"Barbarians at the Gate?"

A commentary by Justice Terry Sheahan on a paper delivered by Chief Justice Warren

JCA Colloquium, Fremantle
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While the "separation of powers" in Australia, as between executive and legislature, is necessarily quite blurred, we have strongly adhered to the separation of both of them from the judiciary, and to the related doctrine of "independence of the judiciary".

We have, however, wrestled with how far that independence spreads when the judiciary is discharging administrative as distinct from judicial functions, and with how independent judges can be from each other.

Public accountability is another vexed issue on occasions. Court and tribunal systems cost and handle substantial public monies, and other "government" agencies are now scrutinised not only for their administration of public monies, but for the efficiency, productivity, etc. with which they discharge their public duties.

I was elected to a State legislature nearly 40 years ago; within a few years of that my Party was elected to government; and in 1980 I became a Minister. I served for 8 years in a range of portfolios, including three as Attorney General. My father had been a silk, and, for my first 18 years, was a senior Minister in an earlier government. He was a great believer in the courts, and in local members of parliament, as the primary protectors of the public from abuses of power.

In those 40 years since my first election, however, we have seen many additional alleged "protectors" created by the executive and the legislature, displacing MPs, and virtually all of those measures are dealt with in Marilyn's paper.

The public clamour for greater openness and accountability everywhere in the public sector seems never to have been satisfied, and the more bombastic and expansive the approach taken by some bureaucratic, non-elected invaders of the areas guarded for centuries by the independent judiciary became, the more the public called for more scrutiny, in studied ignorance of the importance **to them**, not just us, of maintaining the separation/independence of the judiciary.

Marilyn has described well those pressures, and has acknowledged, as we all must, that these are new rules under which we must play. The primary tension to be faced is the one Neville Owen spelled out for us yesterday – that between independence and accountability. It was the tension at the forefront of the controversy I ignited in 1986 when, among a package of reforms, I introduced the first Judicial Commission.

At the time a High Court Judge, a former Chief Magistrate and a Cabinet Minister faced serious charges, and there were many other questions raised about the administration of justice, all of which tested the adequacy of the traditional mechanisms, and proved that a dogged straight bat was no longer enough.

There is much which could be said about those times and events – some of which I cannot say while Laurence Street is alive – but "**lines**" have to be clearly drawn, and clearly explained for all outside the judicial world, and Marilyn has done both in her excellent paper today.

Neville stressed another important point yesterday – the need for judicial collegiality behind good judicial leadership.

In the 1986 crises in NSW, the tabloid and other media almost destroyed the healthy judicial collegiality in the NSW District court, but they could not blunt its courageous leadership. Chief Judge Jim Staunton led his beleaguered judges into a firm commitment to the Commission I proposed, not just for its proposed complaints function, but also for its much-needed focus on judicial education and sentencing information. The reform was then cemented when one of his senior judges (the late Barry Thorley) left the bench to become the Commission's first CEO.

On the other hand, many other judges behaved very badly in expressing their opposition to the proposal, but only one judge resigned in protest. Their "hate mail" to me had to be read for its outrageousness to be gauged. The Supreme Court did not sit one morning, holding a classic old "stop work" meeting. The leadership of the bar frocked up and marched into Parliament House to hear the debate, in wigs and gowns.

The judicial opponents of the plan argued that accountability, in terms of a complaint process, fundamentally offended judicial independence, as they understood it – often wrongly.

Many Members of Parliament were unsure in the heat of the debate, and, while cabinet was behind it, it often seemed they were a long way back when I

looked.

When the Chief Justice slammed me publicly the media did not care that they did not understand the matter – it sounded like tall poppy pruning to them, and they also enjoyed the unseemly public stoush I was having with the Chief, so they covered it all widely. The cartoons I keep in my Chambers to this day were fantastic.

The then Opposition wanted **all** complaints about judges (not just serious corruption allegations) to go to their then-promised ICAC. When they came to office shortly after the Commission opened, that policy position was quickly seen to be untenable, and my concept not so bad after all.

The Commission might have been the first public sector reform which appeared to "target" the judiciary, but I predicted at the time that the judiciary would come to see it as a great and liberating thing for them, and I believe that has been proven correct.

I briefly mention these events of that time to remind us all that when we demand respect and the right to be critical, we must afford respect to the other arms of government, and, when needed, we must engage them on matters such as how invasive their scrutiny of us is allowed to go.

We need to "give a little" occasionally – the movement is not always anti-judge: not long after the Kennett government "did over" the transport judges – an action which was one reason for the establishment of the JCA – the NSW government entrenched judicial tenure in the State constitution.

Attorneys General and their colleagues in the legislature and the executive see problems from a different perspective. Their duties are as onerous as ours, and their constituency, watching closely, is less forgiving. They do not have tenure – removal is at the whim of the voter's pen. We have to accept that there are "no votes in judges" – you only have to see the media commentary and letters to the editor that follow any mention of judicial pay rises or non-contributory pensions (e.g. the Courier Mails of 30-31 July).

We have to make the best of the new "rules", steadfastly maintain and defend our independence, as we properly understand it, strive to constantly improve our qualifications, skills, and performance, and closely watch the incursions of the executive into our work, so that they affect only the administrative and not the judicial.

Clearly, the so-called productivity of a court and its judges cannot be properly

measured in ways now accepted in commerce and industry, but we must be always able to defend our total commitment to the work, and the quality of its output.

At the same time, as Marilyn has done throughout her tenure and again today, the leaders of our courts must advocate for the lines to be clear, accepted, and respected, and the judicial effort to be properly resourced.

The tensions that Marilyn identifies are real, but they can be beneficial to all sides.

It was not enough in NSW in 1986, and it is no longer enough anywhere else in Australia, for us to work in public, give reasons, and accept reversal on appeal. People deserve an avenue to test fitness for office, when it is in question, even as we guard our immunity, and our privileges and conditions.

I am as committed now – as a judge of 15 years, who has had to survive three complaints about me to the body I created, as I was in 1986 to the Judicial Commission. Among its impacts was that, for the first time, we recognised the local courts as Judges in all but name.

Its rationale was best described by Justice John Racanelli, of the Californian Commission, on which I based the NSW one, when he faced up to the criticisms of me by Dick McGarvie and Denis Mahoney – on behalf of the judiciary through the AIJA, there being then no JCA – at a secret seminar convened by the Standing Committee of Attorneys General in early 1987.

Racanelli noted that their Honours were criticising me for “using an elephant gun to kill a fly”, but, speaking from his own bitter experience of judicial misbehaviour in the US, he warned them: “Well, Judges, you had better hope he has the gun handy when the elephant comes around”.

Judicial appointment should remain the province of the executive – and not delegated to yet another non-elected body – and removal should remain the province of the legislature, but I do not support parliamentary control over the investigation of complaints.

However, as Marilyn recognises, while we hold such privileged office, we have a responsibility not only to behave in a manner beyond reproach, but to manage appropriately the public resources dedicated to our operations, and account for them by sustained top performance.

We should all be up to walking all the tightropes that need to be walked, as scrutiny, both government and public, and particularly in this electronic age, hots up, as it inevitably will.

We have to tailor our positions to the realities of changing times. For example, Anne Twomey has identified for us in her recent paper how common it has always been for judges to advise vice regal officeholders, even beyond 1975, but the so-called Mason revelations would appear to have crystallised public opinion against any such behaviour occurring from now on.

We do not want a truly independent judiciary to become as irrelevant to our citizens as elected parliaments and their members have.

With leaders like Marilyn who get the balance and the advocacy right, with bodies like the JCA which can greatly assist the public discourse, and with papers like today's, so nicely book-ended by Neville's yesterday, I face the future with confidence and optimism.