



AIJA NEWS

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The Australian Institute of

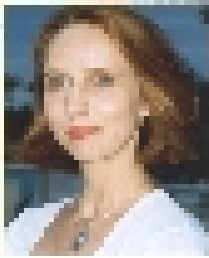
Judicial Administration Incorporated

Newsletter of the Australian Institute of Judicial
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DISQUALIFICATION OF JUDGES – PRACTICE AND PROCEDURE New AIJA Research publication



Dr Melissa Perry

It is a well established principle that a judge should not sit if, in all of the circumstances, the parties or a fair-minded lay observer might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the issues involved in the matter. The substantive law relating to judicial bias has been considered in several recent cases including the important decisions of the High Court in *Clenae Pty Ltd v Quick & Others* and *Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63 (7 December 2000).

However, to date there has been little research into the practice and procedure relating to the disqualification of judges in Australian courts for apparent bias. Issues such as

- (a) the way in which questions of disqualification are raised and dealt with;
- (b) the extent to which a decision by a judge to withdraw or to continue to sit may be susceptible to review; and
- (c) the extent to which evidence relevant to the question of disqualification may be put before the court which initially considers the question and on review,

are largely unregulated at present and different, even conflicting, approaches have been adopted by different courts.

Dr Melissa Perry of the South Australian Bar was commissioned by the AIJA to prepare a discussion paper on this area with a view to providing practical assistance for judicial officers in relation to these issues. Her work was supervised by a Project Advisory Committee convened by Justice Catherine Branson, former AIJA President and including Justice Bryan Beaumont of the Federal Court of Australia, Justice Marilyn Warren of the Supreme Court of Victoria and Mr Arnold Shott, the Chief Magistrate of Tasmania.

The paper examines the context in which matters of practice and procedure arise, the procedural law, the manner in which the disqualification may arise and the appropriateness of the present rule that the challenged judge should decide the issue. It considers the manner in which the decision of a single judge at first instance might be reviewed, the special position of intermediate and collegiate courts is considered and that of the High Court. This is followed by a comparison with practice and procedure in the United States which has taken a very different path to that taken in Australia. The paper concludes with an appraisal of the present practice and with suggestions as to the manner in which areas of difficulty might be addressed.

Dr Perry's paper provides an informative and practical guide for judicial officers in relation to the procedural and evidential aspects of disqualification on the ground of apprehended bias. The Institute is grateful to Dr Perry for her careful research and analysis of the practices and procedures and is confident that the publication will be of great practical benefit for judicial officers and those who appear before them.

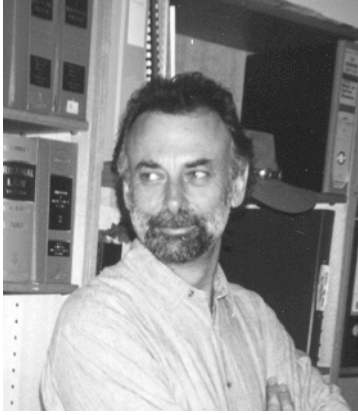
The AIJA is grateful to the members of the Advisory Committee for their assistance and would particularly like to acknowledge the input of Justice Bryan Beaumont, who originally suggested the project.

*Financial members of the AIJA will automatically received a copy of this publication. Additional copies can be ordered from the
AIJA Secretariat:
1st Floor, 723 Swanston St
CARLTON VIC 3053
Tel: (03) 9347 6600 Fax: (03) 9347 2980
or email: k.jarrett@unimelb.edu.au*

Also to be published shortly is a report on *Appellate Courts and the Management of Appeals in Australia* by Mr Brian Opeskin.

For further details see the next edition of *AIJA News* or check the AIJA Website at <http://www.aija.org.au>

EAST TIMOR SUPPORT COMMITTEE FORMED



Committee Convenor, Richard Coates

After 500 years of colonialism, the East Timorese desire for a free and independent judicial system is considerable. AIJA members have been at the forefront of the Australian legal community's efforts to support our colleagues in newly independent East Timor.

We participated in the initial training programs for judges and prosecutors, which were held in Darwin in late 1999 and early 2000. We also organised donations of judicial gowns for the newly appointed judges and were instrumental in arranging for the shipment of several containers of furniture and computers to Dili for use by the District Courts.

A number of members have been to East Timor, including Justice Neil Buckley of the Family Court and seen first hand the enormity of the task the new judges and prosecutors face in establishing the rule of law.

In March 2000 the AIJA Council resolved to establish a committee to provide support and training for the East Timorese judiciary. The convenor of the committee is Richard Coates, Director of the Northern Territory Legal Aid Commission and other members include Justice Neil Buckley, Mr Peter Levy, Justice Chris Steytler and Mr Nick Cowdery.

The Committee arranged to bring the President of the Dili District Court, Dr Domingos Sarmiento and two other East Timorese judges to the AIJA's Annual conference in Darwin in July.

Dr Sarmiento gave a moving address to the conference, outlining the view that the law has been used for the past 500 years as a tool of oppression by the various colonisers of his country. He believes the major challenge for the judiciary is to promote respect for a system of law which is seen as fair and independent and serves the community's needs. The East Timorese judges are keen to establish a collegiate relationship with their Australian counterparts and see this as a means by which they can promote the importance of judicial independence.

The Committee had also arranged for two judges to attend this year's Judicial Orientation Program in August however last minute problems in obtaining a visa meant the judges were unable to get to Sydney in time for the course.

The United Nations Transitional Administration in East Timor has determined that in the interim at least, the legal system in East Timor will follow the civil law/inquisitorial model. It has concentrated on providing judicial training from a civil law perspective and has, so far, shown little interest in accepting the many offers of assistance from lawyers with a common law background.

Notwithstanding UNTAET's position the committee is still attempting to ascertain how we might co-operate with them to assist in the development of an effective judicial system. Apart from our offer to assist with judicial training we have also indicated a preparedness to help in training prosecutors and public defenders.

We will also continue to work directly with the judges to identify what further practical assistance we can provide and support them in their determination to establish a strong and independent judiciary in East Timor.

RICHARD COATES

Convenor

AIJA East Timor Support Committee

AIJA CONFERENCE, COURSE AND SEMINAR PROGRAMME 2001-2002

SCHEDULED:

- ❑ 4th AIJA Tribunals Conference - 8 June 2001 (Sydney)
- ❑ 11th AIJA Oration (Speaker: The Hon Justice Michael Kirby, High Court of Australia) – 22 June 2001 (Sydney)
- ❑ AIJA Magistrates' Conference, 20-21 July 2001 (Melbourne)
- ❑ 19th AIJA Annual Conference, 21-23 September 2001 (Hobart)
- ❑ National Judicial Orientation Programme 21-25 October 2001 (Sydney)
- ❑ 20th AIJA Annual Conference, 12-14 July 2002 (Brisbane)

TO BE CONFIRMED:

- ❑ Electronic Filing Seminar 4-5 May 2001 (Sydney)
- ❑ National Sheriffs' Conference - 21 September 2001 (Hobart)
- ❑ Appellate Court Judges' Program
- ❑ Biennial Masters' Conference - March 2002 (Hobart)

If you are a member of the AIJA and your membership is financial, you will automatically receive information about AIJA conferences and seminars as it becomes available. Up-to-date information is also available on the AIJA web site at www.aija.org.au

PUBLIC FEEDBACK MECHANISMS IN AUSTRALIAN COURTS

In 1998 Professor Stephen Parker's report for the AIJA on "Courts and the Public" recommended that:

"All courts should state clearly the mechanisms by which complaints about the service of the court can be made by court users and how these complaints will be dealt with. 'Service' for these purposes does not include the content of decisions made by the court in interlocutory matters or at a trial."

As part of the follow-up to that report, the AIJA's Courts and the Public Committee, convened by Justice RD Nicholson of the Federal Court of Australia, undertook an exercise to compile information about those mechanisms as they exist in Australian courts.

The issue was again highlighted in discussion at the 18th AIJA Annual Conference held in Darwin (14-16 July 2000) on the theme of "Judicial Accountability".

The information obtained has been compiled in a document entitled "Public Feedback Mechanisms in Australian Courts" which can be downloaded from the AIJA web site (at www.aija.org.au/feedback.rtf). The report focuses primarily upon complaints other than complaints against judicial officers although there is reference in the document to complaints procedures against judicial officers in some jurisdictions.

The report has been approved by the Council of the AIJA which is resolved that it be circulated with a view to assisting courts and tribunals to consider the issue against the background of relevant information. It contains a recommended best practice model for handling feedback and complaints.

The AIJA is grateful to all court officers who responded to the survey of complaints handling mechanisms.

Comments and feedback on the compilation can be forwarded to AIJA Executive Director, Professor Greg Reinhardt - g.reinhardt@unimelb.edu.au

*The report is available to download on the AIJA web site at <http://www.aija.org.au/feedback.rtf>
If you would prefer a hard copy version, please contact Chrstine Crawford at the AIJA Secretariat on (03) 9347 6600 or email c.crawford@unimelb.edu.au*

Looking for an AIJA Publication?

- try our on-line publications page . . . <http://www.aija.org.au/onlinepub.htm>

A number of AIJA publications are now available free to download from the AIJA web site. They include:

- Papers from the 1999 and 2000 AIJA Annual Conferences
- *AIJA News*
- Papers from the Criminal Trial Reform Conference (March 2000)
- Papers from the 1999 and 2000 AIJA Tribunals Conferences
- *Public Feedback Mechanisms in Australian Courts*, AIJA, June 2000
- *AIJA Guide to Uniform Production of Judgments*
- Proposed Australian Judicial College Discussion paper
- 10th AIJA Oration (16 June 2000) 'Constitutions and Courts' The Rt. Hon. Dame Sian Elias GNZM, Chief Justice of New Zealand
- 9th AIJA Oration 'Human Rights and the Judicial Role' Justice Rosalie Abella

For a full list of the available material see <http://www.aija.org.au/onlinepub.htm>

A complete list of AIJA publications is also available on-line at <http://www.aija.org.au/list.htm>

OVERSEAS CONFERENCES, COURSES AND SEMINARS

Following are details of some overseas courses/conferences that may be of particular interest to members.

March 2001

1-3	<i>Toronto, Canada</i>	Retirement Planning Seminar	<i>National Judicial Institute (Canada)</i>
5-9	<i>Memphis, Tennessee</i>	Technology Trends in Courts	<i>National Center for State Courts</i>
12-16	<i>New Orleans</i>	Managing Human Resources (for courts)	<i>National Center for State Courts</i>
26-28	<i>San Francisco</i>	Practical Re-Engineering in The Courts	<i>National Center for State Courts</i>
26-28	<i>Williamsburg, Virginia</i>	Research & Evaluation (in courts)	<i>National Center for State Courts</i>

April 2001

2-4	<i>Denver, Colorado</i>	Fundamental Issues of Caseflow Management	<i>National Center for State Courts</i>	18-20
	<i>Seattle, Washington</i>	Electronic Filing/Document Imaging	<i>National Center for State Courts</i>	
20-27	<i>Lac Carling, Canada</i>	New Judges Training Program	<i>Canadian Association of Provincial Court Judges</i>	
22-25	<i>Montreal</i>	Appellate Courts Seminar	<i>Canadian Association of Provincial Court Judges</i>	
23-25	<i>Chicago, Illinois</i>	Trial Court Leadership Program	<i>National Center for State Courts</i>	

May 2001

14-16	<i>San Francisco</i>	Advanced Caseflow Management	<i>National Center for State Courts</i>
16-18	<i>Scottsdale, Arizona</i>	Court Financial Management	<i>National Center for State Courts</i>
21-23	<i>Scottsdale, Arizona</i>	Caseflow Management for Rural Courts	<i>National Center for State Courts</i>
28 - 1 June	<i>Ottawa</i>	Early Orientation for New Judges	<i>National Judicial Institute (Canada)</i>

June 2001

3-4	<i>Montreal</i>	Genetics, Ethics and the Law	<i>National Judicial Institute (Canada)</i>
6-7	<i>Victoria, Canada</i>	Social Context Education: Faculty and Program Development Conference	<i>National Judicial Institute (Canada)</i>
13-15	<i>Calgary, Canada</i>	Retirement Planning Seminar	<i>National Judicial Institute (Canada)</i>

July 2001

8-18	<i>Cambridge, England</i>	Cambridge Lectures	<i>Canadian Institute for Advanced Legal Studies</i>
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August 2001

14-16	<i>Baltimore, USA</i>	CTC7 Court Technology Conference	<i>National Center for State Courts</i>
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September 2001

4-7	<i>San Francisco</i>	Jury Management	<i>National Center for State Courts</i>
10-12	<i>Los Angeles</i>	Collecting Fines & Fees	<i>National Center for State Courts</i>
10-12	<i>Alexandria, Virginia</i>	Access to Justice: A Total Approach in Diversity	<i>National Center for State Courts</i>

October 2001

1-3	<i>Orlando, Florida</i>	Juvenile and Family Court Performance Standards	<i>National Center for State Courts</i>
3-5	<i>Orlando, Florida</i>	Improving Caseflow Management in Family and Juvenile Courts and Justice Systems	<i>National Center for State Courts</i>
4-8	<i>Christchurch, New Zealand</i>	Joint Conference of Law Asia and the New Zealand Law Society (in conjunction with 9 th Conference of Chief Justices of Asia and the Pacific)	<i>LawAsia New Zealand Law Society</i>
15-17	<i>San Diego, California</i>	Managing Court Financial Resources	<i>National Center for State Courts</i>
17-19	<i>Halifax, Canada</i>	Retirement Planning Seminar	<i>National Judicial Institute (Canada)</i>
11-26	<i>San Diego, California</i>	Managing Human Resources (for courts)	<i>National Center for State Courts</i>
22-27	<i>Montebello, Canada</i>	Chief Justices Program	<i>National Judicial Institute (Canada)</i>

November 2001

1-3	<i>Williamsburg, Virginia</i>	Court Library Management	<i>National Center for State Courts</i>
7-9	<i>Vancouver</i>	Retirement Planning Seminar	<i>National Judicial Institute (Canada)</i>
7-9	<i>San Francisco</i>	Court Performance Standards	<i>National Center for State Courts</i>
7-9	<i>San Diego, California</i>	Advanced Research Methods (for courts)	<i>National Center for State Courts</i>
14-16	<i>Orlando, Florida</i>	Advanced Court Performance Standards	<i>National Center for State Courts</i>
26-30	<i>Ottawa</i>	Early Orientation for New Judges	<i>National Judicial Institute (Canada)</i>

December 2001

3-5	<i>San Francisco</i>	Technology for Judges	<i>National Center for State Courts</i>
5-6	<i>Quebec</i>	Social Context Education: Faculty & Program Development	<i>National Judicial Institute (Canada)</i>
5-7	<i>Phoenix, Arizona</i>	Court and Community Collaboration	<i>National Center for State Courts</i>
10-12	<i>Orlando, Florida</i>	Fundamental Issues in Caseflow Management	<i>National Center for State Courts</i>
26-30	<i>Ottawa</i>	Early Orientation for New Judges	<i>National Judicial Institute (Canada)</i>

This list can be found on the AIJA Website at <http://www.aija.org.au/OSHYPE.htm> - where links to relevant organisations are also provided.

What's new in the Library?

The AIJA maintains a specialised reference collection of material relating to judicial administration. The collection has a primarily Australian focus. Enquiries can be directed to the Institute's Librarian, Mary Young on email: m.young@unimelb.edu.au or telephone (03) 9347 6600.

- Judicial Cultural Awareness Conference.** Conference held Marysville 31st March to 2nd April 2000. [M 208.43K1 JUD]
- Court System of Japan.** 2000 25p. [L 219.5J3 COU]
- AMERICAN BAR ASSOCIATION **Model Code of Judicial Conduct.** New Providence NJ: Martindale-Hubbell. 2000 17p. [L 240.3G1 AME]
- ARMYTAGE, LIVINGSTON **Educating Judges:** Towards a New Model of Continuing Judicial Learning. The Hague: Kluwer Law International. 1996 xii,238p. [240.5 ARM]
- AUSTRALIA. ADMINISTRATIVE REVIEW COUNCIL **Practical Guidelines for Preparing Statements of Reasons.** June 2000 iii,20p. [M 303.K1 AUS] and **Commentary,**46p. [M 303.K1 AUS]
- CANADIAN JUDICIAL COUNCIL **The Conduct of Judges and the Role of the Canadian Judicial Council.** CJC 2000. 7p. [L 240.3F1 CAN]
- COUNTY COURT OF VICTORIA **Annual Report 1999.** Melbourne: Government Printer. 2000 [L 225.K2V COU]
- DEWAR, JOHN; SMITH, BARRY W.; BANKS, CATE **Litigants in Person in the Family Court of Australia:** a report to the Family Court of Australia. 2000. Research report no.20. 98p.[N 370.1K1 DEW]
- FABRI, MARCO (EDITOR); LANGBROEK, PHILIP M. (EDITOR) **The Challenge of Change for Judicial Systems:** developing a public administration perspective. IOS Press: Amsterdam. 2000. Series: vol.14 International Institute of Administrative Sciences Monograph. lx,307p. [M 236 FAB]
- FEDERAL COURT OF AUSTRALIA **Delivering Justice** 2000. Information booklet on the Federal Court of Australia. Includes brochures on human rights, bankruptcy and mediation. 8p. [L 221.K1 FED]
- Glanfield, Laurie and Ted Wright, *Model Key Performance Indicators for New South Wales Courts*, Law Foundation of New South Wales, February 2000-05-17
- HUDZIK, JOHN K, *Judicial Branch Education Directory*, Jeritt 2000, United States
- HUDZIK, JOHN K.; CONNER, MAUREEN E.; STATE JUSTICE INSTITUTE; NATIONAL ASSOCIATION OF STATE JUDICIAL EDUCATORS; MICHIGAN STATE UNIVERSITY. SCHOOL OF CRIMINAL JUSTICE. **Judicial Branch Education Programs Summary: Jan - Dec 1999.** East Lansing MI: Jeritt. 2000 vii,435,xiiip. [L 150.G1 HUD]
- JUDICIAL CONFERENCE OF THE UNITED STATES. COMMITTEE ON CODES OF CONDUCT; OFFICE OF THE GENERAL COUNSEL. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS. **Code of Conduct for United States' Judges.** Washington DC: Administrative Office of the US Courts. September 1999 20p. [L 240.3G1 JUD]
- LAND AND ENVIRONMENT COURT OF NSW **Annual Review 1999.** [N 94.K2N LAN]
- LE SUEUR, ANDREW; CORNES, RICHARD; UNIVERSITY COLLEGE LONDON. SCHOOL OF PUBLIC POLICY. THE CONSTITUTION UNIT. **What do the Top Courts Do?** London: University College. June 2000 42p. [L 221.A1 LES]
- LEGAL INFORMATION STANDARDS COUNCIL **Best Practice Guidelines for Australian Legal Web Sites.** Law Foundation of NSW April 2000. 14p. [105.K1 LEG]
- LOCAL COURT NEW SOUTH WALES **Annual Review 1999** Sydney: Office of the Chief Magistrate. 1999 [L 217.K2N LOC]
- MAGISTRATES' COURT OF VICTORIA **Annual Report 1998/99.** Melbourne: Magistrates' Court. [L 224.K2V MAG]
- NEW SOUTH WALES. DISTRICT COURT **Annual Review 1998.** [L 317.K2N NEW]
- NEW ZEALAND LAW COMMISSION **Costs in Criminal Cases:** Report 60 Wellington: Law Commission. May 2000 vii,55p. [N 397.L1 NEW]
- QUEENSLAND. INDUSTRIAL COURT **Annual Report of the President of the Industrial Court in respect of the Industrial Court, the Industrial Relations Commission and the Industrial Registrar's Office, Queensland 1998/99.** Brisbane: Industrial Court. [L 228.6K2Q QUE]
- QUEENSLAND LAW REFORM COMMISSION; MUIR, J.D.M. (CHAIR) **The Role of Justices of the Peace in Queensland.** Brisbane: Queensland Law Reform Commission. Dec 1999. Report no.54 xvii,402p. [L 243.K2Q QUE]
- QUEENSLAND LAW REFORM COMMISSION **The Receipt of Evidence by Queensland Courts:** the evidence of children. Report no.55 part 1. Brisbane: Queensland Law Reform Commission. June 2000 119p. [N 390.K2Q QUE]
- SINGAPORE. SUBORDINATE COURTS **Annual Report 1999.** Singapore: Subordinate Courts. 2000 [L 223.S1 SIN]
- SINGAPORE. SUBORDINATE COURTS; SINGAPORE POLICE FORCE; NATIONAL COUNCIL OF SOCIAL SERVICE; SINGAPORE. MINISTRY OF LAW; SINGAPORE. PEOPLE'S ASSOCIATION. **Community Justice Guide.** Singapore: Subordinate Courts. 84p. [L 219.5S1 SIN]
- SOUTH AUSTRALIA. JUVENILE JUSTICE ADVISORY COMMITTEE **Annual Report 1999** [M 637.K2S SOU]
- SUPREME COURT OF NEW SOUTH WALES **Annual Review 1999.** [L 221.K2N NEW]
- SUPREME COURT OF THE UNITED STATES **Recusal Policy** : Statement of recusal policy with attachment. Eagan MN: West. 1 November 1993 7p. Also included are other documents related to recusal 1. Conflict of Interest Rules for Part Time Magistrate Judges 2p. 2. Compendium of Selected Opinions 87p. 3. Resolutions of the Judicial Conference 7p. 4. Published advisory opinions. 8p. [L 240.6G1 SUP]
- VICTORIA. DEPARTMENT OF JUSTICE; VICTORIA. DEPARTMENT OF HUMAN SERVICES; VICTORIAN ABORIGINAL JUSTICE ADVISORY COMMITTEE; et al **Victorian Aboriginal Justice Agreement.** Melbourne: Victoria. Department of Justice. 2000 2 copies. 47p.

AIJA MEMBERSHIP

AIJA Membership is open to judges, magistrates, members of tribunals, practitioners, graduates in law or jurisprudence, researchers in law reform and related agencies, court administrators, law librarians, and others with an interest in judicial administration. In each edition of *AIJA News* we publish a list of our most recent members. This appears below.

Members receive free copies of the AIJA research publications, *AIJA News*, our *Annual Report* and advance notice of AIJA courses, conferences and seminars and discount registration rates.

If you are interested in becoming a member of the Institute, or would like further information, please contact the AIJA Secretariat (Tel: (03) 9347 6600 Fax: (03) 9347 2980 or email the Membership and Publications Officer, Kathy Jarrett on k.jarrett@unimelb.edu.au)

New Members

Mr Linton John Drever, Legal Practitioner, Geelong, Victoria
The Hon Justice Dutney, Supreme Court of Queensland
His Hon Judge M Finnane, District Court of New South Wales
Mr Michael Ryan, Legal Practitioner, Perth, Western Australia
Mr Graham Taylor, Barrister, Wellington, New Zealand

IS YOUR MEMBERSHIP UP-TO-DATE?

Reminder invoices for membership fees have recently been issued. Please note that we cannot supply copies of research publications to members who are unfinancial.

If you have any queries about your membership fees, call Raffaella Stefanovski at the AIJA Secretariat on (03) 9347 6600

Australian Law Reform Commission Conference on Penalties: Policy, Principles & Practice in Government Regulation

When - Thursday 7 June - Saturday 9 June 2001

Where - Dockside, Cockle Bay at Darling Harbour, Sydney

The ALRC is bringing together leading Australian and international experts in regulatory theory and practice for this conference on Penalties: Policy, Principles & Practice in Government Regulation.

The conference - to be opened by the Attorney-General of Australia, the Hon Daryl Williams AM QC MP - will address issues such as globalisation of regulation, risk control strategies and regulatory enforcement, the blurring of civil and criminal enforcement paradigms, principles of accountability and fairness, ascribing liability to company employees and directors, the role of courts in regulatory arrangements and how to measure effective regulation.

*For further information contact:
Michelle Hauschild or Stephanie Dawes
Australian Law Reform Commission
GPO Box 3708*

*SYDNEY NSW 1044
Ph: (02) 9284 6333 Fax: (02) 9284 6363
Email: conference@alrc.gov.au*

Regular conference updates will be posted on the ALRC's website at: <http://www.alrc.gov.au>

Journal of Judicial Administration

Editor: Professor Greg Reinhardt (AIJA Executive Director)

With major developments in judicial administration in Australia and round the world, plus the interest in the role and operation of the judicial system and related institutions, there is a real need for one source to keep you current on the topical issues in this area.

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