Judicial Education

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INTRODUCTION

That we are discussing judicial education at this colloquium suggests that it is expected to be an inevitable aspect of judicial life in the next century. If so, then we are very fortunate in having foreseen a probable outcome of current trends in time to influence that outcome. The goals and scope of judicial education in this country are still very much open for discussion. We have a chance to shape the future, and we should exploit it to the utmost. If further government funding becomes available in this area, we should ensure that it is wisely spent.

I confess to being somewhat ambivalent about judicial education and the current outbreak of interest in it. This ambivalence is largely attributable to my own uncertainty about what people mean when they speak of "judicial education". What is "judicial"? What is "education"? Both terms are very elastic and probably mean different things to different people. Questions which immediately spring to mind include:-

(a) Who are to be educated?

(b) What are they to be taught?

(c) When are they to be taught? Is the education to be pre- or post-appointment? Are judicial numbers to be increased to allow for time spent at education programmes?

(d) What is the significance to a judge and to the community if he or she does or does not undertake an available education programme?

(e) How is judicial education to be delivered and by whom?

(f) Who is to pay?

I have the impression that many of those who talk about judicial education consider the answers to all of these questions to be obvious, but they are not obvious to me. Further, I fear that unless it is properly handled, the development of a programme for judicial education may undermine many of our fundamental views about the judiciary and judicial independence.

Judicial Independence

Some will see my concern in this area as reflecting typical judicial paranoia, but the more I think about the idea of judicial independence, the more certain I am that our defence of it, like all forms of defence, must involve early identification of likely threats and a plan for aggressive defence in depth. We cannot defend judicial independence by waiting until we are facing a potentially terminal threat. We must try to prevent that threat from ever arising. We can only do that by identifying and dealing with minor, and even potential threats as they arise or seem likely to arise, and in particular, by so educating the community that the environment is not conducive to the emergence and development of such threats. The primary role of the Judicial Conference of Australia is the defence of judicial independence, not judicial education nor even meeting the professional needs of judges. In joining the Conference and in coming to this activity, we are indicating that we consider that the threat is a real one.

Let me say a little more about my concerns. It is very easy to assume that any form of education must be

beneficial to some degree, or at least not harmful. In general, I agree. However, as with any other innovation affecting an ancient institution, it is as well that we take time to consider how such a programme may affect the substance of the judiciary and public perceptions of it. Very often, such effects may not be easily foreseen.

The maintenance of judicial independence depends as much upon perceptions as upon reality. Judicial independence means nothing unless individual members of the community believe that the judiciary is independent. That belief will inevitably be based upon perceptions. Attacks on judicial independence will rarely be by way of full-frontal assaults made by cold-blooded despots who wish to turn the nation into a dictatorship. The threat will usually be from ill-informed politicians and public servants who don't appreciate the value and delicacy of judicial independence as much as they appreciate the value of other short term political benefits to themselves and/or their constituents. The attack will usually be incremental, initially upon peripheral matters which go to the perception of independence rather than to independence itself. Such an attack will be justified on the ground that it does not affect matters of substance. But because perceptions are so important, we must uphold them as strenuously as we defend actual independence. If the perception of independence goes, then the public will no longer believe that we are independent. Hence they will not be troubled by subsequent attacks on the reality of our independence. If the perception has gone, then the reality will follow.

How can an education programme undermine judicial independence or the perception of judicial independence? I suggest that there are at least three ways in which such a programme may have negative effects in this area. The first, and most obvious, is that a programme which is apparently sponsored by and/or controlled by government would seriously affect perceptions of the separation of the judiciary from government. There would be the real risk of a perception that government was telling judges what to do and how to do it. Further, government would quickly come to believe that it was doing just that, start enjoying it, and seek to go further.

Another, and more subtle effect would be in connection with recruitment. I suggest that judicial independence is well-served by the practice of recruiting from the legal profession, although there have been, and are some notable and very worthy exceptions to the practice – people who have come from the universities and government. At the level of actual independence, this general practice has meant that the ethos of the judiciary has been largely based upon the values of the independent profession which is accustomed to doing battle with government in one form or another. This background is reflected in the way in which judges behave. Community perceptions must be affected both by knowledge of the usual source of judicial recruitment, and by the way judges behave because of their common backgrounds. Those of us who remember the old magistrates' courts, constituted by magistrates appointed from, and remaining within the public service have seen direct evidence of the effects of recruitment sources upon both judicial independence and perceptions thereof.

The present recruitment policy also supports judicial independence in another way. There is always room for concern that governments will try to appoint judges who reflect their party-political views and values. In addition, there is great pressure for appointments based on gender and ethnic or social backgrounds. The present appointments system is very much geared towards ensuring that selection will be from a pool of people who have proven themselves in practice. An appointment from that pool can be assessed by the profession to ensure that it is, at least primarily, merit-based. Any departure from that criterion can and will be criticized by the profession who will be seen to know what they are talking about. An appointment from outside that pool may not be so easily assessed. It will be easier for government to avoid scrutiny by those best qualified to perform that function. Government will justify such an appointment on the rather vague basis that it is "broadening" the background and experience of the judiciary, which may be fair enough, but there will often be nobody who can make an informed assessment of such an appointee to ensure that he or she possesses other appropriate capacities and qualifications.

At present, it is difficult for government to justify appointment from outside the pool of practitioners because it is fairly clear that there is no viable alternative career path to the bench. There is no course

which purports to "train" people for appointment. The existing orientation course for new judges certainly makes no such claim. However, a course of that kind may appear to offer a basis for developing a new route to judicial office. A government wishing to give credentials to a class of candidates from outside the practising profession would find it very easy to build upon an existing course of judicial education so that, in time, it could be passed off as offering qualification for appointment. Such a "back door" change to recruitment methods may detract from judicial independence unless it is accompanied by new safeguards. By ensuring that any programme cannot be easily passed off as offering qualifications for judicial office, we will ensure that if the present selection practice is to be changed, the question of appropriate qualifications is squarely raised and discussed and that necessary new safeguards are developed.

The third threat to judicial independence lies in the nature of the educational process. Within the profession, we have generally approached the content of education programmes in an ad hoc way, but that is not the way in which professional educators would carry out the project; nor should they. They would want to find out what judges do and what they should know; then they would want to see where the shortfalls occur in current performance. On that basis, they would design an appropriate programme. Any useful programme would also involve some method of assessing the extent to which instruction was assimilated and its long term benefits.

None of these things is bad in itself, and such close examination of the judicial function may well be worthwhile, even overdue. But the relevant information will not be derived from some overall assessment of the whole judiciary. It will require close consideration of the work of individual judges. Such detailed scrutiny would be quite inconsistent with the current ethos of the judiciary. Again I stress that it may be about time that we addressed these issues, but we must understand that to do so will involve substantial attitudinal changes and real and perceived threats to judicial independence. I am not saying that we should not follow that course, but if we do so, we must rethink the practical safeguards which we rely upon to ensure judicial independence.

Since writing this, I have seen the article by Livingston Armitage in the Judges' Forum newsletter for September, 1998. It is entitled "Evaluating Judicial Education: Performance Indicators". The author concedes the incompatibility to which I have referred between the requirements of judicial independence and assessment of judicial performance. He implies that but for such incompatibility, judicial assessment would be an appropriate basis for evaluating judicial education courses. Further, the alternative performance indicators which he proposes in the absence of such assessment do not seem very useful, suggesting that there will be pressure to permit judicial assessment in order that we be better able to evaluate such courses in the future.

WHO IS TO BE TAUGHT?

What is the likely scale of any undertaking to provide judicial education? We are not talking about a few lectures for judges traditionally so-called. Also included will be the very large number of magistrates and judges of local courts. In addition, there are many specialist courts, such as the Family Court, planning and environment courts, industrial courts and others. There are also numerous quasi-judicial tribunals which decide quite important matters. We are talking about a large number of people, with different responsibilities and needs. Although there may be some common aspects to their work, we should not assume that one course will be suitable for all, or even most judges. Needs may be quite specialized. If we start with the assumption that all judges should receive some training, we may tend to conclude that it is appropriate, in order to reflect that assumption, that all judges be offered a common programme regardless of its suitability, simply because that is all we can do with the resources available. We should rather start by trying to identify needs. This may lead to our offering specialized courses to small groups and no, or very few, general courses. We will have to make decisions about priorities, but at least we won't be wasting people's time. In other words, we must avoid the temptation to establish a judicial education scheme, with the associated empire, just for the sake of it. We must rather identify and try to satisfy the real needs of the judges and the community.

WHAT DO WE TEACH?

There is a tendency in this country to confuse education and vocational training. For political reasons, our leaders try to justify the education budget upon the basis that it helps young people to get jobs. No doubt, in each individual case, this is true. There is, however, also a subliminal message that education can create jobs. I doubt the veracity of that proposition, but whether it be so or not, my point is that these messages have led to a public perception which overlooks the distinction between education and vocational training. Unfortunately, even our universities seem unwilling to emphasize it.

The expression "education" is more properly used to describe much broader programmes of intellectual, physical and moral development than are properly described by the word "training", which implies preparation for the narrower requirements of a specific task or range of tasks. "Educating" judges might well involve a wide range of activities designed to expand, directly or indirectly, the whole range of life experiences, to develop understanding of the human condition as it is presented every day in every court in the land. "Judicial training", on the other hand, implies the teaching of skills thought to be part of the judicial process. My own view is that a person who has enjoyed the benefits of a broad education will find that the technical skills of the judicial process are easily acquired. Indeed, he or she will be well-equipped to develop innovative and perhaps, unique approaches to judicial duties which will enrich the judiciary generally. There is no reason why all judges should perform all aspects of their work in uniform ways. Judging is a very personal business. The basis of our judicial system is that we put the dispute-resolution process in the hands of people who have certain qualities and qualifications. There is little to be said for then telling them how to use those qualities and qualifications.

This brings me back to the point which I made earlier concerning the perception that people can be trained to be judges. If our courses are educational in the broad sense, then they will not be so easily misrepresented as offering qualification for judicial appointment. Conversely, if they are about technical matters - writing judgments, deciding issues of creditability, court room conduct – they will be very easily depicted as imparting fundamental skills and thereby offering judicial qualification. I suspect that there would be much more enthusiasm among judges for judicial education in the broad sense than there would be for judicial training in the narrow sense. But the point is that we must decide what it is that we want to do before we expend resources in designing a programme.

METHODS

In approaching this question, we must remember that we are considering education or training for a group of people who, by and large, have already experienced a degree of success in that they have been identified as suitable to receive the authority of the state to resolve disputes between citizens and between the state and citizens. It is reasonable to infer that in terms of talent, experience, education and training, they are generally well above average community standards. They will be people who are, themselves, regularly asked to participate in programmes as speakers and teachers. That does not mean that they have nothing to learn; but it does mean that any programme must be worthy of the time which they will be asked to invest in it. That is a daunting challenge.

GUIDELINES

I turn now to suggest possible guidelines for the development of judicial education and/or training programmes. Some reflect points already made and will require no further elaboration. One or two may require explanation.

1. Programme development should be judge-driven, with the widest possible involvement of judges at all levels and from all geographical regions.

2. The programme must be delivered by an organisation which represents judges and can be seen to be separate from government.

3. The aims of the programme must be clearly stated and widely publicised. Needless to say, those aims should not include preparation for judicial office. It would also be as well if it were made clear that the programme is not to be a platform for special interest groups to lecture judges about real or imagined defects in the judicial system.

4. As far as possible, the delivery of the programme should be de-centralized. There should be no attempt to establish a college which is physically centralized. We should avoid empires and empire-builders. Probably, the only practicable approach will be to co-locate the administrative centre with a law school as the AIJA and this conference have done, or with a court. Membership of the governing body should turn over regularly and should reflect the diversity of the programme's clientele.

5. The programme must meet real, not imagined needs. It should not reflect the political agendas of governments; nor should it be a public relations exercise for the judiciary as a whole or for those judges and others who may be running it. The governing body should have no role beyond provision of the programme. In particular, it should not make public statements other than about the programme.

6. The programme must recognize that different judges have different needs. It is unlikely that any one course will be suitable for all judges. We should not assume otherwise simply to indulge a desire to be seen to be educating as many judges as possible with the available resources.

7. The programme must also recognize that judges are people who have already achieved substantial advancement. They are well-educated and experienced. Course design and methods should recognize this. There is unlikely to be much room for formal lectures. The emphasis should be on self-teaching in small discussion groups, based on well-planned, practical problems. Courses so designed could be easily conducted at various places around the country.

8. There should be no attempt to standardize judicial approaches to problems or issues or to label any approach as "right" or "wrong", nor should there be any public comment upon the extent to which any judge, in his or her work, has complied with, or failed to comply with approaches suggested in the course of the programme.

9. We should avoid emphasis on the role of teachers in the programme, rather stressing its self-educative nature. Staff should guide discussion and encourage participation, but should not be seen as a faculty separate from the students. They should generally be experienced and respected judges. Staff should change regularly to maximize input from the whole judiciary and to avoid the institutionalization of the views of a small group.

10. Attendance must be voluntary, and performance must not be assessed in any way. There should be no course reports on individual performances.

FUNDING

Finally, let me say something about money. This could be a very elaborate or a very modest affair. Judges involved in the programme in any capacity will have to be released from other duties. This will create a need for more judges. If the programme is conducted centrally, there will be substantial travel and accommodation expenses. There will obviously be office expenses, including rent, secretarial costs and possibly the cost of a professional co-ordinator, although there may be suitable retired judges willing to act in an honorary capacity.

Once again, I stress the need to avoid empire-building.

Since writing this, it has occurred to me that the funding issue may be more sensitive and difficult than I initially imagined. Governments are not uniform in their attitudes to funding judicial education activities. I am familiar with the positions in the Supreme Court of Queensland and in the Federal Court. In the former, individual judges have, in effect, their own allowances for such activities. In the latter, there is a budgeted amount which is distributed by the Chief Justice. Presumably, other courts have similar arrangements. I suspect that relevant governments would expect courts to meet the cost of attending judicial education courses from existing resources. Such courses would therefore have to compete for support with other activities, some of which may be more attractive, particularly those involving overseas travel. It would be unfortunate, even counter-productive, if a proliferation of judicial education opportunities were to reduce support for well-established activities such as annual or biennial national conferences, AIJA activities and activities of the Judicial Conference, or travel opportunities.

CONCLUSION

In conclusion, I suggest four key characteristics for any programme of judicial education or training:-

1. The programme must meet real needs.

2. The administrative structure must be as simple as possible and as de-centralized as possible.

3. As many judges as possible must be involved at all stages.

4. The programme must be seen as an opportunity to share experiences rather than as one in which there are teachers and students.