Chief Justice Murray Gleeson AO - "reasonably calm"

Ruth McColl interviews the Chief Justice

Bar News: *When I interviewed you in 1988* at the time of your appointment as the Chief Justice, you said you anticipated having some difficulties translating to the position of being both a Judge and the Chief Justice, and in particular you thought that you may have considerable difficulty in not regarding it as any part of your function to persuade counsel to agree with you. Did you have any problems with that when you first started sitting as you anticipated?*

Chief Justice: Not really. I think that when I first started on the Bench I was probably inclined to intervene to a greater extent than has been the case in the last couple of years. I wasn't setting out to persuade counsel to agree with any particular point of view, but I did make an effort to bring them to what seemed to me to be the issues in the case. Additionally, of course, it is often necessary to seek information from counsel as to the facts or as to the legal principles upon which they rely. Nowadays, however, subject to seeking assistance of that kind, I make a conscious attempt to intervene in argument less. One of the reasons is purely practical. I find that judicial intervention slows down the progress of cases.

Do you think your approach to being a Judge has changed since you first went to the Bench? If it has, how has your approach changed, and what factors have brought about that change?

I'm not conscious of any particular change. If others have observed it, they haven't mentioned it to me.

You said in that interview that we could expect to see you run a relaxed, friendly court, a cosy place in which a just solution to people's problems can be sorted out as the result of a quiet chat between Bench and Bar. Have you been successful in establishing that sort of court?

It is my recollection that you said that anyone who would believe that would believe anything. However, I would like to think that the atmosphere in courts in which I preside is reasonably calm, and I hope that counsel feel they have an opportunity to make the points they want to make.

Has your image of the sort of courtroom you can run changed over the years as a result of any changed appreciation of your role as a Judge?

I regret to say that the enormous workload of both the Court of Appeal and the Court of Criminal Appeal, and the backlog of cases with which those Courts have to contend, means that the judges operate under a pressure that I had not imagined when I was at the Bar. In the Court of Criminal Appeal, for example, we routinely list five or six appeals in a day, some of which, of course, would be sentence appeals. Counsel have to provide written submissions before the day fixed for hearing and there is usually a large amount of paperwork to be read by the judges before the hearing commences. Similar considerations apply in the Court of Appeal. I don't think that I had realised the amount of pre-hearing work which judges have to undertake in order to get through their lists. This also has a disadvantage for counsel. It means that the judges approach the argument with a more developed view as to the issues than would be desirable in a perfect world. Of course, we haven't yet got anywhere near the situation that applies in the United States of America, where most of the work of appellate courts is done on the papers, and oral argument is limited. I, for my part, hope we never get into that situation.

You were asked in the 1988 interview whether you perceived a role in the Supreme Court for a public relations/media liaison person and your response was "no". In the past two years such a person has been appointed to the Court. I would assume that you either initiated that appointment or agreed that it should take place. What happened between 1988 and 1992/1993 to bring about a change in your attitude?

A number of things happened, the most significant of which was the strident criticism of judges that developed as the result of certain events (that occurred mainly, I might add, in other States) in 1992 and 1993. That brought to a head discontent that had been gathering amongst the judges for a number of years. At a conference of judges in 1992 a paper was delivered by Gordon Samuels in which he put a proposal for the appointment of what was then called a Media Liaison Officer. Coincidentally, at about the same time, the Law Foundation approached me with a suggestion that there should be a pilot programme under which the Law Foundation would fund the employment for a year of a person who would perform functions of the kind that were being suggested by Gordon Samuels. The matter was taken forward with the general, although not unanimous, approval of the judges. A person who is now described as a Public Information Officer was appointed for a year, and the appointment was funded by the Law Foundation. That year expired in March 1994 and the Department of Courts Administration took over the

---

* *Bar News* Summer 1988

responsibility for continuing her employment. By that time the project had been such a success that, in practical terms, it had to be followed through.

In what way has her appointment been so successful?

First, it has been very successful with journalists themselves. It is obvious that most journalists are anxious to get their facts straight. As professionals they don't like being corrected, and they make extensive use of the officer's services. It also has an important practical benefit for the judges and their associates. They no longer have to field random enquiries from journalists. There is now a well-established system under which the media can obtain information about the operations of the Court as well as about particular cases. Furthermore, she has played an important function in communicating to the media the position of the judiciary on matters as to which, in the past, the views of judges have not been communicated adequately. She is employed as a member of my staff and reports to me and not to any officer of the Executive Government. Her services are available to all the courts in the New South Wales court system.

On what sort of issues has she been able to give members of the media a greater insight into the views of the judiciary?

Let me give a routine example in relation to the magistracy. Some months ago there was publicity critical of a magistrate who had granted bail to a man the subject of an apprehended violence order. Whilst on bail the man killed the woman in whose interests that order had been granted. When that story broke, spokespersons for the police authorities, in an apparent attempt to deflect criticism, suggested that the magistrate was at fault in granting bail. As it happened, the proceedings in the Local Court were tape-recorded. The recording showed that the police prosecutor in court had submitted to the magistrate that he had no option but to grant bail. The Public Information Officer produced the tape-recording to the media and very quickly deflected criticism of the magistrate. There was also a potentially more serious occurrence in which a public disagreement occurred between a senior Minister and a senior Judge of the Court over a particular incident, and in early media reports the position that the senior Judge had taken was incorrectly stated. The true facts were promptly brought to the attention of the media by the Public Information Officer. I think it is fair to say that journalists understand that judges have no political axe to grind, and they have been very ready to accept information coming to them through the Public Information Officer. I think it is important to stress that this is not some kind of public relations exercise on behalf of the judiciary, and it does not represent a radical change on the part of judges as to the extent to which they are prepared to publicise their views on controversial issues. The objective is in keeping with the traditional reserve that judges have maintained, and I hope will continue to maintain, about matters of that character. However, it was felt that the time had come when we had to be more self-reliant on occasions when it was necessary that our views should be known to the public.

Have you felt the need since your appointment as Chief Justice to "speak up" on certain matters? I note, for example, that you published an article in Volume 66 of the Australian Law Journal *concerning "access to justice" (1992) (66 ALJ 270). Is that an example of you trying to speak up on important issues? Is sufficient notice being taken of what you say on such occasions?*

Yes, that is an example of my trying to speak up on issues that I regard as important. I hope that I am appropriately selective in my choice of subjects. As to whether sufficient notice is being taken of what I say, that is a matter that is difficult for me to determine. Time will tell.

"...the public are becoming increasingly aware of the importance of an independent judiciary"

You also agreed in 1988 that the public image of the administration of justice had become tarnished both because of events of recent years concerning the judiciary and generally because the community was more critical of professions than it used to be. You hoped that the passage of time would decrease the effect of the first factor and that reductions in court delays in New South Wales would ameliorate the second. Do you believe that the public image of the administration of justice has improved in recent years and, if so, to what do you attribute this improvement?

I think that different sections of the public have different images of the administration of justice. It is not easy to generalise about this subject. I think, for example, that in recent years parliamentarians and public servants have become more aware of the pressures under which judges operate and of the diligence with which they address the problems confronting them, including, in particular, the problems of coping with an ever-increasing workload. I think also that the public are becoming increasingly aware of the importance of an independent judiciary. There has been a lot of emphasis in the last year or two upon the power of the courts and there have been a number of striking examples of judges intervening to maintain the rule of law. There is no doubt that the community generally is now more questioning and critical of authority than it was in the past. This questioning and criticism is sometimes represented as manifesting a lowering of confidence in the judiciary, but I think that involves a misunderstanding. If you believe, as I do, that the system of administration of justice has its basic principles right, then public discussion and examination of those principles should lead to an increase in respect for the judiciary.

Recently you, and seven other Judges of the Court, participated in a series of interviews published in the Sydney Morning Herald *in early March in which you and fellow Judges exposed your thoughts about a number of issues. The journalists who interviewed you attributed the reason for your participating as being a complaint that the Attorney-General no longer speaks out in the Judges' defence and attributed to you the quote "We have to be prepared to defend ourselves more". Was that, in fact, the key reason for the Supreme Court participating in the series of articles?*

The quotation that appeared in the newspaper article was actually taken from a speech that I gave at a conference of judges in New Zealand in March 1992. To put the quotation in its context it is desirable that I repeat the passage in the speech from which it is taken. I said:

"It is the inevitable consequence of consumerism that courts will come under increasing pressure to explain and justify their procedures and their decisions. How is this to be done? Judges are ill-equipped to enter the field of public relations and their traditional reliance on the Attorney-General to defend them may not be an adequate safeguard especially if the Government is under political pressure in relation to the issue in question. Indeed, the Judiciary may find itself in conflict with the Executive Government. Judges may have to develop procedures not inconsistent with their need to maintain independence and impartiality for communicating to the public their point of view on some controversial issues. They can, of course, never do that in relation to the merits of individual cases. Even in this area, however, there are steps that can be taken on appropriate occasions to see that the public is given a better understanding of what the court is deciding. Judges should not be above attending to the requirements of proper presentation and explanation of their decisions. Furthermore, on issues relating to court administration and the way in which courts go about their business, the Judiciary is going to have to be prepared to join in an appropriate fashion in the public debate. It can no longer depend on others to put its case."

What reaction did you get from the public to the series of articles and was it the reaction you expected?

The reaction was generally favourable. I was surprised to hear remarks from quite a number of people who were pleased to be given personal glimpses of the lives of judges. For my part, I've never been anxious to give personal glimpses but I was pleasantly surprised with the comments I heard.

What sort of reaction did you get from lawyers to the articles? Was that the reaction you expected?

The reaction from lawyers also was generally favourable, although, of course, many lawyers already knew the sort of information that was published, and would also have been aware of the judicial attitudes that were expressed.

The first article was introduced by a quote attributed to Lord Kilmuir in 1955: "So long as a Judge keeps silent (when off the bench) his reputation for wisdom and impartiality remains unassailable." Do you think that it is possible for Lord Kilmuir's words to have any general application today having regard to the increased exposure of the Court to criticism at all levels, community, media and political?

No. In fact, the Kilmuir Rules have been formally abandoned in the United Kingdom. That is simply a recognition of the trend that I mentioned earlier, that is to say, the increasing public interest in questioning all forms of authority. I happen to think that's a healthy, rather than an unhealthy, trend, but whether you like it or not, it makes the attitude embodied in the Kilmuir principles impossible to sustain.

One of the articles dealt with the issue of bias on the Bench and the question of whether the Judiciary can and should be made "more representative". On the first issue, Mr Justice Clarke said: "I don't think every Judge would say he wasn't biased, and who am I to say he's not correct; but there may be people [Judges] who are biased and probably don't realise it." Is the Court making any attempt to sensitise all the Judges to issues of gender bias and, if so, what steps are being taken in this respect?

Any judge in 1994 who isn't sensitive to the issue of gender bias must be very slow on the uptake. However, the Court is taking steps in this regard and on Thursday and Friday of this week (21 and 22 April - ed) at the conference of judges we are going to have a number of papers delivered to us in order to increase our sensitivity to the issue of gender bias. We will all listen to those papers with a keen interest.

Who is delivering those papers?

We are having a workshop session on the subject "Is gender bias a problem in courts." The session is being addressed by Justice Deidre O'Connor; the workshop leaders are three female judges, Justices Mathews, Brown and Simpson. The commentator is a Canadian judge, Judge Campbell, who is

from the Western Judicial Education Centre in Canada, which has been very active in judicial education on this and related topics. However, your question refers to another subject on which I am also sensitive, that is to say, proposals for a representative judiciary. There is an ambiguity in the concept of representation. It could mean something innocuous, such as mere presence. To ask whether, for example, Presbyterians are represented on the Bench may mean nothing more than asking whether there happen to be any Presbyterian judges. Suppose, however, some person advocating a representative judiciary were to say "Presbyterians are under-represented on the Supreme Court; we need more judges to represent the Presbyterian element of the community". What exactly would be involved in that proposal? Would it be intended that a Presbyterian would decide cases differently on that account? Would it be suggested that part of the role of such a person would be to look out for the interests of Presbyterians; to make sure that Presbyterians were not being badly treated in some way or other? If that were the idea involved in having a greater representation of Presbyterians on the Bench, I think most people would consider it rather sinister. Most women judges that I know would be deeply offended by any suggestion that they should act as though they were appointed to represent the interests of women. The judicial oath requires a judge to decide cases without affection or ill-will. I think that people who advocate a representative judiciary ought to spell out clearly what they have in mind by the concept of representation.

"... there is a much greater level of access to the courts than there has ever been in the past"

The last of the three articles which dealt with the costs of justice referred to a proposal that the Supreme Court should control its own purse-strings in the same way as the High Court and the Federal Court. How do you see the Court's ability to control funding affecting the cost of justice?

I don't see the Court's ability to control funding as having a direct effect on the cost of justice. I don't see it affecting the level of fees that need to be paid to lawyers, or even the level of filing fees. The Court's ability to control funding is related to the constitutional imperative of judicial independence. There is, however, an indirect effect which the Court's ability to control funding could well have on the cost of justice. It ought to lead to greater efficiency in the management of the Court. The modern and generally accepted theory is that devolution of decision-making promotes efficiency. Decisions as to the expenditure of money ought to be taken by the people who are best informed as to the consequences of those decisions. In particular, choices between priorities in relation to expenditure should be made by people best fitted to make judgments on those issues. In that respect the Court's ability to control its expenditure, and the capacity of judges to decide on priorities, ought to result in increased efficiency. That is the theory on which the Federal Government is operating, and I have never heard any explanation from the State Government as to why it is wrong.

What steps should be taken to improve accessibility to the courts?

This is a large subject and it is impossible to give an adequate answer in the context of an interview such as this. There is no single solution to the problem and, indeed, there is a substantial area of disagreement as to what the problem is. In many respects, there is a much greater level of access to the courts than there has ever been in the past. The courts are flooded with litigants. The problem is that community expectations have been raised to a level which cannot be met by the resources governments are willing to make available to the court system. The assumption behind much of the discussion on this topic seems to be that there is, in the community, a vast unsatisfied desire to litigate. If that be true, then satisfaction of that desire is obviously going to require governments to spend a great deal more money on the justice system. If it be right to say that more people ought to have access to courts than enjoy such access at the present time, then that has obvious implications concerning the size of the court system, or the nature of court processes, or both.

The Attorney-General is planning to introduce the Court Legislation (Mediation and Evaluation) Amendment Bill 1994 which is proposed (inter alia) to amend the Supreme Court Act by giving the Court the power to refer matters for mediation or neutral evaluation if the parties consent. What effect do you see the exercise of that power having on the traditional role of the Court?

As long as the mediation, or neutral evaluation, is not done by judicial officers, then what is involved should simply be the availability of a useful facility of alternative dispute resolution which can be taken advantage of by litigants at their choice. This does not involve any interference with the traditional role of the Court, but is an appropriate response to an increasing public demand for some reasonable alternative to litigation, with all the cost and trauma that involves.

What effect do you believe introduction of those amendments will have on the workload of the Court?

It is to be hoped that these measures will promote settlement of cases and, in particular, will minimise the number of cases which ultimately settle, but which occupy unnecessary court time before they settle.

A criticism which has been made strongly this year is that few, if any, common law cases are being heard because the Judges

are mainly sitting on criminal trials. Is there, at the moment, a particular push to dispose of criminal matters?

Yes, there is a push to dispose of criminal matters. I am not willing to preside over a court in which large commercial matters are routinely brought on for hearing in a shorter time than trials of persons who are in custody. In the United States and Canada there are time-limits applied to bringing people in custody on for trial. In New South Wales we go nowhere near complying with those time-limits. In the United States and Canada the consequence of not complying with the time limits is that the accused person must be released. It is imperative that we significantly lower the time taken for bringing people accused of crime on for trial, especially in the case of people who are in custody. There are some courts in the United States of America which have ceased doing civil work altogether in circumstances where they cannot deal with their criminal work in a timely fashion. I make no apology for giving priority to criminal work over civil work. My concern is whether, in the past, sufficient priority has been given.

Is there going to be any balancing exercise carried out when common law matters will be dealt with more thoroughly?

We endeavour, and will continue to endeavour, to maintain an appropriate balance consistent with our obligations in relation to the criminal work. There won't be any special sittings in the foreseeable future, but we will pay careful attention to the needs of our civil lists.

You have spoken on at least two occasions recently within the community as to what is expected of the legal profession. Do you see the Judiciary as having a role in clarifying the ideas of participants in the debate about what is involved in the legal profession and, if so, how do you perceive the Judiciary's role in that activity?

The public are confused as to what they expect of professions in general and of the legal profession in particular. There is little I can add to what I have said on this subject in the past, except that the Bar needs to insist, wherever necessary, upon recognition of the significance of the professionalism. The judiciary has a role to play in this respect also. One of the most important things that can be done is to ensure that the issue of the maintenance of professional standards is constantly kept on the agenda where the future of the profession is debated.

Do you have any views on whether or not barristers should be permitted to practise in partnership with other barristers or, indeed, with any other professionals?

I do not think it desirable to permit barristers to practise in partnership. I think the individuality of the operations of barristers is an important aspect of their independence. I think that it helps to define in a significant way the profession of a barrister. It is hard for a person who is practising in partnership with others to observe the cab rank rule. This has been a source of contention in States like South Australia and Western Australia, where the Chief Justices have traditionally required practitioners to leave firms and go to the independent Bar when taking silk.

Has your perception of the Bar been changed in any way by your observations of the Bar from your position on the Bench?

After 25 years of practice, I had a pretty good idea what barristers were like, and I have not changed that idea.

In past years members of the Bar have been appointed to the Bench as acting Judges. Do you see that as a useful way to reduce court delays or would you prefer to see the appointment of permanent Judges in preference?

I would prefer to see the appointment of an adequate number of permanent judges. However, I despair of that happening in the foreseeable future, and I regard the appointment of acting judges as the next best alternative.

Do you believe that it is appropriate at this stage for the Government to be considering appointing solicitors to the Bench or do you think that it will not be until solicitors have a great deal of proficiency and expertise in advocacy that they should be considered for such appointment?

I have no difficulty in principle with the appointment of appropriately qualified solicitors to the Bench. What constitutes appropriate qualification is related to the work of the particular Bench to which an appointment is made. For example, the appointment to the Equity Division of this Court of an experienced commercial solicitor may be entirely appropriate. On the other hand, it might to difficult to expect a solicitor to handle criminal trial work if that solicitor had not had experience in advocacy. There are, of course, numerous solicitors who are experienced advocates. ❑

Special Sort of Leave

At a recent special leave application the Court (Mason CJ, Toohey and McHugh JJ) called first on the respondents to persuade it that it should not grant special leave. McHugh J expressed a "firm view" to counsel for the respondents from the outset. It was one of those days when the tide flowed strongly. At one stage there was the following exchange:

McHugh J: "Mr Holmes, on the hearing of an appeal you may be able to convince me that that is right but at the moment it seems to me that there is a strong case for the grant of special leave to appeal in this case."

Mason CJ: "You may have better luck with other members of the Court when you are addressing a Court of seven, Mr Holmes ... Mr Justice McHugh may fall ill between now and then. " ❑