The First 100 days ... or so..

(Chief Justice Gleeson addressed the Sydney University Law Graduates Association on 26 June)

Theo Simos invited me to address this luncheon on any subject of my choice. In issuing that invitation he was taking something of a risk. I was tempted to seek to demonstrate what a concerned and compassionate human being I am, or to display the vibrancy of my awareness of current issues, by addressing you on such subjects as: "Woodchipping and the Greenhouse Effect", "Stress Reduction in the Public Sector Workplace", or "Alternative Dispute Resolution in China". However, consistently with my view that a shoemaker should stick reasonably close to his last, I thought it better to say something about the judiciary.

Since my appointment I have found that people, sometimes out of politeness, and sometimes out of a genuine interest, often ask me how I find the job. This is not as dangerous as asking me about my health, but it does give me an opportunity to unburden myself.

The New South Wales Government did me one great favour. At about the same time as they announced my appointment, they also announced the appointment of a firm of management consultants to investigate the subject which was given the less-than-neutral description of "Delays and Inefficiencies in the Court System". This provides me with a form of public absolution of which I have been quick to take advantage.

It will be obvious to astute observers, even from that limited material which has already been made public, that, as one would have expected, the first question which the management consultants asked themselves and others was the obvious and important one: "Who is running this show?" One of the major pieces of information that I have gained in the last few months is that that is an astonishingly difficult question to answer. A conclusion which I have reached with certainty is that unless and until that question is faced up to and resolved in a manner which is consistent both with principle and political reality it will never be possible to make a permanently successful attack upon the inadequacies of the Court system, for the reason that it will never be possible to identify who is responsible for them or who has the capacity to remove them.

In Franz Kafka's work "The Trial" there is a despairing description of a Court system which, of course, I do not suggest accurately represents our system. The horror identified by the author, however, reflects in a grossly exaggerated form a difficulty which some people see in our own system. He wrote of people who entertained "a passion for suggesting reforms which often wasted time and energy that could have been better employed in other directions". He said:

"The only sensible thing was to adapt oneself to existing conditions. Even if it were possible to alter a detail for the better here or there - but it was simple madness to think of it - any benefit arising from that would provide for clients in the future only, while one's own interests would be immeasurably injured by attracting the attention of the..officials. Anything rather than that. One must lie low, no matter how much it went against the grain, and try to understand that this great organisation remained, so to speak, in a state of delicate balance, and that if someone took it upon himself to alter the disposition of things around him, he ran the risk of losing his footing and falling to destruction, while the organisation would simply right itself by some compensating reaction in another part of its machinery - since everything remained interlocked - and remain unchanged unless, indeed, as was very probable, it became still more rigid, more vigilant, severer, and more ruthless."

To the contrary of that, my own view is optimistic. I believe that provided the right questions are asked, and persisted in, answers will ultimately emerge.

I return to the question asked by the management consultants and, of course, asked also by me at the time I took up my appointment. It is one in which I in particular, lawyers and indeed the public in general have a keen interest. Who does run the system of the administration of justice in New South Wales? Who ought to run it?

The question is essentially one of constitutional law. The position which currently operates in New South Wales is in important respects substantially different from that which operates either in England or in the United States of America. In England where history and compromise are at least as important as theory in establishing constitutional arrangements, the Court system operates under an entrenched combination of legislative, executive and judicial controls. At the head of the system stands the Lord Chancellor, who is the presiding officer in the House of Lords, a member of the Cabinet, and the senior judge.

On the other hand, in the United States of America, where the doctrine of separation of powers is applied with considerable strictness, the judiciary stands apart from the legislative and executive branches of Government and the view is taken that its independence requires that it manage its own affairs and make its own decisions about and take responsibility for, the application of resources which the legislature determines would be available for the administration of justice. A somewhat similar view prevails in the Federal area in this country where the High Court of Australia has for years operated on a one line budget and makes its own decisions concerning the application of resources allocated to it by Parliament. The Federal Court of Australia also moves on to a one line budget as from the commencement of the next financial year.

The Court system of New South Wales is, of course, far more extensive and complicated than either of the two Federal Courts to which I have just referred. The New South Wales Courts deal with a volume of civil and criminal litigation far in excess of that dealt with by the Federal Courts. Indeed, to the considerable discomfiture of the New South Wales Attorney General the New South Wales Court system is burdened with the cost and expense of enforcing Federal laws, and a very substantial amount of New South Wales judicial resources are devoted to dealing with Federal prosecutions for such matters as drug offences and revenue frauds.

The New South Wales Government's commitment to reducing delays and eliminating inefficiencies in the Court system provides, so it seems to me, the ideal backdrop to a re-examination, which is long overdue, and possible redefinition, of the relationship between the judiciary on the one hand and the legislative and executive branches of Government on the other. I for my part entirely support the idea that Courts should strive for managerial efficiency provided always that that does not diminish the quality of the justice which they administer. Managerial efficiency, however, normally requires as its corollary managerial capacity.

Up until the present time the judiciary in New South Wales have been not only totally dependent upon the legislative and executive branches of Government in respect of the quantum of resources available for the administration of justice, but they have also been subject to executive control, extending down to matters of the utmost detail, in relation to the application of those resources. It is the legislature which decides how much money will be made available for the administration of justice. Within the ambit of that decision, it is the executive which decides, and decides in detail, how those resources will be allocated amongst and applied by the various Courts which make up the New South Wales Court System.

It is the executive Government which decides how many courtrooms there will be, how many judges there will be, what staff will be made available to judges, what forms of secretarial and other assistance they will be provided with, what registry and other support staff the Courts will have, what library facilities will be available to judges, whether and which Courts will have computer systems installed, which Courts will receive daily transcripts of proceedings, how many court reporters will accompany judges when they go on circuit, and a host of other matters which affect in the closest degree what a modern managerial expert would call the productivity of judges.

There is a large measure of inconsistency, of a kind which would be recognised by any management consultant, between, on the one hand, calling for judicial officers to involve themselves in a managerial fashion in the productivity of their Courts whilst at the same time leaving the judiciary without any measure of decision making capacity in relation to the application of resources which are made available for the administration of justice. This is the question which requires reconsideration. This is an aspect of the relationship between the judiciary and the executive that may call for redefinition It is not my present purpose to propose any particular solution to this question although some of you may have observed that a certain solution has been proposed by the management consultants recently engaged by the Government.

My immediate purpose is to awaken interest in the question amongst members of the legal profession. It is, I believe, not an adequate solution to the problem to rely as has been done in the past upon the personal influence of the Chief Justice in order to procure the result that the requirements of the administration of justice are given appropriate consideration at a decision making level. The Chief Justice may lack any or sufficient influence. The extent to which a Government may take account of his wishes will wax and wane. The judiciary is ill-equipped to engage in public controversy with politicians and it is normally inappropriate that it should attempt to do so.

The time is ripe for a reconsideration of the relationship between the judiciary and the executive branch of Government, and the Government's call for increased efficiency in the operation of the Court system, a call to which judges are willing and anxious to respond, provides the ideal opportunity for such a reconsideration.

The other issue which is thrown up by the report of the management consultants concerns the balance to be held between efficiency and justice.

This is a problem which has caused much concern in the United Sates of America where, by and large, there is a more longstanding interest in judicial administration than that which is recently arising in Australia.

In an article in the University of Columbia Law Review of 1978 (Vol. 13 p.52) Professor Shetreet said:

> "The Judge who conducts trials is confronted daily with the dilemma between the efficiency and the quality of the adjudicative process. The heavy case loads, backlog and delays present the judges with a difficult choice. On the one hand they seek the speedy disposition of the case, which will alleviate the pressure and expedite the proceedings in the court, on the other hand, they wish to conduct the trial with patience and deliberation, to give the parties full opportunity to present their case without cutting them short, and to allow them adjournments when they demand it. They are put under pressure to deliver written judgments as speedily as they can in order to make themselves available sooner to the long line of people who seek judicial services; justice requires deliberate judgment and considered opinion which cannot be rendered under pressure of speed and statistics. Generally, there should not be a conflict between justice and speedy judicial process; speedy trial is a component of justice, and unreasonable delayed justice is a denial of justice, but if in the conduct of the trial there appears to be a conflict between efficiency and justice, I submit that justice should prevail."

Professor Shetreet concluded his reply by quoting a phrase from the judgment of Mr. Justice White of the Supreme Court of the United States of America in the case of Stanley v. Illinois 405 US 645 1656:

"The constitution recognises higher values than speed and efficiency."

I do not wish what I am saying to be misunderstood as indicating the least resistance on my part to innovative measures which, consistently with the providing of due process of law, assist in overcoming the serious delays and inefficiencies in our justice system. My point is that there is a need to keep steadily in mind that the ultimate objective of the system is justice and not merely decision making, and that there are qualitative as well as quantitive values to be respected.

In an article in the Harvard Law Review (Vol 96 Pt. 1) in 1982 entitled "Managerial Judges" the learned author (Professor Resnik) pointed to the danger that the goals and values of judicial management systems appear to elevate speed over deliberation, impartiality, and fairness. She pointed to one interesting and frequently unrecognised aspect of this problem in the area of civil litigation.

Observing that due process is usually understood to require, in the area of civil justice, the making of a judicial decision in public following a full hearing, and with an opportunity for appellate review the author pointed out that emphasis on pre-trial procedures in aid of case flow management in the United States has produced the consequence that many of the important decisions affecting the ultimate resolution of a particular dispute are now made at a pre-trial stage without full argument, with no reasons being given for the judge's decision, and in circumstances where it is difficult, if not impossible, to obtain a review of the decision by the ordinary appellate process. This the author contends involves a great erosion of the standards of due process which are ordinarily regarded as applicable in the disposition of civil disputes. She says at p.430:

> "The literature of managerial judging refers only occasionally to the values of due process: the accuracy of decision making, the adequacy of reasoning, and the quality of adjudication. Instead, commentators and the training sessions for district judges emphasises speed, control and quantity. District Court chief judges pose and base statistics on the number of cases terminated, the number and type of discreet events (such as trial days and oral arguments) supervised, and the number of motions decided. The accumulation of such data may cause - or reflect - a shift in the values that shape the judiciary's comprehension of its own mission. Case processing is no longer viewed as a means to an end; instead, it appears to have become the desired goal. Quantity has become of importance; quality is occasionally mentioned and then ignored. Indeed, some commentators regard deliberation as an obstacle of efficiency."

This is simply one aspect of the age-old problem of maintaining an appropriate balance between competing requirements. We can all think of individual judicial officers who err on the side of despatch and others who err on the side of deliberation. It is, I believe, fair comment that the judicial system as a whole has in the past given insufficient attention to considerations of efficiency. There are various reasons for this, not the least of which is that, because the judicial branch of Government is totally dependent on Parliament and the executive in terms of resources, and because the executive have had the control, down to the most minute detail, of the application of the available resources, there has been very little incentive for judges to regard themselves as managers. They have had so little control or influence over decisions, which go to the root of the capacity of the system to deal with its workload that they have tended to keep well out of the field of judicial administration. But all that is changing.

The important thing is that the changes, welcome as they are, should not subvert the system's basic ideals.

In this State at the moment judicial officers are confronted with a challenge that is by no means peculiar to New South Wales. The problems which we currently face, which have resulted in a large part from substantial increases in the demands made on the court system both in respect of civil and criminal justice unmatched by appropriate increases of resources, is one that courts in other countries, especially in the United States of America, have had to grapple with. The measure of the success of our response to this challenge will be found in our ability to achieve an appropriate balancing of the more recently recognised values of managerial efficiency on the one hand with the traditional values of our system of justice on the other. This is a difficult and delicate task and its proper performance will require both the openness of mind and willingness to accept change and at the same time an appropriate degree of strength of mind and confidence in the underlying values which we have inherited from the past. ❑