OPENING JUDICIAL CONFERENCE OF AUSTRALIA COLLOQUIUM 2002
BY
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I am glad to have been asked to join you today. It really is very good to be with judicial friends and colleagues again.

The establishment of the Judicial Conference represented a significant step in the history of the development of judicial collegiality in Australia. It can be seen as the culmination of a process which started in the 1960's when the Chief Justices of Australia started holding biennial meetings. That was followed by the inauguration of Supreme Court Judges' Conferences in 1972, national conferences of Magistrates in 1978 and Australian Institute of Judicial Administration programmes and meetings in the 1980's. The establishment of the Judicial Conference in 1993 represented a further important development. In particular for the first time membership was extended so as to include all judicial officers. That reflected an appreciation both of the fact that the essential nature of the judicial function is the same whatever the jurisdiction and the fact that all judicial officers share a common interest in defending judicial independence and the principles which comprise the philosophy of the rule of law. I think that another important aspect of the advent of the Judicial Conference is that it is an incorporated body. That gives it a continuity of existence and an identity distinct from its members which means that any views it expresses are seen to be the collective views of its membership rather than the views of individual judicial officers with the problems which that can create.

I think that the Judicial Conference has an increasingly significant role to play. The function of encouraging and facilitating collegiality and interaction between judicial officers is most valuable. But the Conference also has a more general contribution to make to our society. In particular I think it has an important role to play in addressing what could be called a two cultures problem which I think exists in Australia today. Drawing on the analogy of the two cultures problem involving scientists and non scientists made famous by C.P. Snow, I am referring to a gap which I think exists between the socio political culture on the one hand and the legal culture on the other.

The existence of the gap between these two cultures is manifested in various ways. It is evidenced by a widespread lack of understanding in the community of many aspects of judicial work such as the raison d'etre of rules of procedure and evidence, the nature of the appellate function and its limitations, the distinction between the judicial functions of exercising a discretion, finding facts or declaring the law, why judicial decisions can create precedents whilst say jury verdicts do not and what actually goes on in real court rooms in Australia as distinct from the court rooms portrayed in Sea Change, Ally McBeal or if you watch late night re-runs – Perry Mason. And of course many other examples could be cited. But whilst that sort of ignorance is serious, this morning I would like to refer to another consequence of the gap between the two cultures: a lack of understanding of some of the fundamental components of our system of law and governance. Let me give four examples which I have deliberately drawn from quite different domains.

My first example is the blurring of the distinction between government and parliament. In media reports and popular discourse the

words ‘government’ and ‘parliament’ are routinely interchanged. For example, one often reads statements such as that the government – the government, not parliament - has enacted or amended such and such a statute. I recognise that the blurring of the distinction between government and parliament is often only a reflection of the fact that a government with a majority in the lower house of a parliament usually has the capacity to determine what the parliament does. But that is not always the case and in any event whatever might be the realpolitik situation at any given time, constitutionally the distinction is crucial. And the vice of not recognising that distinction in day to day usage is that it can lead to the erosion of the status and function of parliament as a distinct and important institution of our democracy. That is not an alarmist speculation. There is evidence that it is happening already. Take for example the practice of governments announcing that for some reason they no longer intend to enforce a particular Act of Parliament. Typically this has been done in the case of obsolete statutes which no one has got around to repealing or statutes which it is expected will soon be repealed, although in New South Wales at least there have been cases where it has been done simply because the government did not approve of the statute.

The announcement by a government that it will no longer enforce an Act of Parliament rarely attracts any comment but in fact however well intentioned it is quite unconstitutional. That was reaffirmed in an instructive New Zealand case. In 1975 in New Zealand the National Party was elected to government. Soon after the election, pursuant to a campaign promise that he would abolish the New Zealand Superannuation Scheme, the Prime Minister, Robert Muldoon, published a statement to the effect that pending the passage of the necessary repealing legislation neither employers nor employees would any longer

be compelled to make contributions to the scheme. A brave public servant thereupon commenced proceedings in the Supreme Court of New Zealand against the Prime Minister on the ground that his action amounted to a suspension of statutory law contrary to Section 1 of the Bill of Rights (1689). His claim was upheld by the court, which declared that the Prime Minister's announcement amounted to a suspension of the Superannuation Act and was therefore unlawful and indicated that if necessary it would grant a restraining injunction against the Prime Minister. Mr Muldoon's action was a serious breach of the constitution and of the most fundamental principle of any democratic system, the supremacy of parliament. But it would not have occurred had the Prime Minister and his advisers been as conscious of the constitutional environment in which they were operating as they were of the political environment and the distinction between government and parliament had been properly maintained. A classic example of the gap between the sociopolitical culture and the legal culture. Incidentally the report of the case does not record what impact the taking of these proceedings had upon the Plaintiff's subsequent career in the public service.

My second example is provided by the widespread misconception which emerged during the debate on the Republic that had the Commonwealth Constitution been amended so as to sever the Commonwealth's links with the Crown somehow that would have necessarily also entailed a change in the position of the governors of the States. Of course as you know a yes vote in the referendum would not have had the slightest impact upon the States or State Governors. Whatever the result of the referendum it would have remained a matter for each State to determine what the powers, functions and role of the Governor should be.

You may think that we need not feel all that concerned about the existence of that misconception, it merely reflecting a lack of understanding of a rather limited part of our system. But we should be concerned because in fact it reflected ignorance of the larger principle that upon Federation the constitutions of the States continued as they were before and may only be amended by the State concerned. That is truly a basic provision of the constitution, it defining the very nature of the components of the federation. That there exists widespread ignorance on the part of many otherwise well informed people of that fundamental element of our constitutional arrangements is troubling.

A failure to understand other fundamentals of our system is also revealed in discussions about mandatory sentencing which I note the Conference discussed at last year's colloquium and is on the agenda again this year. The way in which the issue of mandatory sentencing is debated reveals a gap between the socio political and the legal culture in at least two respects. The first arises out of the fact that an inevitable consequence of the creation of a system of mandatory sentencing is that sooner or later a case will arise when a court is compelled to impose a sentence which even the most hawkish supporters of mandatory sentencing are forced to acknowledge is manifestly inappropriate and excessive. That can be empirically demonstrated by reference to the experience of jurisdictions from California to the Northern Territory but it can also be theoretically shown to be an inevitable result of the introduction of such a system.

The only possible justification for creating a system which it is known will inevitably produce manifest injustice to an individual is that it is the price we have to pay for the larger public benefit which it is

claimed flows from having a system of mandatory sentencing. But such a proposition is in conflict with the core values of our society which affirm the significance and rights of every person as an individual and which reject the doctrine accepted in authoritarian and Marxist States that individuals are expendable in the interests of the State.

The other fundamental principle not given adequate weight in popular and political debate about mandatory sentencing is that like cases must be treated alike. That is an axiom of the law which pervades the entire system. But a corollary of the axiom that like cases must be treated alike is that cases having different relevant characteristics must be treated differently. It follows that a system of mandatory sentencing in which courts are compelled to impose fixed penalties irrespective of the circumstances of the particular offence or the particular offender must necessarily violate that axiom.

I should make it clear that I am not intending to mount a case against mandatory sentencing. I well understand and to some extent sympathise with the reasons which actuate such measures and I also recognise that the strict application of principle must sometimes yield to pragmatic and political realities.

But what I am suggesting is that public and political debate about mandatory sentencing is seriously flawed because it fails to give adequate weight to those two fundamental principles of our system and that failure is a direct result of the two cultures problem.

For my final example I refer to discussions about human rights, another topic you will be discussing at this colloquium. It seems to be

generally assumed that the most important guarantees of human rights are our democratic forms of government and the existence of some sort of Bill of Rights. But there is a widespread lack of understanding of the contribution made by the common law to the protection of human rights. To a large extent our freedoms and the most valued characteristics of our system have not come from democratic processes or bills of rights but have been the product of the creative processes of the common law. The sort of contributions I am referring to include the common law doctrine that the executive government is under the law and that unlike a private person a public authority may only do that which the law has authorised it to do; the requirement that when it is making a decision affecting the interests of individuals a public authority is required to observe procedural fairness; those presumptions of statutory interpretation which are designed to protect human rights and the pre-occupation of the courts with ensuring that an accused person gets a fair trial.

But as well as a failure to understand the direct contribution which the philosophy of the Common law makes to protecting human rights there is also a failure to appreciate that the nature of that contribution is qualitatively different from that made by Bills of Rights. In particular the common law operates by raising a general presumption in favour of a universal right to do anything unless it is expressly forbidden by law or unless it impinges upon the rights of others. By giving certain identified rights a special status, a Bill of Rights can have the effect of downgrading the significance of rights that are not mentioned so that a citizen might in fact end up having fewer rights than before. That could be avoided if proposals for the protection of rights were informed by an understanding of that common law approach which upholds a general right to do

anything which is subject to specific exceptions rather than the other way round.

Once again as with my comments about mandatory sentencing I emphasise I am not wanting to engage in debate about the efficacy of Bills of Rights. The point I wish to make is that discussions about the protection of human rights are inadequate unless they are informed by an understanding of the special contribution which the common law approach makes and that ignorance about the nature and significance of that contribution provides another illustration of the existence of the gap between the socio political and the legal cultures.

Those four examples and others which could be cited demonstrate the existence of a significant gulf between the two cultures. Let me emphasise that nothing that I have said is intended to suggest some sort of superiority of the legal culture over the socio political culture. Both are integral parts of our system and there is more to society than just its legal system. What I think is a matter of concern is the very existence of the two cultures and the idea that the law is some exotic domain peopled by judicial officers, lawyers and other aliens which is irrelevant to or at least of only marginal significance to the general run of our social and political affairs. I would also like to make it clear that I do not wish to apportion blame for the existence of the gap between the cultures save to say that I accept that judges and lawyers must accept some of the responsibility themselves.

I think the gap between the two cultures matters. The fundamental principles upon which our system is based need to be understood, promoted and defended by the whole community if they are to survive.

But so long as we have a two cultures problem they are at risk and that puts the rule of law at risk.

Whilst I appreciate that the Judicial Conference may not feel that it can address all aspects of the two cultures problem, I do think that in important respects it has a major role to play in bridging that gap and given the intimate connection between the rule of law and judicial independence I suggest it has a strong interest in doing so.

I hope you all have an interesting, productive and above all enjoyable colloquium.

Thank you again for asking me to join you today.

I have much pleasure in declaring the Judicial Conference of Australia's 2002 Colloquium open.