

# COURT SERVICES VICTORIA AND THE NEW POLITICS OF JUDICIAL INDEPENDENCE: A CRITICAL ANALYSIS OF THE COURT SERVICES VICTORIA ACT 2014 (VIC)

TIN BUNJEVAC\*

*This article critically analyses the landmark reform of the Victorian court system from a comparative international perspective. It is argued that the institutional design of Court Services Victoria ('CSV') was largely driven by a desire to protect judicial independence from the executive government and partly also to enhance the institutional capacity of the judiciary to effectively respond to the emerging social, political and legal challenges. Despite the establishment of CSV, the legislation preserves certain legacy administrative arrangements that impeded court administration in the past, such as the internal governance arrangements in the courts and the absence of clearly defined lines of administrative responsibility. The article also argues that the legislation confers too narrow a function on CSV that focuses on the provision of basic technical and administrative support to the courts. The proposed alternative would be for CSV to assume a much broader developmental mandate in the court system in order to improve the quality of the administration of justice. The article also argues that greater 'corporatisation' of the judiciary will be necessary in order to protect its hard-fought independence and visibility in the political arena. The article concludes that greater judicial independence requires more, rather than less, political astuteness and engagement by the judiciary with the other branches of government and the public.*

## I INTRODUCTION

On 11 February 2014, the *Court Services Victoria Act 2014* (Vic) ('*CSV Act*') received royal assent and commenced operation on 1 July 2014. The *CSV Act* established an independent public sector entity called Court Services Victoria ('CSV') with a statutory responsibility to 'support judicial independence in the administration of justice in Victoria'.<sup>1</sup> According to s 4 of the *CSV Act*, the new entity is designed to provide the courts with the 'administrative services and facilities' that were previously provided and managed by the executive arm of government.

\* The author is a lecturer at Victoria Law School. He is also a member of the Victorian Bar and the International Association for Court Administration. The author would like to thank Professor Kathy Laster, Director of the Sir Zelman Cowen Centre at Victoria University and Professor Tania Sourdin from Monash University for their comments in relation to an earlier version of this article.

<sup>1</sup> *Court Services Victoria Act 2014* (Vic) s 4.

CSV is governed by the Courts Council, which comprises the chief judicial officers of the Victorian courts and the Victorian Civil and Administrative Tribunal ('VCAT'), and up to two non-judicial members with relevant expertise in finance, administration or management.<sup>2</sup> The Courts Council is presided over by the Chief Justice, who retains the power of veto over any decisions of the Council that are deemed to be 'incompatible with ... the institutional integrity of a jurisdiction' or 'the capacity of the Supreme Court to function as the Supreme Court of the State'.<sup>3</sup> The Courts Council has broadly-defined powers to 'direct the strategy, governance and risk management' of CSV, and to appoint the Chief Executive Officers ('CEOs') of CSV and the individual courts.<sup>4</sup> In turn, the CEO of CSV is tasked with the 'appointment and management' of court staff,<sup>5</sup> and 'direction' of the individual court CEOs, who are also subject to directions by the Chief Judges of their courts.<sup>6</sup>

The need to protect judicial independence strongly permeates through the Act and appears to have been the driving force behind the Victorian reforms.<sup>7</sup> In practice, this means that the individual courts will no longer have a direct institutional connection with the executive government, although CSV itself (and, by extension, the courts) will receive funding in accordance with an expenditure review procedure that must ultimately be approved, 'with or without modification,' by the Attorney-General.<sup>8</sup>

The primary objective of this article is to offer an introductory analysis of the Victorian court system reform, which has been described as 'one of the most significant developments in Victoria's legal history'.<sup>9</sup> It will be argued that the institutional design of CSV was largely driven by a desire to protect judicial independence from the executive government and partly also to enhance the institutional capacity of the courts to effectively respond to emerging social, technological and legal challenges.

Despite the establishment of the new entity, however, the Victorian legislation does not seek to alter the 'legacy' governance arrangements in the individual courts, which may arguably be regarded as an oversight. This was purportedly done out of a desire to retain a strong emphasis on separate court administration

2 Ibid s 14.

3 Ibid ss 12(3), 16(1).

4 Ibid s 11(a)–(b); see also ss 9, 25(2). The Courts Council and the CEO are empowered to do 'all things necessary or convenient to be done' for the performance of their statutory functions.

5 Ibid s 25(1)(b).

6 Ibid s 33(2).

7 See Attorney-General Robert Clark, 'Speech at the Launch of Court Services Victoria' (1 July 2014) <<http://www.robertclark.com.au/speeches/other-speeches/speech-at-the-launch-of-court-services-victoria/>>.

8 See *Court Services Victoria Act 2014* (Vic) pt 5, especially s 41(4).

9 Marilyn Warren, 'A Better Way to Manage the Courts', *The Age* (online), 4 November 2013 <<http://www.theage.com.au/comment/the-age-editorial/a-better-way-to-manage-the-courts-20131103-2wup8.html#ixzz2sPsWdcmp>>.

in each jurisdiction,<sup>10</sup> but could ultimately impede the development of greater administrative capacity in the individual courts. At the same time, it will be argued that the declared emphasis on autonomous administration in each jurisdiction is an important distinguishing feature of the Victorian model and one that suggests that the main focus of the reform and future organisational development will be the courts themselves. As a result, this article argues that the primary focus of CSV should be to assist the courts in each jurisdiction to develop their own internal organisational competencies as fully integrated and autonomous units, rather than be involved in the day-to-day planning and resource allocation processes across multiple jurisdictions and court tiers. In other words, it is argued that CSV's 'main mission' should be developmental and technical, rather than operational. To achieve these aims in practice, it is argued that CSV's overall approach to its relationship with the individual court tiers should be inspired by the so-called northern European judicial councils, which have assumed an impressive array of supporting functions in court administration, while also assisting the courts to develop their own internal administrative capacity using the system of integrated management. Ultimately, it is argued that the potential combination of fully integrated management in the courts, together with the developmental and technical support offered by CSV is — in principle — a most promising feature of the Victorian model. Nevertheless, it will be necessary to consider whether the existing legislative provisions in the *CSV Act* and — especially — the legacy administrative arrangements in the courts themselves, might in practice impede the effectiveness of the reform. Victorian judges have had limited experience in managing such large organisations on their own and there may be a natural inclination to rely on a 'central' administration service, instead of seeking to develop and better integrate the internal managerial and operational competences within the courts themselves.

Part II of this article offers a historical and contextual analysis of the developments that led to the introduction of the *CSV Act* in Victoria, against the background of similar developments in other jurisdictions, such as the Australian federal courts and South Australia.

Part III highlights the organisational legacy of the executive model of court governance and its potential impact on CSV. The analysis of the *CSV Act* suggests that certain distinctive features of the previous model may have been replicated in the new structure, although the actual relationships between CSV and the courts appear to be developing in a different, and potentially more effective, direction in practice.

Part IV discusses the internal working arrangements in the courts. It points to the continuing administrative divisions and the absence of clearly defined lines of responsibility that have been inherited from the executive model. It is argued that

10 Supreme Court of Victoria, Submission to the Productivity Commission, *Access to Justice Arrangements*, June 2014, 12 [69]–[72]. See also Clark, above n 7. According to the Attorney-General, '[e]ach court remains as a separate entity and its governing council, internal arrangements and rule-making responsibilities remain unchanged'.

further reforms may be required to better define and integrate the administrative powers of court executives and judicial administrators in the courts themselves.

Part V describes the key features of the northern European judicial councils, which have assumed an important developmental function not only in court administration, but also in promoting the ‘quality of the administration of justice’ in a broader sense. It is argued that CSV’s future approach to such issues should be guided by the northern European experiences.

Part VI reflects on the broader political and institutional ramifications of the Victorian court system reform. It is argued that greater judicial independence requires more, rather than less, political astuteness and engagement by the judiciary with the other branches of government and the public. Greater public accountability and institutional ‘corporatisation’ of the judiciary may be necessary in order to protect its hard-fought independence — and visibility — in the crowded political arena.

## II EARLY HISTORY OF COURT GOVERNANCE REFORMS: THE FEDERAL COURTS AND SOUTH AUSTRALIA

In this part of the article it is argued that the early court governance reforms of the 1980s and 1990s demonstrated that the judiciary was more than capable of managing the courts, when given the opportunity to do so.<sup>11</sup> The experience of South Australia highlighted the benefits of having a judicial umbrella organisation to protect the individual courts from executive interference, while the federal courts’ system of integrated management demonstrated that the courts were not only capable of producing high-quality judgments, but that they could also be innovative, efficient and well managed. The following analysis demonstrates that the early reforms were groundbreaking in many respects and that they served as an inspiration for reformers both in Victoria and overseas.<sup>12</sup>

### A *Australian Federal Courts*

According to Sallmann and Smith, the movement towards greater judicial self-governance in Australia started in 1979, when the High Court of Australia achieved full operational independence from the executive government.<sup>13</sup> This was a significant milestone, because the Commonwealth Parliament conferred on the High Court judges full administrative control and responsibility over

11 Peter A Sallmann and Tim Smith, ‘Constitutionalism and Managerial Effectiveness: Revisiting Australian Courts’ Governance’ in *Australian Courts: Serving Democracy and Its Publics* (Australasian Institute of Judicial Administration, 2013) 265, 265–7.

12 See, eg, Working Group on a Courts Commission, ‘Third Report: Towards the Court Service’ (Government of Ireland, 1996) 10–11 (‘Denham Group’). The report makes it clear that the structure of the Irish Courts Service was largely inspired by the South Australian Judicial Council.

13 Sallmann and Smith, above n 11, 267.

the court's staff, finances and operations.<sup>14</sup> As a result, the Court was, for the first time, fully independent and able to make a 'wide variety of administrative decisions on an independent collegial basis'.<sup>15</sup>

In 1989, the Commonwealth Parliament introduced similar changes to the governance arrangements in the federal courts. However, in sharp contrast to the collegiate judicial arrangements in the High Court, the legislation conferred all of the administrative powers and responsibilities on the Chief Justices alone.<sup>16</sup> According to Church and Sallmann, the key motivation for placing the sole administrative authority in the Chief Judges of the larger federal courts was that responsibility and authority would be vested in specific individuals, which meant that responses to problems could be 'swift and consistent'.<sup>17</sup>

Despite occasional criticism that the Chief Justice's administrative powers could infringe upon individual adjudicative independence of other judges,<sup>18</sup> the federal courts' administrative model has proved to be highly effective in practice. Notably, the Chief Justices' powers have been further expanded over time to also include full responsibility for the administration of the intra-curial arrangements in the distribution and execution of the judicial business of those courts.<sup>19</sup> This point is best illustrated by s 15 of the *Federal Court of Australia Act 1976* (Cth), which gives the Chief Justice the responsibility to ensure the 'effective, orderly and expeditious' discharge of the business of the court, together with the corresponding powers to assign cases and caseloads to particular judges, or even to temporarily restrict judges to non-sitting duties.

Proponents of the federal courts' integrated management model argue that the integration of the administrative, financial, operational and judicial responsibilities under the courts' own umbrella has allowed them to develop business-like, strategic planning and judicial administrative capabilities,<sup>20</sup> while at the same time bringing judges into an 'appropriate working relationship with professional administrators'.<sup>21</sup> This is an important point that ought to be highlighted, because the federal courts (including the Family Court) have made some outstanding achievements in areas as diverse as strategic planning, judicial

14 Ibid. The authors note that the Court still ultimately depends on Parliament for its annual budget: at 268.

15 Ibid 267. See also *High Court of Australia Act 1979* (Cth) s 17.

16 See *Federal Court of Australia Act 1976* (Cth) s 18A. Notably, however, the power is also 'subject ... to such consultation with Judges as is appropriate and practicable': s 15(1AA)(a). In addition, the Chief Judicial Officers are assisted by Chief Executive Officers and Registrars, who operate under their direction.

17 Thomas W Church and Peter A Sallmann, *Governing Australia's Courts* (Australasian Institute of Judicial Administration, 1991) 68.

18 Lou Hill, *Constitutional and Managerial Principles of Judicial Court Governance: Implementation in the State of Victoria* (LLM Thesis, The University of Melbourne, 1995) 94–6.

19 *Federal Court Act 1976* (Cth) s 15.

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

21 Michael Black, 'The Federal Court of Australia: The First 30 Years — A Survey on the Occasion of Two Anniversaries' (2007) 31 *Melbourne University Law Review* 1017, 1047. See also Soden, above n 20.

innovation, benchmarking and productivity for the judiciary,<sup>22</sup> case management reform and even the development of international outreach projects for overseas judiciaries.<sup>23</sup>

For example, under the leadership of Chief Justice Michael Black, the Federal Court was the first court in Australia to establish the individual docket system, which revolutionised the judicial approach to case management in Australia.<sup>24</sup> Justice Anthony North described the operation of the system and pointed to a sense of greater judicial involvement and responsibility for the operation of the Court as a whole.<sup>25</sup> Notably, he also highlighted the significant expansion of the administrative and case management functions performed by the judges' chambers, where judges' associates and court staff had assumed a central role in ensuring the efficient disposition of cases in individual judges' dockets.<sup>26</sup> Thus, it can be said that the very conception of the judges' 'chambers,' which had traditionally consisted of a single desk and a library, assumed an expanded meaning in the Federal Court, because many judges were managing an 'office' staffed by a small team of legal and registry officers. This example illustrates the importance of the integration of the judicial and administrative processes in the courts, which led to the development of deeper patterns of work delegation as well as other procedural innovations.<sup>27</sup>

Critics of the federal courts model point out that the federal courts' governance arrangements may be unsuitable for an entire state court 'system,' because each federal court operates within a single tier of the court system's hierarchy.<sup>28</sup> In addition, the federal courts are to a certain extent still vulnerable to direct executive interference, due to the fact that they must each directly negotiate their budget with the executive government. Occasional budgetary overruns may even create a perception that judges are poorly equipped to manage such

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

23 See Soden, above n 20, 4. See also Anthony North, 'My Court Car Is a Helicopter' (Speech delivered at the Canadian Judicial Council Conference: Inside the Administration of Justice: Toward a New Model of Court Administration, Victoria, British Columbia, 31 January 2007).

24 Caroline Sage, Ted Wright and Carolyn Morris, *Case Management Reform: A Study of the Federal Court's Individual Docket System* (Law and Justice Foundation of NSW, 2002). Other unique procedural innovations include the establishment of appellate benches with specialist panels, and procedures for sequential and concurrent expert evidence.

25 North, above n 23.

26 Ibid. Similarly, the author of this article is aware of initiatives in the former Federal Magistrates Court, where the supporting legal officers were encouraged to draft judgments and even created template paragraphs for complex judgments in particular types of cases, such as Child Support for example.

27 Black, above n 21, 1048; Soden above n 20, 17.

28 Stephen Skehill, 'Comment on Court Governance' (1994) 4 *Journal of Judicial Administration* 28, 29. The author states that the federal courts' jurisdictions do not reflect 'true complementarity'.

large organisations, which could diminish public confidence in the judiciary as a whole.<sup>29</sup>

Regardless of the perceived deficiencies, the key strengths of the federal courts model lie in its overall operational effectiveness and the development of a sense of institutional confidence in many areas of the courts' activity. It cannot be overstated that such attributes are a direct result of the judicial control over both the judicial and administrative operations of the courts and — just as importantly — the existence of clearly defined lines of administrative responsibility vested in the Chief Justices.<sup>30</sup>

## **B The South Australian Judicial Council**

The next phase of the Australian court governance reforms began with the establishment of the South Australian State Courts Administration Council and its central administrative arm, the Courts Administration Authority, in 1993. The South Australian institutional framework is especially significant in the Victorian context, because it established an independent system of judicial court governance across an entire court system comprising several tiers of the court hierarchy in that state.

Indeed, there are numerous parallels between the South Australian and Victorian models of court governance, which is not surprising given the historical connections between the two jurisdictions, and the fact that the South Australian model has been the subject of 'much favourable comment and attention' both in Australia and overseas.<sup>31</sup> First, the South Australian Judicial Council is an independent statutory entity, which is governed by the Chief Judges of the individual court tiers.<sup>32</sup> Secondly, the South Australian Chief Justice wields the power of veto over any decisions of the Judicial Council.<sup>33</sup> Thirdly, the Council's main responsibility is to provide 'the administrative facilities and services for participating courts'.<sup>34</sup> In practice, as in Victoria, that responsibility is delegated to a CEO of the council, who also has the power to 'control and manag[e]' the court staff.<sup>35</sup>

29 See Nicola Berkovic, 'Diana Bryant Calls for Federal Overseer', *The Australian* (online), 26 September 2014 <<http://www.theaustralian.com.au/business/legal-affairs/diana-bryant-backs-calls-for-federal-overseer/news-story/880b04bca65bd3ec22ed2e4bd26e8c19>>. The article states that the Chief Justice of the Family Court of Australia expressed support for an independent body to oversee the federal courts, following a report by KPMG which found that the federal courts were on track to have a budget deficit of \$75 million by 2017–18.

30 Black, above n 21. See also *Federal Court of Australia Act 1976* (Cth) s 18B. In the management of the administrative affairs of the court, the Chief Justice is assisted by the Registrar. Under s 18D, the Registrar has the power to do 'all things necessary or convenient to be done for the purpose of assisting the Chief Justice' and 'may act on behalf of the Chief Justice in relation to the administrative affairs of the Court.'

31 Sallmann and Smith, above n 11, 271. See also Denham Group, above n 12, 10.

32 *Courts Administration Act 1993* (SA) s 7.

33 *Ibid* s 9(3).

34 *Ibid* s 10. This duty is expressed in almost identical terms in the Victorian legislation.

35 *Ibid* s 17(2).

The most important feature of the South Australian Judicial Council is that the courts are effectively shielded from direct executive interference in their day-to-day operational management. Unlike the federal courts, the individual courts in South Australia do not have to negotiate their budgets with the Attorney-General's department, because they each receive their funding from the Judicial Council in the form of a one-line budget.<sup>36</sup> Nevertheless, as a recent review has suggested, the South Australian courts may still be vulnerable to a different type of competition for resources — from within the Judicial Council itself — partly because the Chief Justice has the power of veto over the Council's decisions.<sup>37</sup> Clearly, this is an issue that could also arise in the Victorian context which was duly noted during the parliamentary debates leading to the introduction of the *CSV Act*.<sup>38</sup> The key concern is that the Victorian Courts Council may similarly become gridlocked should an argument arise about the distribution of funding or other competing court priorities and the Chief Justice opts to utilise her power of veto.

Proponents of the South Australian model point out that the South Australian Judicial Council is in a stronger position than the federal courts to take a broader systemic view of court operations, because it is tasked with central oversight of the judicial and administrative processes across multiple court tiers and different levels of the courts hierarchy.<sup>39</sup> This is regarded as a significant advantage of the South Australian model, although critics have pointed out that the composition of the Council is somewhat static and 'inward-oriented,' with no external members being represented on the governing board.<sup>40</sup> The much broader composition of the Courts Council in Victoria, which includes up to two non-judicial experts, arguably represents a key area of departure from the South Australian model. This may well be regarded as an advantage, because it introduces an element of 'social accountability' and outside expertise into the judicial organisation.

### **C The Road to Reforms in Victoria**

Despite the successes of the earlier reforms instituted by the Commonwealth government and South Australia, the movement towards greater judicial self-governance in Victoria gained momentum much later.<sup>41</sup> In 2004, the Chief Judges of the Victorian courts issued a report that outlined their joint vision for the future

36 Ibid s 24. See Chief Justice Len King, 'A Judiciary-Based State Courts Administration — the South Australian Experience' (1993) 3 *Journal of Judicial Administration* 133, 139.

37 Des Semple et al, 'Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance' (Attorney-General's Department, 2008) 25, 48–51. See *Courts Administration Act 1993* (SA) s 9(3).

38 See Victoria, *Parliamentary Debates*, Legislative Council, 4 February 2014, 17 (Jenny Mikakos).

39 Sallmann and Smith, above n 11, 271. See also Denham Group, above n 12, 10; Carl Baar et al, 'Alternative Models of Court Administration' (Research Report, Canadian Judicial Council, September 2006) 27 ('*CJC Report*').

40 Laurie Glanfield, 'Governing the Courts — Issues of Governance Beyond Structure' (Paper presented at the 18th Australasian Institute of Judicial Administration Annual Conference, Darwin, 14–16 July 2000). See also Church and Sallmann, above n 17, 9.

41 For a useful chronology of earlier reform proposals in Victoria see Hill, above n 18, ch 2.



strategic directions of the Victorian court system.<sup>42</sup> They identified a series of newly emerging challenges that had a negative impact on judicial independence and court performance, such as the increasing political and budgetary pressures, unprecedented delays and backlogs, the growing litigiousness of society, greater complexity of the law, as well as stakeholders' demands that the courts deliver more justice in less time and for less money.<sup>43</sup> A closer analysis of the identified challenges suggests that the focus of the court governance debate in Victoria had shifted somewhat from the need to protect the courts from executive interference alone to the need to protect the judiciary from multiple threats to judicial independence, authority and relevance.

The Victorian Chief Judges were unanimous in their view that the key obstacle to addressing those challenges was the existing model of court administration.<sup>44</sup> Under the so-called 'executive' model of court administration in Victoria, there was a far-reaching organisational separation between the administrative and judicial functions in the courts. Judges operated in administrative isolation from the court administrators, because the court staff, infrastructure and operations were separately managed and funded by the executive arm of government.

One of the consequences of this bifurcated arrangement was that judges were lacking the appropriate level of managerial capacity and authority to strategically plan the operations of their courts.<sup>45</sup> Similarly, the civil servants who were in charge of court operations were also not in the best position to make effective decisions about competing court priorities, because they were answerable to an external bureaucracy that was physically removed from the courts and often had its own organisational demands and priorities.<sup>46</sup>

Unlike other large organisations, the Victorian courts did not even have a stable budget or sufficient discretion over already-allocated funding. According to former Supreme Court Justice Tim Smith, the courts constantly had to compete for funding with other entities from the Attorney-General's portfolio, such as police, gaming or racing.<sup>47</sup> As a consequence, the courts regularly found themselves in a situation where, '[a]t unpredictable intervals during the financial year, amounts [were] moved around within the budget, or sometimes even removed *from* the budget, by the aforementioned civil servants'.<sup>48</sup>

Following publication of the *Courts Strategic Directions Project*, a consensus developed, both in Victoria and overseas, that the executive model of court

42 Supreme Court of Victoria, *Courts Strategic Directions Project* (2004) 77–81.

43 *Ibid* 51–63.

44 *Ibid* 75.

45 John Alford, Royston Gustavson and Philip Williams, *The Governance of Australia's Courts: A Managerial Perspective* (Australian Institute of Judicial Administration, 2004) 86 ('*AIJA Study*').

46 Tim Smith, 'Court Governance and the Executive Model' (Paper presented at the Judicial Conference of Australia Colloquium, Canberra, 6–8 October 2006), 4.

47 *Ibid* 8–9, 15–16. See also Church and Sallmann, above n 17, 23. According to the authors, officers in the Attorney-General's department first ranked court-related proposals in relation to each other and then compared the court requirements relative to other areas of departmental responsibility, such as prosecution, legal aid and government legal services.

48 *AIJA Study*, above n 45, vii, 85.

administration represented an obstacle to the strategic long-term planning of court operations, and was also not optimal for judicial independence, efficiency and quality of justice.<sup>49</sup> An expert managerial study commissioned by the Australasian Institute for Judicial Administration ('AIJA') found the executive model to be fundamentally flawed, because it was characterised by an organisational misalignment between 'authority' and 'responsibility,' an arrangement that is considered sub-optimal in the management literature.<sup>50</sup> Professor Philip Williams et al pointed out that, while judges in Victoria had the responsibility to improve court performance and deliver more 'justice' each year, they had insufficient authority over their own staff and financial resources because most operational matters had been controlled by an external government bureaucracy.<sup>51</sup>

### III COURT SERVICES VICTORIA AND THE ORGANISATIONAL LEGACY OF THE EXECUTIVE MODEL

The authors of the AIJA Study ultimately expressed support for a model that would give greater administrative independence to the judiciary, which was largely inspired by the South Australian Judicial Council and a Canadian federal courts model.<sup>52</sup> The earlier discussion of the South Australian Judicial Council shows that the institutional design of CSV had been strongly influenced by the South Australian entity. However, a closer analysis of that jurisdiction also reveals that the South Australian Courts Administration Authority has in practice assumed a somewhat central function in the courts' financial and operational management. For example, the Authority itself is involved in the maintenance and support of registry operations, planning and allocation of staff and resources, and other internal court functions, although the individual courts retain some degree of internal administrative autonomy in their day-to-day operations.<sup>53</sup> The question arises, then, whether that level of administrative centrality could in practice impede the work of individual courts in a jurisdiction that is as large and diverse as Victoria? This is the context in which it is necessary to consider the organisational legacy of the executive model in Victoria against the Canadian federal courts model.

#### A *Canadian Federal Courts and the Executive Model*

In the Canadian federal jurisdictions, the central responsibility for court administration was also transferred from the executive government to an

49 Ibid, 85–6.

50 Ibid 86.

51 Ibid.

52 Ibid 89.

53 Hill, above n 18, 50. Hill points out that the South Australian Courts Administration Authority transfers staff and funding from one court to another. See also *Courts Administration Act 1993* (SA) ss 10(2)–(3). See also King, above n 36, 139.

independent statutory entity, which is governed and managed by a central Administrator.<sup>54</sup> In 2004, the Victorian Chief Judges expressed strong support for that arrangement, partly because the very existence of an independent entity had given the Administrator a ‘measure of independence’ from the executive government.<sup>55</sup> In addition, the Canadian legislation empowered the Chief Judges of the federal courts to issue binding operational ‘directions’ to the Administrator where that was deemed necessary by them.<sup>56</sup> This distinctive feature of the Canadian federal model has been replicated in s 33 of the *CSV Act* (in a modified form), which requires the court CEOs to follow any ‘directions’ issued by the Chief Judges, while also being subject to the direction of the CEO of CSV ‘in relation to all other matters.’<sup>57</sup>

This is an unusual provision, because its wording strongly suggests that a broad residual authority over court operations is now vested in the CEO of CSV, as well as the Chief Judges. That arrangement is strongly reminiscent of the earlier situation in the executive model, where the court CEOs had been responsible to the Chief Judges in relation to basic administrative tasks, while also remaining responsible to the Executive Director of Courts from the Department of Justice in relation to ‘broader business management reporting activities’ and ‘resource planning and allocation’.<sup>58</sup>

The equivalent Canadian provision was considered in the seminal study *Alternative Models of Court Administration* commissioned by the Canadian Judicial Council (‘CJC’) in 2006.<sup>59</sup> In sharp contrast to the views earlier expressed by the AIJA experts and Victorian Chief Judges, the CJC Report considered the Canadian federal courts model to be merely a *variant* of the executive model, despite the fact that the court administration was formally separated from the executive government and was also subject to the Chief Judges’ administrative directions.<sup>60</sup> The Canadian experts formed the view that the newly established statutory entity had merely taken over the responsibility for administering the courts from the executive government. In effect, one externally run court administration was replaced with another one, while judges in the individual courts continued to operate in accordance with their traditional judicial administrative arrangements that they had inherited from the executive model. In other words, judges continued to work in relative isolation from the essential business processes that were impacting their immediate working environment.

This is an important point that needs to be further expanded upon, particularly in light of s 25 of the *CSV Act*, which also confers on the CEO of CSV the

54 *Courts Administration Service Act*, SC 2002, c 8, s 7.

55 Supreme Court of Victoria, above n 42, 79–80.

56 Ibid 138; *Courts Administration Service Act*, SC 2002, c 8, s 9.

57 *Court Services Victoria Act 2014* (Vic) s 33(2).

58 *AIJA Study*, above n 45, 203. See also R E McGarvie, ‘Judicial Responsibility for the Operation of the Court System’ (1989) 63 *Australian Law Journal* 79, 92. The CEO was historically subject to directions of the Chief Justice, who was the only person entitled to give directions to the CEO.

59 *CJC Report*, above n 39.

60 Ibid 102–3.

administrative powers to appoint and *manage* court staff, in addition to his residual power to *direct* individual court CEOs.<sup>61</sup> This provision strongly suggests that the CEO of CSV has assumed a central role in the courts' operational management, which would place him in a position that is similar to that of the Chief Administrator in the Canadian federal courts.<sup>62</sup> However, the problem with the Canadian arrangement was that the Chief Judges were not adequately involved in the strategic planning processes affecting their courts, which made it difficult for them to determine whether a direction to the Administrator was needed in the first place.<sup>63</sup> Against that background, the authors of the Canadian report concluded that court performance largely depended on relationships of trust and goodwill between the central court Administrator and the judiciary, and their ability to foster an ongoing and detailed exchange of information on all aspects of court administration.<sup>64</sup> In their view, this was a key characteristic of the executive model and, as such, represented a 'fragile and unsatisfactory basis for court administration'.<sup>65</sup>

## B *CSV and Court Autonomy*

At this point it must be acknowledged that the perceived deficiencies of the Canadian model are not equally applicable in the Victorian context, because the Victorian Chief Judges are, after all, represented on the Courts Council, which is responsible for setting out the strategic policy for CSV and, ultimately, its CEO.<sup>66</sup> This is an important substantive difference between the Canadian Courts Administration Service and CSV, and one that should not be underestimated. Secondly, each court in Victoria has its own CEO, although these officers have been placed in an uncomfortable position because they are subject to directions by both the CEO of CSV and the Chief Judge.<sup>67</sup> The third substantive difference between the Canadian and Victorian situations is that the Courts Council and the CEO of CSV have been entrusted with remarkably broad statutory powers to do 'all things necessary or convenient to be done' in the exercise of their functions.<sup>68</sup> Therefore, it can be argued that the powers conferred by those provisions are sufficiently flexible to allow the CEOs of CSV and the individual courts to fine-tune their relationship and determine the 'correct' balance between the need for CSV to maintain a general oversight of the court system and the individual courts' need for greater operational autonomy.

61 *Court Services Victoria Act 2014* (Vic) s 25.

62 *CJC Report*, above n 39, 103.

63 *Ibid.*

64 *Ibid.*

65 *Ibid* 15.

66 *Court Services Victoria Act 2014* (Vic) s 11.

67 Victoria, *Parliamentary Debates*, Legislative Council, 4 February 2014, 17 (Jenny Mikakos). According to Ms Mikakos, '[a] further potential for conflict arises when Court Services Victoria appoints a court CEO nominated by the head of the jurisdiction. In this case the court CEO would be answerable to both the head of the jurisdiction and Court Services Victoria and, by extension, ultimately the chief justice.'

68 *Court Services Victoria Act 2014* (Vic) ss 9, 25.

The argument that the courts require far greater administrative autonomy than they had under the executive model is compelling, because the Courts Council and CSV have a limited capacity to be involved in the resource planning and operational management processes of the individual jurisdictions. First, the Courts Council is primarily a policy-making body that only meets a few times each year and as such is not likely to be in a position to consider the operational and resourcing issues as and when they arise. Similarly, CSV itself may have a limited capacity to respond to the different organisational priorities across six different court tiers and multiple levels of the courts' organisational hierarchy.<sup>69</sup> This point is best illustrated by the fact that the Magistrates' Court of Victoria alone is almost as large as the entire South Australian court system.<sup>70</sup> Thirdly, even if CSV and the Courts Council were in a position to respond to all of the competing courts' priorities, they would risk becoming entangled in the operational decision-making processes of the individual jurisdictions. This could possibly also result in a 'competition for resources' between the jurisdictions, an issue that was noted earlier in the South Australian context.<sup>71</sup>

### **C A Broader Developmental Function for CSV?**

In view of the issues identified above, it is difficult to escape the conclusion that CSV will not be able to manage court operations by replicating the 'legacy' governance arrangements and lines of accountability that were inherited from the executive model or adapted from the South Australian model. As the analysis of the Canadian federal courts model demonstrates, the re-emergence of an 'executive' system of court administration could potentially simply replace one ineffective and inefficient organisation with another. Not only would this outcome be undesirable from a systemic point of view; it would also be likely to stymie the internal organisational development in the individual jurisdictions and lead to

69 See *AJJA Study*, above n 45, 62–3, 66–7. The study noted the limits to any 'economies of scale' that may be achieved through the centralisation of court administration in Victoria. The authors suggested that joint administration may be more appropriate in South Australia, Tasmania and Western Australia than in the larger state jurisdictions such as Victoria and New South Wales.

70 Courts Administration Authority of South Australia, 'Annual Report' (2012–13), 77; the State Courts Administration Authority employed 803 persons in the reporting period. See also The Magistrates' Court of Victoria, 'Annual Report' (2012–13), 8. The Magistrates' Court employed 684 judges and staff in the reporting period.

71 Semple et al, above n 37, 49 [137].

further inefficiencies.<sup>72</sup> Instead, it is argued that CSV will be more likely to assume a broader developmental and supporting function in court administration. This approach would require CSV to offer general and technical support to the courts in order to assist them to develop their own internal administrative capacity. In other words, CSV will be more likely to focus on activities that are aimed at improving the courts' internal working *methods*, rather than directly involving itself in their operational management. This will be an important and challenging task, because the courts have also inherited 'legacy' issues from the executive model that could impede their internal reform processes. The central issue appears to be a lack of clearly-defined lines of formal administrative responsibility, as the analysis in the following part suggests.

#### IV THE COURTS AND THE LEGACY OF THE EXECUTIVE MODEL

The AIJA Study and CJC Report pointed to an inherent structural deficiency in the executive model that resulted in the development of two parallel governance structures inside the courts: judicial and administrative. That framework implied a formal separation of tasks and functions, whereby judges were responsible for the dispensation of justice, while court CEOs were responsible for the courts' operational management on behalf of the Department of Justice. Furthermore, the old structure also implied a formal division of the administrative responsibilities in relation to judges and court staff between the Councils of Judges and the Department of Justice, respectively.

The impact of the organisational arrangements within courts on the work of judges was considered in an international study that was commissioned by the European Commission for the Efficiency of Justice ('CEPEJ') in 2003.<sup>73</sup> The Commission's report included a detailed comparative overview of the court administration systems of several European countries, which was based on a substantial body of academic and empirical research undertaken by leading

72 See Judge Michael Forde, *What Model of Court Governance Would Optimize the Expeditious Delivery of Justice, Judicial Independence and the Accountability of Queensland's Court System?* (Master of Public Sector Management Thesis, Griffith University, 2000) 60–1. The academic thesis written by Queensland District Court Chief Judge Michael Forde compared the District Courts of South Australia, New South Wales and Queensland and concluded that the South Australian results 'do not reflect a more efficient system.' A similar situation has been reported in Ireland, where the Irish Courts Service was modelled on the South Australian Judicial Council. After a period of initial successes, extraordinary delays started to accumulate across all tiers of the Irish court hierarchy to a point where litigants had to wait up to three years to have simple summary cases heard by the courts. See Tin Bunjevca, 'Court Governance: The Challenge of Change' (2011) 20 *Journal of Judicial Administration* 201, 214 n 101. For associated problems in England and Wales, see Gar Yein Ng, 'Quality Management in the Justice System in England and Wales' in Philip M Langbroek (ed), *Quality Management in Courts and in the Judicial Organisations in 8 Council of Europe Member States: A Qualitative Inventory to Hypothesise Factors for Success or Failure* (European Commission for the Efficiency of Justice, 2010) 23, 41.

73 Wim Voermans and Pim Albers, 'Councils for the Judiciary in EU Countries' (Report, European Commission for the Efficiency of Justice, February 2003) <[https://www.coe.int/t/dghl/cooperation/cepej/textes/CouncilOfJusticeEurope\\_en.pdf](https://www.coe.int/t/dghl/cooperation/cepej/textes/CouncilOfJusticeEurope_en.pdf)>.

European court administration experts in the preceding 10 years.<sup>74</sup> The CEPEJ report is particularly significant in the Victorian context, because it endorses the system of ‘integrated management’ for individual courts, while also proposing the establishment of an independent judicial council,<sup>75</sup> based on the so-called ‘Northern European model’.

According to the authors of the report, Professor Wim Voermans and Dr Pim Albers, the court system reforms that were implemented in many northern European countries initially focused on the internal governance structures in courts in order to determine whether the existing judicial and administrative arrangements were still appropriate to ensure the most efficient and effective processing of cases.<sup>76</sup> The findings highlighted a series of organisational shortcomings in the executive model that not only impacted on the independence and administration of courts as organisations, but also — notably — on the quality of the *judicial* work of judges.

Voermans and Albers argue that the internal division of responsibilities in the executive model fundamentally impaired the administrative capacity of judges to respond to the challenges posed by the increasing caseloads and greater complexity of modern litigation.<sup>77</sup> The authors refer to a series of empirical studies they had conducted in the Dutch courts in the 1990s, which found that the *operational* and *interpersonal divide* between the judicial and non-judicial officers, in particular, had substantially reduced the possibilities for greater workflow integration and the creation of deeper patterns of work delegation between judges and professional court staff.<sup>78</sup> One may recall that these were the key areas of improvement that were identified in the Australian federal courts following the introduction of integrated management and the individual docket system.

Notably, Voermans and Albers also found that the judicial administrative arrangements in the executive model were deficient because they predominantly relied on the individual work ethic of each judge in the distribution and execution of their work, while any new procedural or operational initiatives had to be approved by all judges at the plenary meetings of the Councils of Judges.<sup>79</sup> This is an important point, because, in Victoria, the administrative responsibility of the Councils of Judges was entrenched in the legislation that established the Supreme Court in the 19<sup>th</sup> century, when only a handful of judges were appointed to the

74 Wim Voermans, ‘Councils for the Judiciary in Europe’ (2000) 8 *Tilburg Foreign Law Review* 121; Wim Voermans and Pim Albers, ‘Geïntegreerde Rechtbanken: Het Vervolg, Evaluatierapport Herziening Rechtelijke Organisatie (Onderdeel 2)’ [Integrated Courts: Evaluation Report Part Two] (Report, 1994).

75 Voermans and Albers, ‘Councils for the Judiciary in EU Countries’, above n 73, 112.

76 *Ibid* 100–1.

77 *Ibid* 100.

78 See Voermans and Albers, ‘Geïntegreerde Rechtbanken’, above n 74, 70–7, 90–2.

79 Voermans and Albers, ‘Councils for the Judiciary in EU Countries’, above n 73, 100–1. See also McGarvie, above n 58, 91.

bench.<sup>80</sup> According to Chief Justice Marilyn Warren, the original Supreme Court legislation had contemplated a Council of only four judges to be responsible for administering the Court in 1852. She contrasted this with the more recent situation, when there were almost 40 judicial officers on the Council of Judges in the Supreme Court alone.<sup>81</sup> The Chief Justice's comments suggest that the existing judicial administrative arrangements had become unwieldy, because, 'as courts and tribunals become larger the traditional structures of internal management and leadership become more cumbersome and provide a poor fit'.<sup>82</sup>

## A Weak Judicial Administrative Structures

Against this background, it is not surprising to learn from the European experts that there developed fairly weak and horizontal governance structures on the judicial side of court administration, which were primarily aimed at reaching a consensus among judges on all aspects of their work in the courts.<sup>83</sup> Voermans and Albers contrast these arrangements with the integrated management system that was introduced in the Dutch courts in the early 2000s and conclude that more centrally integrated and hierarchical administrative structures are essential in order to transition the courts from *organisations of professionals* to *professional organisations*.<sup>84</sup>

The term 'integrated management' in this context refers to a unified responsibility for the management of all administrative, financial as well as judicial aspects of court administration under a single executive court authority, which is broadly comparable to the system that operates in the Australian federal courts.<sup>85</sup> One of the key benefits of that system is that it allows the court management to assume full administrative responsibility for both judges and court staff, thus giving it

80 Civil Justice Committee, *Report to the Honourable the Attorney-General Concerning the Administration of Civil Justice in Victoria* (1984) vol 1, 341. The Committee also noted that the court staff had at first not been under the control of the executive government, even though some of them had been paid out of public funds.

81 Marilyn Warren, 'State of the Victorian Judicature' (Speech delivered at the Banco Court, Supreme Court of Victoria, 22 May 2007) 36 <<http://assets.justice.vic.gov.au/supreme/resources/4108bbb-3257-47a9-b3d6-03a3a7844908/inaugural+state+of+judicature+address+may+2007.pdf>>. See also *Supreme Court Act 1986* (Vic) s 28; *County Court Act 1958* (Vic) s 87; *Magistrates' Court Act 1989* (Vic) s 15.

82 Warren, 'State of the Victorian Judicature', above n 81, 35. See also Thomas W Church Jr, 'Administration of an Appellate Leviathan: Court Management in the Ninth Circuit Court of Appeals' in Arthur D Hellman (ed), *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* (Cornell University Press, 1990) 226, 229, quoting Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change* (1973) 1. The author refers to the findings of the Hruska Commission Report in California, which found that any court governing organ with more than 15 members "'inevitably" gives rise to "[s]erious problems of administration and of internal operation."

83 Voermans and Albers, 'Councils for the Judiciary in EU Countries', above n 73, 100–1.

84 Ibid 101, 108. See also Voermans and Albers, 'Geintegreerde Rechtbanken', above n 74, 70–2, 90–1.

85 See J Franssen, A Mein and S Verberk, 'Gerechtsbesturen, Integraal Management En MD-Beleid' [The Functioning of Court Administrations, Integral Management and Management Development Policy] (Study, B&A Groep, WODC, 2006) 1–6.



more internal possibilities to ‘drive the essential processes’ more efficiently and effectively ‘from intake to judgment’.<sup>86</sup>

The described arrangements should be contrasted with the situation that still exists in the Victorian courts, despite the establishment of CSV. Fundamentally, there appears to be a lack of clarity regarding the division of tasks, powers and responsibilities within the courts themselves, in addition to the aforementioned lack of clarity regarding the operational function of CSV in court administration. Apart from the provisions in the courts legislation that establish the Councils of Judges,<sup>87</sup> there appear to be very few provisions that add to or clarify the relationship between the internal judicial and administrative arrangements in the courts.<sup>88</sup> That, of course, does not mean that Victorian judges have not developed any administrative arrangements. On the contrary, as former Supreme Court Justice Richard McGarvie pointed out more than two decades ago, judges have developed fairly sophisticated non-statutory internal governance structures, such as the executive committees, divisional arrangements and administrative portfolios that were assigned to specific judges-in-charge.<sup>89</sup> Such arrangements were found to facilitate more efficient and functional delegation of work among judges because they were characterised by a degree of administrative autonomy and greater judicial and administrative specialisation.<sup>90</sup>

However, the internal administrative structures had been established within the executive model, where judges operated in almost complete administrative isolation from the rest of the court administration. As a result, there are practically no provisions in the courts legislation today that facilitate or clarify the functions of judges-in-charge, either in relation to other judges, or — especially — in relation to the court administration as a whole. Neither the Chief Judges nor the divisional Chief Judges (‘Principal Judges’) in the County or the Supreme Courts have any formal legislative authority or management tools to administer their courts and divisions.<sup>91</sup> With the possible exception of the Magistrates’ Courts’ management committees, which include the Court’s CEO, it is also unclear what formal or informal arrangements are available for the CEOs in the higher courts to coordinate their activities with the Councils of Judges, executive committees or divisions. This should be contrasted with the statutory arrangements in other

86 Voermans and Albers, ‘Councils for the Judiciary in EU Countries’, above n 73, 100–1.

87 *Supreme Court Act 1986* (Vic) s 28; *County Court Act 1958* (Vic) s 87; *Magistrates’ Court Act 1989* (Vic) s 15.

88 There are notable exceptions. For example, *Magistrates’ Court Act 1989* (Vic) ss 6, 13 confer on the Chief Magistrate the powers to assign duties to magistrates and to ensure their attendances in court. Similarly, there are provisions in each of the Courts Acts that make the chief judicial officers responsible for directing the professional development and training of other judicial officers: *Supreme Court Act 1986* (Vic) s 28A; *County Court Act 1958* (Vic) s 17AAA; *Magistrates’ Court Act 1989* (Vic) s 13B. In the Court of Appeal, ‘[t]he President is responsible for ensuring the orderly and expeditious exercise of the jurisdiction and powers of the Court of Appeal’: *Supreme Court Act 1986* (Vic) s 16. In addition, the chief judicial officers of the County and Supreme Courts have certain controlling competences in relation to the business of the associate judges and judicial registrars: *Supreme Court Act 1986* (Vic) ss 17E, 109A; *County Court Act 1958* (Vic) s 17ABA.

89 See generally McGarvie, above n 58.

90 *Ibid* 91–2.

91 Warren, ‘State of the Victorian Judicature’, above n 81, 36.

jurisdictions, such as the federal courts, Queensland or even VCAT, in which the responsibilities, powers and functions of the relevant officers are much more clearly defined.<sup>92</sup>

## **B Integrated Management in the Courts**

Despite the fundamental changes that have been brought about by the introduction of the *CSV Act*, the courts are somehow expected to transition to self-governance using the legacy administrative structures and management tools that they inherited from the executive model, when judges only had limited responsibility for court administration. Yet, the transfer of responsibility for court administration to the judiciary is far more complex than a simple handover to a new management team, because the *character* of court governance is fundamentally different to that in the executive model. In the new model, judges are responsible not only for their traditional administrative arrangements that focus on legal procedure; they also have assumed the additional responsibility to act as policy-makers for the administrative, financial and human resources operations of their courts. Undoubtedly, these issues have important ramifications for the structure of the internal governance system and co-ordination of the judicial and administrative processes not only within the individual courts, but also between the courts and CSV.

International experiences are also instructive in this regard. The CEPEJ report issued a set of recommendations to the government of the Czech Republic to consider introducing the system of integrated management in individual courts, based on a model that is broadly comparable to the Australian federal courts.<sup>93</sup> The report noted that this system would likely allow the individual courts to integrate their internal processes far more efficiently and effectively while also improving the working relationships between judges and court administrators, just as it did in the Australian federal courts.

The earlier discussion of the federal courts model similarly highlighted the importance of vesting formal administrative authority in specific individuals, such as the Chief Judges, the Principal Registrar or other judicial and non-judicial officers. In Queensland, for example, there are appointed Judge Administrators who are statutorily responsible for overseeing and 'steering' the administration of the courts' internal lists and divisions.<sup>94</sup> This allows them to better understand the

92 Ibid. For a more detailed discussion of the administrative powers of judges in Australia see Kathy Mack and Sharyn Roach Anleu, 'The Administrative Authority of Chief Judicial Officers in Australia' (2004) 8(1) *Newcastle Law Review* 1.

93 Voermans and Albers, 'Councils for the Judiciary in EU Countries', above n 73, 112.

94 The Senior Judge Administrators are responsible to the Chief Justice. In addition, the chief judicial officers have statutory powers to do 'all things necessary or convenient to be done' for the administration of the courts and they are responsible for ensuring the 'orderly and expeditious exercise' of the jurisdiction and powers of the court: *District Court of Queensland Act 1967* (Qld) s 28A; *Supreme Court of Queensland Act 1991* (Qld) s 15. See Judge Michael Forde, 'Judicial Independence and Court Governance' (Speech delivered at the Magistrates Court Conference, Brisbane, 7 April 2003) <<http://archive.sclqld.org.au/judgepub/2003/forde070403.pdf>>.

legal and administrative requirements of the divisions, coordinate tasks with the Chief Judges and court administrators, and improve overall efficiency.<sup>95</sup>

Arguably, all of the above attributes would place the Chief Judges, the Principal Judges and the court CEOs in an ideal position to act as members of a principal executive organ of the courts. An instructive example can be found in the Netherlands, where the formal responsibility for court governance was transferred from the Council of Judges to a smaller executive board comprising the Chief Judge, up to four divisional judge-administrators and the court CEO.<sup>96</sup> If such an arrangement were to be adopted in Victoria, it would not only vest formal administrative responsibility in specific individuals, but would also potentially address the criticism of the Chief Justice's administrative dominance in the Australian federal courts. Most importantly, the arrangement would place the court management in a more effective position to respond to competing court priorities and make all strategic and operational decisions for the court as a whole, without relying on an external CEO or vast judicial collegium in that process.

## V THE NORTHERN EUROPEAN JUDICIAL COUNCILS

The preceding analysis identifies an organisational legacy of the executive model of court administration in the Victorian courts. While further empirical research ought to be undertaken to assess whether that legacy could continue to impede the work of judges and court administrators in practice, two broad, potentially centrifugal, tendencies have been highlighted. The first concerns the relationship between CSV and the courts, as the initial analysis of the *CSV Act* suggests that CSV could potentially assume a commanding position in the administrative and operational affairs of the courts. The second is that judges are likely to continue to operate in accordance with the administrative arrangements that they inherited from the executive model, which may well be regarded as a significant disadvantage.

The preferred alternative would be for CSV to assume a broader developmental function in court administration, and there are some early indications that it may be positioning itself in that direction.<sup>97</sup> Namely, the Chief Justice of the Supreme

95 For a discussion of this issue in the USA see Church, above n 82, 244. According to Church, one of the most important early innovations of the US Ninth Circuit Court of Appeal was to provide for extensive formal delegation of administrative duties to administrative Chief Judges and their inclusion as members on the Court's Executive Committee.

96 *Judiciary Organisation Act 1827* (Netherlands) s 23 <[https://www.rechtspraak.nl/English/Legislation/Documents/WetopdeRechterlijkeOrganisatie\\_EN\\_.pdf](https://www.rechtspraak.nl/English/Legislation/Documents/WetopdeRechterlijkeOrganisatie_EN_.pdf)>. The Council of Judges retains an important advisory function in this process, just as it does in the Australian federal courts. See also W J Deetman et al, 'Judiciary Is Quality' (Report, Committee for the Evaluation of the Modernisation of the Dutch Judiciary, December 2006) 22. To carry out its duties, the board has the power to give general or special instructions to all officials working in the court, including judges, although the instructions may not relate to the procedural handling, substantive appraisal or the decision of a case or category of case: *Judicial Organisation Act 1827* (Netherlands) s 27.

97 Marilyn Warren, 'Court Governance in the State of Victoria' (Speech delivered at the International Association for Court Administration, Sydney, 24 September 2014) 11.

Court of Victoria recently pointed out that although CSV had formal statutory authority over jurisdiction administration, in the majority of areas it would only act as a ‘service agency’ to the courts.<sup>98</sup> This suggests that CSV will be likely to assume a less operational function in court administration, although it is not yet clear whether the services to be provided to the courts will be purely technical or of a broader developmental character. A broader developmental approach would require CSV to rely on its broadly-defined statutory powers in order to assist the courts in strengthening their internal administrative capacity and improving their internal working methods under a system of ‘integrated management’. To achieve these aims, it is argued that CSV’s organisational competencies should be modeled on the experiences of the northern European judicial councils.

### **A Provision of Technical and Developmental Support**

According to Voermans, the proliferation of independent judicial councils in the northern European countries, such as Sweden, Denmark and the Netherlands, was not merely a coincidence.<sup>99</sup> They were established to address a myriad of challenges that were inherited from the almost complete administrative dominance of the executive government in the operation of the court system. First, as in Victoria, judges felt that they needed a protective ‘buffer’ between the courts and the executive, primarily as a means of safeguarding judicial independence. Secondly, the European reformers were also driven by a desire to strengthen the capacity of the court system as a whole, to enable it to operate in a more challenging social, technological, political and legal environment.<sup>100</sup> In some respects, this issue highlights perhaps the most fundamental flaw in the executive model: the executive control of court operations and policy had left judges without a common institutional framework — a supporting organisation — that would enable them to adequately respond to emerging challenges or develop a unified position on behalf of the third arm of government as a whole.<sup>101</sup> The solution to such problems was seen in the establishment of independent and dedicated ‘judicial councils’ that were entrusted with tasks such as supervising the courts, supporting the development of the court system and creating the appropriate organisational conditions for the courts to improve their operations.<sup>102</sup>

Upon initial inspection, the statutory functions performed by CSV in Victoria broadly correspond to the technical tasks that have been entrusted to the northern European judicial councils. For example, in Sweden, the principal tasks of the Swedish National Courts Administration (‘SNCA’) are, among others, to ensure ‘an appropriate allocation of resources’ and provide ‘administrative support and

98 Ibid.

99 Wim Voermans, ‘Councils for the Judiciary in Europe: Trends and Models’ in F F Segado (ed), *The Spanish Constitution in the European Constitutional Context* (S L Dykinson, 2003) 2133, 2139.

100 Philip M Langbroek, ‘Organization Development of the Dutch Judiciary, between Accountability and Judicial Independence’ (2010) 2(2) *International Journal for Court Administration* 21, 21.

101 Ibid 24.

102 Voermans, ‘Trends and Models’, above n 99, 2138.

service' to the courts.<sup>103</sup> In performing these tasks, SNCA is similarly responsible for maintaining the common administrative systems and shared services for the courts, such as ICT, financial administration, payroll, statistics, security, archiving and procurement.<sup>104</sup>

However, upon closer analysis, it becomes clear that the northern European judicial councils have also assumed a much broader developmental function in the court system, because they are also responsible for supporting and improving the courts' internal working *methods*, rather than providing purely technical support, or being directly concerned with the courts' operational management.<sup>105</sup> As seen in the example of the Netherlands, the courts were expected to develop substantial new capabilities in their administrative and financial affairs and to introduce transparent internal organisational rules under the system of 'integrated management'.<sup>106</sup>

As a result, the development of greater managerial competence in court administration was identified as a key area of responsibility for the judicial councils. From the outset it was recognised that judges were lacking the managerial tools to independently run large organisations that employed thousands of people.<sup>107</sup> To address these issues, the northern European judicial councils invested heavily in education and training of court staff and judicial administrators.<sup>108</sup> For example, in Sweden, the SNCA had been instrumental in the development of a Courts Academy, which offers management training courses for judicial administrators and court staff. The SNCA also provides other forms of training and support to the courts, in areas such as competence design, financial and auditing support, recruitment and personnel management.<sup>109</sup> Similarly, in the Netherlands, the Council for the Judiciary was given a statutory responsibility to develop and maintain an organisational quality framework and an objective workload measurement system for the courts, which were designed to assist the management of the courts to measure and improve various aspects of court

103 SNCA, 'Operational Plan 2010–2012' (Domstolsverket, 2009) 8. The report refers to the Swedish Government's Appropriation Directions for the 2011 budget year in respect of the Courts of Sweden.

104 Ibid 26–7.

105 Gar Yein Ng, *Quality of Judicial Organisation and Checks and Balances* (PhD Thesis, Utrecht University, 2007) 79. See also Gar Yein Ng, 'Quality and Justice in the Netherlands' in Marco Fabri, Philip M Langbroek and Hélène Pauliat (eds), *The Administration of Justice in Europe: Towards the Development of Quality Standards* (Lo Scarabeo, 2003) 304, 321. See also Bunjevac, 'Court Governance: The Challenge of Change', above n 72, 219.

106 Voermans and Albers, 'Councils for the Judiciary in EU Countries', above n 73, 22–3. See the *Judiciary (Organisation) Act 1827* (Netherlands) art 19. The legislation also requires the governing boards in each court to draw up transparent organisational rules in the form of court regulations, detailing procedure, decision-making, division of responsibilities, organisational structure, the jurisdictional allocation of cases between divisions, complaints and delegation procedures, etc. The governing board is centrally responsible for the general management of the courts, including all judicial and personnel matters, budgeting, planning and control cycle, the quality of the administrative and organisational procedures and information and management systems.

107 See Franssen, Mein and Verberk, above n 85.

108 Ibid 5. For example, in the Netherlands, the Council for the Judiciary developed a 'Management Development Policy' to assist members of the courts' executive boards perform their administrative functions.

109 SNCA, 'Operational Plan 2011–2013' (Domstolsverket, 2011).

operations, such as the work processes area, the finance area, the learning and development area and the customer service area.<sup>110</sup>

## **B The Responsibility for Improving the Quality of Justice**

The Council for the Judiciary in the Netherlands has adopted an even more ambitious agenda. This body has a broad legislative mandate to improve the *quality of the administration of justice* in the court system.<sup>111</sup> This was seen as an important function for the peak body of the third arm of government, in order to compensate for the withdrawal of the executive from the administration and management of the court system. In performing that function, the Council conducts training courses nationally, provides various forms of organisational and legal assistance to the courts, maintains customised ICT and legal databases, undertakes expert analyses of the economic, social, procedural and legal trends affecting the courts, and conducts multi-disciplinary academic research in close consultation with the courts and agencies that work with the courts.<sup>112</sup>

In contrast, the formal legislative mandate of CSV appears to be rather modest, given its responsibility to provide ‘administrative services and facilities’ to the courts, which implies a relatively narrow technical function in the court system that is centered on the provision of shared services.<sup>113</sup> An important developmental function in the Victorian court system is currently performed by the Judicial College of Victoria (‘JCV’), which is a well known and respected provider of judicial education and forms an integral part of the statutory framework that was established by the *CSV Act*. However, the focus of the programs offered by JCV is on keeping judicial officers abreast of the latest developments in the law and some social issues, rather than promoting the organisational development of the courts as organisations, or improving the quality of the administration of justice in the broader sense described above. This is an important area in which CSV could potentially expand its mandate, either on its own, or in cooperation with an external provider.

## **VI THE POLITICS OF JUDICIAL INDEPENDENCE**

The introductory analysis of the Victorian court system reform would be incomplete without a discussion of its wider institutional, political and social ramifications. There is little doubt that the establishment of CSV represents a significant, if not

110 Netherlands Council for the Judiciary, ‘Quality in the Judicial System in the Netherlands’ (2008) 13.

111 *Judiciary (Organisation) Act 1827* (Netherlands) art 94.

112 See The Council for the Judiciary, *Other Duties and Responsibilities* (2014) De Rechtspraak <<http://www.rechtspraak.nl/English/The-Council-for-the-Judiciary/Duties-and-responsibilities/Pages/Other-duties-and-responsibilities.aspx>>.

113 *Court Services Victoria Act 2014* (Vic) s 4. See Warren, ‘Court Governance’, above n 97, 13: the organisational chart of ‘Jurisdiction Services’ of CSV reveals the existence of four internal divisions that are purely technical in nature, such as Financial Analysis, Information Technology, Asset Planning & Management and People & Business Services.

monumental, victory for the constitutional doctrine of the separation of powers and judicial independence in this state. Victoria has joined an enviable group of jurisdictions in which courts are entitled to receive their funding directly from Parliament and have almost no direct institutional connection with the executive government.<sup>114</sup>

## **A A Reduction in Ministerial Responsibility and Interest**

At the same time, one of the most striking features of the Victorian reform is the near-abandonment of the principle of general ministerial responsibility for the courts. Namely, apart from the provisions in the *CSV Act* that require CSV to keep the Attorney-General periodically informed of the budgetary and operational requirements of the courts,<sup>115</sup> there are few provisions in the Act itself to suggest that the Minister has any other (non-financial) mechanisms left at his disposal to respond to any urgent matters affecting the administration of justice in the courts.<sup>116</sup> This issue has received surprisingly little academic or professional scrutiny in Victoria, in stark contrast with other jurisdictions that have introduced similar reforms in recent years.<sup>117</sup>

Whilst the principle of diminished ministerial responsibility for the courts was ultimately adopted in Sweden, Norway, Ireland, Denmark and the Netherlands, the Minister's responsibility for certain threshold questions affecting the operations of the courts was not removed in its entirety.<sup>118</sup> First, in relation to justice policy, the legislation identifies the need for the court system to align its policies with other justice sector organisations in order to promote greater systems integration and pool all available resources for the benefit of court users. To achieve these aims, the legislation in Ireland, for example, specifically requires the Board of the Courts Service to submit for the Minister's approval ('with or without amendment') a strategic plan for each ensuing three-year period.<sup>119</sup> Furthermore, the Courts Service is required by law to *have regard* to 'any policy or objective of

114 Ibid 6.

115 *CSV Act* ss 41–2.

116 In practice, the Attorney-General retains the power to approve the courts' budget, 'with or without modification': *CSV Act* s 41. See also s 40, which makes it clear that additional reporting requirements apply under *Financial Management Act 1994* (Vic) pt 7.

117 The absence of academic and professional commentary is partly due to the closed nature of the consultations between the government and the judiciary that led to the introduction of the *CSV Act*. One of the reasons for this situation also lies in the successes of the federal courts and the South Australian Judicial Councils, as described in Part II. In contrast, the court reforms in Scandinavia, the Netherlands and Ireland have been well documented and were the subject of detailed academic and professional analyses over a period of several years. Most of the overseas resources are freely available on the internet and typically include full English translations of the original documents. See, eg, the full collection of the Denham Group Reports from Ireland (Denham Group, above n 12), available at <<http://www.courts.ie/courts.ie/library3.nsf/pagecurrent/5D12A39F06827AD080256DA60033FE87?opendocument&l=en>>. For the Netherlands, see the collection of reports that are available at <<http://www.rechtspraak.nl/Organisatie/Publicaties-En-Brochures/Pages/Kwaliteit-van-de-Rechtspraak.aspx>>.

118 Tin Bunjevac, 'Court Governance in Context: Beyond Independence' (2011) 4(1) *International Journal for Court Administration* 35, 44.

119 *Courts Service Act 1998* (Ireland) s 7.

the Government or a Minister of the Government insofar as it may affect or relate to the functions of the Service'.<sup>120</sup>

Secondly, in certain clearly defined exceptional circumstances, the Minister may be entitled to set aside decisions or even dismiss members of the Courts Council where they have made decisions that are 'manifestly contrary to the law', or the Auditor-General advises the Minister that there are significant financial irregularities in the management of the Council's budget.<sup>121</sup> This solution was only made possible due to the introduction of *fixed term* appointments to the boards of the Council, which is considered to be an advantage in institutional governance theory, because of the perceived benefits that flow from greater separation between 'ownership' and 'management' of an entity.<sup>122</sup>

In contrast, the Victorian legislation confers a central responsibility for the operation of CSV on its CEO,<sup>123</sup> who is also classified in public sector law as a Public Service Body Head and Accountable Officer of the entity.<sup>124</sup> Presumably then, it is the CEO who will be called upon, together with the Minister, to give account to a Parliamentary Accounts and Estimates Committee in relation to any operational problems that may arise in practice.<sup>125</sup> In extreme cases, the *CSV Act* also contemplates that the CEO may be removed — *by the Courts Council* — on the basis of 'misconduct', 'neglect of duty', 'inability to perform the duties of

120 Ibid s 13. Similarly, in the Netherlands, the Minister is entitled to issue general directions to the Judicial Council insofar as they may be necessary to ensure proper operations of the courts. See *Judiciary (Organisation) Act 1827* (Netherlands) art 93. For Sweden, see the appropriation directions in SNCA, above n 103, 8. However, see *CSV Act* s 18(2), which states that the Courts Council 'must take into account any business, corporate or strategic plan when making decisions in respect of the provision of administrative services and facilities to each jurisdiction'. It appears that this provision is referring to individual jurisdictions' operational and business plans, rather than government policies.

121 *Judiciary (Organisation) Act 1827* (Netherlands), arts 106, 107. The Minister makes the recommendation, but the decision is made by Royal Decree and there are corresponding avenues of appeal to the Supreme Court under art 108. For Denmark, see Jesper Wittrup and Poul Sørensen, 'Quality and Justice in Denmark' in Marco Fabri, Phillip M Langbroek and Hélène Pauliat (eds), *The Administration of Justice in Europe: Towards the Development of Quality Standards* (Lo Scarabeo, 2003) 119, 125.

122 Bunjevac, 'Court Governance in Context: Beyond Independence', above n 118, 43. There are statutory mechanisms available to ensure that the judicial appointments to the Courts Council remain transparent and attuned to the needs of the courts and judiciary. See, eg, *Judiciary (Organisation) Act 1827* (Netherlands), s 85 which prescribes a nomination procedure whereby a Committee of Recommendations, which comprises a number of judicial members and is presided over by a judge, recommends candidates from a list of several nominees that have been initially proposed by the Minister of Justice and agreed to by the Judicial Council.

123 See also *Courts Service Act 1998* (Ireland) s 20; *Courts Administration Act 1993* (SA) s 17.

124 *CSV Act* ss 25–7. In practice, this means that the appointment of the CEO is also governed by the *Public Administration Act 2004* (Vic) pt 3 and the *Financial Management Act 1994* (Vic) s 42.

125 Unlike the South Australian legislation, there is no provision in the *CSV Act* that clarifies the relationship between CSV and parliamentary committees, which means that the relationship is governed by the general public sector legislation, such as the *Parliamentary Committees Act 2003* (Vic), the *Public Administration Act 2004* (Vic) and the *Financial Management Act 1994* (Vic). See *Courts Administration Act 1993* (SA) s 29, which provides that '[a] member of the Council, or the Administrator, must, at the request of a parliamentary committee, attend before the committee to answer questions'.



the office', or 'any other ground on which the Courts Council is satisfied that the Chief Executive Officer is unfit to hold office'.<sup>126</sup>

Based on the above, it appears that an overarching statutory responsibility for the 'general direction and superintendence' of CSV now also rests with the Courts Council,<sup>127</sup> whose members have a duty to act 'with appropriate care, diligence and integrity'.<sup>128</sup> However, in view of the Chief Judges' *permanent* stewardship of the Council, it is unclear what reputational or legal consequences would follow should this organ issue general directions to the CEO that are unlawful or result in unintended but nevertheless serious financial or operational irregularities.<sup>129</sup>

The authors of the CEPEJ report sounded a note of caution regarding the practice of vesting of primary statutory responsibility in the CEOs and the ostensible reduction in ministerial responsibility.<sup>130</sup> According to Voermans and Albers, '[t]he line of a Minister's political responsibility to Parliament has different dynamics than that of the much slower and less direct line of responsibility that the [Courts have] with Parliament'.<sup>131</sup> In other words, when politically sensitive incidents involving the courts do arise, the Attorney-General will be under tremendous political pressure to respond and find an immediate solution in order to appease the government and the electorate. Therefore, it can be said that the Minister's general political responsibility will nevertheless continue to play an important role in the new institutional environment, particularly at times of crises.<sup>132</sup> However, the exact scope and boundaries of the Minister's responsibility have not been clearly defined in the *CSV Act*, which suggests that it may be open to future interpretation and negotiation.

126 *CSV Act* s 24.

127 *Ibid* s 10.

128 *Ibid* s 17.

129 Arguably, the Courts Council's power to dismiss the CEO for conduct that the Council itself may have authorised creates a conceptual problem within the existing public sector legislation that may not have been anticipated at the time of the drafting of the *CSV Act*. This stems from the fact that CSV is a public sector body *sui generis*, because it is uniquely positioned within the *judicial* arm of government, whereas the adopted legislative framework of the *Public Administration Act 2004* (Vic) and the *Financial Management Act 1994* (Vic) was designed for public sector entities that are broadly positioned within the legislative or executive arm of government's areas of responsibility. In such cases, the Minister or the Governor is often entitled to dismiss the principal officers in cases of serious misconduct (see, eg, *Victorian Law Reform Commission Act 2000* (Vic) s 10; *Victorian Inspectorate Act 2011* (Vic) s 23). The solution adopted by the *CSV Act* is anomalous, because it denies the politically responsible Minister the ability to dismiss the CEO, while conferring on the Courts Council the power to dismiss the CEO for conduct that the Council itself may have authorised, which evidently creates a responsibility vacuum.

130 Voermans and Albers, 'Councils for the Judiciary in EU Countries', above n 73, 38.

131 *Ibid* 33.

132 See John Uhrig, 'Review of the Corporate Governance of Statutory Authorities and Office Holders' (Commonwealth of Australia, 2003) 42. The review gives the example of the Civil Aviation Safety Authority ('CASA'), which had previously been managed by an independent board that was fully responsible for its operations. However, despite the existence of the board, and following a number of aviation safety incidents, the 'community expected the Minister to be accountable for the performance of the authority'. This prompted the government to remove the board and take a greater role in the operation of CASA. See also Voermans and Albers, 'Councils for the Judiciary in EU Countries', above n 73, 38.

The absence of clearer legislative expectations in this area also carries the risk that the courts will be left to their own devices, which in some respects may be considered a disadvantage. The management of courts is hardly a burning political issue in Australia and other developed countries,<sup>133</sup> which raises the question of whether the new judiciary will be able to secure sufficient *visibility* in the crowded political arena. This is an issue of considerable importance to the judiciary and one that will necessitate further study and analysis, as the following discussion demonstrates.

## **B Increasing Judicial Visibility through Greater Engagement**

A recent landmark study of ‘the politics of judicial independence’ in the UK identified the ‘retreat of the politicians’ as being a *primary challenge* for the new judiciary.<sup>134</sup> The authors of the study, Professors Graham Gee, Robert Hazell, Kate Maleson and Patrick O’Brien interviewed more than 150 senior judges, politicians, parliamentarians and public servants over a three-year period in order to understand the interactions and processes of consultation and negotiation that occurred between the various constituencies following the introduction of the *Constitutional Reform Act 2005* (UK). The central contention of the study is that judicial independence is a political, rather than legal achievement.<sup>135</sup> Accordingly, the authors argue that judicial independence depends on the way in which judges, politicians, civil servants and others ‘negotiate the meaning, content and limits of judicial independence and accountability in the UK.’<sup>136</sup>

While there are significant institutional and historical differences between the UK and Victorian court system reforms, it is instructive to note that the authors found the ‘new’ politics of judicial independence in the UK to be much more dispersed, fragmented, politicised, formal, open and accountable than before.<sup>137</sup> One of the key reasons for this situation is that a much wider range of political actors, relationships and bodies are now involved in the processes that define the scope and nature of judicial independence, while some of the more traditional figures, such as the Lord Chancellor, no longer command the same degree of power, respect or influence as before.<sup>138</sup> These findings lead the authors to the important — if paradoxical — conclusion, that greater institutional independence of the judiciary requires more, rather than less, political astuteness and engagement by judges with the other branches of government and the public.<sup>139</sup>

If one provisionally accepts the findings of the UK study for the purposes of the present analysis, there are some important lessons to be learnt, particularly

133 Voermans and Albers, ‘Councils for the Judiciary in EU Countries’, above n 73, 112.

134 Graham Gee et al, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge University Press, 2015) 262.

135 Ibid 252.

136 Ibid 9.

137 Ibid ch 10.

138 Ibid 253–4. On the position of the Lord Chancellor, see also 35.

139 Ibid 263.

in areas where judges, politicians and public servants are regularly called upon to ‘negotiate’ the meaning and scope of judicial independence. If judicial independence can be considered a political achievement, it depends on the strength of the formal, institutional, as well as the informal, personal, relationships between the judiciary and the other branches of government. This issue is perhaps most obvious when it comes to the funding arrangements for the courts. Thus, despite the fact that the courts now formally receive their budgetary appropriations directly from Parliament, in reality it is the Attorney-General who approves their budget and represents their interests at Cabinet in order to secure a majority support in government and Parliament.

Additionally, the *CSV Act* has established a complex web of new institutional relationships, such as those between CSV and Parliament, and those within the judiciary itself, which will take time to develop in a consistent and systematic fashion. The authors of the UK study particularly highlighted the depth and importance of the newly-formed institutional connections between the judiciary and Parliament, where judges now regularly participate in and give evidence to Parliamentary Committees in order to ventilate their concerns, hold Ministers to account, demonstrate the judiciary’s own accountability and monitor the workings of the new institutional architecture of the court system.<sup>140</sup> Remarkably, the authors of the study go so far as to suggest that the new institutional relationships between the judiciary and Parliament have not only acquired a central role in promoting greater judicial accountability and visibility; they also have developed into ‘key guardians of judicial independence’.<sup>141</sup>

### **C Judicial Corporatism and Accountability**

Based on the discussion above, it is quite conceivable that the Victorian judiciary may also find it necessary to develop deeper institutional connections with Parliament and other public sector entities (such as the Ombudsman and the Auditor-General, for example), partly in order to enhance the courts’ ‘visibility’ in the political arena. However, the establishment of structured institutional relationships with other public sector entities will also necessitate the development of a more clearly defined internal organisational structure within the judiciary itself. If the British and northern European experiences are anything to go by, the judiciary’s new administrative structures and internal arrangements will be increasingly characterised by greater organisational openness and an emerging culture of ‘judicial corporatism’.<sup>142</sup>

According to Professor Kate Maleson, the traditional forms of judicial accountability — such as the open nature of court proceedings, publication of judgments and availability of the appellate process — are no longer sufficient to

140 Ibid 99–101, 113.

141 Ibid 112.

142 See ibid 155.

maintain the public's confidence in the independent judiciary.<sup>143</sup> She argues that additional new forms of 'soft' accountability must be developed by judges in order to counter their growing independence and influence in public life.<sup>144</sup> Examples of the soft accountability mechanisms given by Malleon include greater internal administrative transparency, more diverse representation of the judiciary, a more transparent judicial appointments process, greater openness to academic scrutiny and even the introduction of a formal system of performance appraisals.<sup>145</sup>

Similarly, Professor Phillip Langbroek argues that the absence of direct ('vertical') ministerial insight into court operations must somehow be compensated via alternative ('horizontal') mechanisms of accountability that demonstrate greater institutional openness in the relationship between the judiciary and the politicians on the one side, and the judiciary and the public on the other.<sup>146</sup> Courts in some jurisdictions have already developed modern forms of 'corporate accountability' in order to compensate for the reduction in ministerial responsibility.<sup>147</sup> As we have seen, in the Netherlands, the courts have introduced a transparent workload budgeting system and detailed 'court regulations' that govern all aspects of court administration, including decision-making at the executive board level, divisional structures and powers, complaints procedures, delegation of duties, replacement of members in the event of sickness, and the jurisdictional allocation of cases between divisions.<sup>148</sup>

Similarly, in the USA, there are very detailed rules in many state jurisdictions that formally govern key aspects of court administration. They typically include provisions in respect of the functions and powers of the Chief and Administrative Judges, coordination of judicial schedules, court organisation and operations, appointments of court committees, and so on.<sup>149</sup> In some states, such as California, there are also remarkably detailed rules that govern the proceedings of the Judicial Council itself.<sup>150</sup> Rule 10.6 of the *Judicial Administration Rules* (California) embodies the general principle of the internal administrative transparency of the Californian judiciary: business meetings of the Judicial Council are open to the public, subject to a few exceptions.

These examples illustrate Mohr and Contini's contention that corporate accountability of the judiciary is a two-way channel of communication between

143 See generally, Kate Malleon, *The New Judiciary: The Effects of Expansion and Activism* (Ashgate, 1999).

144 Ibid 37–74.

145 Ibid 199–202.

146 See Philip M Langbroek, 'Quality Management and Autonomy for Court-Organisations' (2001) *EGPA paper 2001 Studygroup on Management and Delivery of Justice*, 6. See also Bunjevac, 'Court Governance in Context: Beyond Independence', above n 118, 44.

147 Bunjevac, 'Court Governance in Context: Beyond Independence', above n 118, 44.

148 See *Judiciary (Organisation) Act 1827* (Netherlands) art 19.

149 National Center for State Courts, *Key Elements of an Effective Rule of Court on the Role of the Presiding Judge in the Trial Courts* (National Center for State Courts, Virginia, 2006) 2.

150 See *Judicial Administration Rules (California)* <[http://www.courts.ca.gov/documents/title\\_10.pdf](http://www.courts.ca.gov/documents/title_10.pdf)>.

the courts and their stakeholders.<sup>151</sup> Firstly, an accountable judiciary should establish processes and strategies that convey information about the internal culture and workings of the judicial organisation to those having the right to know.<sup>152</sup> Secondly, those strategies should also include transparent mechanisms that demonstrate how members of the organisation act consistently with the organisational values and interests that are embedded in their organisational culture.<sup>153</sup>

## **D Towards Judicial Corporatism in Victoria?**

In Victoria, much has been done to establish a sound basis for improving the quality of the administration of justice in a relatively short period of time. The establishment of CSV has given the judiciary an opportunity to act with one voice in relation to any and all matters that affect the operations of the courts. Most importantly, the new organisational structure has removed the inherent structural barriers that had plagued court administration in the executive model, thus giving the courts a suite of new opportunities to improve the effectiveness, efficiency and, ultimately, quality of justice.

The possibilities are many. They include the potential development of internal administrative structures and mechanisms that will enhance the judiciary's 'corporatisation', public accountability and visibility in the public and political arenas.<sup>154</sup> While a number of potential teething problems have been identified in this article, they must be placed in appropriate context, given that the process of organisational development of the judiciary in Victoria is still only in its infancy. Experiences from other jurisdictions that have introduced similar reforms are generally positive and there is no reason to fear that Victorian judges will not be up to the challenge.

However, the challenges are many and there is no place for complacency. First, as the discussion in Parts IV and V demonstrates, a key focus should be placed on the issue of management development, by introducing training programs and activities that are aimed at improving the courts' internal governance structures and enhancing their managerial capabilities. This will be an important and challenging task, because, as we have seen, the courts have inherited certain 'legacy' administrative arrangements from the executive model that have the potential to impede the reform processes in the courts themselves.

In addition, CSV should investigate the possibility of broadening its mandate (legislatively or otherwise), in order to assume the responsibility for improving the quality of the administration of justice in the courts, as discussed in Part V.

151 Franceseo Contini and Richard Mohr, 'Reconciling Independence and Accountability in Judicial Systems' (2007) 3(2) *Utrecht Law Review* 26, 30.

152 *Ibid.*

153 *Ibid.*

154 Indeed, the Victorian courts have already piloted some notable initiatives such as the International Framework for Court Excellence. See, eg, County Court of Victoria, *2012–2013 Annual Report* (2013) 4.

A broader mandate would also enable CSV to take a much more proactive and systematic approach to issues such as research and development, organisational quality, justice policy, legal policy, judicial ‘corporatisation’, public accountability and the ‘politics’ of judicial independence. The proposed broadening of CSV’s organisational competencies would likely also assist the judiciary to improve its institutional confidence, secure greater visibility in the political process and protect judicial independence.

## VII CONCLUSION

The introductory analysis of the *CSV Act* shows that the institutional design of Court Services Victoria was largely inspired by the South Australian Judicial Council and driven by a desire to protect judicial independence from the executive government. In that respect, the reforms can be considered a great success, given that CSV effectively shields the courts from any direct interference by the executive government.

Despite the establishment of the new entity, however, the Victorian legislative framework preserves certain administrative features that were inherited from the executive model, both within CSV and the individual courts. This in some respects may be regarded as an oversight, although there are early indications that the actual relationships between the courts and CSV may take a different and more effective direction in practice. In particular, it is contended that CSV’s ‘main mission’ is likely to be more developmental and technical, as opposed to operational. To achieve these aims in practice, CSV’s overall approach to its relationship with the individual court tiers should be guided by the experiences of the northern European judicial councils, which offer not only organisational support to the courts, but have also assumed a robust mandate to improve the quality of the administration of justice in a broader sense.

A broader conception of CSV’s mandate would likely also result in greater institutional confidence and ‘corporatisation’ of the judiciary, which may be necessary in order to protect its hard-fought independence and visibility in the political arena.

**Postscript:** *Following the submission of this article, the Victorian County and Supreme Courts have proposed and announced the establishment of non-statutory management boards with responsibility for court administration.*