The State of the Judicature

AN ADDRESS BY
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Four years have elapsed since I gave the last 'State of the Judicature' address. In that time, much has happened that is relevant to the courts and the judges. First and foremost, the legal system has come under increasing scrutiny. That scrutiny has taken many forms. It has suffered from the defect that none of the many inquiries that have been undertaken into particular aspects of the legal system has been completely comprehensive. Their principal virtue is that they have increased public awareness of the characteristics and shortcomings of the system. That is to be applauded.

What we need to recognize is that demands for the provision of legal services vary greatly in kind and complexity and that different methods of dispute resolution may be more suitable in some situations than others. The questions we should ask ourselves are:

(1) How can the particular legal services which the community needs — and there is a wide variety of them — best be delivered to meet the requirements of accessibility, efficiency and cost? and

(2) What system of dispute resolution is best suited to the resolution of a particular class of dispute?

COST AND EFFICIENCY OF LEGAL SERVICES

The economics of the provision of legal services and dispute resolution is obviously a very material consideration, the more so now when the services are so costly. But economy is neither the *sole* nor the principal consideration. It is simply no use providing a legal system which, though economic, fails to maintain or win community confidence.

That said, the continuing scrutiny of the legal system in recent years has established the need for improvement in accessibility and efficiency. Accessibility and cost are interrelated. In the context of the court system, the unpalatable fact is that the cost of litigation, even in the District and County Courts, let alone the Supreme Courts and the Family Court, is well beyond the means of most Australians. And governments are unable or unwilling to fully fund the shortfall by means of legal aid, much less finance a significant expansion in the resources of the court system.

In some jurisdictions at least, there has been a reduction in real terms in legal aid funding. According to the Chief Justice of the Family Court, legal aid

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funding for family law in most States and Territories has fallen from abov 60 per cent to 25 per cent approximately in the last five years and is stil falling. This has led to a substantial increase in the number of litigants i person with all the associated difficulties that follow from the absence of lega representation, particularly for people for whom English is not a first lan guage. Shortage of legal funds has had an impact upon the capacity of litigant to appeal.

The emergence of the litigant in person on a large scale is a new phenom enon which is not confined to the Family Court or to Australia. The Chie Judge of the Ninth Circuit Court of Appeal in the United States reports tha 37 per cent of filings in his Court involve a litigant in person on one side a least. Our adversary system is not designed to cater for the litigant in person The system contemplates, in general, a contest between those who ar represented. As Lord Devlin said:

> Where there is no legal representation, and save in the exceptional case o the skilled litigant, the adversary system, whether it remains in theory, i practice breaks down.

The rise of the litigant in person therefore presents a formidable problem fo the adversary system as we have known it, particularly in the context o criminal trials. The neutrality of the judicial role in the adversarial syste restricts the assistance which the judge can properly give to the litigant i person so that the conduct of a criminal trial in which the accused appears i person is an exceedingly difficult undertaking for the judge.

Apart from reduction in legal aid funding, the cost of litigation to litigant has been increased by limited adoption of the 'user pays' principle in relatio to court fees. As court fees are not presently a large component in litigatio costs, the increased burden on litigants is not great. But that situation wil change if further increases are made.

ALTERNATIVE DISPUTE RESOLUTION

Again with a view to reducing the demands made upon the court system increased emphasis has been given to mediation and arbitration as a means o resolving disputes. It is a facility now offered by courts, both State and federal This innovation is by no means remarkable as some might think. In Asia countries, mediation has been a traditional mode of dispute resolution. In society such as ours, with its prevailing emphasis on rights and enforcemen of rights determined by judicial decision, mediation is regarded with som reserve.

However, conciliation, and to a lesser extent mediation, has had marke success in Family Law. In the Family Court only 5.5 per cent of cases require judicial determination. Even that statement fails to do justice to the success o conciliation procedures because half of the efforts of the Court Counsellin Service is directed to couples who have not commenced proceedings — 75 pe cent of those matters is resolved without recourse to litigation.

But alternative dispute resolution ('ADR') has not been as popular in other jurisdictions, notably in the commercial field. That fact should not deter us from seeking to enhance ADR facilities and skills. The massive cost of adversary litigation is surely an inducement in that direction. What is needed is a change in the prevailing legal and commercial culture which is a by-product of the adversary system and the confrontation which it engenders.

LENGTH OF COURT PROCEEDINGS

Other modes of dispute resolution offer no alternative to our existing criminal procedures. The jury trial and its lower level counterpart, the summary trial, are here to stay. Endeavours have been made to streamline the criminal process with qualified success. Committal proceedings, though not eliminated, have been streamlined. The video-taping or tape-recording of interrogation of suspects has reduced the length of the criminal trial by reducing the need for voir dire hearings. And, in New South Wales, the Government proposes to eliminate the right of the accused to make an unsworn statement. That will bring New South Wales into line with other States but I doubt that it will reduce the length of the criminal trial.

Despite the reforms, the criminal trial can take too long. Too much time can be spent in lengthy or ineffectual cross-examination of witnesses. There is no easy answer to this problem which has become evident since the introduction of legal aid. The capacity of the trial judge in a criminal trial to control the length of cross-examination is more limited than in civil trials. This is why in other jurisdictions emphasis has been given to proposals to determine the real issues in advance of the commencement of the trial.

In the civil trial, where the difficulties are not as great, steps have been taken already to secure more precise definition of issues and to limit the time taken in examination and cross-examination of witnesses. More can still be done by implementing more generally the procedures adopted in commercial causes. That will require judges to become more insistent in ensuring that time is not wasted by counsel. As I said on another occasion, there is no reason for judges to think that the High Court would fail to support reasonable steps taken by trial judges to set reasonable limits to the cross-examination of witnesses.

It is sometimes suggested that the exclusion of lawyers is the answer to these problems, at least in tribunals outside the orthodox court system. But, the exclusion of lawyers neither enhances nor accelerates the course of justice. If my long experience of reading the transcripts of proceedings in the Industrial Relations Commission and its predecessor the Conciliation and Arbitration Commission has any lesson to offer, it is that the presentation of cases by non-lawyers does not lead to clarity and speedy hearings; on the contrary, it is more likely to lead to confusion and to long, drawn-out proceedings due to the failure of non-lawyers to identify the true issues clearly. No doubt lawyers are a nuisance — they habitually find unexpected defects in legislation and administrative and other decisions by those who exercise power. But that is no reason for excluding lawyers.

MOVES TOWARDS A NATIONAL LEGAL SYSTEM

One positive advance is the increasing uniformity of Australian law. The Standing Committee of Attorneys-General is giving increased emphasis to the achievement of uniformity and reciprocity in a variety of fields. The production of a uniform criminal code is making progress, though some had hopes that it would have progressed at a more rapid pace. Likewise, progress has been made with a law of evidence, though, as yet, only the Australian Capital Territory and New South Wales have adopted it or signified their intention to adopt it. The proposed law is not without its critics. Some objections made to the law might have been avoided if greater account had been taken earlier of the experience of practising lawyers.

Progress is also being made, again under the aegis of the Standing Committee and the Law Council of Australia, towards the creation of a national legal profession. The decision in *Street* v *Queensland Bar Association*[1] paved the way for the developments which are now in train. The emergence of a national profession may become a reality, granted movement towards uniformity in Australian law and the rapidity of technological change which has revolutionized communications across the continent. The emergence of a national profession may well entail uniform admission requirements and national standards, will stimulate competition and complement our growing sense of national unity. It may eventually raise for reconsideration the desirability of having a national court system. That idea was canvassed at some length by the Constitutional Commission some years ago but the various proposals for such a system fell by the wayside. Since then, difficulties inherent in the dual system of State and federal jurisdictions have been alleviated by the cross-vesting legislation which appears to be working well.

COURT ADMINISTRATION AND FINANCE

The trend towards judicial autonomy in the area of court administration has continued. In South Australia, the courts have recently gained control of their own administration, thus joining the High Court, the Federal Court and the Family Court. One disadvantage of the new system is that the time of judges is taken up in overseeing administration but, with further experience, the time expended on administration may lessen.

Administrative autonomy does not mean that the courts have financial autonomy. Court finances are fixed by parliamentary appropriations which give effect to budget decisions made by government. The budgets fixed by government set limits to the resources and facilities available to the court system. When critics demand better and greater court facilities, they should address their demands to government. In some other countries, the United States is one, courts negotiate their budgets with the legislature and its

[1] (1989) 168 CLR 461.

committee, not with the government. It is an alternative that may require consideration sometime in the future.

In an era of recession and budgetary restraint, the court system, like other institutions of government, is subject to strict financial constraints. Naturally, they differ from jurisdiction to jurisdiction, some faring less well than others. Some State courts — they include the Supreme Courts of New South Wales and Victoria — have sustained overall budget reductions in real terms. One difficulty which confronts the courts is that they do not have the same capacity to make economies as do large government departments and statutory authorities. The staff of courts is small in number and the scope for reduction is extremely limited. Some authorities are funded with a view to meeting the demands made upon them; this is generally not so in the case of the courts. Contrast the estimated recurrent expenditure of ICAC in New South Wales for the year 1992–93 ($14 533 000) with the estimated recurrent expenditure of the Supreme Court in that State for the same year ($18 921 000). The comparison does not allow for a number of variables, eg, the Commission pays rent, the Court does not. But the point is that the Commission's budget is 'demand driven', whereas the Court's budget is 'capped'.

Sometimes governments magnify the impact of budget cuts by responding to a public demand for increased access to justice by taking various steps which inevitably increase the workload of the courts. Likewise, legislatures from time to time enlarge the jurisdiction of courts without providing them with resources commensurate with the exercise of that jurisdiction. What is needed is a requirement that government should provide, in consultation with the relevant court, a statement setting out the estimated impact on the court of the enlarged jurisdiction and an estimate of the additional resources required for the exercise of that jurisdiction. There should be an obligation on governments and legislatures to ensure that the courts are provided with those additional resources.

The 'principles' according to which the federal courts are funded are a matter of major concern. These 'principles' have been shaped by public servants for application to government departments and statutory authorities. Efficiency dividends, productivity gains and performance pay are concepts which cannot readily be applied to courts. Efficiency dividends amount to an arbitrary 1¼ per cent annual reduction in court funding regardless of needs. Unlike other agencies, courts cannot reduce the services which they provide without compromising their capacity to deal with cases coming before them and prejudicing public access to the courts. The application of the concept of performance pay to registrars who hear and decide matters seems prima facie to be inconsistent with the performance of judicial or quasi-judicial duties. The notion that a registrar or a judicial officer should be paid more because he or she decides cases quickly is a potential inducement to depart from proper standards of natural justice. Indeed, the notion of performance pay, even as applied to public servants, raises questions about the suitability of the criteria to be applied. The same comment may be made about productivity gains if they are simply assessed by reference to the speed with which cases are processed.

THE HIGH COURT

In the High Court there has been a substantial increase in the filing of special leave applications. This year it is likely that they will significantly exceed 250. The reason for this development is not apparent as the percentage of successful applications is low, lower than it has been in the past. The cost of presenting a special leave application, even if it fails, is very small compared with costs already incurred in the entire litigation, so that there is no solid disincentive against making an application. My impression is that too many applications are presented as a 'mini-appeal'. Whatever the underlying causes, in many cases the Court dismisses the application without calling on the respondent.

The imposition of time limits will alleviate, but not wholly eliminate, these problems. Each side will be restricted to 20 minutes, subject to the possibility of extension but only when appropriate, and to a brief reply. Ultimately, the Court will find it necessary to consider dealing with these applications on written argument, a course which has been taken in Canada and, very recently, by the House of Lords without objection by the English Bar. The primary purpose of the special leave procedure is to act as a filtering mechanism so that the Court can determine the cases which have the strongest claims on its attention. The profession does not always recognize this and considers, mistakenly in my view, that entitlement to special leave is dictated by firm principles. In truth, the grant or refusal of leave, in which various factors are taken into account, is a matter of discretionary judgment.

Another feature of the High Court's work is an increase in constitutional cases. That fact, coupled with the increase in special leave applications, naturally affects the time available to deal with general appeals. The Court's ability to deal with constitutional cases and general appeals would be significantly enhanced if it were given power to remit to the Federal Court applications for relief by way of prerogative writ under s 75(v) of the Commonwealth Constitution directed to the Industrial Relations Commission and the Coal Industry Tribunal. The High Court has power to remit applications for relief under this section of the Constitution when the applications relate to the decisions of other bodies but that power does not extend to decisions of the Industrial Relations Commission or the Coal Industry Tribunal. Very few cases brought to the Court in connection with the decisions of these two bodies are worthy of the Court's attention and, in recent times, applications concerning their decisions have occupied a significant part of the Court's time. The cases in question often turn on issues of fact, the interpretation of awards and the vague provisions of union rules. These matters can be dealt with by the Federal Court. The argument that giving jurisdiction to that Court would damage the status of the Industrial Relations Commission vis-à-vis the Federal Court is too trivial to warrant a moment's consideration.

LAW LIBRARIES

In the case of the courts, the compelling need to make economies invariably leads to pressure to reduce libraries and library services. That is partly because, due to the devaluation of the Australian dollar and an increase in publishing costs, particularly overseas, subscription rates and acquisition costs have risen quite sharply. The need to make economies in the financial year ended 30 June 1993 resulted in the Joint Law Courts Library in Sydney, the Library which services the Federal Court and the Supreme Court of New South Wales, to cancel approximately 300 subscriptions to serial publications, including some law reports. The consequences of that cancellation illustrate the adverse impact on the courts which a reduction in library facilities brings about. A significant proportion of the serial publications cancelled comprise overseas journals. They play an important part in judicial education, enabling judges to keep up with and take advantage of the latest developments and academic writings. To some extent it is possible to minimize the loss by borrowings from other libraries but that is achieved with a loss of judicial time and efficiency and at some expense.

The high reputation which Australian superior courts enjoy overseas is due in no small measure to the legal knowledge and scholarship of Australian judges. Legal knowledge and scholarship depend upon the provision of good library facilities. Yet law libraries, not only in the courts but also in the universities, are being forced to cut back very significantly. What is happening represents a trend which, if it continues, has the potential adversely to affect legal education and the quality of judicial work done by the courts.

Law libraries, like other libraries, are encountering particular problems in consequence of rapid technological advances. At present, a library must keep up its traditional hard copy collection and, at the same time, build up its holding of electronic materials. Evolution is still continuing at a rapid rate so that it is not easy to predict what will happen and plan for the future. But it is very likely that important decisions will need to be made before very long as to the ways in which library services can best be provided to Australian courts. Critical to those decisions are court procedures. For example, the provision of authorities in courts to meet the requirements of oral argument constitutes a large part of court library functions.

PUBLIC PERCEPTIONS OF THE JUDICIARY

Much media publicity has been directed to some instances of what has been described as judicial gender bias. Exaggerated reporting, sometimes involving the quoting of judicial comments out of context, has been an element in this 'sensational' publicity. A glaring example was the report in a Sydney newspaper of a judgment of Judge Sinclair in the District Court of New South Wales. Criticism of that judgment was rightly rejected by the Attorney-

General for New South Wales. The overall publicity might well have been understood as suggesting to female litigants that they would not obtain a fair hearing before a male-dominated Judiciary. Granted the accuracy of some reports on lack of 'gender awareness', that suggestion is without foundation. It reflects the serious mistake of reasoning from particular instances to a general proposition about the quality and attitudes of Australian judges and fails to take account of the power of an appellate court to correct error. Nonetheless, it is important that public confidence in the Judiciary should not be eroded by lack of sensitivity on gender issues.

On the other hand, media organizations have a responsibility to report and comment fairly and objectively. They should live up to that responsibility instead of descending to sensationalism. Some reports have set at risk public confidence in the administration of justice, a matter of the highest importance, when the demands made upon the resources of the courts are greater than they have ever been. Australian courts deserve the confidence of the public and that confidence should not be jeopardized by exaggerated reporting and sensationalism.

Although it is not possible to make an assertion about the level of public confidence in the courts, it may be significant that in the recent survey 'The Australian Rights Project', conducted by Professor Joseph F Fletcher of the University of Toronto and Professor B Galligan of the Australian National University, 61.1 per cent of respondents considered that the Courts, not Parliament, should have the final say in deciding upon issues of basic rights and freedoms. Only 38.9 per cent favoured Parliament.

The composition of the Judiciary is another current topic of debate. The Judiciary, like other Australian institutions, is not representative of the various elements which make up Australian society. No doubt some elements in society, particularly minority groups, believe that they would have greater confidence in the Judiciary if it were more representative, just as they would have more confidence in our political institutions if they were more representative of the diverse elements in society. But, unlike the politician, the judge is not appointed to represent anyone. The judge's paramount responsibility is to be *impartial* and to decide the contest between the parties by applying the relevant principles of law as the judge understands or enunciates them to the facts as found.

Although it is desirable to make judicial appointments from a wider range of persons, this must not be allowed to divert attention from the necessity of having regard to paramount criteria based on merit in making judicial appointments: professional qualifications, skill, experience and integrity. Nothing is more likely to damage public confidence in the Judiciary than a departure from these criteria. It would set at risk the quality of the judges and the efficiency of the court system at a time when we are placing emphasis on the need for courts to become more efficient. As I have said before, the efficiency of the system depends very largely on the quality of the judges who sit at first instance. Lack of quality at that level only throws a greater burden on the appellate courts at greater cost to litigants.

That said, it would be desirable for the Judiciary to reflect to a greater extent than it presently does the composition of the community. No doubt

the increasing number of women in the legal profession and in law schools means that we will see an increase of appointments of women of merit to the Judiciary.

And, while experience in court work is unquestionably an extremely important quality for a judge to possess, that does not mean that the appointment of judges must be confined to barristers. But one must keep steadily in mind the fact that mastery of the law of evidence and procedure is essential to the successful conduct of litigation at trial level, more particularly in jury trials. So it is not surprising that the solicitors who have very recently been appointed at superior court level in New South Wales are sitting initially in specialized jurisdictions in non-jury cases.

JUDICIAL EDUCATION

Judicial education is attracting a high level of participation. The Australian Institute of Judicial Administration ('the AIJA') and the Judicial Commission of New South Wales maintain and support programmes, conferences and seminars for judges and magistrates. Professor Peter Sallmann, the Executive Director of the AIJA, has stated that there is a high level of support for AIJA programmes from chief judicial officers and the Judiciary generally. He went on to say that

> there is immense enthusiasm among the ever-increasing number of judicial officers for the concept and practice of judicial education. There are no doubt many reasons for this but central to it is a strong change in the judicial culture. Judges and magistrates tend to be less remote from the practical day-to-day world than they used to be, more in touch with what is going on in relation to other professional groups around them and more and more aware that there are benefits to be derived from things like properly conducted seminars and workshops.[2]

The AIJA has taken various steps in relation to gender education. Professor Mahoney from Canada, an expert in that field, has delivered several lectures which were well attended by Australian judges. And a number of Australian judges are visiting Canada to take advantage of programmes which have been developed there in this area of the law. The AIJA is developing its courses in this field and is undertaking a pilot programme in the Victorian courts. The Supreme Court of Western Australia has likewise been active in the field of gender education. It has also taken the initiative in shaping a seminar which is designed to equip judges with a better understanding of Aboriginal society and culture and with the problems which Aboriginal people face. The AIJA is taking up that initiative and extending it to judges in other jurisdictions.

There has been some apprehension that educational programmes of this kind could amount to indoctrination or an inducement to hold 'politically correct' views, thereby compromising judicial independence. So long as these

[2] P Sallmann, 'A Note on Judicial Education in Australia: The Australian Institute of Judicial Administration Perspective' (1992) 2 *Journal of Judicial Administration* 28, 36.

programmes are left in the hands of the AIJA, the Judicial Commission and the courts, I do not think that these apprehensions will be realized. It must be recognized that there is a limit to what can properly be achieved in this area — it is simply not possible, nor desirable, for judges to be 'educated' about every different group within our society. At the same time, I do not think that judicial education should be confined to the discussion of legal principles, judicial activities and court administration. Judicial education should extend to aspects of the interaction between law and society, eg, the impact of accounting and disclosure requirements on corporate and commercial practice, the impact of the law of contempt and defamation on freedom of communication. If judges formulate and apply the rules of the common law, as they unquestionably do, the better the understanding they have of the impact of those rules, the better fitted they will be to discharge their task. The need to maintain judicial independence is no argument against the desirability of judges becoming better informed about the interaction of law and society.

THE COURTS AND THE COMMUNITY

In the past two years we have witnessed a remarkable upsurge of interest in the courts and their decisions. Much the same thing is happening, if it has not already happened, in other parts of the world. That is because the protection of fundamental rights is essential to the preservation of the dignity of the individual and to the modern concept of democracy. Once that is accepted, it is inescapable that the courts have a central role in enforcing fundamental rights, whether those rights have a constitutional or statutory source or look to the general law for protection. Hence, the interest taken in such recent landmark decisions as *Mabo* v *Queensland (No 2)*[3] and *Australian Capital Television Pty Ltd* v *Commonwealth (No 2)* (the *Political Advertising* case).[4]

As judicial protection of fundamental rights occasionally results in the determination of controversial and important issues, it has focussed attention on what the courts are doing, their role in society and their relationship with the legislative and executive branches of government. These matters, as well as the merits of particular decisions, become the subject of debate. At the same time, the courts, being an integral part of the legal system, have been caught up in the on-going debate over the adequacy and efficiency of that system.

Judges can no longer expect that their decisions will be accepted without criticism or that, when criticized, they and their decisions will be defended automatically by their Attorney-General. As we know, some of the strong criticism of *Mabo (No 2)* was made with the object of persuading governments to introduce legislation displacing or qualifying the principles which it enunciated. That is an entirely legitimate exercise in a democracy. It is for legislatures, within the powers conferred upon them by their constitutions, to

[3] (1992) 175 CLR 1.
[4] (1992) 66 ALJR 695; 108 ALR 577.

determine whether they will alter the law as declared by the courts. But it is quite another thing to subject judges to personal abuse, and that is to be deplored. It has been suggested that strong criticism of judges may coerce them into making decisions with a view to avoiding such criticism. Provided that we continue to appoint as judges persons who are of independent mind, that will not happen. But it does mean that integrity (a quality which includes independence of mind) is a judicial quality of vital importance. It is the only guarantee of independence in judicial decision-making.

Ignorance of the nuances of the judicial process and the virtues of judicial independence hamper informed discussion of the courts and their decisions. With a view to alleviating this problem, the Supreme Court and Federal Court Judges at their annual conference last January resolved in principle to form an Australian Judicial Conference. The main objects of that Conference would be to preserve and maintain judicial independence and to bring about better understanding of what that involves. In addition, I have agreed to participate with the Chief Justices of the Federal and Family Courts and the Chief Justices of the State and Territory Supreme Courts in a *Chief Justices' Council* with a view to exchanging information and ideas in relation to matters of common concern and matters of concern to the Judiciary and the public which it serves. That exchange should assist the Judiciary in reaching decisions on questions arising between Judiciary and government and on a range of matters having significance for the courts and the community. The philosophy behind these initiatives is that the courts are institutions which belong to the people and that their function is to serve the people.

The fact that court decisions and judicial reasoning are exciting criticism and controversy from time to time is no bad thing. It indicates that there is a marked upsurge of public interest in the courts and what they are doing and a recognition of the importance of what they are doing. That upsurge of interest provides all those who are connected with the law a timely opportunity to contribute to a better popular understanding of the important role which the courts play in society. It also provides the judges with a greater opportunity of reinforcing public confidence in the administration of justice. They can take advantage of that opportunity by dedicating themselves to the just, efficient and courteous disposition of cases coming before them. And, where appropriate, they can explain publicly their work and the issues they face. That is now happening in the United Kingdom and I see no reason why it should not happen here from time to time, so long as judges refrain from expressing views about questions likely to come before them or about the legal implications and consequences of their decisions. In that way, judges can increase public understanding of, and confidence in, the court system. But their contribution in this field will be relatively minor compared with that of other qualified legal commentators.

In conclusion, I express the hope that the upsurge of public interest in the law and the administration of justice will convince governments that it is imperative that the courts should be provided with adequate resources to discharge their onerous responsibilities. Nothing less will suffice if we are to maintain public confidence in the court system.