BECOMING STRONGER AND MOVING FORWARD TOGETHER: THE ROLE OF JUDICIAL ASSOCIATIONS IN THE MODERN ERA

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Abstract: Judicial independence is fundamental to the rule of law. Paradoxically, the judiciary is the weakest of the three branches of government in tripartite systems and thus, alone, insufficiently equipped to protect its independence, judicial institutions and the rule of law. By collaborating through the formation of effective judicial associations, both domestic and international, judiciaries can strengthen their ability to protect their independence and thereby better fulfil their collective constitutional role as a cornerstone of democracy.

Keywords: Judicial independence – judicial independence, the protection of – judicial associations – rule of law.

Introduction

Any democratic society that respects the principle of judicial independence and values the rule of law needs judicial associations to protect the independence of the judiciary as the third branch of government and to preserve the rule of law as the other cornerstone of democracy.

Almost three decades ago Justice McGarvie outlined a number of “foundations of judicial independence” (see Justice R.E. McGarvie, “The Foundations of Judicial Independence in a Modern Democracy” Journal of Judicial Administration (1991) 1, pp. 3-45). He did not include judicial associations as one of those foundations, but he certainly came close to including them when he observed (at p. 22):

In Australia, it is proper and expected that leaders within the legislative arm and the executive arm of government are alert and active to ensure that their arm is adequately sustained and protected. It is for judges to act in the same way in respect of their arm of government.

Judicial associations are the perfect means by which the judiciary can ensure that the judicial branch of government is adequately sustained and protected. Judicial associations are truly a foundation of judicial independence.

The judiciary has traditionally been regarded as the weakest (Alexander Hamilton, The Federalist Papers, No. 78) and most vulnerable branch of government—and yet it is expected to be the guardian and guarantor of judicial independence and the rule of law. However, the independence it seeks to sustain and protect (in the interests of preserving the rule of law) is always at risk due to the very weakness and vulnerability of the judiciary within the structure of government. Judicial associations serve the function of addressing the power imbalance between the judiciary and the other two more powerful arms of government with a view to making the judiciary an equal branch of government. They achieve this by bringing the judiciary together and augmenting the power and influence of the judiciary as the third branch of government—a simple and pure case of “becoming stronger together”.

As the active and public voice of the judicial branch of government, judicial associations play a vital role in strengthening and defending the independence of the judiciary and preserving the rule of law in a modern democracy.

Judicial Associations as Legitimate Entities

Judicial associations are an internationally recognised phenomenon that have a legitimate existence in modern society.
Principle 9 of the United Nations Basic Principles on the Independence of the Judiciary states:

Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their independence.

Similar recognition of judicial associations as legitimate entities is to be found in Article 8 of the Beijing Statement of Principles on the Independence of the Judiciary in the Law-Asia Region, Article 22 of the Syracuse Principles on the Independence of the Judiciary and Article 2.09 of the Montreal Declaration.

Perhaps, the fullest recognition of the legitimacy of judicial associations is to be found in the very recent Brisbane Declaration on the Independence and Integrity of Judicial Officers of the Lower Courts (endorsed and issued by the General Assembly of the CMJA at the 18th Triennial Conference on 13 September 2018), which also provides a blueprint for the objects or purposes for which judicial associations may be formed (see below).

The Need for Judicial Associations

The judicial branch of government is traditionally regarded as "the least powerful (although it may be influential) in that it may act only when resorted to by parties who choose to invoke its jurisdiction and because it is dependent upon the other branches of government to enforce its decisions" (Justice R.D. Nicholson "Judicial Independence and Accountability: Can They Co-Exist?" (1993) 67 ALJ 404, p. 410). Alexander Hamilton concluded that "the judiciary is beyond comparison the weakest of the three departments of power" because:

The judiciary ... has no influence over either the sword or of the wealth of society, and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment, and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.... (The Federalist Papers No 78, p. 304).

The judicial branch is also the least powerful of the three branches of government because of its "over-dependence upon administrative and financial resources from the executive arm of government" (J. Lowndes, "The Australian Magistracy: From Justices of the Peace to Judges and Beyond, Part II" (2000) 74 ALJ 592 at 601).

Furthermore, Parliament has a right to reorganise the court system in "the interests of the improvement of the judicial system": "A Brief History of the Early Days of the Judicial Conference of Australia", Secretariat of the Judicial Conference of Australia, p. 17 ("Brief History"). However, the possibility that "the real reason for a particular reorganisation is to rid government of a court which itself is regarded, or some of whose members are regarded, as inconvenient" (Brief History, p. 17) lays bare the vulnerability of the judicial branch of government.

The circumstances that make the judiciary the least powerful branch of government also make it the most vulnerable branch.

Given the judiciary's lack of power and vulnerability within the structure of government there are very few protective mechanisms to protect its independence.

The primary protective mechanisms are the Latimer House Principles and the doctrine of the separation of powers. Although these Principles encourage mutual respect between the three branches of government in relation to the fulfilment of "their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner" (Principle 11(b))— as well as acknowledging that "each Commonwealth country's Parliament, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law" (Principle 1) and that "an independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice" (Principle 1V)—they afford minimal protection for the judicial branch of government as they have not been formally adopted by governments across the Commonwealth, except for the Australian Capital Territory of Australia.
That only leaves the doctrine of the separation of powers. However, because this doctrine is not always constitutionally entrenched or legislated, and only operates by way of the common law or convention, it remains "an incomplete and fragile mechanism for ensuring judicial independence" (John Lowndes "Judicial Independence and Judicial Accountability at the Crossface of the Australian Judiciary", a paper delivered at the Northern Territory Bar Association in Dili, East Timor July 2016, p. 24). As noted by Diana Woodhouse ("United Kingdom, The Constitutional Reform Act 2005 – Defending Judicial Independence the English Way" (2007) 5 JICL 153 at 158), where the doctrine of the separation of powers is based on "understandings, convention and guidance," its efficacy depends on "a commonality of purpose and shared values across various political, institutional and judicial cultures". However, "developments in government—such as the emphasis on public management and efficiency, changes in the role and focus of the judiciary making it more outward looking, and increased public expectations coupled with a decline in public trust—mean that the relationships that have promoted a sharing of values are changing" and "commonality of purpose can no longer be assumed" (Woodhouse at 158).

Notwithstanding the fundamental importance of the Latimer House Principles and the doctrine of the separation of powers as institutional safeguards of judicial independence they are fragile mechanisms that are liable to threaten the in an instant—even in a modern and stable democracy.

Traditional thinking maintains that the judiciary and the public should look to the Attorney-General (in Australia) or to the Lord Chancellor (the equivalent office in the UK) to defend the courts and the judiciary from threats to judicial independence and unjustified and irresponsible criticism (see The Hon. L. King "The Attorney General, Politics and the Judiciary" (2000) 72 ALJ 444 at 453; Sir Anthony Mason "No Place in a Modern Democracy for a Supine Judiciary" 1997, 35(11) Law Society Journal 51; Woodhouse at 154). However, over the past three decades minimised such that the judicial branch of government can no longer look to neither an Attorney-General nor a Lord Chancellor to protect the independence of the judiciary. In this latter regard, see King at 453; former Australian Attorney-General Daryl Williams, "Judicial Independence" (1998) 36(3) Law Society Journal 50-51 and "Who Speaks for the Courts," in "Courts in a Representative Democracy"—A Collection of Papers from a National Conference presented by the AJA, the Law Council of Australia and the Constitutional Convention Foundation, November 1994, 182 at 192; Justice Robert Beech Jones "The Dogs Bark but the Caravan Rolls On: Extra-Judicial Responses to Criticism," an address presented to the South Australian Magistrates Conference May 2017, p. 15; Brief History at 6-8, Woodhouse at 154-156).

In 1994, prior to becoming the Australian Attorney-General, Mr. Daryl Williams expressed the view that "the judiciary should accept the position that it could no longer expect the Attorney-General to defend its reputation" (Williams, "Who Speaks for the Courts" at 192). This view of the role of an Attorney General "appears to represent the approach adopted by most [subsequent] Federal and State Attorneys-General" (Beech Jones at 15) and continues up to the present day.

The experience in the United Kingdom has been similar: As pointed out by Woodhouse (at 154), over the past two decades there have been concerns that Lords Chancellor have not always fulfilled the role of "protector of judges and their independence" effectively. Specifically, the support of Lords Chancellor for, and implementation of, policies of putting into effect the government's commitment to efficiency and value for money have led to accusations that, rather than protecting judges and the administration of justice from interference, they have been a party to it" (Woodhouse at 159). As is further pointed out by the author below, doubts have arisen about the willingness of Lords Chancellor to protect the independence of the judiciary from either government policies that encroach on the administration of justice or from political criticism.

It would seem that the Constitutional Reform
Act 2005 did little to enhance the role of the Lord Chancellor as the defender of the judiciary and its independence. According to Woodhouse, by “fundamentally changing the responsibilities of the Lord Chancellor” the reforms enacted by the Constitutional Reform Act have “cast doubt on the suitability of the office [of Lord Chancellor]” to fulfil the task of defending the judiciary (at 160). Woodhouse has concluded (at 163) that the Constitutional Reform Act appears to “afford less protection than has been portrayed by the government; the judges may find that they themselves will have to take some responsibility for the defence of their independence”. The recent case of R (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768 supports that conclusion.

In Miller the High Court held that it was for the UK Parliament, not the government, to decide whether to trigger Article 50 of the Treaty on European Union and to instigate the process of the UK leaving the Union. To say that the court’s decision was not well received is an understatement. The three judges constituting the court were extensively criticised in the media, with one outlet (the Daily Mail) labelling them “enemies of the people”.

The Lord Chancellor’s slow and weak response to the vitriolic attack on the three UK judges who delivered the Brexit decision was a three-line statement to the effect that “the independence of the judiciary is the foundation upon which the our rule of law is built and our judiciary is rightly respected the world over for its independence and impartiality”. Such a response did little to instil confidence in the ability of the Office of the Lord Chancellor to fulfil its statutory duty to protect the independence of the British judiciary.

It is abundantly clear that in Australia and the United Kingdom—democratic countries which are generally regarded as bastions of the rule of law and judicial independence—the judiciary cannot confidently rely upon either the Attorney General or the Lord Chancellor to protect the judiciary and its independence, at least to the requisite level.

The reluctance of Attorneys-General and Lords Chancellor in Australia and the UK in recent times to defend the judiciary—when it is clear that they have a duty as first law officers to protect the independence of the judiciary and to preserve the rule of law—is a significant factor contributing to the relative weakness and vulnerability of the judicial branch of government within the tripartite structure of government. It is a factor that points to the need for judicial associations.

The historical reasons for the emergence of organisations such as the CMJA, the Judicial Conference of Australia (“JCA”) and the Association of Australian Magistrates (“AAM”) bespeak the need for judicial associations. All three associations were born out of a perception that the independence of the judiciary was not guaranteed because of:

- a lack of independence per se;
- the fragility of the principle of judicial independence; or
- the absence of strong institutional safeguards of judicial independence.

The CMJA, originally the Commonwealth Magistrates Association (“CMA”), was formed in 1970. In 1990, the CMA was renamed the CMJA to take account of the fact that in some Commonwealth jurisdictions magistrates had become judges.

The impetus for the creation of the CMA came from Sir Thomas Smythe who had in mind for a long time the formation of a Commonwealth judicial organisation (Smythe, “CMJA: Serving Judicial Officers in the Commonwealth for 30 Years”, p. 1). Sir Thomas considered that “those who were in greatest need of [such] an organisation were the Magistrates” for the following reasons (at 3-4):

- magistrates around the Commonwealth exercising extensive powers were not legally qualified and were in need of professional training;
- “their scrutiny and independence left much to be desired”; and
- “in some places the conditions under which they had to operate were appalling”.

The JCA was formed in 1993. Although its establishment coincided with the debate about
the proper role of the Attorney-General, the JCA was not established because the Attorney-General at the time had "expressed the view that he saw his role as no longer being a defender of the judiciary" (Brief History, at 6). Rather, the impetus for the creation of the JCA was a fundamental concern to protect the important yet fragile principle of judicial independence (Brief History at 1, citing Justice David Angel "The Early Days of the Judicial Conference" Judicial Conference News, No 1, p. 2). However, as was pointed out by Justice Beech-Jones (at 16), "to an extent by reason of the history and practice the JCA fills the role that the Attorneys-General used to perform but no longer do"; and is therefore a factor justifying the existence of the JCA.

In his seminal paper "The Foundations of Judicial Independence in a Modern Democracy" JJA (1991) 1, pp. 3-45, Justice McGarvie helped to sow the seeds for the birth of JCA by raising "concerns that there were great challenges to judicial independence from the rising power of cabinet and the public service and from social changes". He also noted that "some of the safeguards of judicial independence in fact lacked real strength and that the institutional framework should be repaired and extended so that it gave effective protection to judicial independence" (Brief History, at 2).

In a later foundational paper, "The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence" JJA (1992) 1 at 236 at 243, Justice McGarvie argued that the judicial branch of government needed to organise and assert itself "in the manner necessary for the preservation of judicial independence in the modern democratic world"; and to display "a commitment to doing what is necessary to meet the challenges to judicial independence" (see Brief History, at 2-3). To that end, His Honour proposed (at 239) the creation of a judicial association—an Australian Judicial Conference, sharing some of the features of the Canadian Judges Conference (now Canadian Superior Court Judges Association); see Brief History, at 3.

However, it is important not to overlook the fact that the need to meet these imperatives and challenges was not the only rationale behind the establishment of the JCA. It was anticipated that the JCA would also have "an educational role, directed towards the wider community and the legislative and executive branches [of government]" (Brief History, at 8). This encapsulated Sir Anthony Mason's view that "judges could reinforce public confidence in the administration of justice by explaining publicly their work and the issues they faced" (Brief History, at 7 citing Sir Anthony Mason "The State of the Judicature" (1994) 20 Monash University Law Review 1 at 11).

The Australian Stipendiary Magistrates Association ("ASMA") was formed in June 1978 and renamed the Association of Australian Magistrates ("AAM") in about 1994. The purpose of ASMA was to enable magistrates of the various States and Territories of Australia to speak with a national voice, and to address matters of importance to the Australian magistracy; and, where appropriate, to institute national projects relevant to the magistracy and its development.

Judicial associations endow the traditionally weakest branch of government with the ability to adequately sustain and protect its independence. As judiciaries in a modern democratic society generally have a hierarchical structure, there may be a lack of institutional unity—the judges may not be bound together institutionally as the judicial branch of government. Justice John Priestley has commented on the lack of institutional unity in the New Zealand judiciary (Justice Priestley, "Chipping Away at the Judicial Arm: The Harkness Henry Lecture" (2009) Waikato Law Review, vol. 17, 1 at 12). Judicial associations have the potential to create the institutional unity that is necessary to maintain a strong and independent judiciary. As an old proverb says, "unity is strength". We become stronger if we stay united.

The CMJA, JCA and AAM are prime examples of associations that bind judicial officers together institutionally as the judicial branch of government. The CMJA brings together judicial officers at all levels of the judiciary across the Commonwealth. The JCA is a national judicial organisation whose membership comprises both magistrates and judges from all tiers of the Australian judiciary. By having a Governing Council that represents
superior and intermediate courts as well as the lower courts, the JCA helps to integrate the Australian judiciary in a way that contributes to the institutional unity of the judicial branch of government. The composition of AAM’s Executive and its membership contributes to institutional unity at the level of the Australian magistracy.

However, there are further reasons why a modern democratic society needs judicial associations as a foundation of judicial independence.

Although there are others like Chief Justices and heads of jurisdiction—as well as the legal profession—that the judiciary can look to for the protection of its independence, the assistance provided by these protectors may be limited, depending on the circumstances.


The Chief Justice must be ready to speak for the judiciary of the nation, or of a State or Territory, on issues such as those that affect judicial independence and attacks on the judiciary.

As former Chief Justice Gleeson of the High Court of Australia acknowledged, “from time to time it will be necessary for Chief Justices to respond to criticism of judgments or judges when response is necessary and the Attorney General does not respond” (Justice Margaret McMurdo, “Should Judges Speak Out or Shut Up”, an address based in part on a paper delivered at the 5th JCA Colloquium, April 2000, p. 6 citing I. Henderson, “Gleeson Vows to Defend Judges” The Australian, 25 June 2001). This is reflected in clause 5.6.2 of the ATJA Guide to Judicial Conduct.

However, the role played by Chief Justices or heads of jurisdiction as protectors of the independence of the judiciary may be limited. Issues may arise that are not confined to a particular jurisdiction within a country but extend to the judiciary as whole. Issues of this type may require an institutional response through a national judicial association. Cases may arise where the head of jurisdiction is the subject of unwarranted criticism. In such cases it may be more appropriate for a judicial association to respond to the attack. Furthermore, there may be cases where as a result of consultation between the head of jurisdiction and the judicial association it is mutually agreed that in the circumstances of the case it would be more appropriate for the judicial association to make the response.

As was observed by the Hon. David Malcolm AC KCJ, “independence of the judiciary and the legal profession is recognised internationally as a core element of any civilised society”, and “the independence of the judiciary and the independence of the legal profession is for the protection of the people, and is the backbone of a free and democratic society” (“Independence of the Legal Profession and Judiciary”, Church Service, May 2005, pp. 3 and 4). As enunciated in the Latimer House Guidelines “an independent, organised legal profession is an essential component in the protection of the rule of law” (Guideline V111).

Thus, the judiciary and the legal profession have been enduring allies and the protector of each other’s independence and the rule of law. However, as pointed out by Justice Margaret McMurdo “the legal profession cannot be relied upon to routinely explain and defend the work of the judiciary and the courts; its hands are quite full enough promoting and defending its own position” (Justice Margaret McMurdo “Should Judges Speak Out”, a paper presented at the JCA Colloquium, Uluru, April 2003, p. 5).

The judiciary needs the support of the legal profession; but as the primary guardian and guarantor of judicial independence and the rule of law, the judicial branch of government is duty bound to organise and assert itself in a manner that protects its independence. The best way for the judiciary to organize and assert itself is by forming judicial associations and for members of the judiciary to join and support such associations.
The Role of Judicial Associations

It is obvious from the preceding discussion that the primary role of judicial associations is to strengthen and defend the independence of the judiciary and to preserve the rule of law.

By way of example, the primary objects of the JCA are:

In the public interest:

1. To ensure the maintenance of a strong and independent judiciary as the third arm of government in Australia and

2. To defend the judiciary and judicial officers against unwarranted attacks and to respond to such attacks

3. A main object of AAM is to also "ensure the maintenance of a strong and independent judiciary as the third arm of government in Australia".

Likewise, a primary aim of the CMJA is to "advance the administration of law and the rule of law by promoting the independence of the judiciary within several countries of the Commonwealth." Furthermore, the recent Brisbane Declaration on the Independence and Integrity of Judicial Officers of the Lower Courts states, amongst other things:

Consistent with their fundamental rights, all members of the judiciary shall be free to form and join associations or other organisations to:

a. ensure the maintenance of a strong and independent judiciary within a democratic society that adheres to the rule of law;

b. promote and encourage continuing legal, judicial and cross cultural study and learning by members of the judiciary;

c. promote and encourage the exchange of legal (or judicial) educational practical or professional information on best practice between members of the judiciary and other persons or bodies including wherever possible by attendance at relevant conferences within or without the jurisdiction for which appropriate funding should be made available for attendances by judicial officers from the lower courts;

d. promote a better understanding and appreciation of the proper role of the judiciary in the administration of justice and the importance of a strong and independent judiciary in protecting the fundamental human rights and ensuring good governance and to do likewise within the Executive and Legislative branches of government;

e. seek improvements in the administration of justice and the accessibility of the judicial system;

f. undertake supporting research that will further the achievement of these aims.

As the principal object of judicial associations is to promote, preserve or protect "judicial independence" it is essential to define "judicial independence" in order to determine what types of issues should properly concern a judicial association. This point was made by the Supreme and Federal Court Judges' Conference ("SFCJC") Steering Committee chaired by Justice Sheppard in 1992 in relation to the possible formation of the Australian Judicial Conference (Brief History, at 5).

The principle of judicial independence "focuses on the creation of an environment in which the judiciary can perform its judicial function as the third branch of government without being subject to any form of duress, pressure or influence from any persons or other institutions, in particular the two other branches of government" (John Lowndes, "Judicial Independence and Judicial Accountability at the Crossroads of the Australian Judiciary", citing E. Campbell and H.P. Lee, "The Australian Judiciary", p. 50; J. Debeljak "Judicial Independence: A Collection of Materials for the Judicial Conference of Australia, JCA Colloquium, Uluru, April 2001, p. 2).

The principle of judicial independence has a broad compass (J. Lowndes "Judicial
Independence and Judicial Accountability at the Coallface of the Australian Judiciary", p. 3)

...the principle of judicial independence connotes more than just the notion of impartiality; it requires that there exist an environment which ensures that the judiciary performs its "central, distinctive function [which is] independent and impartial adjudication" (Sir Anthony Mason "The Appointment and Removal of Judges" in H. Cunningham (ed.) Fragile Bastion: Judicial Independence in the Nineties and Beyond (1997) 1, 4), and is perceived to perform that important function (Campbell and Lee, p. 49). It primarily "denotes the underlying relationship between the judiciary and the two other branches of government which serves to ensure that the court will function and be perceived to function impartially (Mackie v Hickman [1989]) 2 SCR 796 per MacLachlan J at 826).

As was stated by Sir Anthony Mason, a further distinctive feature of judicial independence is that it is "a privilege of, and protection for, the people" (A. Mason, "The Independence of the Bench, the Independence of the Bar and the Bar’s Role in the Judicial System" (1993) 10 Australian Bar Review 1 at 3).

The promotion or protection of the independence of the judiciary is clearly an appropriate and pre-eminent object or aim for a judicial association to pursue. However, in pursuing that aim, associations need to keep in mind the broad nature of judicial independence and its status as a right of every citizen in a modern democracy. These two aspects define the types of issues that should concern a judicial association. Judicial independence issues must always be pursued in the public interest.

It must always be borne in mind that judicial associations are not—and should never be—"a judges’ trade union, advancing the financial interests of judicial officers" (Brief History, at 8) and other personal interests. This is also made clear in the "CMJA Procedures for Dealing with Judicial Independence Issues". If judicial associations were to be perceived to be mere judges’ trade unions, that would impugn their credibility (Brief History, p15).

Judicial associations exist for the purpose of maintaining a strong and independent judiciary that adheres to the rule of law; and, in pursuing that fundamental object, judicial associations need to "act in the overall interest of ensuring that the independence of the judiciary as an institution continues to be of worth and value to the public" (John Lowndes "Judicial Accountability as an Evolving and Fluid Concept (2018), 24(1) CJJ 15). As pointed out by former Chief Justice of the High Court of Australia, Robert French, "these objectives transcend any notion of a mere judges’ trade union" ("Seeing Visions and Dreaming Dreams" JCA Colloquium, Canberra, Oct 2016, p. 2).

It is legitimate for any judicial association concerned with the protection or promotion of judicial independence to respond on behalf of the judiciary whenever the independence of the judiciary or the rule of law is threatened.

The "Policies and Procedures in Regard to the JCA’s Role of Defending the Judiciary" identify the various ways in which the independence of the judiciary and the rule of law may be threatened and which may warrant a response from the JCA:

- The executive or legislative branches of government may propose an action that affects a court or the judiciary generally and the proposed action has the potential to "undermine a strong and independent judiciary";
- An attack may be launched against an individual judicial officer, or a particular court or the judiciary generally in such a manner as to threaten or compromise the independence of the judiciary or the rule of law. By way of example, " a judicial officer [may] be vilified or denigrated", " a judicial officer [may] be threatened with violence", " a call [may] be made for a judicial officer to be 'sacked' or removed from a particular geographical area or from hearing particular types of matters", "the role of the judiciary or a judicial officer [may] be inaccurately or improperly described eg to implement the will of the people as expressed in Parliament, or even to respond to a campaign conducted by a newspaper or other medium, leading to
the potential that the public's perception will be misled;

- "There [may] be calls for inappropriate reform eg that the judiciary be elected, or the judiciary generally [may] be denigrated because its members are an unelected elite": see for example the response of the media following the Brexit decision.

When an individual judicial officer or a court or the judiciary is attacked in any of the above ways it may be appropriate for a judicial association to respond to the attack (as is the policy of the JCA) by way of a "front-line defence" of the judicial office, court or the judiciary. The JCA has regularly responded to such attacks: see the JCA website under "Media Statements" at <www.jca.asn.au>.

As has been pointed out by Justice Beech Jones (at 12), the particular circumstances of the case may warrant a response not to "vindicate the reputation or even feelings of the individual judge by correcting the misapprehension", but because "some criticisms, considered individually or cumulatively, have the capacity to seriously undermine public confidence in the particular court, courts generally and ultimately the rule of law". Whilst the "right of citizens to comment and criticise judicial decisions" is well recognised (Beech Jones at 19), a response may well be called for when the criticism exceeds the permissible limits of freedom of speech by undermining the authority or independence of the judiciary. This is supported by Article 5 of The Commonwealth Principles on Freedom of Expression and the Role of the Media in Strengthening Democratic Processes and Good Governance which was launched before the CHOGM in April 2018:

The rule of law, including the independence of the judiciary, is essential in order to uphold the right to freedom of expression, other human rights and the democratic process. The judiciary should promote open justice and facilitate media access to the courts for the reporting of proceedings. The media have a responsibility not to undermine the authority or independence of the judiciary and to communicate judicial decisions to the public.

Justice Beech Jones (at 20) says this about the purpose and content of the JCA's responses to unwarranted attacks:

...[they] have been prepared on the basis that its ultimate aim is to promote the respect for the judiciary and the rule of law... overall it has sought to make its response conform with a number of common themes that meet its principal objective such as the need to explain the judicial process, the importance of judicial independence and the rule of law, the accountability of judges through the process of giving reasons and the system of appeal. The responses have also referred to the inability of individual judges to respond to personalised attacks as a reason why such attacks should not be made.

As is clear from the CMJAs front-line defence of the independence of the judiciary, it may also be appropriate for a judicial association to respond to disciplinary proceedings to suspend or remove a judicial officer for alleged misconduct or the arrest and detention or imprisonment of judicial officers in circumstances that indicate that the process may be unconstitutional, unlawful, unfair or otherwise improper such as to erode the independence of the judiciary. Furthermore, it may be appropriate for a judicial association to respond to a failure by governmental agencies to comply with court orders. A failure to fulfil court orders strikes at the heart of an independent judiciary which depends upon the executive to enforce its decisions. The CMJA has responded to such potential challenges to judicial independence; see the CMJA website under "Recent CMJA Activities" at <www.cmj.org>.

However, the role of judicial associations is not confined to a "front-line" defence of judicial independence and the rule of law.

Judicial associations can perform a legitimate role in commenting on, or making submissions concerning, proposed legislative and executive action in the interests of pre-emptively protecting judicial independence, the rule of law and the administration of justice in a democratic society.

The CMJA has established a set of guidelines for dealing with requests from member governments, through their Ministries of Justice
or equivalent, the Commonwealth Secretariat and Member Associations/Chief Justices (as well as individual judicial officers) to respond to consultations on constitutional or legislative reforms: see "The CMJA Procedures for Dealing with Judicial Independence Issues".

When there is a request for assistance in relation to constitutional or legislative reforms, a process is followed. This includes an assessment as to whether or not the proposed reforms "relate to the CMJA and whether or not the CMJA has responded to similar requests in the past on the same or similar issues". The process also includes consultation with the Executive Committee of the CMJA to ascertain whether there is any objection to the CMJA responding to the request and "whether or not any response should be made as a member of the Latimer House Working Group rather than the CMJA". If the request has been received from a government source, the local member of Council or Regional Vice President and local Member Association are also consulted as "to whether or not there are objections to a response from the CMJA". An inquiry is also undertaken to establish whether or not "any responses have already been made by the Member Association or legal or judicial services within the country and check what, if any, responses are being made by other international organisations/partner organisations".

After it is decided that a response should be given, a draft response is circulated to the Executive Committee for its input, and where possible to the Member Association or Chief Justice for their approval. Once approved the response is sent to "source of request with a copy to the Member Association /Chief Justice and Regional Vice President/Council Member for the country concerned as well as members of the Executive Committee". Thereafter, progress on the constitutional or legislative reforms is monitored.

The JCA has also developed a set of guidelines concerning the circumstances in which it would be appropriate for it to make comment or submissions concerning proposed legislative changes: see "Public Pronouncements about Proposed Legislation: Guidelines". These guidelines are designed to "inform the Governing Council or the Executive of the JCA in speaking on behalf of the judiciary".

As is noted in the guidelines:

Inevitably, within such a large body as the JCA, there will be some disparity of opinion upon issues which are the subject of, or related to, a political controversy. This is a further reason to be careful to avoid, if it is possible to do so whilst pursuing the objects of the JCA, participation in a discussion on matters of government policy. But it is a consideration which should not compromise the proper pursuit of the JCA's objects. It is by limiting its public statements on proposed legislation to where they are reasonably required in the pursuit of those objects, that the Council or Executive will be able to speak authoritatively for the JCA and the Australian judiciary.

The guidelines acknowledge the necessity to "recognise that even where it is appropriate for the JCA to speak, ultimately it is for the Parliament to decide upon the content of legislation, and to that end to resolve issues of policy".

With those matters in mind, the guidelines suggest that "in the main, the public statements of the JCA [in relation to proposed legislation] will be confined/directed to: (a) matters affecting the independence of the judiciary; (b) matters affecting the operation of courts; (c) the maintenance, promotion and improvement of the judicial system; and (d) matters likely to affect some aspect of the administration of justice". These guidelines are broadly in line with the "Guidelines for Communications and Relationships Between the Judicial Branch of Government and the Legislative Branches Adopted by the Council of Chief Justices of Australia and New Zealand on 23 April 2014" and the UK Judicial Executive Board's "Guidance to the Judiciary on Engagement with the Executive".

The JCA guidelines recognise that "the range of matters which may affect some aspect of the administration of justice may, on some views, be extensive". Accordingly, caution is to be exercised when "considering making a public statement on matters which affect the administration of justice". As a general rule, the JCA will make "public statements on
matters of that kind only if they bear directly on the central functions of the judiciary”.

The guidelines proceed to set out a number of considerations that are meant to guide the JCA in making such public statements:

- the fact that it is Parliament which ultimately has the responsibility of resolving issues of policy affecting the content of legislation;
- the subject matter of the proposed legislation, and the extent to which it involves political controversy;
- the desirability of the judiciary avoiding entering into political controversies, but accepting that on occasions it will be inevitable;
- the desirability of judicial officers sharing their experience so as to inform public debate and to improve the quality of legislation;
- whether the making of the public statement has been invited/solicited and, if so, the source of the request, and the uses which may be made of the public statement;
- the potential impact of the public statement on reasonable perceptions of judicial independence and impartiality, and to the desirability of avoiding a perception that judicial officers might not consider the law in question fairly and dispassionately;
- the desirability of avoiding so far as practicable a circumstance in which a reasonable apprehension of bias may arise in relation to the JCA’s members who will have to consider the law in question;
- in respect of a law which has effect on or in a certain jurisdiction, the views concerning the law expressed by the members of the judiciary in that jurisdiction, particularly views expressed of a head of jurisdiction, and attempt, so far as practicable, to avoid inconsistency with those views;
- the desirability of avoiding the expression of public and conflicting views by judicial officers; and
- the extent to which the members of the JCA may themselves hold conflicting views concerning the merit or otherwise of the law in question.

However, in making such public statements, any judicial association—as much as the judiciary itself—must operate within the framework of the Latimer House Principles and its theoretical underpinning, the doctrine of the separation of powers. Both require the three branches of government to mutually respect each other’s function in a democratic society. In making such public pronouncements a judicial association must be careful not to breach the doctrine of the separation of powers nor in any way appear to undermine the principle of parliamentary sovereignty.

In addition to pre-emptively defending the independence of the judiciary in the manner discussed, it is legitimate for judicial associations to promote, foster and develop “within the executive and legislative arms of government, and within the general community, an understanding and appreciation that a strong and independent judiciary is indispensable to the rule of law and to the continuation of a democratic society” and to bring about “a better understanding and appreciation of the benefits of the rule of law and of the role of the judiciary in the administration of justice” (see CMJA Brisbane Declaration on the Independence and Integrity of Judicial Officers of the Lower Courts; JCA Constitution; and AAM Constitution). This is an important educational role which is designed to strengthen the independence of the judiciary as the third branch of government.

As Justice Margaret McMurdo has pointed out (“Should Judges Speak Out” at 5):

"Most of us now accept that it is for the judiciary to foster public confidence in the courts by ensuring the public understand the role of judges to administer justice according to law. This is necessary to maintain public confidence, understanding and support for the courts."

Later, Her Honour acknowledges (at 10) the desirability of “institutional communication to explain the workings of judges and the courts”. Indeed, such institutional communication is an absolute necessity as the judiciary is under an
ethical obligation to engage in civic education (S. Bookman, "Judges and Community Engagement: An Institutional Program" (2016) 26 JJA 3 at 5). There is no better vehicle for institutional communication of this type than judicial associations.

As pointed out by Lowndes, the judiciary has indeed a "societal obligation to engage the community in the manner suggested by Bookman because as an important social institution the judiciary needs to impart information to the public concerning its role, functions and activities in order to sustain its legitimacy—which is derived from the community it serves—and to maintain public confidence in it as a branch of government" (J. Lowndes, "Judicial Accountability as an Evolving and Fluid Concept" at 22, citing Bookman at 6). Judicial associations provide a means by which the judiciary as an institution can meet this fundamental obligation.

Finally, but not least, a judicial association must be concerned with providing "training and continuing professional development for the judiciary"—which is "essential to ensuring high ethical standards and competent judges" (Horizon Institute, "Judges Associations", p. 3; Principle 9, United Nations Basic Principles on the Independence of the Judiciary). Unethical and incompetent judicial officers are the arch enemies of judicial independence and impartiality. Continuing judicial education strengthens the independence of the judiciary and the rule of law.

The Functioning of Judicial Associations

To be effective, a judicial association needs to be a well-organised, well-oiled and finely tuned machine.

It is essential that a judicial association have in place appropriate policies and procedures for responding to threats to the independence of the judiciary and the rule of law, so as to ensure a principled and consistent approach to the defence of judicial officers, a particular court or the judiciary generally against unjustified attacks. To that end, both the JCA and the CMJA have developed such policies and procedures.

In conducting a "front-line defence" of the judiciary, judicial associations need to possess the following characteristics:

- the ability to become aware of threats or risks to the independence of the judiciary and/or rule of law—otherwise a judicial association cannot begin to fulfil its role as defender of the judiciary;
- a process which enables an assessment to be made as to whether it is appropriate to respond to the threat or risk and procedures for determining the response (if any) to be made; and
- the ability to make a swift and effective response.

These characteristics are shared by the CMJA and the JCA.

As referred to in the "CMJA Procedures for Dealing with Judicial Independence Issues," threats or risks are brought to the attention of CMJA through a number of sources: member associations, Commonwealth Chief Justices, individual judicial officers, notifications from other Commonwealth organisations or a partner organisation such as the CLA or CLEA and through media reports identified by the CMJA Secretary General. As mentioned in the "Policies and Procedures in Regard to the JCA's Role of Defending the Judiciary," attacks are brought to the attention of the JCA through the Secretariat who regularly monitors media reports or through a member of the Governing Council or Executive Committee of the JCA or a JCA member.

Both the CMJA and the JCA have a structured approach to responding to threats or risks to judicial independence which is characterised by a well-developed set of procedures.

The CMJA's approach is comprehensive, no doubt due to the fact that the CMJA is an international organisation with a diverse and dispersed membership consisting of both individual members and member associations.

A distinctive feature of the process is that the CMJA only responds to issues of judicial independence at the request of a member association /Chief Justice or an individual judicial officer.
Upon receiving a request of the first kind, the CMJA assesses the nature and urgency of the threat and conducts an inquiry to establish "the geo-political status of the country concerned (including any past example of threats against the judiciary or the administration of justice)" and whether "any disciplinary measures have been taken in accordance with constitutional or legislative requirements" as well as the reactions of other national bodies and other organisations involved in the area of the rule of law, good governance, and human rights and any information received by other international organisations or the Commonwealth Secretariat on the issue and how these organisations might be responding to the issue. The following process is then followed:

a. The CMJA Secretary General engages in the consultative process that is undertaken in relation to requests for assistance in relation to constitutional or legislative reforms as well as making the relevant inquiries: see above.

b. The Secretary General, in consultation with Executive Committee, takes one of the following three approaches depending on the urgency and seriousness of the issue: (i) contacts "the Commonwealth Secretary General and/or members of the Ministerial Action Group, expressing CMJA's concerns and urging them to resolve the issue according to Commonwealth fundamental values"; (ii) contacts other international organisations working in the area of judicial independence such as IBAHRi, ICJ or CLA who "might more easily produce a press statement or further investigate the matter"; (iii) provides the member association or Chief Justice with all the information they may need in support of their defence of judicial independence and the rule of law. The Secretary General would only approach the Minister responsible for the judiciary in exceptional circumstances.

c. At all times, the Secretary General, assesses "the risk of any approach on the members of the judiciary within the country concerned".

d. The Secretary General then drafts a response citing relevant international documents (including the Latimer House Principles) which is circulated to the Executive Committee and the member association/Chief Justice for final input prior to being sent to the relevant recipients referred to in paragraph (b) above.

e. The Secretary General then continues to monitor the situation within the country concerned, keeping the Executive Committee, Council and membership informed of any developments, as well as informing the Commonwealth Secretariat relevant divisions of "any developments that might affect the way they deal with the issue".

Any response sent in accordance with paragraph (d) above is posted to the CMJA website.

If the request emanates from an individual judicial officer and the issue pertains to his/her personal position the Secretary General recommends that the judicial officer "take up the issue with the national association and/or the International Commission of Jurists Centre for the Independence of Judges and Lawyers who might be able to assist". However, if the request relates to the rule of law, the independence of the judiciary or the administration of justice the process referred to in paragraph (a) above is followed. The Secretary General may consult with the President and the Executive Vice President as well as the relevant members of the Council as to whether or not the matter might be considered as affecting the independence of the judiciary, rule of law, or the administration of justice. If so, the Secretary General assesses the nature and urgency of the threat and conducts the other inquiries that are undertaken when a request for assistance is received from a member association or the Chief Justice, and proceeds in accordance with the process outlined in paragraphs (b) and (c) above.

The CMJA also has similar processes for responding to threats to judicial independence communicated to the association from other partner organisations such as ComSec or the CLA or other organisations such as IBAHRi and the ICJ. The CMJA also has a similar process for responding to threats to
judicial independence which are brought to the attention of the association through the Secretary General’s monitoring of press and media reports.

The JCA’s process for responding to attacks against the judiciary is not as detailed owing to the fact that the JCA is a national, rather than an international, association and does not have to operate within a framework like the Commonwealth of Nations. The JCA’s process for responding to attacks against the judiciary which is set out in its “Policies and Procedures” may be summarised as follows:

- any response is “made by, or in the name of, the President”;
- if the President is unavailable or it is inappropriate for the President to respond, the Vice President, Treasurer or a member of the Executive Committee in order of availability responds;
- the process of responding is co-ordinated through the Secretariat;
- the President makes “every effort to contact the judicial officer/s concerned and the relevant head of jurisdiction, and seek their views as to whether a response should be made and in what terms”;
- if those persons cannot be contacted, usually no response is made;
- if either person requests that the JCA not respond, usually no response is made;
- “given that a response is only potentially effective if it is made very swiftly, the President is not obliged to seek the views or approval of the Executive Committee, but in some circumstances the President may decide to do so”.

The form of response made by the JCA is governed by the nature of the attack or criticism and may consist of:

- a media release sent to media outlets, “presidents and media persons at the Law Council of Australia, bar associations and law societies”;
- a letter to “the editor of the relevant newspaper”;
- “an opinion piece article” sent to “the relevant newspaper or journal”;
- a letter to “the editor of the relevant media outlet expressing concern and seeking a retraction or correction”;
- a letter to “the person/s who made the attack seeking a retraction or correction”;
- “a complaint to the Australian Press Council”;
- if the attack is “sustained and personalised”, a letter to the Attorney-General requesting him/her to “place in the public domain the reasons for the judicial officer’s decision and confirm that he/she acted in accordance with law”;
- if the attack is made in Parliament, a letter to “the Attorney-General of the relevant jurisdiction, seeking his/her support in defending the judicial officer”.

The President of the JCA decides the form that the response is to take, involving, if necessary, “the Secretariat in the logistics of making the response”.

The JCA policies and procedures recognise the imperative for a swift response—otherwise the effectiveness of the response "is essentially dissipated". Accordingly, once the President becomes aware of the attack, he/she contacts "the judicial officer/s concerned" and "the relevant head of jurisdiction". The President also advises the Secretariat (if he is not already aware of the attack) that "a response is to be made and to be prepared to assist". The President then prepares the appropriate response and arranges for the response to be distributed or forwarded, usually by the Secretariat.

As a general rule, all members of the JCA are advised of the response, including its contents, either by email or by inclusion in the weekly JCA News & Media, and the response is posted on the JCA’s website.

Moving Forward Together

Judicial associations enable the judiciary to “become stronger together” and to assert itself as an equal branch of government. But what about the future? How does the judiciary move forward as a separate, but equal branch of government?
Judicial associations are one of the foundations of judicial independence. They can give the judicial branch of government an institutional unity that it otherwise lacks—even in the most integrated court systems around the Commonwealth.

The structure and membership of judicial associations is critical to, and dictates, the degree of institutional unity engendered by a judicial association. The greater the institutional unity (or judicial solidarity) that a judicial association creates, the more likely it is to be effective. The reason for that is simple and straightforward. A judicial association whose membership only comprises members from one tier of the judiciary is bound to be less effective than an association whose membership extends to other or all tiers of the judiciary. The most effective judicial associations are those which represent all tiers of the judiciary such as the CMJA and the JCA.

Such associations are more conducive to creating the institutional unity that is needed to enable the judiciary to stand firmer against executive and legislative action that challenges the independence of the judiciary and the rule of law (as suggested by Dr. Brewer, the Secretary General of CMJA). Again, as suggested by Dr. Brewer, associations like the CMJA and the JCA avoid the "divide and rule" situations—pitting the higher levels of the judiciary against the lower levels—that some Commonwealth nations have faced. Is this not a matter of "united we stand, divided we fall"?

Looking to the future, judiciaries around the Commonwealth are encouraged to the extent they have not already done so to form judicial associations. Ideally, the membership of those associations should include both magistrates and judges (from all tiers of the judiciary) so as to ensure a sufficient level of institutional unity to enable them to operate effectively within their jurisdictions. In that regard, nascent judicial associations have some excellent models to look to—such as the CMJA and the JCA.

The CMJA is a network of not only individual judicial officers, but also of member associations. As part of becoming stronger and moving forward together the CMJA needs to have strong member associations in all the regions of the Commonwealth: the Caribbean, East, Central and Southern Africa, Indian Ocean, Atlantic & Mediterranean, Pacific and West Africa. The strengthening of the network will assist the CMJA in strengthening and defending the independence of the judiciary around the Commonwealth.

The opportunity that the CMJA affords for "networking" brings with it other benefits such as "opportunities to promote professional development through for example judicial study exchanges and conferences" and "guidance on the establishment and role of judges’ associations" (Horizon Institute, "Judges Associations", p. 5).

Finally, but not least, such networking enables judicial associations around the Commonwealth to learn from each other as to the most effective ways to defend and strengthen the independence of the judiciary and preserve the rule of law in an ever-changing world that presents new challenges.

As observed by Woodhouse, "a key characteristic of the concept of judicial independence is its fluidity, which enables it to adapt to some degree to political, social and practical requirements"; and given "the elusive nature of judicial independence, it is also difficult to determine what developments might put it under pressure or undermine public confidence in the judiciary" (at 164).

The judicial branch of government must become stronger together—and move forward together—to meet the inevitable challenges ahead. As advocated by the Canadian Judges Conference (now the Canadian Superior Court Judges Association), the judiciary must be "constantly vigilant and committed to assuring the preservation of a strong and independent judiciary" (Brief History, at 3). That role is best served by well organised judicial associations in all Commonwealth countries that are truly representative of the judiciary as a whole and able to speak and act on behalf of the judiciary as an institution when it comes under attack. That is not to overlook the indispensable role played by the CMJA in bringing together judicial associations around the Commonwealth as a key strategy in preserving a strong and independent judiciary that adheres to the rule of law from one end of the Commonwealth to the other.