The Hon Daryl Williams AM QC MP

Attorney-General

Judicial Conference of Australia

Colloquium 2001

Opening Ceremony

Ayers Rock Resort – Uluru

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Introduction

1. I am delighted to be here to open the Judicial Conference of Australia's Colloquium 2001.

2. A number of the issues listed for discussion during the course of the Colloquium strike at the very heart of what being a member of the judiciary is all about.

   I would like to offer a few brief comments on those issues, as someone who represents a separate arm of our democratic system and who is an interested observer of, and sometime participant in, the judicial process .

3. To continue making a contribution to Australian society, judges face a number of challenges.

   You must retain your independence, yet you must not be above scrutiny.

   You have to defend yourselves against criticism, yet you must not compromise your impartiality.

   And you must deal with sensitive issues without crossing the line into the political arena.

Judicial Independence

4. There can be little argument that an independent judiciary is the cornerstone of our democratic system of government.

It provides a balance to, and a check on, the legislative and executive arms of government.

5. An independent judiciary also ensures that cases are determined impartially and according to the law.
   This impartiality applies regardless of whether cases are between individuals or between a citizen and the State.

6. The preservation of this independence depends on the judiciary being able to exercise its judicial functions without interference from the Executive or the legislature.
   The community must be able to approach the courts, even when taking action against the Government, and be confident that the Government cannot unduly interfere with the judicial process.

7. Judicial independence ensures that the community can conduct legal action without fear or favour.
   Its purpose is to provide for justice and equity.
   It has nothing to do with encasing judges in an isolated and theoretical ivory tower.

Increased Scrutiny of the Judiciary

8. The concept and practice of judicial independence is well accepted Australia and it has served us well.

9. However, like all other democratic institutions, the judiciary is becoming increasingly subject to scrutiny.

10. In the modern age, no public institution or arm of government can expect to be immune from public criticism.

Today's society is more critical, more knowledgeable, and more demanding than even a decade ago.

11. This augurs well for the strength and future of our democratic system. But it means that the judiciary must carefully assess its role in the justice system and determine how it can best respond to public demands for greater transparency in its processes and to the criticisms which may be levelled at it.

Judges Speaking Out

12. The issue of how the judiciary should respond to criticism and how to educate the public about the courts is a contentious one.
In fact, I note that you are devoting a whole session at this colloquium to 'judges speaking out'.

13. I respect the right of the judiciary to raise community awareness about legal issues by explaining the role of courts and the process of judicial decision making.
And I would welcome moves from various jurisdictions to educate the community about the judicial process.
The production by some courts of publicly available material which explains exactly what it is they do greatly assists in raising awareness and understanding.

14. I believe that it is also up to judges to take the lead in defending themselves and their courts against direct criticism.

15. Criticism of a court's administrative processes, at least under the federal system of judicial self-administration, seems to be a clear example of a situation where the court can, and should, respond in its own defence.

16. Where criticism is directed at a particular decision, one response is to point out that the parties have rights of appeal to superior courts.

17. In many cases, criticism is based on a misunderstanding of the law or on inaccurate reporting of a case.
    Under these circumstances, there is clearly a role for judges or court-based media offices to correct public misunderstandings.

18. Of course, any response from a court must be compatible with judicial independence, objectivity and the maintenance of public confidence in the judicial system.
    The community must feel secure that they will get a fair, impartial, and objective hearing.

19. Of course, there will often be constraints on Chief Justices responding to criticism about particular cases.
    And this is particularly so in relation to superior courts where appeals are taken within the courts themselves.

20. As well as responding where appropriate to misinformed criticism, it is important that judges continue to work towards improving their training and awareness of contemporary issues.
    This may help defuse the nonsensical and boorish criticism that judges are isolated from the real world.
    Surely there is no other profession that has so much contact with the trials and tribulations of daily life.

    Yet the judiciary is still seen by many in the community as aloof and out of touch.

21. Judicial training is a matter that is of great interest to me and I will return to it in a moment.

Role of the Attorney-General

22. Some of you will be familiar with my view of the role of the Attorney-General in defending the judiciary.[1]

    In a nutshell, I do not believe it is the Attorney-General's job to be the defender of the judiciary[2] .

    Following my appointment, I made this view known to the Chief Justices of the federal courts and I had at that time previously published a paper expressing that view.

23. In the past, the Attorney-General was often called upon to speak for the judiciary.

    The primary reason for this was the desire to avoid having the judiciary involved in public debate.

24. Many thought that any public comment by the judges would severely compromise the judiciary's independence.

25. While I am completely sympathetic to the view that the judiciary should not become embroiled in political debate, relying on a politician to defend judges has its own serious problems.

    If the Attorney-General allows him or her self to become the de facto representative of the courts, the distinction between the executive and the judiciary - which is so vital to judicial independence - would be eroded.

26. There are further practical reasons why neither judges nor the public should look to the Attorney-General to defend the courts.

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[1] These views at set out in more detail in *Who speaks for the Courts?* Paper delivered at the National Conference on Courts in a Representative Democracy presented by the AIJA, November 1994.

[2] See for example *Who Speaks for the Judges?* Australian Judicial Conference, 3 November 1996; and *Judicial Independence, the Courts and the Community* Address to the South Australian chapter of the Australian Institute of Judicial Administration, 7 February 1997.

27. The idea of the Attorney-General rushing to the defence of the judiciary simply ignores contemporary political realities.

28. Attorneys-General are members of governments.
They are politicians first and foremost.
An Attorney-General cannot cease to be a member of the Government in order to defend the judiciary.
It is also naive to expect the public to be able to perceive the Attorney-General to be acting as anything other than a partisan politician in such cases.

29. In any case, Attorneys-General cannot continually be put in situations where there is potentially a conflict between representing the interests of the judiciary and representing the political interests of the Government.

30. Moreover, the Attorney-General cannot realistically be expected to defend all actions or utterances of judges whatever the circumstance or context.

31. This is not a mere theoretical problem.
On a daily basis my office receives calls and correspondence from members of the public complaining about all manner of issues concerning the courts.
The complaints range from perceived problems with court administration and decision making to the conduct of particular members of the judiciary.
Every effort is made to assist people to understand the judicial system and to direct them to the most appropriate point of contact for their complaint.
However, if I or my office were to engage in debate with the public on the appropriateness or otherwise of judicial decisions it would be difficult - if not impossible - to ensure confidence that the judiciary remained free of political interference.

32. If such unquestioning defence is to be the Attorney's role it would be necessary to inquire into all matters in a detailed way and determine an appropriate response.

    In practice, this would place the Attorney in the inappropriate position of judging the judges.

33. There is also the very real danger that by defending the judiciary the perception is created that the Attorney-General is acting out of political motives .

    The involvement of the Attorney-General would then give the appearance the judiciary is itself involved in political controversy.

    The irony of this situation would be that a well-intentioned attempt to protect and defend an independent judiciary could actually constitute a politicisation of the judiciary.

    This would undermine the very independence that is sought to be protected.

Differences Between the United Kingdom and Australian Models

34. The argument that an Attorney-General should be responsible to defend the judiciary is an outmoded notion that has its roots in British tradition.

35. In the United Kingdom the Attorney-General is invariably a barrister of high standing.

    The Attorney does not administer a department, is not responsible for administration of justice and has no formal role in relation to the appointment of judges and magistrates.

36. These are quite fundamental differences to the role of the Attorney-General in Australia.

    They highlight the frailty of the notion that there is a tradition that Australian Attorneys-General always defend the judiciary.

37. Nevertheless, I acknowledge that there will be circumstances where it is appropriate for an Attorney-General to comment on or explain judicial activity on developments.

38. This might be appropriate where criticism might significantly impair confidence in the justice system.
For example, sustained political attacks capable of undermining public confidence in the judiciary may justify a defence by an Attorney-General.
In circumstances such as these I would not hesitate to step in and lend my support to the judiciary.

Public Comment on Policy Issues

39. I think my comments so far make it clear that I am a supporter of the judiciary defending itself.
However, this support is qualified.
I do not support judges commenting on politically contentious issues.
Politics is the domain of the democratic political process - it is a place for politicians, not for judges.

40. The doctrine of separation of powers must work both ways.
On one hand, it means that the judiciary should be free of interference from the executive.
But it also means that the judiciary should not interfere in matters that are the responsibility of the government.
The public's confidence in the impartiality of the courts depends on individual judges being seen as above the rough and tumble of political debate.

41. As an example, it was inappropriate in my view that some members of the judiciary last year ventured into the public debate about mandatory sentencing laws.

42. My own concerns about mandatory sentencing are well known.
As a lawyer, I appreciate the importance of judicial discretion.
However, while the Commonwealth does not support mandatory detention laws, we believe that sentencing policy in these circumstancesis rightly a State or Territory issue.

43. The States and Territories are best placed to address law and order problems through their own legislatures and court systems.
Issues such as crime and juvenile offending can only be resolved by parliaments - and those parliaments are answerable to the people.

44. Judges should not be using their office to criticise the political process.
To be brutally honest, simply stating that laws should be repealed does nothing to solve the problems that necessitated the laws in the first place.

45. The reality is that mandatory detention laws reflect a complex range of forces, not the least of which is a perception in the community that our criminal justice system is failing to properly protect the community and deter re-offenders.
As a politician who has spoken against such laws in my home State of Western Australia - where they receive bi-partisan political support - I can attest to the fact that those community views are very strong.
Merely telling the community these concerns are misplaced does little to ameliorate those concerns or to deal with the underlying causes of crime and in particular re-offending.

46. The Commonwealth could have joined the chorus of disapproval against mandatory detention laws in the Northern Territory.
    However rather than merely engaging in a largely media-driven debate, the Government felt that it was better to take action to ameliorate the impact of these laws on young people under the age of 18.

47. Last year the Commonwealth reached agreement with the Northern Territory Government provide $20 million to fund a juvenile pre-court diversion scheme and to jointly fund an Aboriginal interpreter service.

48. Since the agreement came into effect great progress has been made.

49. In the next couple of days I will be meeting with the Northern Territory Attorney-General and the Northern Territory Police Commissioner to discuss the impact of the measures.
    I will also be seeing for myself some of the diversionary projects that are up and running.

50. I note that the issue of discretion in sentencing is on the program for tomorrow afternoon.
    Given past events, I have no doubt that this will be a lively session

Judicial Conference

51. I have expressed the view that the judiciary has a valid role in directly correcting misconceptions and misinformation.
    At the same time I have indicated that the judiciary should not comment on political issues.
    I have also indicated that there are many pitfalls associated with an Attorney-General representing the judiciary's public interests.
    These comments do not provide an answer the question of who should speak for the courts.

52. It is my belief that the courts themselves or a body like the Australian Judicial Conference are best placed to speak for the courts.

53. In particular, I consider that it is appropriate for the Conference to take on a greater role as a representative voice for the judiciary on the broader questions that arise in relation to the judiciary as an institution and on the important role that it plays in our democratic system.

54. I note that the Conference has considered these issues and has issued guidelines on some of these matters.
I commend the Conference for taking a leading role in this area.

55. As Justice Sheller has indicated, the Government has provided the Conference with financial support to establish a secretariat and to undertake a research project on judicial independence.

56. I note that the Conference has prepared briefing materials to explain judicial independence for the Australian community.
As with everything these days, the materials are available on the Conference's website[3].

Judicial Accountability

57. I would also like to make a few comments on judicial accountability.

58. The principle of judicial independence is consistent with the requirements of judicial accountability.
Both are aspects of the duties owed by the judiciary to the community.

59. The courts themselves have to maintain and enhance public confidence in the judiciary, by the quality of their work.
The courts are accountable to the community by the requirement that their

[3] The Internet address is www.law.monash.edu.au/JCA

duties be performed in public and are publicly reported, and by the appeal process.

60. In the case of courts which have separate financial administrations, such as the High Court, the Federal Court, the Family Court and the Federal Magistrates Service, they alone are responsible for the proper expenditure of significant amounts of public moneys.

61. A relevant criterion in looking at the efficient use of public money is the issue of court performance or judicial productivity.
I welcome the initiatives of a number of courts in developing benchmarks for court performance[4].

62. Another aspect of judicial accountability is improving the efficiency of the judiciary through judicial training and continuing education.
I am pleased to note that Chief Justice Gleeson, in the recent Boyer lectures, expressed the view that it was proper for modern governments to take an interest in judicial education[5].

Judicial College

63. Some of you will know, that the Standing Committee of Attorneys-General and the Council of Chief Justices I have set up a working group to explore the establishment of an Australian Judicial College.
The College will have the responsibility for the professional development of judges and judicial officers on a national basis.

64. The working group consists of judicial officers from the Commonwealth and State courts.

[4] See for example, *Benchmarking and Productivity for the Judiciary*, Justice Stephen O'Ryan and Tony Landsell, Paper for AIJA Conference on Judicial Accountability, July 2000.
[5] Boyer lecture Six–The Judiciary 24/12/00

It also has representatives of the Commonwealth, New South Wales, Victorian and Western Australian Governments.[6]

65. The working group will provide a report to the Standing Committee of Attorneys-General on options for establishing a college.
This will include its role, nature and structure; arrangements for funding; and management, operation and administration.
For example, it will consider the types of programs that might appropriately be provided to members of the judiciary.
These might include orientation for new judges and continuing education in legal development, managing cases and social context issues.

66. A draft report prepared by the working group on options for establishing a national college was circulated for comment to courts and other stakeholders at the end of last year.

67. I expect that the group will report in the middle of the year.

Conclusion

68. In conclusion, I reiterate my view that an independent judiciary is crucial to our system of government.
However, in a modern society judges must not consider themselves isolated from the community.

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[6] The members of the working group are:
Chief Justice John Doyle, Supreme Court, South Australia (joint chair)
Mr Robert Cornall, Secretary, Commonwealth Attorney-General's Department (joint chair)
Justice John Dowsett, Federal Court, Brisbane;
Justice John Byrne, Supreme Court of Queensland;
Chief Judge Reginald Blanch, District Court, New South Wales;
Magistrate Sue O'Connor, South Australia;
Mr Laurie Glanfield, Director-General, New South Wales Attorney-General's Department;
Mr Robert Meadows QC, Solicitor-General for Western Australia;
Professor Peter Sallmann, Crown Counsel, Victoria; and
Ms Kathy Leigh, Commonwealth Attorney-General's Department.

69. Judges, as part of the wider legal system, have a responsibility to deliver accessible and equitable justice.

70. They must be accountable and they must respond to criticism themselves or through a professional association.

    At the same time they must ensure that they do not transgress into the field of politics.

    No doubt this is at times a difficult task.

71. A questioning of, and even irreverence for, our public institutions is a characteristic of the Australian psyche - and it is a good thing for the health of our robust democracy.

72. I am sure that if we work together in a spirit of cooperation and good will we can be part of the vigorous public debate and at the same time fulfil our respective roles and responsibilities.