Independence from One Another

Judicial Conference of Australia Colloquium

8 October 2010, Hobart

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At the ceremonial sitting of the High Court held to mark his retirement, Chief Justice Gleeson[1] observed that the capacity of the judiciary to develop its own organisational resources is essential to its continued independence. He referred to the Australasian Institute of Judicial Administration, the Judicial Conference of Australia and the National Judicial College in this connection. He went on to sound one note of caution, which was to say that since a primary object of each organisation is to support and sustain judicial independence they should not be permitted to undermine it. His Honour identified the challenge for bodies such as this as being to foster the judiciary's organisational resources without sacrificing the qualities that they are designed to protect. Having identified the challenge, the Court adjourned.

Since the Chief Justice had never made an unconsidered remark, and since at the time I was the President of the AIJA, I took note of these remarks. I

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1 [2008] HCATrans 317 (29 August 2008).

thought that the JCA's Annual Colloquium might be an occasion to explore the concerns that may have informed his Honour's choice of topic for his farewell speech.

The remarks were the more pointed given that the Hon Murray Gleeson has in the past warned judges against overstating the principle; against invoking independence in circumstances in which it is not, in truth, under threat. He has counselled judges against turning every disagreement about the conditions of judicial service or the funding of courts into an issue of independence[2]. As far as real threats to independence are concerned, he has pointed out that in Australia they are unlikely to be direct. The more likely prospect is that people who do not understand the concept will make well-intentioned demands, in the name of accountability, that are inconsistent with independence[3]. His Honour's remarks on retirement were directed to the personal independence of judges – the independence of judges from each other – in the context of the risk of the future bureaucratisation of the judiciary.

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[2] Gleeson, 'The Role of a Judge and Becoming a Judge' (speech delivered at the National Judicial Orientation Program, Sydney, 16 August 1998).

[3] Gleeson, 'The Right to an Independent Judiciary' (speech delivered at the 14th Commonwealth Law Conference, London, September 2005).

Sir Anthony Mason warned against an allied risk in an address given to an audience comprising the English, Scottish and Australian Bar Associations almost 20 years ago[4]. He described proposals for the improvement of the performance of the courts which were being mooted at that time. These included that judicial remuneration and court funding should be linked to "court throughput". Sir Anthony neutrally observed that proposals of this character reflected an imperfect understanding of the judicial function and the concept of independence. It was a difficulty that he considered had become more acute since economic rationalism and managerialism had become the dominant philosophy of government. Happily the proposals of which he spoke did not bear fruit. However, some such proposal appears to have been raised in New South Wales in the more recent past. Chief Justice Spigelman referred to it in a paper that he delivered at the AIJA's 2006 Annual Conference[5]. Chief Justice Spigelman joined Sir Anthony in criticising the prevailing managerialist ideology in the public sector, particularly in its insistence on the use of

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[4] Mason, 'The Independence of the Bench; the Independence of the Bar and the Bar's Role in the Judicial System' (1993) 10 *Australian Bar Review* 1 at 2-3.

[5] Spigelman, 'Measuring Court Performance' (paper presented at the Annual Conference of the Australian Institute of Judicial Administration, Adelaide, 16 September 2006).

quantitative measures for the assessment of the performance of the courts.

The desire of governments to draw conclusions about the value of the work of the courts from quantitative measures will not go away. The task of explaining why an analysis of "court throughputs" is not particularly meaningful will continue to fall to Chief Justices. It poses particular difficulties for State and Territory courts which, save for South Australia, function as cost centres within a government department[6]. It is against this background that the AIJA has been working with the Productivity Commission in an endeavour to develop more sensible statistical measures with respect to the work of courts.

A clear exposition of what it is that courts do, drawing on the language of management, is found in the introduction to the 1996 Annual Review of the Supreme Court of New South Wales written by Murray Gleeson when he was Chief Justice of that State[7]:

> "The administration of civil and criminal justice, the exercise of judicial power to determine legal

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[6] Alford, Gustavson and Williams, *The Governance of Australia's Courts: A Managerial Perspective* (2004) at 38.

[7] Gleeson, *The Supreme Court of New South Wales, Annual Review* (1996) at 1.

> rights and liabilities, and the maintenance of the rule of law, are the essential functions of the Court. Those are its core activities.
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> The Court is not merely some kind of publicly funded dispute resolution centre whose object is to process the maximum number of cases, in the shortest possible time, at the least cost. Even so, the members of the Court, the government and the public have a legitimate interest in the way in which the Court operates as an institution, the adequacy of its infrastructure, and the efficiency with which it deals with the business coming before it.
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> The Court cannot control its workload, and it depends entirely upon the executive government to provide its resources. At the same time, in the discharge of its essential functions, it is required to maintain its independence from the executive government. Reconciling these necessities is not always easy."

Concerns about the impact of the spirit of managerialism on the judiciary are not likely to be confined to Australia.

In the United Kingdom the Judicial Appointments Commission has developed a set of generic "qualities" with matching "abilities" that are required for holders of judicial office. The publication of this set of qualities on the Commission's website is presumably thought to meet demands for accountability and transparency. The "qualities" and "abilities" are stated in the familiar language of human resource recruitment. They are expressed at a surprising level of generality given their function. Judicial office requires the "quality" of "intellectual capacity", which quality is accompanied by the matching "ability" of "appropriate knowledge of the law and its underlying

principles, or ability to acquire this knowledge where necessary". Personal qualities for the holders of judicial office include "integrity and independence of mind" and "sound judgment" and "the ability to work constructively with others". The quality of "efficiency" may be demonstrated by, among other things, "leadership and managerial skills where appropriate"[8].

In July 2010, the Chairman of the Appointments Commission announced that, following consultation with "key partners", a second set of qualities – focussing on leadership and management – had been developed for senior roles within the judiciary[9]. These competencies include: "forming and delivering business objectives; motivating, supporting and encouraging professional development; building constructive relationships with colleagues and effectively managing change".

In 2008, the Judicial College of Victoria adopted a framework of judicial "qualities" and "abilities" for Victorian judicial officers, which draws on the English model. It is said to have been informed by "the best international

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[8] www.judicialappointments.gov.uk/application-process/112.htm.

[9] www.judicialappointments.gov.uk/about-jac/1017.htm.

standards of judicial performance"[10]. There may be room for debate about whether reducing well-understood attributes for the holder of judicial office to one-line items in a pro forma job description is a useful exercise. "Decision-making abilities" for judicial officers under the Victorian framework may be demonstrated by abilities including, "objectively and impartially evaluates evidence", "properly weighs sufficiency and quality of evidence", "relies on own judgment" and so forth. "Professionalism and integrity" may be demonstrated by the judicial officer who "respects and complies with the law".

The Victorian framework has not, to date, adopted an additional management and leadership skill-set for senior members of the judiciary. However, leadership and management are qualities within the generic framework. Core abilities in this respect are "strategically plans and organises"; "manages change"; "supports and develops talent"; "manages quality standards" and "encourages and facilitates teamwork". One way in which a judicial officer may demonstrate his or her ability in these respects is that he or she "works in partnership with judicial colleagues and the administration to achieve objectives".

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[10] Judicial College of Victoria, *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers*, September 2008 at 2.

Courts are publicly funded institutions and they should make efficient use of the resources that are allocated to them consistently with the performance of their constitutional function. Requiring the parties to civil litigation to conduct proceedings in a manner which recognises that the parties are making use of publicly-funded resources does not compromise the function of the court. Recognition of these facts does not require that holders of senior judicial office should have management skills.

It is important to distinguish the administration of the court from case management. Much of the work of the former is carried out by court administrators who have specialised skills in this field. While it is important that the allocation of cases to judicial officers remains under the supervision of the judiciary, there is no reason why listing cannot be done by administrative staff using the predictive tools that the task requires. It is arguable that judges, including senior judges, are better employed in judging than in administration.

Sometimes, in the discussion of court performance the distinction between court administration and case management is blurred. I have attended seminars on court governance at which it has been suggested that one indicator of performance is the number of adjournments between the filing of originating process and the final disposition of the matter. The suggested measure assumes

that the determination of an application should turn, at least in part, by reference to targets having nothing to do with the merits of the application.

The development of case management owes much to the work of the AIJA. It was established in 1982 by a group of judges, legal practitioners and legal academics with the aim of introducing modern principles of management and organisation into the administration of justice in Australia[11]. The concern was with reform of procedures. It was sought to assess the value of reforms by empirical means rather than by recourse to intuitive views or hunches as had happened in the past. The AIJA's first research project involved an investigation into the cause of delays and inefficiency in civil litigation in the Supreme Courts of New South Wales, Victoria and the Australian Capital Territory[12]. Over the years the AIJA has done a deal of excellent work directed to the reform of civil and criminal procedure. Case management has come to be the accepted way of handling litigation of any length or complexity. Effective case management requires that the judge have an understanding of the practical conduct of litigation. Quintessentially it involves judicial skills and not those of a middle manager.

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[11] (1982) 56 ALJR at 387.

[12] (1982) 56 ALJR at 387-388.

The overriding purpose that is now stated in the rules of the courts of most of the Australian jurisdictions is the facilitation of the just resolution of the real issues in civil proceedings with minimum delay and expense[13]. In *Aon Risk Services Australia Limited v Australian National University*[14], the High Court recognised that the rules governing civil litigation are not directed solely to the resolution of the dispute between the parties and that the just, timely and cost-effective resolution of a dispute has an effect upon the court and upon other litigants[15]. The implications of *Aon* by contrast with *Queensland v JL Holdings Pty Ltd*[16] are to be the subject of discussion at this conference. In *Aon* it is acknowledged that the objectives of case management expressed in the rules were likely to have been written with the decision in *JL Holdings* in mind[17]:

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[13] *Uniform Civil Procedure Rules* 1999 (Qld), r 5; *Civil Procedure Act* 2005 (NSW), ss 56-60; *Supreme Court (General Civil Procedure) Rules* 2005 (Vic), r 1.14; *Supreme Court Civil Rules* 2006 (SA), r 3; *Supreme Court Rules* (NT), r 1.10; *Rules of the Supreme Court* 1971 (WA), o 1, rr 4A, 4B.

[14] (2009) 239 CLR 175; [2009] HCA 27.

[15] *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 at 211 [93] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

[16] (1997) 189 CLR 146; [1997] HCA 1.

[17] *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 at 213 [97] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

> "The purposes stated in r 21 cannot be ignored. The *Court Procedure Rules* make plain that the Rules are to be applied having regard to the stated objectives of the timely disposal of the proceedings at an affordable cost. There can be no doubt about the importance of those matters in litigation in the courts of the Australian Capital Territory."

Judges charged with the responsibility of case managing particular matters or with the conduct of specialised lists are likely to find *Aon* a useful authority to have at hand. It remains that the management of cases is directed to the just resolution of the proceedings. The exercise of judicial discretion remains just that. An overly enthusiastic "one size fits all" approach to case management designed to demonstrate judicial efficiency is likely to be counter-productive. Our adversarial system expects that a judge will hear both sides of the argument before giving a decision – and that he or she will keep an open mind while doing so.

The role of the courts in the enforcement of legal rights and obligations, the administration of the criminal law and the resolution of disputes between citizens and between citizens and governments is fundamental to our form of democratic government[18]. It assumes that judicial

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[18] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343 [3] per Gleeson CH, McHugh, Gummow and Hayne JJ; [2000] HCA 63; *North Australian*

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power will be exercised by judges who are independent of the legislature, the executive and each other. The ability to manage assumes the ability to direct others in the performance of their functions. To speak usefully of management is to assume that goals may be achieved by the employment of incentives and disincentives. While heads of jurisdiction may be responsible for the allocation of cases and may informally counsel judicial officers over matters, including the timely delivery of judgments and the like, the judiciary is not a hierarchical service. Heads of jurisdiction are likely to lead by force of intellectual power rather than by employing the tools of management.

The reason for the independence of the judicial branch from the executive has rarely been better expressed than in the speech of Lord Atkin in *Liversidge v Anderson*[19]. The House of Lords was divided on the construction of a World War II defence regulation empowering the Home Secretary to make an order detaining a person on the strength of the recital that he (the Home Secretary) had reasonable grounds for belief that the person had hostile associations. The passage will be familiar to this audience[20]:

Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146 at 152 [3]; [2004] HCA 31.

19 [1942] AC 206.

20 *Liversidge v Anderson* [1942] AC 206 at 244.

> "In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

Of course, Lord Atkin was in dissent in *Liversidge*. He described the arguments that had found favour with his colleagues as ones that might have been acceptably addressed to the Court of Kings Bench in the time of Charles I[21]. He expressed dismay at the attitude of judges who faced with a claim involving the liberty of the subject showed themselves "more executive minded than the executive"[22]. Famously, the only authority that he could find to support the construction favoured by the majority was Humpty Dumpty's reply to Alice in *Through the Looking Glass*[23].

Lord Bingham, in a lecture in 1997, gave an account of an exchange between Viscount Simon, then the Lord Chancellor, and Lord Atkin shortly before the delivery

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[21] *Liversidge v Anderson* [1942] AC 206 at 244.

[22] *Liversidge v Anderson* [1942] AC 206 at 244.

[23] *Liversidge v Anderson* [1942] AC 206 at 245.

of judgment in *Liversidge*[24]. Viscount Simon had seen a copy of the speeches. He wrote to Lord Atkin suggesting that the reference to Lewis Carroll would be wounding to his colleagues and suggesting that reference could be removed without weakening the force of the speech. Lord Atkin politely declined to do so. Lord Bingham pointed out to his audience at the Reform Club that "inherent in the independence of judges [is] that they should be independent of each other" and went on to characterise Viscount Simon's request as extraordinary. All in all, Lord Atkin's speech stands as a singular example of personal independence. Whether he would have scored highly at interview on the measure of "working constructively with others" may be an open question.

Pressures on the judiciary to adopt changes with a view to becoming more "transparent and accountable", to use the language of public sector management, are not infrequently accompanied by the assertion that to do so will increase public confidence in the judiciary. How one assesses public confidence from day to day may be contestable. An ill-considered remark made by a judge in a particular case may attract publicity and a deal of justified criticism of the judge. It does not follow that the public

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[24] Bingham, 'Mr Perlzweig, Mr Liversidge, and Lord Atkin' in *The Business of Judging* (2000) at 216.

lacks confidence in the judiciary. The courts and our parliamentary institutions have a long and stable history and in a real sense each enjoys public confidence. However, if it were necessary to explain to a group of fair-minded citizens why it is that judges are independent of the executive, the legislature and each other, I would be inclined to start with Lord Atkin's speech in *Liversidge*.

The increasing size of the judiciary and specialisation within the profession (arising from the greater complexity of legal work) has led to recognition of the need for judicial education. The work of the New South Wales Judicial Commission, the Judicial College of Victoria and the National Judicial College demonstrates that aspects of court craft and the business of judging can be taught. Judicial officers, like other professionals, are also likely to benefit from exposure to a range of subjects of broader interest than topics of immediate professional concern.

The National Judicial College, with the support of the Judicial Conference of Australia and the AIJA, has developed a national standard for professional development for Australian judicial officers[25]. The report containing the standard includes a valuable survey of the schemes for

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[25] National Judicial College of Australia, *A National Standard for Professional Development for Australian Judicial Officers* (April 2006).

judicial professional development in each of the Australian jurisdictions and overseas. The promulgation of the standard serves to assist the courts and the College and the Commissions in making a case for funding the programs and freeing-up judicial officers to attend them.

The discussion in the College's paper canvasses whether a scheme for professional training should be mandatory and whether judges should be free to select the courses which they considered to be of value to them[26]. Arguments in favour of prescription included that it would avoid the standard being undermined by judicial officers who chose to undertake courses bearing little or no relationship to their work needs. If this were thought to be a real problem it would say something rather more profound about the state of the judiciary.

The standard is that judicial officers should have access to five days per annum of professional training[27]. It is not mandatory. It is recognised that the training needs of judicial officers will vary according to the nature of their work. The standard builds on the pioneering work

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[26] National Judicial College of Australia, *A National Standard for Professional Development for Australian Judicial Officers* (April 2006) at 24-25.

[27] National Judicial College of Australia, *A National Standard for Professional Development for Australian Judicial Officers* (April 2006) at 29-30.

undertaken by the Judicial Commission of New South Wales, and places the development of programs under the control of the judiciary[28].

It is important that judges retain control of programs of judicial education. The reasons for this are obvious. The executive is a frequent litigant. The executive should not be responsible for guiding judicial decision-making. It is a point that was nicely made some years ago by Chief Justice Lamer of the Supreme Court of Canada. His Honour observed that "the elected branches of government simply have no business telling the judicial branch what it is important for that branch to know or, worse still, how it is to think"[29].

In Victoria, judicial education has been placed on a statutory footing. The *Courts Legislation Amendment (Judicial Education and Other Matters) Act* 2007 established a uniform scheme applying to judicial officers in the Supreme, County, and Magistrates' Courts, and the Victorian Civil and Administrative Tribunal. Amendments

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[28] National Judicial College of Australia, *A National Standard for Professional Development for Australian Judicial Officers* (April 2006) at 29.

[29] Lamer, 'The Tension Between Judicial Accountability and Judicial Independence: A Canadian Perspective' (1996) 8 *Singapore Academy of Law Journal* 291 at 301-302.

to the governing legislation of each court charge the head of jurisdiction with responsibility for directing the professional development and continuing education and training of judicial officers. Each head of jurisdiction is empowered to direct all judicial officers, or a specified class of judicial officers, or a specified judicial officer, to participate in a specified professional development or a continuing education and training activity[30].

The reason for the introduction of these provisions was identified as being to strengthen the community's confidence in the legal system. This, it was said, would be promoted by supporting the judiciary to stay up to date with developments in the law, in technology and in community attitudes[31]. The provision of judicial training in Victoria is in the hands of the Judicial College of Victoria. The Board of the College has a majority of judicial members. The legislature's recognition of the importance of ongoing professional training for the judiciary is to be applauded[32]. The statutory power of direction conferred on

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[30] *Supreme Court Act* 1986 (Vic), s 28A; *County Court Act* 1958 (Vic) s 17AAA; *Magistrates' Court Act* 1989, s 13B; *Victorian Civil and Administrative Tribunal Act* 1998 (Vic), s 38A.

[31] Courts Legislation Amendment (Judicial Education and Other Matters) Bill 2007, Second Reading Speech, Victoria, *Parliamentary Debates*, Legislative Assembly, 23 May 2007 at 1598.

[32] See, too, the Commonwealth recognition of judicial education under the *Federal Court of Australia Act*

Footnote continues

heads of jurisdiction is curious. Traditionally judges are *primus inter pares*. Their independence is secured principally by tenure. In Victoria the tenure of judicial officers is provided under the *Constitution Act* 1975[33]. This is not the occasion to explore any tension that may exist between constitutional recognition of the independence of Victorian judicial officers and certain of the amendments introduced by the *Courts Legislation Amendment (Judicial Education and Other Matters) Act.*

There are limitations on the scope of judicial training under our common law system of adversarial trial. The assumption of the system is that the judge decides the case on the basis of the issues that the parties present. Quite a deal of judicial decision-making involves evaluative judgments. This is so in the sentencing of offenders and in aspects of the award of damages. It is where the increasing size and specialisation of the profession has made the task of judging more difficult for newly appointed judges.

1976, s 15(1AA)(b)(iii), which requires the Chief Justice of the Federal Court of Australia to ensure that arrangements are in place to provide judges with appropriate access to and reimbursement for the cost of judicial education

[33] *Constitution Act* 1975 (Vic), s 87AAB.

Taking New South Wales as an example because it is the largest jurisdiction: in 1974 there were 27 District Court judges. I select 1974 because at the end of that year the *Trade Practices Act* came into operation. That statute alone had a significant impact on the conduct and complexity of much civil litigation. There are now 68 District Court judges in New South Wales. Their numbers are swelled by the addition of acting judges. The judges in 1974 were all drawn from the Bar and were generalists. On appointment they were likely to have an understanding of the pattern of sentencing for given offences and of the range of general damages awards in personal injuries actions. Skilled, specialist practitioners are now appointed to the District Court, who may not have practiced at all in these fields. It is a phenomenon that was noted in the course of argument in *Wong v The Queen*[34], the case which challenged the guideline judgment for the sentencing of offenders for the importation of narcotic goods. The Chief Justice asked counsel what was a judge who had never sentenced a person to do – pick up the telephone (and ask another judge)?[35]

One feature of today's judiciary, apart from its size, which stands in contrast with the judiciary of a generation

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[34] (2001) 207 CLR 584; [2001] HCA 64.

[35] *Wong v The Queen* [2001] HCATrans 165 at 3015.

ago, is our relative informality. Certainly in New South Wales judges enjoy frequent exchanges with one another and inevitably these exchanges include discussion of cases. While I would not favour a return to purdah for judges, on occasions such as this one it is useful to reflect on how we might maintain our congenial informality but be sensitive of the need for appropriate restraint. The appellate process is the mechanism for the correction of error. Remarks, including jocular remarks, about decisions, particularly those involving the exercise of evaluative judgment, can serve to undermine independence as much as inroads from outside the judiciary.

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