PUBLIC CONFIDENCE IN THE JUDICIARY - A RESPONSE TO THE ANNOUNCEMENT BY THE HONOURABLE THE ATTORNEY-GENERAL

Speech delivered by the Honourable Marilyn Warren AC Chief Justice of the Supreme Court of Victoria at the Judicial Conference of Australia Colloquium, Melbourne Friday 9 October 2009

I was invited by the Judicial Conference of Australia to speak today on the legal topic *The Duty Owed to the Court – Sometimes Forgotten*.

I have a paper here to present but I will put it to one side for the moment.

I woke this Friday morning to read some unhappy headlines saying "frosty judges told to warm up with public", "plan to get tough on judges' behaviour", "judiciary urged to defend itself" and "jolt for judges".

The headlines and newspaper articles came as a surprise and troubled me as to the portrayal of the judiciary in the community.

I think on behalf of the Victorian judiciary I need to respond. I have spoken to the Chief Judge of the County Court and the Chief Magistrate and they share my troubled views.

As we now know the Attorney-General released his speech yesterday afternoon to the media. I was not provided with the speech until a little while ago, late this morning. I did not know of its contents and no comment was sought by the media.

Much of what the Victorian Attorney has said is welcomed by the judiciary. The trouble is that parts of the speech are picked up by the media in a way that damages the judiciary. Let me explain.

Reading the reports of the Attorney's speech the community might be led to believe:

- someone needs to "get tough" on judges. The Attorney-General is portrayed as the one to do it. He is leading the way.

- judges are misbehaving and a complaints system is needed to deal with them.

- there will be a collision between the Attorney-General and the Victorian judiciary when the Minister calls for more judicial accountability through a complaints system.

- the judiciary sees itself as removed from scrutiny and needs to "come in from the cold".

- the judiciary will resist reform to a complaints system.

- judges (along with the legal profession) are "lofty".

- judges are not about serving the community.

- judges do not engage with the community.

- judges are especially well remunerated "public servants".

Let me dispel these misconceptions.

The Victorian judiciary and the national judiciary (through the Judicial Conference of Australia) have led the way in reforming the judicial complaints system. It is the judiciary, as I will explain shortly, not politicians who have driven the announced reform of a new judicial complaints system. Rather than resisting a new system and

its scrutiny the judiciary understands the need for the community to have a place to go to if they have a complaint. The community also needs to know, as the judiciary fully understands, that complaints will be taken seriously and determined fairly and impartially.

Certainly judges are well remunerated by community standards. They regard it as a privilege and an honour to serve their communities. However, judges serve the public, but they are not "public servants". To suggest so displays a complete misunderstanding of the structure of government. The judiciary is a separate arm of government and not part of the executive of which public servants are. It is a fundamental constitutional principle upon which our democracy is built.

Judges are well engaged with the community. We have committed ourselves in Victoria to serving the community, the same as all judicial officers have across the nation. I have often stated our commitment to service of the community for example when speaking to the Victorian Bar in November 2008[1], at the launch of the Commercial Court of the Supreme Court in February 2009[2] and in my speech to the Law Institute of Victoria on alternative dispute resolution on 18 March 2009[3]. Only last Wednesday, the President of the Victorian Court of Appeal, Justice Maxwell, spoke of community service when addressing the Victorian Criminal Bar. He said:

> "……what drives the Supreme Court's engagement with both procedural and substantive law reform is our commitment to the community. We are striving, as did all those who preceded us, to deliver to Victorians a first class system of justice."

As judges we already engage extensively with the community. We speak to schools, community groups, universities, professional associations and, of course, legal occasions. In the Supreme Court of Victoria in 2008-2009 there were about 370 speeches, papers and attendances given by members of the court to the community alone. If we applied a multiplier effect across all Victorian courts there would be hundreds more. If we applied a national multiplier I expect there would be thousands of engagements by the judiciary with the community. Mostly these engagements occur in addition to judges' court workloads.

We are not removed from the community and are actively engaged with it. Generally court business is serious. If a judge is sentencing a person to gaol for many years even the rest of the individual's life; if a judge is determining whether an individual's home should be repossessed; or if a judge is deciding to order payment by a company that

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1 Remarks to the Chartered Institute of Arbitrators (Aust) Ltd, Victorian Bar, 10 November 2008
2 Remarks at the launch of the Commercial Court, February 2009
3 Law Institute of Victoria "ADR and a Different Approach to Litigation", 18 March 2009

will bankrupt it, then it is very serious business. Seriousness should not be confused or equated with loftiness. Court business is serious and warrants appropriate measures of dignity, gravity and reserve. I do not believe the community wants familiarity and informality in the courts when judges deal with the grave business they do, day in, day out.

Returning then to the impression left by the reports of the Victorian Attorney's remarks, no one needs to "get tough" on judges. Indeed judges are urging government to reform the system to ensure accountability and transparency. Judges are leading the way. There will be no collision between the judiciary and the government, quite the contrary, there has been collaboration to ensure model law reform as I will explain.

The real issue is what impression do the remarks and media reports today convey to the community and do they accurately represent the performance and behaviour of judges, magistrates and tribunal members.

The announced new system to investigate complaints of judicial misconduct and professional behaviour has in fact been driven by judges nationally through the Judicial Conference of Australia and in Victoria through the judiciary.

In Victoria in 2003 a report commissioned by the Victorian Attorney[4] specifically rejected the establishment of a judicial commission. Instead a framework was established in Victoria by amendments to the Constitution Act introduced by the government in 2005 whereby a panel of senior judges of superior courts from outside Victoria and the federal system could be appointed as part of a panel to investigate and report to the Attorney-General as to alleged misbehaviour or incapacity by a judicial officer.

In fact, the provision to my knowledge has only been invoked once in four years with respect to the conduct of a Victorian magistrate.

However, the judiciary itself has urged the Victorian Attorney for some time to reconsider the legislation and pressed for the need for the establishment of a judicial commission in Victoria. In the earlier drafts of the Justice Statement 2 published by the Victorian Attorney, the template for the future direction of the judiciary and legal reform, the prospect of a judicial commission was not included. However, following urging from the Victorian judiciary, in particular the Chief Judge of the County Court[5], the Victorian Attorney resolved to include the subject of a judicial

[4] Report on the Judicial Conduct and Complaints System in Victoria by Professor Peter A Sallmann
[5] By letter dated 3 March 2008

commission in the Statement. The Victorian judiciary applauds and welcomes the initiative.

That in turn led to the convening of a working group consisting of a judicial representative from each of the Victorian jurisdictions, the Department of Justice and the Judicial College of Victoria. The Supreme Court representative on the working group is the Honourable Justice David Harper who is also a member of the Committee developing a national complaints model for the Judicial Conference of Australia. On 14 September 2009 a draft discussion paper was released and is being considered by the working group who in turn have circulated it to members of their jurisdictions.

Meanwhile, the Judicial Conference has been extremely active on a national scale to achieve a national approach to judicial complaints. In September 2008 the Judicial Conference established a committee to look at a national system for dealing with complaints against judicial officers.

It is preparing a second draft report due by the end of the year. It will be a substantive piece of work. The committee consists of the Chief Justice of Western Australia, judges from the Supreme and Federal Courts, the District Courts and also includes some chief magistrates.

The judiciary both nationally and in this state view the matter of complaints against members of the judiciary with the utmost gravity.

Of course, a judicial commission will not come cheaply for government. The New South Wales Judicial Commission model cost well over $5 million in 2007-2008. Admittedly the NSW system encompasses judicial education. By way of contrast, the Victorian Judicial College in 2007-2008 cost $1.2 million. A judicial commission model will be a multi-million dollar proposal for government. However, that is what judges believe is needed and urge government to introduce.

Regrettably the media portray the fact of a judicial complaints system as an indicator of complaints against the judiciary. The reality is that there are very few complaints against members of the judiciary. I am able to say that in my six years as Chief Justice I have not received complaints against judges or associate judges as to improper conduct, fraud, corruption or matters of that grave nature. In Victoria we have a strong judiciary who regard it as an honour and a privilege to be appointed to judicial office. In my experience where complaints do arise they are generally by aggrieved litigants who have lost their case and think it is the judge's fault. More often than not they are self-represented litigants who do not understand the need for pursuing matters through the appeal system. Infrequently, I receive correspondence from

parties complaining that they cannot obtain a trial date or a judge has delayed delivering the decision. These situations arise because judges cannot get through the work.

Judges work extremely hard in their job. They are not looking for accolades or thanks from the community for their hard work. They see the hard work as part of their judicial duty.

That said, a suggestion of judges needing to be more accountable, to behave better, of being detached or needing to engage more with the community do not portray the real picture. There are three impacts. First, it undermines the confidence of the community in the judiciary. Secondly, it damages judicial morale – when judges are working between 60-90 hours a week on a constant basis in a high pressured situation, it does not help. Thirdly, it acts as a disincentive for potential candidates for appointment.

I would wonder about reforms the media views as "confronting" and "jolting" for judges when in fact the judges have initiated the very reform.

At a time when there are delays in filling judicial vacancies, when courts need more resources to meet delays including new court buildings it is a pity that the focus falls falsely upon judicial behaviour and accountability.

The judiciary regards it as fundamental that judges be beyond reproach in our behaviour both in our judicial and private lives. The commitment of the Australian and Victorian judiciary to this principle is demonstrated by the law reform initiated and driven by judges themselves, not politicians albeit we now work cooperatively with government to achieve the desired outcome.

At the end of the day, it might be said that the Victorian Attorney and I are at loggerheads about the judiciary. Let me dispel that view. The Attorney-General and I are united in our commitment to achieving a strong, robust and transparent judiciary and legal system. We are committed to achieving the proper administration of justice in this state. The Attorney-General sets about his approach in the political setting. I set about mine in the judicial setting.

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