertext linked to the case law and legislation contained in the JIRS.

Legislation

Electronic versions of all New South Wales and Commonwealth Acts and Regulations are held in this component. There is also a facility to track the progress of Bills through the New South Wales and Commonwealth

Parliaments. This information is updated at least weekly.

The Judicial Information Research System is not restricted to sentencing but contains features that are applicable to the research requirements of other courts. These include:

Industrial Relations Commission

This database contains the full text of decisions and judgments of the Industrial Relations Commission, together with other information relevant to the jurisdiction.

Land and Environment Court

This database provides judges and commissioners of the court with on-line access to the decisions of the Land and Environment Court together with relevant legislation.

Publications

This component contains an on-line version of the Commission's publications.

Conference Paper Database

In addition to the published material provided, judicial officers in New South Wales can browse for conference papers on an online searchable database. Searching is possible by conference, author surname, key word, topic or date. Papers from 2007 onwards are on the database; new papers will be added shortly after each conference and seminar. The conference paper database will be a useful educational resource for judicial officers in city and regional centres.

ii) *Research*

As part of its charter to disseminate information on sentencing, the Commission undertakes original research on aspects of sentencing. The results are published as a series of monographs which are distributed to all judicial officers and other interested persons.

The Commission also publishes a serial publication, entitled *Sentencing Trends and Issues*. This publication analyses various aspects of New South Wales sentencing statistics and sentencing issues.

6. COMPLAINTS AGAINST JUDICIAL OFFICERS

The Judicial Commission has power to examine complaints about the ability and behaviour of judicial officers.

The complaint function provides a means for people to have their complaints examined by an independent body. An important role of the Commission is not only to receive and examine complaints made against judicial officers, but to determine which complaints require further action.

Who is a judicial officer?

A “judicial officer” under the *Judicial Officers Act* means a -

- judge or associate judge of the Supreme Court of New South Wales;
- member (including a judicial member) of the Industrial Relations Commission of New South Wales;
- judge of the Land and Environment Court of New South Wales;
- judge of the District Court of New South Wales;
- magistrate; and
- the President of the Administrative Decisions Tribunal.

The definition of “judicial officer” includes acting appointments to a judicial office but does not include arbitrators, registrars, chamber registrars, members of tribunals or legal practitioners.

The Commission has no power to examine complaints against Federal judicial officers or a person who is no longer a judicial officer.

Who can make a complaint?

A complaint may be made to the Commission by any person or may be referred to the Commission by the Attorney General.

Legislative requirements

The *Judicial Officers Act* requires that a complaint is in writing and that it identifies the complainant and the judicial officer concerned. The *Judicial Officers Regulation* requires that particulars of a complaint are verified by statutory declaration and that the complaint is lodged with the Chief Executive to the Commission.

Assistance to Complainants

The Commission provides assistance and advice to the public about the complaints process through:

- its website;
- a plain English brochure outlining the complaints process;
- assistance to potential complainants with translation and interpreting services;
- responding to telephone and face-to-face enquiry.

Complaints not within the Commission's jurisdiction

The Commission does not review a case for judicial error, mistake, or other legal ground. Reviews of those matters are the function of appellate courts.

Allegations of corruption against a judicial officer are required to be referred by the Judicial Commission to the Independent Commission Against Corruption for investigation by that body.

Acknowledge receipt of complaints

In most cases complaints submitted to the Commission will be acknowledged in writing within one week of receipt.

Investigating a Complaint

On receiving a complaint, the Commission will conduct a preliminary investigation into the matter. In every case, the judicial officer is advised of the fact that a complaint is made to the Commission and provided with a copy of the documentation.

The Commission conducts a thorough investigation of every complaint received, which often involves an examination of transcripts, sound recordings, judgments and other material relevant to the complaint. If necessary, a response to the complaint is sought from the judicial officer.

Confidentiality

The preliminary examination of a complaint by the Commission will be conducted, as far as practicable, on a confidential basis. The legislative requirement of confidentiality protects the judiciary from unjust criticism and protects those who furnish information to the Commission in the course of its examination of a complaint.

The proceedings of the Commission and all information and materials, written or oral, obtained by the Commission in the course of its preliminary examination are confidential.

Time standards for finalisation of investigations

The Commission aims to finalise the investigation of 90% of complaints within six months of receipt and 100% within 12 months of receipt.

Action Following Preliminary Examination

Following its preliminary examination, the Commission must take one of the following actions:

- summarily dismiss the complaint;
- refer the complaint to the relevant head of jurisdiction; or
- refer the complaint to the Conduct Division.

Summary Dismissal

A complaint must be summarily dismissed if one or more of the following grounds exist:

- the complaint is one that the Commission is required not to deal with;
- the complaint is frivolous, vexatious or not in good faith;
- the subject matter of the complaint is trivial;
- the matter complained about occurred at too remote a time to justify further consideration;
- the complaint is about a judicial decision, or other judicial function, that is or was subject to a right of appeal or right to apply for judicial review;
- the person who is the subject of the complaint is no longer a judicial officer; or,
- in all the circumstances further consideration of the complaint is unnecessary or unjustifiable.

Where a complaint is summarily dismissed the Commission will, as soon as practicable after its determination is made, inform the complainant in writing and provide the reasons for dismissing the complaint. This will include a reference to the relevant provisions of the legislation that have been applied in the handling and determination of the complaint. The judicial officer will also be advised in writing of the Commission's determination.

Many of the complaints that are dismissed by the Commission, because they disclose no misconduct, are nonetheless helpful in the improvement of the judicial system. The feedback from the examination of complaints provides valuable information for the further development of judicial education programs conducted by the Commission.

Reference to a head of jurisdiction

Where a complaint has not been dismissed following the preliminary examination by the Commission, but in its opinion it does not justify reference to the Conduct Division, the Commission may refer the matter to the relevant head of jurisdiction.

The Commission will notify the head of jurisdiction in writing of its decision and will formally refer the matter, including all relevant material, for attention.

In referring a complaint to the head of jurisdiction the Commission may include recommendations as to what steps might be taken to deal with the complaint, such as counselling by the head of jurisdiction.

Where a complaint is referred to the relevant head of jurisdiction the Commission will, as soon as practicable after the decision is made, advise the complainant and judicial officer of the action taken.

In relation to a complaint referred to the head of jurisdiction, the head of jurisdiction may counsel the judicial officer, or make administrative arrangements within his or her court which are designed to avoid a recurrence of a problem.

Reference to the Conduct Division

Where a complaint has not been dismissed following the preliminary examination by the Commission, and has not been referred to the head of jurisdiction, it must be referred to the Conduct Division.

The function of a Conduct Division is to examine and deal with a particular complaint that has been referred to it by the Commission.

The Conduct Division comprises a panel of two judicial officers (one of whom may be a retired judicial officer) and one of the two community representatives nominated by Parliament. The membership of the Conduct Division will be determined by the Commission. The Commission will also appoint one member of the Conduct Division as Chairperson.

Where a complaint is referred to the Conduct Division the Commission will, as soon as practicable after the decision is made, advise the complainant and the judicial officer of the action taken.

The Conduct Division of the Commission

The function of a Conduct Division of the Commission is to examine and deal with a particular complaint that has been referred to it by the Commission. The legislation provides that the Conduct Division may hold hearings in relation to a complaint and that a hearing may be held in public or in private.

The Conduct Division has the functions, protections and immunities conferred by the *Royal Commissions Act 1923* on commissioners appointed under that Act. *The Royal Commissions Act* applies to any witness summoned by or appearing before the Conduct Division.

The ultimate power of a Conduct Division in relation to a complaint is to make a report to the Governor, setting out its findings as to whether the complaint that has been investigated is wholly or partly substantiated, and whether it could justify Parliamentary consideration of the removal of the judicial officer from office. In New South Wales the holder of a judicial office can only be removed by the

Governor on an address from both Houses of Parliament seeking removal on the ground of proved misbehaviour or incapacity¹.

Report to Governor and others

If the Conduct Division forms an opinion that a complaint could justify parliamentary consideration of the removal of the judicial officer complained about from office, it must present to the Governor a report setting out its findings of fact and that opinion. A copy of the report must also be furnished to the Commission, the Attorney General and to the complainant. The copy to the complainant is provided only after it has been laid before each House of Parliament.

Report to the Head of Jurisdiction

If the Conduct Division forms an opinion that a complaint is wholly or partly substantiated but does not justify parliamentary consideration of the removal of the judicial officer complained about from office, it must send a report to the relevant head of jurisdiction setting out its conclusions. The report may also include recommendations as to what steps might be taken to deal with the complaint. A copy of this report is also provided to the judicial officer and the Commission.

Annual Report

The *Judicial Officers Act 1986* requires that certain information, including statistics and information about complaints disposed of during the year, be reported to Parliament. This information appears in the Annual Report of the Commission. The Report is available in hard copy from the Commission or can be found on the website.

The Nature and Scope of Complaints made to the Commission

In the period 1 July 2010 to 30 June 2011 a total of 60 complaints about 52 judicial officers were made by 55 individual complainants.

In any consideration of the statistics of the complaints dealt with by the Commission it must be remembered that there are approximately 300 judicial officers in New South Wales who in the relevant period dealt with in excess of 500,000 matters.

The most obvious aspect of the pattern that emerges from a consideration of the nature of complaints, year by year, is that apprehension of bias, and allegations of failure to give a fair hearing, are the most common grounds of complaints made to the Commission.

A high proportion of complaints alleged that the judicial officer in question, either unfairly or improperly, prevented the losing party to litigation from properly putting his or her case or favoured the winning party. Complaints of this nature are

¹ *Constitution Act 1902*, s53

assessed by examining the detail of the record and, where appropriate, seeking an explanation from the judicial officer involved. In the case of many of these complaints, a sound recording of the proceedings is listened to, or a written transcript is examined.

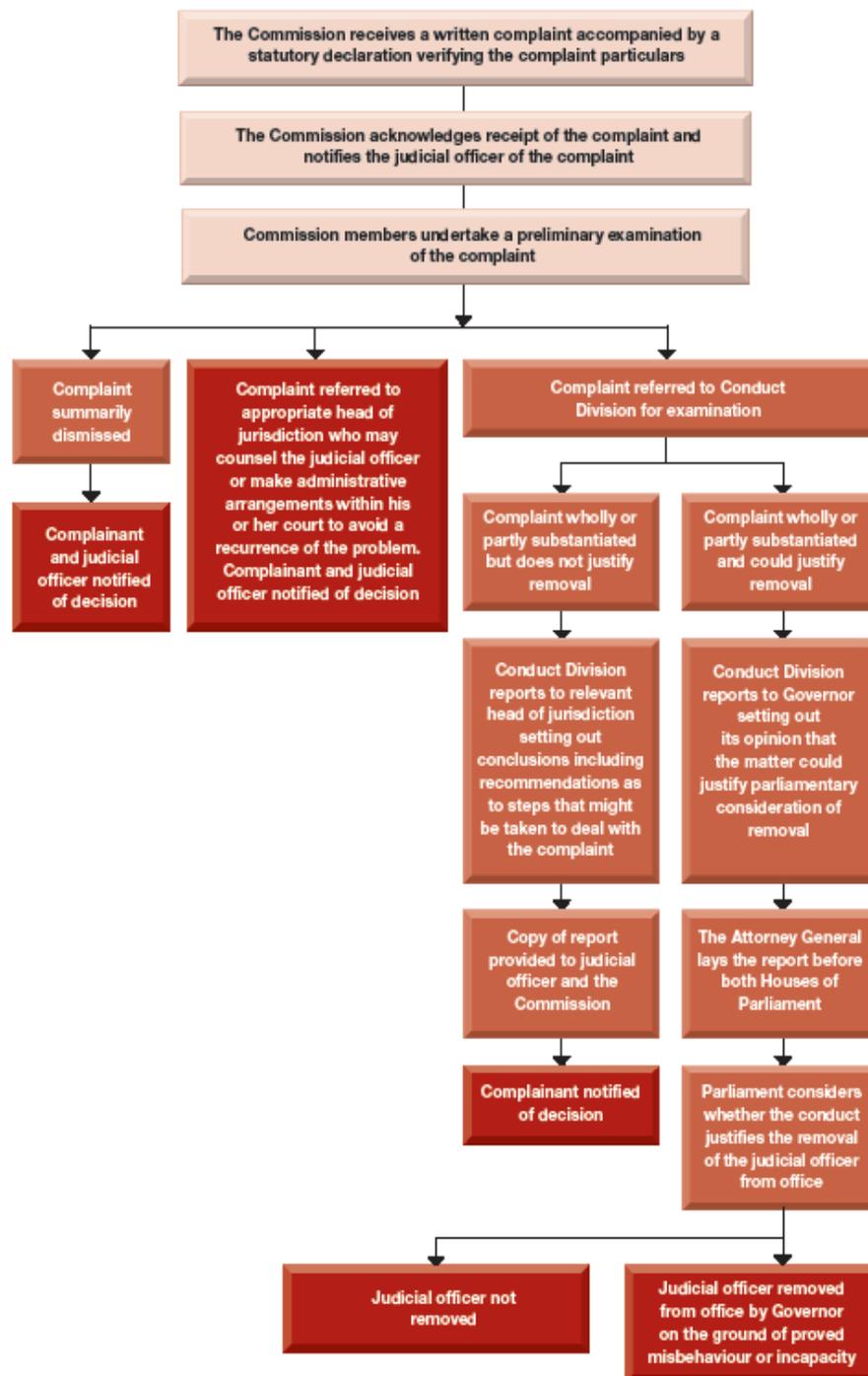
Some complaints involve allegations of incompetence. In evaluating these complaints the members of the Commission consider the issues and evidence in the case in question, and take into account their own knowledge and judicial experience, where appropriate.

Frequently, complaints are made in apparent substitution for appeals to a higher court. Standing alone, this is not a proper basis for a complaint. However, where the complainant goes on to allege that not merely was the decision wrong, but also that it was such that no reasonable person could have made it, and for that reason it reveals some inadequacy on the part of the judicial officer, then the Commission gives close consideration to the material that was before the judicial officer in order to see whether such a charge can be substantiated.

Sometimes a complainant will allege that a judicial officer has made a wrong decision and that this was said to involve judicial misbehaviour on the part of the judicial officer. However, to make an erroneous decision does not of itself amount to judicial misconduct, and there is a difference between an allegation of judicial error and an allegation of judicial misconduct. In many matters of this type the Commission is required to dismiss the complaint on the basis that it relates to the exercise of a judicial function that is or was subject to adequate appeal or review rights.

From a positive point of view, the small number of complaints (relative to the number of judicial officers in the State and the huge volume of litigation with which they deal) is an encouraging indication of the general community's willingness to accept even adverse decisions if they are made in accordance with due process of law.

The complaints process



7. *Future Initiatives for the Commission*

Judicial officers now universally accept that judicial education is part of their life-long learning. Raising awareness for educationally sound judicial education programming over didactic lectures has been more challenging. Judicial officers agree that they want their educational programs to relate directly to the work that they do and that they should be given an opportunity to share and compare experience and perspectives with their peers. Movements for more and more educationally sound programming meeting these criteria have been underway for some time and the move continues with strong support from many judges and magistrates involved in the design of judicial education programs.

Over the next few years the Commission will continue to focus on the provision of high quality and relevant programs to assist judicial officers to undertake their professional responsibilities. The emphasis will be on the provision of timely and practical information whether through publications, conferences and seminars or the computerised JIRS containing sentencing and other information.

In particular, the Commission will offer extensive conference and seminar programs for judicial officers in each court, ranging from induction courses for new appointees to specialist conferences on specific aspects of law, procedure, ethics, judicial skills and technique. The Commission will also continue its initiatives to ensure that New South Wales judicial officers are aware of social context issues involving children, women, sexual offences, domestic violence and ethnic minorities.

The seminars will be organised on a regular basis to keep judicial officers up to date with current developments and emerging trends. Seminar topics will include areas identified as needing review or rapid and major changes in the law. There will also be an Annual Conference for each court and seminars on topics of interest to all courts.

The strategies earlier mentioned, which are designed to achieve consistency in approach to sentencing, will be pursued, including further development of JIRS and undertaking original research into topics of assistance to sentencers.

Lastly, as was stated in the Commission's most recent Annual Report, members of the public and court users have the right to expect that judges and magistrates will conduct themselves impartially, courteously, ethically and to the highest standards of conduct. To that end the commission will continue to provide an effective, independent complaints process.