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"COURT GOVERNANCE AND THE EXECUTIVE MODEL"

A PAPER BY

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"COURT GOVERNANCE AND THE EXECUTIVE MODEL"

Why does court governance matter?

There are those who say that the administration of the courts should be left to the executive arm of government --

> "*Leave us alone and let us get on with our judicial work. Judges and magistrates have enough to do without worrying about the administration of Courts. They are not administrators and judicial officers should just do judging".*

They acknowledge that resources are never enough and there are problems in dealing with government but somehow we manage to get the job done. They would argue that provided judicial officers have security of tenure, they have independence and they can carry out their task without fear or favour. If judicial officers are independent and perform their work competently, the community should have confidence in them and in the court system. The more sceptical also question whether a change of system will necessarily be better. Some also argue that there may be some advantage in being part of a large mega department because should unexpected expenditure be necessary, you can go to the department to seek help. [1]

Homo sapiens has a great capacity to ignore reality. The view that we should leave court administration to the executive is, I suggest, another example of this ostrich like capacity. It ignores the reality that it is not possible to separate the performance of the purely judicial work from administrative arrangements. They are inextricably intertwined and the administrative arrangements can have a profound impact on the discharge of the judicial role.

Why does court governance matter? The question posed is best answered by considering the traditional Executive model, the model operating in the majority of Australian jurisdictions.

The Realities – Introducing the Executive model

In the AIJA report, "The Governance of Australia's Courts: a Managerial Perspective",[2] the learned authors asked the reader to imagine that he or she had been recruited to be Chief Judge of a court in a particular country where the Executive model operates. Having received assurances that independence will be strictly safeguarded, that there is a budget for staff and buildings and other facilities needed you start to go about the work. You worry a little about the expectation that you will

[1] Some express concerns about the appropriateness of the Chief judicial officer having to engage in negotiations with the executive. Similar reservations were aired in Canada. (Canadian Judicial Council, Project on Alternative Models of Court Administration, 2005, 93). But negotiations with the executive are unavoidable whatever model is operating.

[2] Professor J Alford, Dr Royston Gustavson, and Professor Williams, "The Governance of Australia's Courts: A Managerial Perspective" Australian Institute of Judicial Administration 2004, p 2.

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achieve certain outputs but the system seems to leave you some autonomy in achieving those outputs. But you find that

> "*..the manager and administrative staff of the court over which you preside are actually employed directly by the State, that is, they are civil servants who report to the government, rather than to the court. You also discover that the buildings and other facilities are owned directly by the State, rather than by the court. Most disturbingly, you begin to find that the budget itself is subject to variation outside your control. At unpredictable intervals during the financial year, amounts are moved around within the budget, or sometimes even removed from the budget, by the aforementioned civil servants. You start to wonder how you can achieve your mandated outputs without control over the means for delivering them.*"[3]

The learned authors ask whether this is a vignette from "a banana republic or a central European backwater recently emerged from authoritarian rule?" They point out, however, that this story could be set in any jurisdiction in Australia other than South Australia and the Commonwealth.

In this paper a number of criticisms will be made about the executive model of governance that applies in most jurisdictions in Australia. This paper is not intended, however, to be a criticism of the people involved in the administration of the Victorian courts. They are highly capable people. But they are required to operate a fundamentally flawed system. They are attempting to deal with the courts as partners. They do so, however, with flawed perceptions which are shaped by the flawed system.

If I have a criticism it is of the failure of our State government to enter into any discussions about court governance. This is particularly disappointing when it is borne in mind that court governance was identified as an issue for attention in the "Justice Statement", launched in 2004 by the Attorney General and the Department of Justice (DOJ).[4] It is also disappointing when there are precedents within the jurisdiction which could be drawn upon. I refer, for example, to the fact that funding of the Auditor General is a matter for the Parliament. The two houses of Parliament through their presiding officers prepare and negotiate their budgets directly with Treasury. "Entity" number one of the "Criminal Justice System", Victoria Police, has a stand-alone IT system independent of DOJ. When asked why the same could not be done for the courts, the DOJ response is that the police are different. So they are--but so are the courts.

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[3] Op cit vii.

[4] Justice Statement, 3.4.3 – "Well-Managed Courts". Ministerial Statement "New Directions for the Victorian Justice System 2004 – 2014", Hansard, Legislative Assembly, 27 May 2004.

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The Administrative Context – reform and the mega department

As the learned authors of the AIJA Report argue, to understand the issues, it is necessary to understand the context in which court governance is carried out- in particular the reality of administrative reform and the modern mega department.

The recent AIJA Report describes how all Australian governments have pursued and implemented a program of managerial reform of the public sector. In some jurisdictions such as Victoria, South Australia and the Commonwealth, departments and agencies have been restructured to amalgamate functions into "mega-departments" with the result that the Court administration function has been enveloped in a larger organisation, sometimes with a number of portfolios[5]. Generally, there has been a separation of service delivery and policy development functions. Further, there has been a focus on "results rather than processes "[6] and all governments apply output budgeting. They allocate money for specific outputs such as cases completed rather than for inputs such as Court staff or buildings. [7] Parallel with that has been the devolution of authority to lower-level managers who are held accountable for results, the idea being that they will have a strong obligation to achieve the results sought but also the autonomy to determine how to achieve those results. [8] In this way, authority is aligned with responsibility. At the same time, in practice, in most governments, Treasury has retained substantial control over the detail of inputs and processes. [9] The authors make the point that there is a fundamental clash of values in that focusing on efficiency in achieving outputs necessarily fails to consider the other values implicit in the services provided including independence, impartiality and application of the rule of law. A further change they identify is the centralisation of personnel management in government. While in the 1980s, some governments moved towards less Treasury control and more departmental level control and individual contracts, bodies such as courts found themselves still subject to external constraints in managing their human resources and, in reality, Treasuries still retain strong control over human resource decision making.[10] The Victorian Supreme Court can add that Treasury retains strong control over capital works. Not long ago an exhaustive and detailed budget process resulted in Cabinet approval for major building works for the Supreme Court. Notwithstanding that, Treasury subsequently required detailed justification of the expenditure already approved.

The learned authors comment that notwithstanding the widespread application of the above reforms, their application "in practice has often been marked by ambiguity". [11] They refer in particular to the fact that where the administration of the courts has been responsibility of an Attorney General's or Justice Department, they have been reluctant to let go of control while, at the same time, espousing devolution and autonomy for line agencies.

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[5] Op cit 6
[6] AIJA, Op cit, Introduction, vii and 38-9.
[7] Op cit, viii, 6
[8] Ibid
[9] ibid
[10] Op cit 7
[11] ibid

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It is in that context that the AIJA report examines the different models for Court administration. It found that it was only in the Commonwealth and in South Australia that the courts are left with a responsibility of deciding how to achieve their outputs. In all other jurisdictions, including Victoria, it is the Executive that controls the Court staff, buildings, information systems and detailed financial allocations.[12] The judiciary in those jurisdictions have little or no control over the terms on which staff are employed, buildings or other matters which significantly affect their ability to do their jobs.

The report argues for the granting to the courts of control over staff, internal financial management, facilities and operations and limiting the role of the executive to the appointment and remuneration of judicial officer and the provision of annual global budgets.

Its criticisms of the Executive model are strongly supported by an examination of the Victorian "mega-department" and its consequences for the Victorian courts.

[12] Op cit 5,

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