JUDICIAL CONFERENCE 2003
AFTER DINNER ADDRESS
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Introduction

As has frequently been the case with my predecessors in the Northern Territory, I came to the role of Attorney-General without legal qualifications or experience.

I was keenly aware of the need to develop a deeper appreciation of the central tenets and conventions of our legal system, particularly judicial independence.

I chose the topic of judicial independence tonight because I thought it may be of interest to you to get a view of the arrangement from the other side of the fence.

I take very seriously my responsibility as an Attorney-General to uphold the rule of law and know this depends upon an independent judiciary.

My time so far in office has allowed me to reflect on this obligation both in light of matters that have occurred in the Northern Territory under past Attorney-Generals and with issues that have arisen during my own time in office.

It is these personal reflections on judicial independence that I would like to share with you on this occasion.

Why is judicial independence important?

In 1907 Charles Evans Hughes, the then Chief Justice of the U.S. Supreme Court, in a speech given at Elmira, New York said
"... the judiciary is the safeguard of our liberty and of our property under the Constitution."

Although speaking in the American context, and of a Court that is entrusted with the safeguards of individual liberty under the Bill of Rights, these comments are readily translated to the role of the judiciary in Australia.

Charles Hughes was speaking almost 100 years ago but importance of his comments has not dimmed over time.

It is arguable in fact that their importance has greatly increased in a century where threats to civil safety may, in some cases, be too readily be responded to by increasing incursions on civil liberty.

One of the early legislative reforms I undertook was to repeal the provisions of the Criminal Code that dealt with the defense of insanity and the disposition of persons acquitted on that ground.

At that time, the Northern Territory still retained detention at the Administrator's Pleasure for such people which, of course, entails release decisions to be made by the Executive.

The new legislation the Parliament enacted placed the consideration these questions in the hands of the Court.

One immediate effect was to allow the Court to review the situation of three persons who were being held at the Administrator's Pleasure.

When I contemplate the media response to the news that the Court was to review these individual's cases, it very graphically illustrated to me why the Executive should not be involved in these decisions.

One case in particular was front page news for some days.

The paper ran a hotline column seeking readers views on the question "Should murderers be released after 20 years?", using a photo of one of the detainees on the column.

How easy it would be for non-judicial decision makers to be influenced by press coverage of this nature.

My fellow MLA's were under considerable political pressure in the immediate aftermath of this debate – and a not very comfortable position for any Attorney-General who can find him or herself under pressure from colleagues and media alike.

In this case, I believe it is to the Government's credit that it held the line and left the new provisions in place so that the future of detainees could be determined by the courts.

Courts of course are not facing the political pressures that are rightly placed on politicians in a democratic society.

One of the aspects courts should rightly take into account is protection of the community and community values but it is critical that judicial independence is properly maintained and the judiciary is independent from improper influences.

Public opinion

One of the outcomes that might be expected from a system which provides strong judicial independence is strong community confidence in the judiciary.

However, such confidence and trust in our justice system is not always apparent.

I receive considerable correspondence to my office, particularly when there has been a report of a case that carries some controversy, demanding my intervention in the matter.

Directions to the Director of Public Prosecutions, intervention in sentencing decisions, remove or reprimand of judicial officers or immediately legislative change are often sought.

This can be interpreted in two ways.

First, it is easy to say that the public simply does not understand the importance and significance of the independence of the judiciary or that they misunderstand the role of the Attorney-General in the justice system.

This no doubt plays at least some part and perhaps is a failing of our systems of civic education.

Just as worrying is that the correspondent is expressing a lack confidence in the judicial process and regards judicial independence as producing a lack of accountability rather than appreciating it as a positive attribute of our system.

The correspondents are not necessarily people with extremist views.

Sadly their distress or anger sometimes is a result over their direct experience with the legal system.

It is my observation and sense also over the past few years, that the public does not always have the trust that they should have in the justice system in general nor in the role of the legal profession.

In my view, this lack of trust has been brought about by a number of causes, many of which are largely outside the control of the Courts.

First, of course, it is easy to develop mistrust when there is a lack of knowledge or where there is a misunderstanding of the principles that are at work.

This is a matter for Courts to address, to ensure that those before them or effected by their decisions understand the hows and whys of what has occurred.

Many Courts and judicial officers in this country have given considerable thought to this and taken actions to ensure that the public are better informed of their role and decisions.

But with law and order issues a prime target for media attention, public demands are often for simplistic solutions – and courts are an easy target.

In my own jurisdiction I believe this has been particularly apparent.

For example, in April, the Northern Territory had an historic first sitting of the Legislative Assembly in Alice Springs.

The sitting was more than symbolic.

It was an attempt to bring the experience of Parliament to the people of Central Australia – half a country away from their centre of democracy, and to achieve a sense of unity in the Territory, breaking down what is known colloquially as the “Berrimah Line” - Berrimah being a suburb on the southern edge of Darwin.

Sadly, the near total focus of the NT Opposition on that occasion was on crime in Alice Springs.

You would have thought from what they said that it was unsafe to step outside your house in that city, let alone walk down the street.

The portrait they painted was in contradiction to the actual records of crime in Alice Springs, a trend which has been consistently downwards since my government abolished mandatory sentencing and began putting in place real initiatives to tackle crime.

Now, if drumming up law and order in this way had an effect only at the political level then it might be excused as part of the rough and tumble of politics.

But I suggest that that it can produce serious detriment to proper Government because it has the potential to encourage reactive behaviour from politicians fearful at losing public confidence.

This is not just an issue for the Northern Territory but is a national issue.

I suggest also that law and order debates which do not have any depth or complexity have a broader effect.

A considerable focus for the media is on sentencing outcomes, with a portrayal that the judiciary is being lenient on criminal activity.

Prison is promoted as the only response to crime.

When mandatory sentencing was enacted it carried with it a message that the judiciary could not be trusted to impose appropriate sentences.

It is not surprising then that the community displays a lack of trust in the judicial process and is skeptical of judicial independence.

The legislature, of course, has an important role to play in sentencing legislation which I believe needs to take into account community views and the legitimate need for society as a whole to feel that justice has been properly carried out.

But a proper balance can, I believe be found and must be maintained.

Part of this also entails not jumping to an immediate legislative response when a judicial decision provokes some level of adverse response in the community – bad law as they say is made on the basis of a single case.

The appellate system should be supported by legislators and allowed to be fully played out before considering law reform by legislative amendment in most cases.

I draw on a recent example from the Northern Territory to illustrate that point.

Many of you will be aware of the case of *Pascoe* which attracted not just local but national attention.

Pascoe had been convicted of unlawful sexual intercourse with a 15 year old girl. In mitigation he claimed that the girl was his wife according to customary law.

The magistrate had sentenced him to 13 months imprisonment but on appeal to a single judge this was reduced to 1 day. It is fair to say the substituted sentence caused a furore.

Many good people from all over Australia wrote to me expressing their deep concern that young aboriginal girls in the Northern Territory were not being protected by the law or the Courts and seeking a legislative response.

A member of the Legislative Assembly has introduced a private members Bill seeking to exclude customary law as a matter that can be taken into consideration in sexual offences.

I accept that this was a well intentioned act by a member anxious to ensure the protection of young Aboriginal girls.

However, the DPP had entered an appeal, and I considered it preferable that the matter be allowed to proceed and the view of the Appeal Court obtained.

The NT Court of Criminal Appeal allowed the appeal and set a 12 month sentence.

As leave is sought now to appeal to the High Court I will not comment on the merits of any of those decisions – but I mention the case to illustrate that it can be a difficult call for a government to not make urgent legislative response in sensitive matters such as this, but to allow the Court process to be completed before considering reform measures.

In my view Attorneys General need also to be careful of the use of legislation that limits access to the Courts.

In that regard I have in mind the Commonwealth's *Australian Human Rights Commission Legislation Bill 2003* currently being reviewed by the Senate Legal and Constitutional Legislation Committee.

At present, the Commission is able to seek leave of the Court to intervene in cases that raise human rights or discrimination issues in order to provide specialist advice, independent from the parties to a case.

Since 1986 the Commission has intervened in 35 cases. The Commission has never had an application to seek leave to intervene rejected by a Court.

The Bill proposes that the Commission would only be able to seek leave to intervene in a case with the approval of the Attorney-General except where the Commission's President is, or was, a federal judge.

This proposal appears to me not only to impose a significant restraint on the Commission's role but also effects the independence of the judicial process by precluding the Court from making a judgement to determine whether it requires intervention to assist in on the specialist questions under consideration.

This is of great significance when it is appreciated that many cases involve the Commonwealth and may be ones on which the Commission might place a different view before the Court than that presented by the Commonwealth (which occurred in 16 of the previous cases in which the Commission intervened).

By contrast one might consider the grant of the Attorney-General's fiet that was made in the McBain litigation attempting to provide the Australian Catholic Bishops Conference with the means to place their arguments before the High Court on the issue of the provision of fertility services to single women.

We move into dangerous ground if Attorneys General are to influence the appearance of persons before the Courts.

Political attacks

Political attacks on the judiciary are another factor directly contributing to mistrust and are of serious concern.

When these attacks descend to personal criticism of judges, and a failure by those with primary responsibility for the legal system to defend the members of the judiciary, is it any wonder that the general public loses faith in the system?

In my own jurisdiction we had an Attorney-General, my opposition predecessor, found guilty of a criminal contempt following comments made by him at a press conference.

The Federal Court found his comments had a clear tendency to deter a litigant from continuing to prosecute or defend the case, or to dissuade potential witnesses from giving evidence.

If the public experience is of an Attorney-General attempting to intervene in the judicial process and showing disregard for it, then it is of little surprise that confidence in the Courts becomes eroded.

Attorneys General have a significant role to play in supporting the judiciary and the justice system in the political process and the public arena and need to be aware of the consequence that arises from a failure to provide that support.

Accountability

Like all principles, judicial independence must have balance.

Judicial independence does not give judicial officers the right to behave as they like in their Court.

It is a principle that requires accountability in return.

The legal profession, as officers of the Court, must uphold the dignity of the Court.

So too, judicial officers must preserve the dignity of their own Courts.

The judiciary will themselves be responsible for an erosion of community confidence if they fail to demonstrate basic courtesies and deal respectfully with persons in their Courts whether they be members of the legal profession or parties.

Intemperate conduct and ill considered words do little to engender confidence of the community in the wisdom of the Courts.

Judicial independence also requires accountability for the administration and proper conduct of the Courts.

Chief Magistrates and Chief Justices have - in my view - a strong role to play in ensuring the proper conduct of their judicial colleagues.

They most certainly have responsibility for ensuring the proper administration of the Court, including financial management.

The role of the Executive in judicial accountability is to ensure that all judicial appointments are made on merit.

The public will have confidence in the judiciary when they are assured that proper process have been employed to ensure suitable and meritorious appointments are made.

Perception is an important issue.

Once again I can point to examples of appointments in the Northern Territory which may have had the effect of diminishing public confidence.

Shane Stone, a previous Attorney-General and Chief Minister was appointed as a Queens Counsel during his term of office as Attorney-General.

His legal career prior to being Attorney-General was not one which would ordinarily have been considered to merit that appointment.

By contrast, the CLP government later refused to accept the nomination of the Supreme Court for a prominent member of the Bar to be advanced to Queens Counsel, that person being someone who had been an outspoken critic of the policies of the government, particularly mandatory sentencing.

In is not surprising that actions like these leave the public with doubt and cynicism as to the merit of appointments within the justice system, when they can see that political considerations are at play.

Is it any wonder then that the public believe that Attorneys General can and should intervene in the judicial process when they see examples of political influence or favouritism at play?

Conclusion

As I mentioned at this beginning of my talk, my aim tonight has been to bring to you my observations from a purely practical level of the influences on judicial independence that I see from my office and from the past experiences of the Northern Territory.

Espousing high principles is one thing – ensuring those principles work in the reality of politics and government is more difficult – but critical our judicial system.