

**THE JUDICIAL CONFERENCE OF AUSTRALIA**

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**“COURT GOVERNANCE AND THE EXECUTIVE  
MODEL”**

**A PAPER BY**

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## **"COURT GOVERNANCE AND THE EXECUTIVE MODEL"**

### **Why does court governance matter?**

There are those who say that the administration of the courts should be left to the executive arm of government --

*"Leave us alone and let us get on with our judicial work. Judges and magistrates have enough to do without worrying about the administration of Courts. They are not administrators and judicial officers should just do judging".*

They acknowledge that resources are never enough and there are problems in dealing with government but somehow we manage to get the job done. They would argue that provided judicial officers have security of tenure, they have independence and they can carry out their task without fear or favour. If judicial officers are independent and perform their work competently, the community should have confidence in them and in the court system. The more sceptical also question whether a change of system will necessarily be better. Some also argue that there may be some advantage in being part of a large mega department because should unexpected expenditure be necessary, you can go to the department to seek help.<sup>1</sup>

Homo sapiens has a great capacity to ignore reality. The view that we should leave court administration to the executive is, I suggest, another example of this ostrich like capacity. It ignores the reality that it is not possible to separate the performance of the purely judicial work from administrative arrangements. They are inextricably intertwined and the administrative arrangements can have a profound impact on the discharge of the judicial role.

Why does court governance matter? The question posed is best answered by considering the traditional Executive model, the model operating in the majority of Australian jurisdictions.

### **The Realities – Introducing the Executive model**

In the AIJA report, "The Governance of Australia's Courts: a Managerial Perspective",<sup>2</sup> the learned authors asked the reader to imagine that he or she had been recruited to be Chief Judge of a court in a particular country where the Executive model operates. Having received assurances that independence will be strictly safeguarded, that there is a budget for staff and buildings and other facilities needed you start to go about the work. You worry a little about the expectation that you will

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<sup>1</sup> Some express concerns about the appropriateness of the Chief judicial officer having to engage in negotiations with the executive. Similar reservations were aired in Canada. (Canadian Judicial Council, Project on Alternative Models of Court Administration, 2005, 93). But negotiations with the executive are unavoidable whatever model is operating.

<sup>2</sup> Professor J Alford, Dr Royston Gustavson, and Professor Williams, "The Governance of Australia's Courts: A Managerial Perspective" Australian Institute of Judicial Administration 2004, p 2.

achieve certain outputs but the system seems to leave you some autonomy in achieving those outputs. But you find that

*"..the manager and administrative staff of the court over which you preside are actually employed directly by the State, that is, they are civil servants who report to the government, rather than to the court. You also discover that the buildings and other facilities are owned directly by the State, rather than by the court. Most disturbingly, you begin to find that the budget itself is subject to variation outside your control. At unpredictable intervals during the financial year, amounts are moved around within the budget, or sometimes even removed from the budget, by the aforementioned civil servants. You start to wonder how you can achieve your mandated outputs without control over the means for delivering them."*<sup>3</sup>

The learned authors ask whether this is a vignette from "a banana republic or a central European backwater recently emerged from authoritarian rule?" They point out, however, that this story could be set in any jurisdiction in Australia other than South Australia and the Commonwealth.

In this paper a number of criticisms will be made about the executive model of governance that applies in most jurisdictions in Australia. This paper is not intended, however, to be a criticism of the people involved in the administration of the Victorian courts. They are highly capable people. But they are required to operate a fundamentally flawed system. They are attempting to deal with the courts as partners. They do so, however, with flawed perceptions which are shaped by the flawed system.

If I have a criticism it is of the failure of our State government to enter into any discussions about court governance. This is particularly disappointing when it is borne in mind that court governance was identified as an issue for attention in the "Justice Statement", launched in 2004 by the Attorney General and the Department of Justice (DOJ).<sup>4</sup> It is also disappointing when there are precedents within the jurisdiction which could be drawn upon. I refer, for example, to the fact that funding of the Auditor General is a matter for the Parliament. The two houses of Parliament through their presiding officers prepare and negotiate their budgets directly with Treasury. "Entity" number one of the "Criminal Justice System", Victoria Police, has a stand-alone IT system independent of DOJ. When asked why the same could not be done for the courts, the DOJ response is that the police are different. So they are-- but so are the courts.

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<sup>3</sup> Op cit vii.

<sup>4</sup> Justice Statement, 3.4.3 – "Well-Managed Courts". Ministerial Statement "New Directions for the Victorian Justice System 2004 – 2014", Hansard, Legislative Assembly, 27 May 2004.

## **The Administrative Context – reform and the mega department**

As the learned authors of the AIJA Report argue, to understand the issues, it is necessary to understand the context in which court governance is carried out- in particular the reality of administrative reform and the modern mega department.

The recent AIJA Report describes how all Australian governments have pursued and implemented a program of managerial reform of the public sector. In some jurisdictions such as Victoria, South Australia and the Commonwealth, departments and agencies have been restructured to amalgamate functions into "mega-departments" with the result that the Court administration function has been enveloped in a larger organisation, sometimes with a number of portfolios<sup>5</sup>. Generally, there has been a separation of service delivery and policy development functions. Further, there has been a focus on "results rather than processes"<sup>6</sup> and all governments apply output budgeting. They allocate money for specific outputs such as cases completed rather than for inputs such as Court staff or buildings.<sup>7</sup> Parallel with that has been the devolution of authority to lower-level managers who are held accountable for results, the idea being that they will have a strong obligation to achieve the results sought but also the autonomy to determine how to achieve those results.<sup>8</sup> In this way, authority is aligned with responsibility. At the same time, in practice, in most governments, Treasury has retained substantial control over the detail of inputs and processes.<sup>9</sup> The authors make the point that there is a fundamental clash of values in that focusing on efficiency in achieving outputs necessarily fails to consider the other values implicit in the services provided including independence, impartiality and application of the rule of law. A further change they identify is the centralisation of personnel management in government. While in the 1980s, some governments moved towards less Treasury control and more departmental level control and individual contracts, bodies such as courts found themselves still subject to external constraints in managing their human resources and, in reality, Treasuries still retain strong control over human resource decision making.<sup>10</sup> The Victorian Supreme Court can add that Treasury retains strong control over capital works. Not long ago an exhaustive and detailed budget process resulted in Cabinet approval for major building works for the Supreme Court. Notwithstanding that, Treasury subsequently required detailed justification of the expenditure already approved.

The learned authors comment that notwithstanding the widespread application of the above reforms, their application "in practice has often been marked by ambiguity".<sup>11</sup> They refer in particular to the fact that where the administration of the courts has been responsibility of an Attorney General's or Justice Department, they have been reluctant to let go of control while, at the same time, espousing devolution and autonomy for line agencies.

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<sup>5</sup> Op cit 6

<sup>6</sup> AIJA, Op cit, Introduction, vii and 38-9.

<sup>7</sup> Op cit, viii, 6

<sup>8</sup> Ibid

<sup>9</sup> ibid

<sup>10</sup> Op cit 7

<sup>11</sup> ibid

It is in that context that the AIJA report examines the different models for Court administration. It found that it was only in the Commonwealth and in South Australia that the courts are left with a responsibility of deciding how to achieve their outputs. In all other jurisdictions, including Victoria, it is the Executive that controls the Court staff, buildings, information systems and detailed financial allocations.<sup>12</sup> The judiciary in those jurisdictions have little or no control over the terms on which staff are employed, buildings or other matters which significantly affect their ability to do their jobs.

The report argues for the granting to the courts of control over staff, internal financial management, facilities and operations and limiting the role of the executive to the appointment and remuneration of judicial officer and the provision of annual global budgets.

Its criticisms of the Executive model are strongly supported by an examination of the Victorian “mega-department” and its consequences for the Victorian courts.

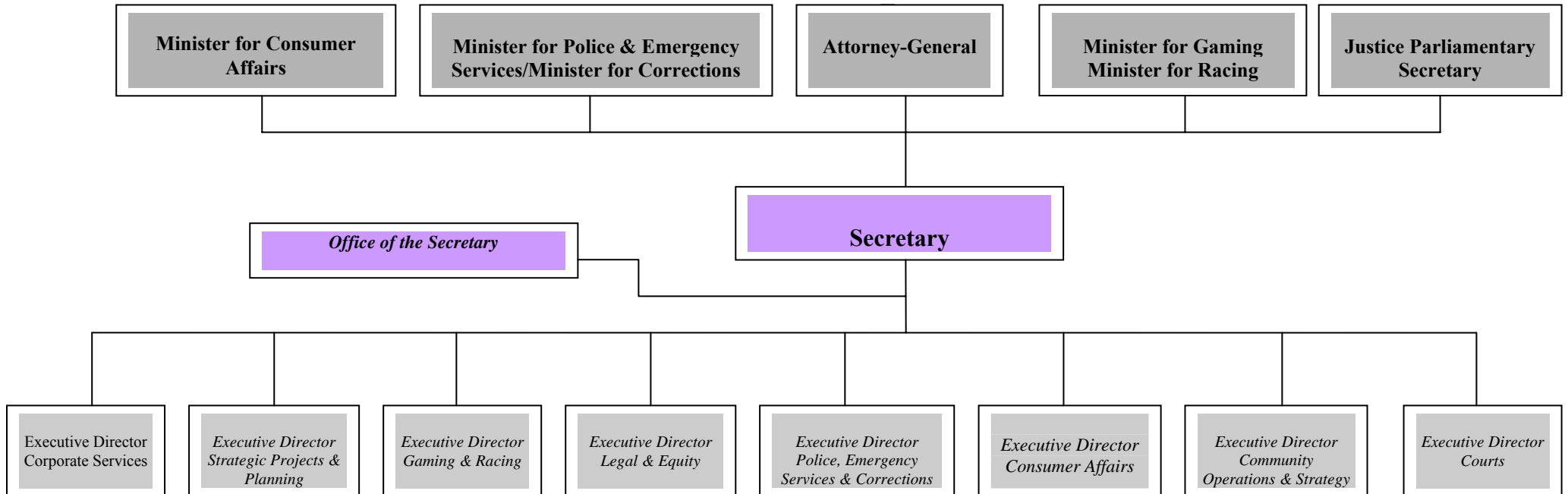
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<sup>12</sup> Op cit 5,

## The Victorian Mega-Department

In Victoria we do not have a mega-department. We have a departmental behemoth.

## Department of Justice - Organisational Chart



There are four Ministers with six portfolios within DOJ and one Parliamentary Secretary. There is no Minister of the Department of Justice but there is one Department Secretary whose job it is to head the Department that serves them all. The Attorney General also holds the Planning Portfolio serviced by a separate department.

It is not relevant to the present discussion to debate the above combination of portfolios and the structure adopted. What is important is to understand the effect on the administration of the courts.

Within DOJ the courts are

- a part of
- one of
- six portfolios

which are the administrative responsibility of the Department of Justice.

Having regard to the organisational structure it is to be expected that departmental officers would not see the administration of the courts as requiring a different approach. In particular, it would be surprising if departmental officers saw the courts as having any greater significance than the other organisations administered by DOJ or as having any special role or needs which warranted special treatment or consideration.

Those conclusions are borne out by an examination of a document issued by DOJ - "Strategic Priorities 2006".

The document identifies five "Systems" which make up the "Justice Systems". They are listed in the following order;

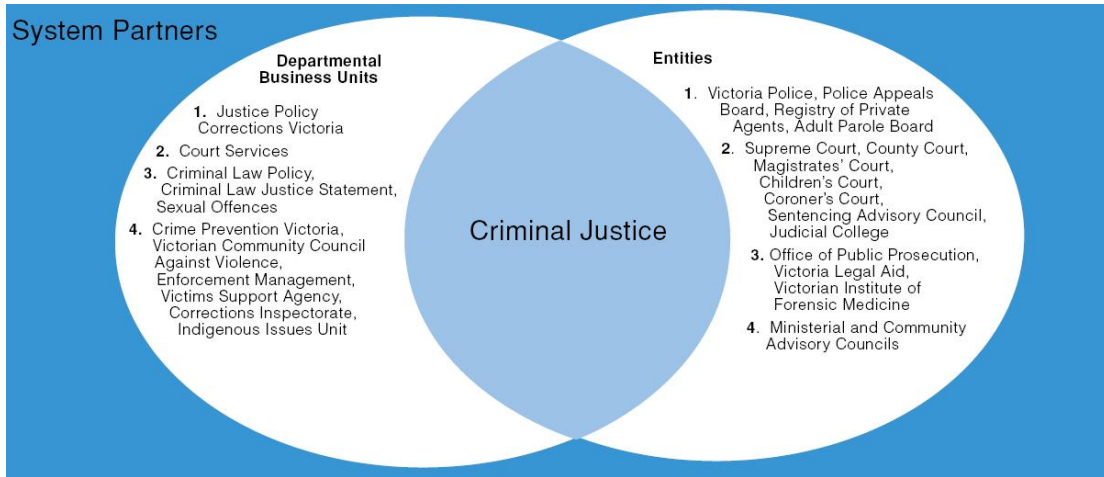
- Criminal Justice System,
- Regulation and Enforcement System,
- Civil Justice System,
- Emergency Services System, and
- Corporate and Strategic Support System.

The courts are specifically mentioned in only the "Criminal Justice System" and the "Civil Justice System".

The document analyses each "System" in terms of its "System Elements" and what are called "System Partners". For the "Criminal Justice System" the following "System Elements" are identified;

Crime Prevention and Early Intervention	Police Assistance	Victims Support	Detection and Investigation of Crime	Prosecution of Offenders	Provision of Legal Aid	Sentencing and Diversion	Offender Supervision and Rehabilitation
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and the following System Partners--



For the Civil Justice system” the following “System Elements” are identified

Law Reform	Education and Awareness Raising	Provision of Legal Advice and Information	Advocacy and Guardianship	Dispute Resolution	Case Management
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and the following “System partners”--



In the other “Systems”<sup>13</sup> the courts are not mentioned even though the courts interact with them because of possible prosecution, judicial review or applications to VCAT. It is also significant that in the “Corporate and Strategic Support System” none of the “Entities” are mentioned as system partners with the Departmental Business Units that are identified as partners in the “Corporate and Strategic Support System”.

We should be thankful that the courts are no longer called “Business unit 19”, but they and their functions are not identified as “System Elements” and are seen within the DOJ Behemoth to be

<sup>13</sup> “Regulation and Enforcement System”, “Emergency Services System” and “Corporate and Strategic Support System”



- merely entities within entities in partnership with other entities and a large number of business units and
- indistinguishable from any other entities.

In addition, the concept of the courts being “partners” of other entities, and particularly Victoria Police, the OPP, VLA and VIFM suggests a fundamental misunderstanding of the role of the courts. This is confirmed by the fact that in the “Criminal Justice System” they are seen as being of less importance than Victoria Police, Police Appeals Board, the Registry of Private Agents and the Adult Parole Board.

DOJ could not portray the courts in the way it has in the Strategic Priorities document if it saw the courts as the third arm of government. As the third arm of government the courts would need to be shown as separate entities which over-arch all other entities and business units. In addition, if they were to be described as partners with any organisations, their co-partners would simply be the Parliament and the Executive. In light of this treatment of the courts in official DOJ documents it is not surprising that departmental officers do not see a need to distinguish the courts from the other entities as the third arm of government and accordingly do not allow that principle to guide the approach to be taken in the supply of administrative services to the courts. Thus the DOJ templates and systems for human resources (including salary structures), budget and information technology have been seen by DOJ as appropriate for, and to be applied to, the courts in Victoria. Some consequences were reviewed in the Courts Strategic Directions Statement (CSD Statement) in 2004.<sup>14</sup> Since then the courts and DOJ officers have tried to address the issues but the Executive model continues to create major difficulties.

### **Being part of the Victorian Behemoth – the consequences in practice**

#### *Staff*

##### *(a) Personal Staff*

Because they are employees of DOJ, the personal staff of judges have to be placed within the departmental staffing and salary structures. Their place is determined by the Department. The departmental structures, however, were not developed with such staff in mind and do not provide a good fit. They have been a constant source of discontent and ongoing discussion between DOJ and the courts. Recently DOJ agreed to an independent review of salaries of personal staff. The proposals of the review were accepted by the Supreme Court and its staff but not the department. Further discussions were required until a compromise was hammered out. That particular exercise involved an enormous amount of time, stress and effort on all sides.

##### *(b) The CEO*

Because the court CEOs are employees of DOJ, the position of the CEO of each court has to be fitted into the staffing structure of the Department. This automatically puts a limit on the salary that can be offered. What can be paid falls short of what

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<sup>14</sup> See Appendix A. Extract from “CSD Statement” (2004) pp 71 - 75

should be paid. It is, for example, well short of that which can be offered in judicial controlled administrations such as that of the Federal Court.

### *IT Services*<sup>15</sup>

#### *(a) The operation of the IT system*

The IT system for Victorian courts is that of DOJ being part of a mega departmental IT system has a number of consequences:

- DOJ is subject to "whole of government" purchasing guidelines. This has the benefit of obtaining purchasing discounts but means that hardware and software are selected having regard to "whole of government" requirements. Often it has not been possible, or not possible without great difficulty to gain approval to use other software<sup>16</sup> or hardware that might be more suitable to court needs.
- DOJ sets "whole of Department" IT policies without prior consultation with the Judges. For example, it will block access to particular web sites,<sup>17</sup> prohibit sending or receipt of certain types of e-mail or e-mail attachments and prohibit the installation of software. The latter is sometimes necessary because of incompatibility with the DOJ system.

Upgrades of systems are guided by the needs of DOJ not the Courts. Approximately 2 years ago the decision was taken by DOJ to upgrade all its IT equipment and systems. This was welcomed by the courts. It came at a price, however.

- The courts were presented with a fait accompli. The only way the courts could obtain a much needed upgrade was to accept the DOJ upgrade. They were already part of the DOJ system and realistically they could not expect funding to be provided for a separate and independent IT system for the courts which would take account of the need to preserve the independence of the courts and the special need to preserve the confidentiality of communications within and between courts and draft judgements
- DOJ insisted on reducing the staff available at the courts to assist Judicial officers and court staff and on more centralised control of the programs and facilities to be provided to the judicial officers.

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<sup>15</sup> The situation in 2004 is also discussed in the Courts Strategic Directions Statement (attached) – Appendix A, p 74.

<sup>16</sup> E. g. software for home printer and "Pivot" which will enable the screen to be used in a landscape format.

<sup>17</sup> One judge found recently that she could not access the ASX web site to search for published material on corporate governance.

The result is that the Courts' staff are not allowed independent access to the system and may only fix technical problems if it is done under supervision of the DOJ IT helpdesk. Any requests for programs such as Aventail, Endnote, Dragon Dictate, etc must be made to unidentified persons at DOJ and can take days and weeks to be installed. A result is that IT staff remaining at the Court now have greatly reduced job satisfaction.

(b) *Examples of problems- their origins and consequences*

The experiences of the Supreme Court's IT committee over the last two years shed considerable light on the issues canvassed in this paper. Its experiences demonstrate the way the courts are seen by DOJ and the difficulties associated with being a mere entity in the system. One judge has commented that

*"there is little understanding of or differentiation between the IT needs of a DOJ administration clerk, a prison officer on night duty who wants to surf the Internet, and a judge".*

As a result, for example, DOJ IT will provide a remote access capacity but see it as a benefit and Judges who seek it as seeking a "privilege".

In late 2004, the Committee entered into discussions with the Director, Technology Services, over the failure of the published DOJ IT policies and guidelines to give due regard to the importance of the independence and integrity of the courts IT systems -- in particular, the protection of confidential data within the court systems (an issue raised in the CSD Statement)<sup>18</sup> These policies not only included the Email Policy referred to in the CSD Statement but also

- Internet Services Users Policy,
- DOJ IT Security Policy, and
- Internet User Guidelines.

The issues arose because the courts do not have their own stand-alone IT system administered by court staff. As a result, DOJ system administration staff have to be able to access all data locations to maintain the network, including restoring data from backups and antivirus scanning. It is also DOJ system administration staff who have to provide the monitoring of the e-mail systems to ensure that they are not being misused for personal or other purposes.

DOJ Technology Services prepared a paper in 2004 describing the policies and processes in place and in late 2004 had discussions about solutions with the Committee. One recommendation agreed upon was to insert appropriate statements in the various DOJ Policy statements and guidelines addressing "judicial independence and integrity". For example in the Internet Services

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<sup>18</sup> Appendix A p 75.

User Policy the recommendation was to insert the following paragraph (after "Data Ownership"):<sup>19</sup>

### **"Judicial Independence and Integrity"**

System Administration staff have a requirement to be able to access all data locations on network servers in order to maintain the network. In recognition of the requirement for confidentiality and integrity of Judicial data<sup>20</sup> within the Department, requests for access to data that are not clearly related to system administration (administrative purposes including restoring data from backups and antivirus scanning) will not be completed without authorisation by the Chief Judicial Officer for Judicial staff data and the Courts' Chief Executive Officer for VPS staff data".

Similar paragraphs were included in the other policies and guidelines.

Another recommendation was to introduce an automatic log of all the activities that DOJ Technology Services account administrators perform in relation to the judge data files. The cost was estimated at \$6,000 and it was said it would take four to five weeks from authorisation to implementation. The Supreme Court sought that implementation. The interface required is being created by DOJ Technology Services staff. The Court IT staff will have the job of checking to see that it works. Some work has been done but further development is required. The person developing the system at Technical Services has left and a replacement is yet to be found. The Committee has been advised that there are problems with the logging system. A full report is awaited.

Plainly these were important improvements but a number of points should be made:

- the complexity of the issues meant that the negotiation process was very time consuming;
- the question of the need to protect the independence of the courts and the integrity of data collected or created by the courts does not appear to have been considered by those who originally formulated the various Policies and Guidelines. The courts were not involved in their development. This is not surprising because within the DOJ structure the courts are merely another entity with no special distinguishing features;
- the people who will determine whether authorisation is required will be the DOJ staff and it is DOJ staff who will have to form an opinion as to whether there is any doubt as to whether the requests for access to data is clearly related to system administration. So long as the IT systems

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<sup>19</sup> "Files stored on the department's network are owned by the department".

<sup>20</sup> This terms does not appear to be defined.

are those of DOJ, this must be the situation -- short of setting up some form of arbiter. The situation, therefore, remains unsatisfactory.

- security of judicial data is not an academic matter. For example, not long ago in one State jurisdiction, an officer gained access to a draft judgment in a matter in which that officer was a party.

As it happened, the modification to the Policies and Guidelines did not cover all situations. This was discovered by the Committee when one of its members did not receive an expected e-mail. It had been blocked and inspected because it infringed the DOJ Firewall Policy. It contained an attachment that exceeded 3MB. Applying the Firewall Policy, a member of the DOJ IT staff inspected the e-mail and stopped it passing to the judge because that person decided that it was "not for business-related purposes".<sup>21</sup>

The Committee entered into further discussions with the Department. Finding a solution, however, is extremely difficult so long as all data remains within the DOJ IT system. The problem is how to protect the IT system from hackers and virus attacks while at the same time protecting the confidentiality of judicial data. It appears that there is no ideal solution. The decision reached was to undertake a six-month pilot in which e-mails directed to a judge which are in fact dangerous to the system<sup>22</sup> will be quarantined and no further action taken and the remainder of the blocked e-mails will be placed in designated judicial folders. They will not be inspected by an IT security officer but notice will be sent to the sender and recipient and the email will be released upon e-mail request to do so from the judicial officer.

Plainly this introduces complications and additional work for the DOJ IT officers, judges and the system, both during the pilot phase and probably beyond.

These examples demonstrate, if demonstration is needed, how the Executive model inevitably involves judicial officers in court administration. But many of the issues that they have had to deal with are the consequence of the Executive model itself. An enormous amount of time and effort is wasted both of judicial officers and DOJ staff. But the decision makers in DOJ when assessing the cost of providing services or changing systems do not appear to see such wastage as a cost. Alternatively, if it is seen as a cost by them, it is presumably seen as an acceptable cost to be borne because it is necessary for DOJ to control these matters.

A recurring IT issue is the extent to which personal use is to be allowed of the system and of equipment such as lap top computers provided by DOJ. For example, the following activities have been blocked: receipt of an e-mail with a travel brochure because of a decision that it was a matter for personal use; access to the ASX web site; access to Commonwealth Securities Limited blocked but not to e-Trade; the loading of software such as a French language course and Photo Shop and software to enable the lap top to print up on the home printer of the

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<sup>21</sup> The Fire Wall policy can also block emails containing attachments in the form of movie files which may in fact be relevant to the judicial officer's work.

<sup>22</sup> executable attachments, encrypted files and corrupted e-mails

judicial officer; loading as a screen saver the picture of a grandchild. Obviously, there can be technical issues of compatibility with the DOJ systems, but the personal use appropriate for a DOJ member of staff who is not expected to provide what would be regarded as personal time in the discharge of his or her duties is not an appropriate standard to apply to judicial officers who will provide anything from 20 to 40 hours personal time per week in the performance of their duties. There will be times in the day when the judicial officers time would be best spent attending to personal matters that may not require a great deal of thought or analysis – for example, considering travel plans after a hard day in court and before returning home to put in a solid evening of writing judgments or preparing a charge.

*(c) Issues still to be resolved and fundamental obstacles to their resolution*

Some issues are yet to be addressed. They too are a consequence of being mere entities in a departmental Behemoth.

- As at February 2005 there were between 13 and 15 account administrators. Technical Services advised the Court Committee that it did not wish to disclose their names "for privacy and confidentiality reasons" unless "the judiciary explicitly requests it". Thus the judiciary was again placed in the position in which it often finds itself as just another entity in the Behemoth and "having to be difficult" if it wishes to pursue an issue relating to independence and the security of its work and communication.
- DOJ takes the position in its Policy and Guideline documents that all data in its systems is owned by DOJ. The courts are yet to address this issue in relation to data originating from Judges and Courts staff. Should they be "difficult" about that?

This highlights a further problem with the Executive model. The relationship between DOJ and court personnel is critical to its operation. Yet it constantly threatens that relationship. The courts are constantly placed in the position of having to decide whether to be "difficult" or whether to put up with an unsatisfactory situation to maintain the relationship. From the DOJ perspective, it is most unsatisfactory because the judicial officers and court staff raise requirements without knowing how difficult they may be to meet and do not carry the responsibility for meeting them.

***Budget***

The system in place for financing the operations of the courts is discussed in the CSD Statement <sup>23</sup>- It was there reported that the "budgetary" process was under review. It is still under review

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<sup>23</sup> Appendix A.

### ***Policy initiatives and funding***

Policy initiatives that originate in the courts and not within DOJ have difficulty securing necessary funding unless they can be aligned with the “story” on which DOJ is focussing. For example:

- getting tough on crime leading to more funding for the criminal trial aspect of the court’s work—the Major Criminal Trials project and the Boston Consulting Review of the criminal justice system;
- Victoria doing business – funding for Commercial Litigation.

If a link can be found, funding can be obtained -- albeit after presenting the case to DOJ, negotiating with it and then negotiating with the Department of Treasury and Finance.

The criminal justice initiatives may have proceeded more quickly than otherwise would have been the case because all the “stakeholders” were entities in the DOJ Behemoth. Thus steps did not have to be taken with other departments to set up a “whole of system” project. But discussions still had to occur within DOJ at executive director level and with the relevant ministers and it is suggested that any benefit would have been marginal.

In the Supreme Court, we are still trying to find the basis upon which DOJ might be approached to consider the resources required for the Common Law Division. That is the Division that handles common-law claims involving the key statutory authorities, WorkCover and TAC, judicial review of administrative action and of the other courts, and appeals from magistrates and VCAT appeals (which can include FOI cases). The Executive government is not a disinterested party in those matters.

### ***Participation in intergovernmental groups***

There is an important body called the Australian Court Administrators Group. It considers matters of court administration of interest to all Australian courts and reports to the Standing Committee of Attorneys General and to the Council of Chief Justices. The courts from jurisdictions which have a judicial controlled form of court administration are represented by the CEO of each court. The courts which operate under the Executive model are not represented by CEOs but are represented by the most senior departmental officer with responsibility for the courts’ administration. Their interests and agendas will not necessarily be those of the courts.

### **Some observations about the experience as an entity in the Behemoth**

Let me emphasise some points that are probably already apparent.

- **Relationships critical.** For the Executive model of court governance to work effectively for both the courts and for the government it is critical that a good day to day working relationship is maintained between the heads of jurisdiction and the Minister, the Department head and any Department officials with whom they have to deal. It is also critical that all judicial officers and staff who work at the courts maintain a good working relationship with those in DOJ with whom they have to deal.

It may be said that under any model a good working relationship is required between the courts and the relevant department or departments, but under the Executive model it is absolutely critical and requires assiduous, day to day time-consuming and exhausting attention.

- **The model constantly damages the relationship.** The Executive model itself poses a constant challenge to the good working relationship that it needs if it is to function. An inevitable consequence of the Executive model is that the departmental officers do not see the courts as being the third arm of government and do not fully understand the need to protect their independence and the security of their data. The judicial officers and the court staff find themselves constantly in the position of having to challenge DOJ policy and initiatives which may impinge adversely on the independence of the courts, their operations and the security of their data.

So long as departmental officers do not fully understand the significance of those matters, these challenges tend to be seen by them as simply the actions of prima donnas with an over-inflated view their own importance. At times, the courts have to take a stand and at times have had to do so publicly. Each time that happens it takes much time and effort to restore relations.

- **The model fetters independence and actions** Every time the courts have concern about the operation of DOJ policy or initiatives, a judgement has to be made within the courts as to whether a challenge should be made because of the potential damage it will do to the working relationship between the courts and DOJ. That in itself places a fetter on the independence of the courts and their ability to function well.

- **Non-alignment of authority and responsibility** The persons who have the responsibility and authority to determine the financial, staff and other resources for the courts do not, and cannot have, the responsibility and authority to discharge the court's functions – and vice versa. This is a formula for an absence of accountability, mistrust and responsibility shifting.

I turn to some of the significant issues of principle that need to be considered when assessing models of court governance.

### **The separation of powers and the rule of law**



The ostrich position ignores the dangers posed by the Executive model<sup>24</sup> to the functioning of our free, democratic and stable society and, in particular, to the separation of powers and to continuing acceptance of the rule of law.<sup>25</sup>

Community confidence in the court system is critical to acceptance of the rule of law. For the power of the courts is based on community confidence in the courts and acceptance of their decisions. That confidence depends on the reality and appearance of individual and institutional independence and the impartiality of the courts. It also depends upon the accessibility of the courts and the efficiency and the quality of the work done by judicial officers. Those aspects depend upon the adequate resourcing of the courts.

- **Independence and the separation of powers**

The distribution of the authority and responsibility for administrative services for the courts has a direct bearing on the degree of judicial independence, community perceptions of that independence and the degree of the separation of the branches of government – key principles in our society. As was put in the Victorian Courts Strategic Directions Statement,<sup>26</sup>

*“Institutional independence gives fundamental support to the independence of each individual judicial officer and the appearance of such independence. The greater the degree and detail of the executive branch's control over the policies, resourcing, administration and staff of the courts.... the weaker:*

- *the reality and appearance of independence of the institutions and the judicial officers...;*
- *the culture of independence within those institutions and the judicial officers....;*
- *the support for judicial independence within the culture of the executive branch.*

*Further, the greater the degree and detail of such control in law and fact the greater the opportunity for the executive branch to interfere directly, or indirectly, in the work of the courts, including the conduct of hearings and the making the decisions . The Civil Justice Committee commented*

*"If it is accepted that Judicial officers are constitutionally responsible for what happens in their courtrooms, they must have some involvement in the determination of administrative policies affecting Courts operations . If they are not and the Executive Government*

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<sup>24</sup> Chief Justice King, “Minimum Standards of Judicial Independence” (1984) 58 Australian Law Journal 340; Sir Guy Greene, “The Rationale and Some Aspects of Judicial Independence” (1985) 59 ALJ 135; Wheeler, “Judicial Administration: Its relation to Judicial Independence,” National Centre for State Courts, 1988; Sir Gerard Brennan “Judicial Independence”, JCA Colloquium 1996; Gleeson CJ, “ Public confidence in the Judiciary”, JCA Colloquium 2002.

<sup>25</sup> Appendix B attached from CSD Statement, 2004, pp35 –40, Appendix A, 66-69.

<sup>26</sup> Op cit 66.

*purports to have complete responsibility and control, then the concept of rule of law, the principle of judicial independence, the doctrine of separation of powers (insofar as it is acknowledged in a responsible system of government on the British model) are at risk (put in footnote 69 from p 66 of the Courts Strategic Directions Statement)."*

If we are not concerned about these issues, we are forgetting the lessons of history and ignoring the lessons that abound in the world today. In Victoria, the protection of the independence of the courts is a real issue because it was recently weakened by legislation that will allow the Attorney General of the day to replace retiring judges with acting judges. Bearing in mind the fact that our Court of Appeal numbers 10 judges, the frequency of retirements and the financial attraction to governments of employing acting judges, this change significantly weakens the structure on which the independence of the courts depends.

But the issue of immediate relevance is court governance and the threat from the Executive model to the independence of judges and their courts is perhaps best demonstrated by the position of the CEOs of the relevant courts.

In any system where the judges and their courts are truly independent of the executive, you will find their CEO's appointed by and accountable to those courts. In Victoria, however, DOJ insists that the CEOs of the courts not only be employees of DOJ but also be accountable to the Executive Director of Courts. On the last two occasions when the CEO position at the Supreme Courts has been advertised<sup>27</sup>, the advertisement has described the CEO as

*"Reporting to the Executive Director of Courts in consultation with the Chief Justice, ....."*

The fact is that there is no institutional independence for Victorian Courts and, if any future Executive was so minded, it could easily interfere in the judicial operations of the courts. Present arrangements place the courts in a subservient position. They are mendicants who must try to please the executive to ensure sympathetic treatment on issues of staff, administration and budget.

The appearance of judicial independence is also seriously compromised because of the lack of institutional independence. In recent months, the Supreme Court, for example, has handed down decisions directly affecting the operations of Corrections in cases where the Secretary of DOJ was a party. Yet it is to the Secretary that the courts must go to seek adequate resources and to whom its staff are answerable.

The courts should be in a position of equality with the other two branches of government. So long as the courts are mere entities in the present mega-department system that position cannot be attained.

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<sup>27</sup> 2003 and 2006

- **Quality of performance, accessibility and efficiency.**

Detailed Executive control of court administration and the budgeting process and other administrative services is likely to adversely affect the performance of courts because of insufficient and inappropriate resourcing and inefficiencies in administration. The reality is that it is the government that controls each line of expenditure and change from the historic expenditure and the provision of additional funds and resources will only occur if it will advance the immediate political agenda of the particular time.

It may be argued that, to the extent that the provision of funds and resources will address a matter that is likely to be of immediate concern to the community, confidence in the courts can only be enhanced. That may be true for the short-term but not for the long-term.

Finally, Victorian experience has shown that the Executive model results in the inordinate wastage of the time and energy of judicial officers and particularly Chief judicial officers and members of court executive committees because of constant negotiations with the Executive. That is time that should be, but is not available, for the discharge of the judicial duties.

The Executive Model as it exists in Victoria poses serious dangers to community confidence in the court system because it affects the reality and appearance of individual and institutional independence and impartiality. It also affects adversely the quality and efficiency of the work done by the courts and accessibility to the courts. This in turn poses dangers for the rule of law and the future of our free democratic and stable society. Unfortunately these issues do not resonate with our political masters because they and the electorate, by and large, do not appear concerned about such long-term issues.

### **The executive perspective?**

The Canadian Report refers to consultations held with members of the executive branch of government.<sup>28</sup> The picture that emerges will be familiar to those who have attempted to discuss the issues with members of the Executive in Australian jurisdictions which operate under the Executive model.

The Report noted that while many in the executive branch of government expressed a preference for the traditional executive model, this was rarely accompanied by an analysis of alternatives. It commented that to some<sup>29</sup>

*"the search for preferred models..... suggested a solution in search of a problem."*

It commented that Executive respondents tended to consider the issues from the

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<sup>28</sup> Op cit 91 - 94

<sup>29</sup> Op cit 92

*"vantage of accountability and responsibility in the parliamentary cabinet system".*

They tended to see judicial independence as limited to adjudication but there had been some small exceptions in the recognition of judicial responsibility for administration in areas such as case assignment. The Report commented that governments fail to acknowledge that their ability to manage the courts in the public interest is severely limited; they can say no to requests for personnel and services but

*"are not in an effective position to facilitate choices among priorities".*

Arguments identified for the status quo advanced by members of the Executive branch were as follows.

- The relative inexperience and lack of capacity on the part of the judiciary to take over the functions performed by executive managers.

The response of the Report –

*"..this approach risks turning the consequences of the executive model into the rationale for that model";*

- The importance of having a "seat at the Cabinet table" through the relevant Minister.

The Report argues that the argument reflects a circular logic and that, if an alternative to the executive model is used, it is arguable that the *"vicissitudes of the Cabinet table"* will have *"considerably less significance"*. It also queries why, assuming the involvement of a Minister, that the effect of the Minister's advocacy should depend on the degree to which officials within the ministry controlled Court administration.<sup>30</sup>

### **Assessment of the Executive Model in Recent Reviews of Court Governance**

The question of how and by whom Courts should be administered has been under consideration for many years in Australia<sup>31</sup> and throughout the world.<sup>32</sup> Two important reports have been published in the last two years.

The first was published by the AIJA in 2004 and is referred to above-- "The Governance of Australia's Courts: A Managerial Perspective". It provides an important analysis of the issues and of the Australian models of court administration from a new perspective – a management perspective. The other significant report is the Report of the Subcommittee on Models of Court Administration published in September 2005 entitled "Canadian Judicial Council, Project on Alternative Models

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<sup>30</sup> Op cit 92 --93

<sup>31</sup> For example, Report of the Civil Justice Committee. (Vic) 1984; Church and Sallmann, Governing Australia's Courts (1991), AIJA; Sallmann and Wright, Going to Courts: A Discussion Paper on Civil Justice in Victoria (2000), Victorian Department of Justice;

<sup>32</sup> See Appendix C

of Court Administration.<sup>33</sup> Both reports are highly critical of the Executive model under which most Australian courts operate.

It is worthy of note, however, that while highly critical of the executive model, the recent Canadian Report sees Australia as being at the forefront of developments in court governance. In the introduction to the Report it commented:<sup>34</sup>

*"Twenty years ago, following the Deschenes Report, countries such as Australia looked to Canadian studies for new models of Court administration. Now, Australian jurisdictions feature different models of self-governing Courts with impressive records of improved effectiveness and efficiency. Canada by contrast, now ranks as one of the last common law jurisdictions in which Court administration continues to be controlled by the executive branch of government. In every Canadian province, notwithstanding a trend toward greater judicial involvement in Court administration, courts are operated as a division of the Attorney General's Ministry, rather than as a separate branch or even a separate department of government. Increasingly, voices from both the judiciary and the executive are asking: is there a better way forward for Court administration in Canada?"*

The Australian models referred to are, of course, the South Australian and Federal models. The rest of us find ourselves struggling in the same unfortunate position as the Canadian provinces. The challenge is to find the model that best suits particular courts in particular jurisdictions.

### **Particular significance for the ACT and Victoria**

The enactment of human rights legislation in the ACT and Victoria will place their courts, particularly their Supreme Courts, in the position where they will be called upon to decide whether executive acts and legislation are contrary to the legislation. The issues are likely to arise in areas which are the subject of keen debate in the community and will be seen to be political. It will be even more important that the courts involved be and be seen to be independent and impartial and accessible. The relationship between the courts and the Executive is likely to be put under increased pressure posing additional problems for negotiating financial arrangements, spending priorities and administrative arrangements. Under the traditional Executive model, a government can use its control of budgeting and administration, directly and indirectly, to affect the capacity of the relevant Courts to process cases involving consideration of such legislation.

This is not idle speculation. The Canadian Charter has led to a significant body of jurisprudence on what is required to ensure independent and impartial tribunals. A catalyst has been section 11 (b) of the Charter which provides

*"any person charged with an offence has the right... (D) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal".*

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<sup>33</sup> prepared by Carl Baar, Robert G. Hann, Lorn Sossin, Karim Benyekhlef and Fabian Gelinias

<sup>34</sup> Op cit page 2.

There have been challenges as to the independent status of provincial courts and other cases in the which there has been judicial recognition of the connection between independence of administration and the independence of a tribunal and the need to depoliticise the relations between the judiciary on the one hand and the legislature and executive on the other.<sup>35</sup>

The Victorian Charter of Human Right Act 2006, section 24 (1) provides

*"(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing."*

S 21 of The Human Rights Act 2004 (ACT) is to similar effect.

Because the legislation is intended to have limited legal consequences, direct comparisons cannot be made with the operation of the Canadian Charter. The fact remains, however, that the courts, particularly the Supreme Courts, will find themselves increasingly being called upon to stand between the citizen and the executive. The reality and appearance of independence and impartiality will be critical to the acceptance of their decisions and the success of this new legislation

### **Reality check**

A number of points must always be borne in mind. One particular model will not suit all courts. Also, the model selected will not necessarily address all administrative or resourcing difficulties being experienced by the courts. For example, the so-called "efficiency dividend" of 1 or 2% per annum has been inflicted on the courts in Australia whatever model is used.<sup>36</sup> In addition the courts will always be competing for resources with the other branches of government. The Canadian Report, however, advances an interesting proposal to deal with such problems. This will be taken up by Professor Sallmann.

It must also be borne in mind that

*" .. the Executive branch and the Parliament must continue to have the constitutional role of not only resourcing the Judicial branch but, in representing the community and, being accountable to the community, have a responsibility to exercise some control over broad policy and priorities in the use of resources."*<sup>37</sup>

That reality must be recognised. The challenge is

*".. to find a way to address the fundamental structural weaknesses so that the appearance and reality of institutional and individual independence of the*

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<sup>35</sup> see discussion generally, Canadian Report, 35-52 and the cases of *Valente v The Queen* [1985] 2 S.C.R. 673, *Beauregard v Canada* [1986] 2 S.C.R. 56, *The Queen v Genereux*[1992] 1 S.C.R.59: *Remuneration Reference* [1997] 3 RCS3.

<sup>36</sup> AIJA, op cit, 38

<sup>37</sup> CSD Statement 2004, 67.

*courts can be maximised while ensuring proper recognition of the responsibilities of the Executive and the Parliament*"<sup>38</sup>...

Those adopting the ostrich position will usually proudly maintain, and properly so, that the courts are the third arm of government. But the ostrich position involves a rejection of the authority and responsibility that courts should accept as the third arm of government. As Sir Guy Greene said,

*"Ultimately, it is the Courts which must accept the responsibility for seeing that the judicial power is properly exercised and in order to discharge that responsibility judicial officers cannot confine themselves to the hearing of cases: doing their incompetent best they have an obligation to concern themselves with all those matters which are ancillary to, or which are capable of affecting, judicial work however mundane or remote from the traditional skills of judicial officers those matters might appear to be."*<sup>39</sup>

We judges and magistrates have a responsibility to review the operation of the systems of court governance under which we operate and to try to ensure that we have the form of court governance that is most appropriate for each of our courts.

### **Options for change**

What are the options? Can the Executive model be modified to address its deficiencies? For example, the position of CEO might be made a Governor in Council appointment. But then what about the rest of the staff of the court? Might there not be even more problems if the CEO is an independent officer answerable to the courts but the rest of the staff public servants answerable to the Executive? Might it be sufficient to secure a proper budget process in which the courts were responsible for preparation of any proposed budget and it reflected the policy and practical needs of the courts? But will such an approach ever be satisfactory bearing in mind the fundamental problem that so long as the courts are a part of a mega-department, the Executive culture will always be one in which the courts are seen as minor units and not the independent third arm of government?

The South Australian and Federal models in Australia have been in operation for many years. From all reports, they appear to address the problems of the executive model and work well. They sit there on the shelf waiting to be selected and downloaded. But we need insight into the experience of those models. It is to them that we should turn together with other options under consideration or in operation in the ACT and overseas.

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<sup>38</sup> Ibid.

<sup>39</sup> Op cit, 147

## **Appendix A**



## **5 Enhancing the Capacity of the Courts and VCAT - Independence**

### **5.1 A Critical Issue - Governance of the Courts and VCAT**

#### **5.1.1 Who should administer the Courts and VCAT?**

The critical issue of how and by whom the Courts should be administered has been debated for some time in common law countries. In Victoria, it has not been possible as yet to reach agreement within the Courts and VCAT or between them and the government as to the appropriate form of governance arrangements.<sup>40</sup>

#### **5.1.2 The significance of independence of the Courts and VCAT**

Part B Section 1 of this Statement identified the vital necessity of the individual and institutional independence of judicial officers and their institutions for the functioning of our free, democratic and stable society, the separation of powers and continuing acceptance of the rule of law. Also identified were the core elements of independence – security of tenure and remuneration of individual judicial officers and their immunity from suit. The importance of community confidence in judicial officers and their institutions being and being seen to be independent of other branches of government and powerful groups was also discussed.

The core elements of judicial independence are intended to ensure that each judicial officer makes determinations subject only to the commands of his or her conscience and the law. But while individual independence is critical, it is also necessary to protect, so far as is possible, the collective or institutional independence of the judiciary.

#### **5.1.3 The significance of institutional independence**

Institutional independence gives fundamental support to the independence of each individual judicial officer and the appearance of such independence. The greater the degree and detail of the Executive branch's control over the policies, resourcing, administration and staff of the Courts and VCAT, the weaker:

- the reality and appearance of independence of the institutions and their judicial officers and VCAT members;
- the culture of independence within those institutions and their judicial officers and VCAT members; and
- the support for judicial independence within the culture of the Executive branch.

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See discussion of history in P A Sallmann and R T Wright, op cit, 44ff.

Further, the greater the degree and detail of such control in law and fact, the greater the opportunity for an Executive branch to attempt to interfere directly, or indirectly, in the work of the Courts and VCAT, including the conduct of hearings and the making of decisions.<sup>41</sup> The Civil Justice Committee commented:

*"If it is accepted that judges are constitutionally responsible for what happens in their courtrooms, they must have some involvement in the determination of administrative policies affecting Court operations. If they are not and the Executive Government purports to have complete responsibility and control, then the concept of rule of law, the principle of judicial independence, the doctrine of separation of powers (in so far as it is acknowledged in a responsible system of government on the British model) are at risk."*<sup>42</sup>

#### **5.1.4 Problems in devising a system of independent governance**

There are, however, fundamental problems in devising a system of governance which seeks to maximise judicial independence.

- **Resource Dependency.** The Courts and VCAT will always ultimately depend on the Executive branch, and the Parliament, for its resources. In Victoria, virtually the whole of the working and organisational environment in which judicial officers operate is funded, provided or controlled by the Executive branch. The Executive branch is, therefore, in a very powerful position to manipulate resourcing "to provoke a dependence."<sup>43</sup> We are fortunate that the Executive branch has not attempted to go that far. However, this fundamental weakness exists in our system of government. While it can and should be addressed it can never be entirely removed.
- **Responsibilities.** At the same time, the Executive branch and the Parliament must continue to have the constitutional role of not only resourcing the Judicial branch but, in representing the community and being accountable to the community, have a responsibility to exercise some control over broad policy and priorities in the use of resources.

#### **5.1.5 The Governance Challenge**

In reviewing this critical issue of governance and developing proposals, the principal challenge is to find a way to address the fundamental structural weaknesses so that the appearance and reality of institutional and individual independence of the Courts and VCAT can be maximised while ensuring proper recognition of the responsibilities of the Executive and the Parliament. The two objectives are not mutually exclusive.<sup>44</sup> There are alternatives to the Victorian Executive controlled model which decrease the control of the Executive and increase that of the Judicial branch. These are discussed below.

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<sup>41</sup> See generally discussion, Chief Justice King, 'Minimum Standards of Judicial Independence' (1984) 58 *Australian Law Journal* 340; Sir Guy Green, op cit, 135; For Canadian discussion, see for example W R Lederman, 'The Independence of the Judiciary' in A M Linden (ed), *The Canadian Judiciary*; and Deschenes, 'Masters in their own House' (1981); see also the discussion in *Valente v The Queen* (1985) 2 SCR 673, by the Supreme Court of Canada on the narrow question whether there was a reasonable apprehension that a Provincial Court (Criminal Division) hearing a particular matter was not an "independent Tribunal" within the meaning of section 11 (d) of the Canadian Charter of Rights and Freedoms.

<sup>42</sup> Report of the Civil Justice Committee, *Concerning the Administration of Civil Justice in Victoria*, Vol 1, 309. The Committee Members were: the then Chief Justice of the Supreme Court, Sir John Young; the then Chief Judge of the County Court, Chief Judge Waldron; the Deputy Secretary to the Law Department, Mr Leonard; Mr W. J. Byrt, Senior Associate, Graduate School of Management, University of Melbourne; Mr W. Clancy, Solicitor; Ms M. E. Patten, Director of Nursing, Royal Children's Hospital; Mr R J. Stanley, QC.

<sup>43</sup> Wheeler, op cit, 11.

<sup>44</sup> see discussion generally in Church and Sallmann, *Governing Australia's Courts*, Australian Institute of Judicial Administration, Melbourne 1991.

## 5.2 Governance of the Courts and VCAT- Guiding Principles

### 5.2.1 Enhancing independence and sound administration, and other objectives

In addition to enhancing individual and institutional independence, the governance arrangements should reflect and reinforce the status of the Courts and VCAT and maximise provision of resources. But there are other aspects to be borne in mind – for example, sound administration.

In his seminal paper, Green CJ<sup>45</sup> advanced the fundamental proposition that:

*"Ultimately, it is the Courts which must accept the responsibility for seeing that the judicial power is properly exercised and in order to discharge that responsibility judges cannot confine themselves to the hearing of cases: doing their incompetent best they have an obligation to concern themselves with all those matters which are ancillary to, or which are capable of affecting, judicial work however mundane or remote from the traditional skills of judges those matters might appear to be."*<sup>46</sup>

Accepting that the Courts and VCAT are, or should be, ultimately responsible for the proper exercise of their functions, they cannot discharge that responsibility without adequate authority over their own administration.

To that end governance arrangements should address good management and accountability, in particular by combining authority with responsibility. Finally, they should:

- enable an effective working relationships between the Courts and VCAT and the executive arm of government;
- serve expedition, accessibility and the just disposition of disputes;
- facilitate where appropriate effective co-ordination of administration within the Courts and VCAT; and
- recognise and address the constitutional responsibilities of the Parliament and the Executive.

### 5.2.2 Minimum Governance Requirements for institutional independence

Are there minimum governance requirements for the institutional independence and sound administration of the Courts and VCAT?

It is generally accepted that institutional independence requires that each Court and VCAT have the responsibility for the assignment of their judicial officers and members, the organisation of sittings and lists, the allocation of court-rooms and the direction of administrative staff carrying out those functions. Applying Green CJ's analysis, however, it is suggested that the institutional independence needed to discharge its responsibilities also requires that the following should be the sole responsibility of the Courts and VCAT:

- (a) **Control over all buildings and facilities.** Independence cannot be fully secured unless the right to exercise complete control over all buildings and facilities is vested exclusively in the relevant judicial officers. The nature of the physical environment and facilities can affect the performance of tasks - for example, a miscarriage of justice could result from the fact that a juror was made drowsy by poor ventilation, or distracted by the uncomfortable seating or unable to hear because of poor acoustics.<sup>47</sup> The Courts and VCAT must also have control so that they can and do ensure proper public access and security.

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<sup>45</sup> Then Chief Justice, Supreme Court of Tasmania.

<sup>46</sup> Sir Guy Green, op cit, 147.

<sup>47</sup> Sir Guy Green, op cit, 144.

- (b) **Control of Budget preparation and expenditure.** Green CJ argued that *"The preparation of judicial estimates by anyone not acting under the direction of the judiciary and the exercise of control by the executive government over the way in which the Courts expend the funds granted to them, represent a potentially serious threat to judicial independence. Even if the total amount of the funds allocated to the Courts is adequate, real abuses are possible if the executive government has control over the manner in which those funds are expended, because control over particular items of expenditure can so readily amount in fact to control over some particular aspect of the Courts work."*<sup>48</sup>

He gave as examples, the executive branch using power over a court's finances to curtail use of important aids like running transcripts, acquisition of necessary legal texts or travel expenses.

- (c) **Administration and staff.** Green CJ argued that those Courts where the judges' personal staff, secretaries and the general administrative staff are members of the Public Service fall short of the minimum requirements necessary for the maintenance of judicial independence. He argued that as a matter of law they are not subject to the control of the judiciary. As a matter of law in the event of conflict between the judiciary and executive government as to the allocation of duties and the provision of facilities and their use, the Courts would have to accept that the will of the Executive government, as a matter of law, must prevail. In practice judicial officers have exercised de facto control over staff but that provides no security.<sup>49</sup> He supported the proposition that the Courts must have an independent authority to hire and fire employees involved in judicial administration.<sup>50</sup>

## 5.3 Governance - the present Victorian structure

### 5.3.1 Introduction

Under the current governance structure, each of the Courts and VCAT is managed as an individual entity, each separately accountable and each provided with separate annual funding allocations. Each jurisdiction manages its operation within budgetary constraints, and can do this with minimal reference to the operations of the other jurisdictions. They have developed separate internal administrative systems, operating protocols, policies and procedures and their own strategic plans. Each has created its own public identity through individual web sites, annual reports and other publications. Each has its own registry and each has its own case management system.

At the same time, each of the Courts and VCAT relies heavily on the Department of Justice for administration and administrative support and is entirely dependent on the Department of Justice in all dealings with Treasury. Treasury in turn closely monitors the Courts and VCAT.

The last decade has seen the Executive branch, through the Departments of Justice and Treasury, maintain close control of the administration of the Judicial branch and, in some areas, increase that control.

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<sup>48</sup> Ibid, 146.

<sup>49</sup> Ibid, 147.

<sup>50</sup> Ibid, 148.

### **5.3.2 Governance – present role of the Department of Justice**

The Department of Justice serves Police, Emergency Services, Corrections, Consumer Affairs and Gaming and Racing as well as the Courts and VCAT. In relation to them, it provides a variety of services, including the following:

#### ***Financial***

- Policy and procedures;
- Financial allocations;
- Purchasing and contracting policy and procedures;
- Taxation compliance including GST, FBT and Payroll tax;
- Audit services; and
- Financial systems.

#### ***Fleet management***

- Policy and procedures.

#### ***Human Resources***

- Policy and procedures;
- Industrial Relations issues;
- WorkCover and Occupational Health and Safety issues; and
- Personal services including pay, superannuation and leave procedures and systems.

#### ***Legal policy administration***

- Co-ordinating responses and advising Ministers on Regulatory impact statements and Legislative changes; and
- Fixing court fees.

#### ***Information Technology***

- Standards, policy and procedures;
- Information Technology Architecture and systems for Internet and e-mail services;
- Standards and system controls to ensure data integrity; and
- Disaster control, backup systems and specialist advice.

### **5.3.3 Governance – present role of the Courts and VCAT**

The CEO of each of the Courts and VCAT, is employed by the Secretary of the Department of Justice. Considerable authority is delegated to each CEO for detailed administration in compliance with Department policies. Broadly speaking, design and system management resides in the Department but the input of data into the Department's systems and its accuracy and most minor day-to-day decisions are made at the Court and VCAT level. Each Court and VCAT has staff engaged in the following areas.

#### ***Financial matters***

- Input to the preparation of the annual allocation processes and internal distribution of allocations;
- Purchases, contracts for services, and various expenditures and the recording of them;
- Input of salary, superannuation, leave and allowance details;

- Identification of tax liabilities and input to the relevant GST, FBT and Payroll Tax systems; and
- Identification and recommendations of "at risk" audit prospects.

#### ***Fleet management***

- Vehicle selection and turnover; and
- Timing and scheduling of maintenance.

#### ***Human resources***

- Industrial relations -- input of local issues;
- WorkCover and Occupational Health and Safety local administration and supervision;
- Identification of issues; and
- Engagement of staff, setting remuneration, training and development matters.

#### ***Legal Policy***

- Preparing and coordinating responses;
- On the impact of proposed legislative, and regulatory and fee changes; and
- To Ministerial and Parliamentary questions.

#### ***Information Technology***

- Local level maintenance; and
- Input into and compliance with –
  - Information Technology architecture and standards;
  - Internet and e-mails services;
  - Information Technology protocols and system controls to ensure data integrity;
  - Design development, implementation and maintenance of local Information Technology applications including electronic Court configurations, videoconferencing, case management systems in the registries; and
  - Technical assistance to users.

## **5.4 Governance – the practical experience**

### **5.4.1 Organisation of judicial officers, allocations and listing**

The Courts and VCAT have the responsibility for the assignment of their judicial officers or members, the organisation of sittings and lists, the allocation of courtrooms and the immediate direction of administrative staff carrying out those functions.

### **5.4.2 Buildings, Staff, Finances, Information Technology**

Turning to the areas identified by Green CJ, a study of the operation of the long-standing administrative structure in those areas demonstrates major difficulties. It is not suggested, however, that the Department could be expected to act in any other way under the present structure.

- (a) **Buildings.** The Courts and VCAT control the access to the buildings that they use and internal use of those buildings. Ownership arrangements vary. The main buildings occupied by the Supreme Court are owned by the Crown through the Department of Treasury and Finance. The sites are managed by the Department of Justice on behalf of the Crown. The County Court and VCAT buildings are

privately owned and leased by Portfolio Infrastructure Development on behalf of the Department of Justice for the County Court and VCAT. The Courts at Frankston, Dandenong and Ringwood are similarly leased by the Department of Justice. Other Courts are owned by the Crown through the Department of Treasury and Finance and managed by the Department of Justice. The practice has been that when Court premises are no longer required, they are returned to Treasury for sale and disposal. The quality of the facilities, something which as noted above can have a direct bearing on the outcome of proceedings, is subject to the detailed funding decisions of the Department of Justice.

(b) **Staff.** All of the CEOs and other staff employed within the Courts and VCAT, including the personal staff of the judicial officers, are as a matter of law employed by the Department of Justice. CEOs, as delegates of the Secretary, are given the power to engage court staff, also as officers of the Department<sup>51</sup>, but are expected to do so within the constraints of the allocation made to the particular Court or VCAT. Particular points should be noted.

- CEO. The Courts and VCAT consider that each CEO should be directly accountable to the relevant head of jurisdiction notwithstanding that he or she may be an employee of the Department of Justice. Despite requests for change, the Executive branch has insisted that the CEOs of each Court and VCAT be an employee of the Department of Justice and that it have the power to decide to hire and fire them. The view of the Department of Justice as to who controls the CEOs is made clear in the advertisement published in December 2003 inviting applications for the position of the Chief Executive Officer of the Supreme Court:

*"The Victorian Department of Justice is seeking to appoint a new Chief Executive Officer to manage the administration of the Supreme Court.*

*Reporting to the Executive Director of Courts in consultation with the Chief Justice, the CEO will have responsibility for a team of 175 staff and a current operating budget of \$19.1 million ... "*

This description of responsibility and accountability highlights:

- the lack of independence of the CEO,
- the view of the Department of Justice that it has the power to override any directions that the Chief Justice might give to the CEO,
- the lack of institutional independence of the Supreme Court of Victoria, and
- the existence of an administrative arrangement where the authority does not match responsibility - this arises out of the conflict of the responsibility of the CEO to the Department and to the Chief Justice.

The CEOs find themselves in an extremely difficult situation trying to serve two Masters,<sup>52</sup> one of whom, the Department, will determine their employment future and remuneration. They have not been helped by the way budgets have been handled in the past. That issue is referred to below. They have done a remarkable job in the past in trying to meet the conflicting demands of their

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<sup>51</sup> Contrary, for example, to clause 36 of "The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region" which states -- "36. The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the Judiciary, or in a body in which the Judiciary is represented and has an effective role." (The Statement was the result of the Sixth Conference of Chief Justices of Asia and the Pacific Region. It was intended to outline the "minimum standards necessary to be observed in order to maintain the independence and effective functioning of the Judiciary").

<sup>52</sup> An aspect criticised by the draft Operations and Resources Report (Smart Consulting and Research, 55) as "contrary to the precepts of good organisational design".

positions but at considerable cost to their health and to efficient and sound administration.

- Judges' personal staff. The employment of the personal staff of judges was formalised in December 1994 by the Executive branch requiring judges to accept a delegation from the head of the Department of Justice pursuant to which their personal staff were employed. It required judges and their personal staff to sign standard departmental contracts. Until recently, the contracts required annual assessment of performance by the judge and purported to entitle personal staff to a limited increase in salary depending on the result of such assessment. The Executive branch, however, had made no commitment to providing the funding to enable compliance with the contracts where judges' personal staff were entitled under those contracts to increases in salary. Rather the purpose of the performance assessment was thwarted and the assessment was determined according to the funds, if any, that the Executive branch was prepared to make available. A new VPS structure has been put in place in which performance pay is replaced by a system of annual progressions subject to satisfactory performance. This may remove some of the dissatisfaction, depending on the resourcing of the system and the approach taken to assessing performance. But the fundamental structure remains the same – all staff including the personal staff of judicial officers are employees of the Department of Justice and answerable in law to it, not the Courts or VCAT.
- Judicial College. By the *Judicial College of Victoria Act 2001*, a statutory corporation was set up to assist in the professional development of judicial officers and provide them with continuing education and training. It is necessary for the reality and appearance of judicial independence that the College not be controlled by the Executive branch. The legislation was said in the Parliament<sup>53</sup> to respect and promote judicial independence. At the same time, as was also stated in Parliament, it was necessary that the College be accountable. It was necessary also that the Executive branch have an involvement and that the community also be involved. The Act addressed these issues initially by providing for a Board of Directors comprising the four heads of jurisdiction and two representatives appointed by the Attorney-General – one an academic and one representing the broader community. Notwithstanding, however, that the College has the power to engage staff, the Act requires the CEO and staff to be employed under the *Public Sector Management and Employment Act 1998*. As a result the CEO and staff are employed by and answerable to the Secretary of the Department of Justice and they must comply with her direction. It is the Secretary who has the power to hire and fire. This is the result of the extension to the Judicial College of the longstanding court governance arrangements. The issue was not specifically addressed by the Working Party that reported to the Attorney-General on the establishment of the College. The result of the legislation is that the Board ostensibly is given the authority and responsibility of running the College as an independent body but it is not an independent body because its CEO and staff are under the direction and control of the Department.

(c) **Finance.** Several areas require consideration.

- “Budget”. The system of resourcing Courts and VCAT has for many years been that the Executive branch provided funding on the basis that:
  - The Courts and VCAT receive the previous year's historically based annual allocations minus, each year, a 1.5 percent productivity "bonus", and
  - The Courts and VCAT are “business units” of no special significance and to be treated in the same way as statutory authorities.

Thus the resourcing of the Courts and VCAT has not been carried out in a measured or strategic way taking into account the needs or the likely income and expenditure in the forthcoming year but rather on the basis of the needs of the Executive branch. It is under the complete control of the

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<sup>53</sup>

Hansard, Legislative Assembly, 3 May 2001, 1024.



Executive branch.<sup>54</sup> By way of example, the Department of Justice provides an annual grant to the Supreme Court Library. It was initially, in 1989/90, \$400,000. Since then it has been reduced by the annual productivity impost of 1.5%. In 2002 the grant had been reduced to \$368,861. At the same time salary and superannuation expenditure had significantly increased.

Control has also resulted from the Executive branch not providing information about the details of allocations until well into the financial year.

The "budgetary" process is under review.

- Control of Finances. Reports on financial matters are provided monthly to the Department and quarterly to the Department of Treasury and Finance. In addition, quarterly reports are provided comparing actual "performance"<sup>55</sup> against foreshadowed "performance" as referred to in Budget Paper No 3. These BP3 reports are used by the Department and the Department of Treasury and Finance to monitor "performance" and seek explanations for unanticipated trends, good or ill. These reports are used as a control measure before the Department of Treasury and Finance releases funds for each quarter. This control occurs despite the fact that there is in fact very little scope for discretionary expenditure because the vast bulk of expenditure by the Courts and VCAT is on salaries and related expenses.
  - Revenue Retention. The Executive branch significantly increased court fees in 1994 and created, from that increase, the Revenue Retention Fund. The original intention was that the funds going into the Revenue Retention Fund would be allocated for specific court projects each year. Its use has changed in that it has been used in part to meet recurrent expenditure. To this extent, the funding provided to Courts and VCAT is not transparent. In addition, some of the funding has been used for what the Courts, would see as departmental expenditure. The Courts<sup>56</sup> are invited to submit to the Executive branch proposals and priorities for the expenditure of the funds. The Executive branch, however, determines the items and priorities of expenditure, not only between the Courts and VCAT and itself but also within each Court and VCAT.
- (d) **Information Technology.** In the time since Green CJ considered these issues, there has been the enormous spread of information technologies. This could have resulted in an increase in the reality and appearance of the individual and institutional independence of the Judicial branch. It has, however, had the opposite effect.
- Control of financial and personal data. The financial data and the core personnel information recorded by Court and VCAT staff is held in the computer systems provided and operated by the Department of Justice. Relevant Department officers have access to the information. That access is subject to controls. Personnel information is controlled in accordance with Privacy principles. The general financial information is more widely available to Department officers.

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<sup>54</sup> Contrary, for example, to clause 37 of "The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region" which states - "37. The budget of the Courts shall be prepared by the Courts or a competent authority in collaboration with the judiciary having regard to the needs of judicial independence and administration. The amount allotted should be sufficient to enable each court to function without an excessive workload." See also Australian Bar Association's "Charter of Judicial Independence", para 26.

<sup>55</sup> They include information on number of disposals, elapsed times from commencement to disposal and the results of a client perception survey of Registry service and Court amenities. They do not, and cannot measure, all aspects of the "performance" of the Courts.

<sup>56</sup> VCAT retains most of the revenue it receives and in practice is not required to submit proposals and priorities for the expenditure of that revenue. It is simply treated as part of the total allocation to VCAT.

- Internet Services. Judicial officers and VCAT members and staff are provided by the Department of Justice with access to the Internet and e-mail services through the Department of Justice system. The e-mail services are used internally for communications between Heads of jurisdiction, judicial officers, CEOs and staff in relation to matters affecting their work in Courts and VCAT. The system, however, is under the control of the Department of Justice. It recently released an E-mail Policy.<sup>57</sup> All are subject to the policy and no distinctions are drawn between "business units" or "staff". All electronic communications sent using the Department of Justice email system are "the property of the State of Victoria" and the Department of Justice "owns all activities conducted upon them and content created with it by users".<sup>58</sup> The Department of the Justice "keeps backups and /or logs of activities undertaken on the DOJ e-mail, and associated infrastructure, facilities".<sup>59</sup> Activities are audited and monitored by designated staff of the Department of Justice. Reliance is placed on ethical and privacy constraints to limit occasions on which such staff can study any information recorded about Internet searches or e-mail traffic and the content of e-mails. The system is programmed to prompt audits by Department staff where there is unusual traffic such as prolonged use of a particular connection or very long files. The Department reserves the right to wholly or partially restrict access without notice or consent in vaguely described circumstances, one being "in exceptional circumstances, when required to meet operational needs."<sup>60</sup> The Policy does not attempt to address or identify priorities. Rather the Policy provides that "Interpretation of this policy is the responsibility of the Knowledge Management Committee".<sup>61</sup> The Head of Courts Section in the Department of Justice represents the Courts and VCAT on that Committee. The Policy states that it is subject to biennial review by the Knowledge, Planning and Architecture group with input from Human Resources, Technology Services and business units managers. As business unit managers, the CEOs can provide input.

In practice it is unlikely that Department staff will read material that passes through the system. But they could. There is no system for the reporting to the Courts or VCAT of auditing or monitoring of the activities of their judicial officers, members and staff.

Approximately three years ago, the Supreme Court raised its concerns with the Department about the unsatisfactory nature of these arrangements and their fundamental inconsistency with the independence of the judiciary but this situation has not been resolved. This is a significant issue bearing in mind the confidential nature of the information on court computers.

## 5.5 Present Governance Structure and Practice - Conclusions

### 5.5.1 Fundamentally flawed

While it is possible to point to areas of administration that are under the de-facto control of the Courts and VCAT most of the time, the reality is that under present governance arrangements, there is no institutional independence for the Courts and VCAT and any future Executive branch, if so minded, could easily interfere in the judicial function of the Judicial branch. Thus the present governance arrangements fail at a fundamental level. They also fail examination when tested against administrative and management principles. Authority and responsibility are not matched. The Courts and VCAT have a responsibility for their performance but lack the authority over the administration required to discharge that responsibility. The

<sup>57</sup> Department of Justice, E-mail Policy, November 2003, Authorised by Department Of Justice Knowledge Management Committee, July 2003.

<sup>58</sup> Paragraphs 1.1 and 2.1.

<sup>59</sup> Para 5.1.

<sup>60</sup> Para 3.1.4.

<sup>61</sup> Para 6.5.

governance arrangements have resulted in a relationship between the Department of Justice and the Courts and VCAT which has, for many years, been dysfunctional. They have resulted in a loss of trust on both sides, significant and ongoing tensions, continual stress<sup>62</sup> and unnecessary work.

### **5.5.2 Perception held by the Courts and VCAT**

For many years, the balance of authority between the Executive and the Courts and VCAT and, therefore, the extent of their institutional independence has been determined by the Executive. It is hardly surprising, therefore, that the Courts and VCAT perceive the past history and the present arrangements as demonstrating that the Executive has not accepted the principle of the separation of powers, the special roles and fundamental importance of the Courts and VCAT or the fundamental importance of their independence. Rather, they are seen as demonstrating that the Executive regards them as merely units of administration to be controlled as far as possible by it. In relation to the Supreme Court in particular, it is also hardly surprising that it perceives the Executive as ignoring its constitutional role and its position as the constitutional equal of the Parliament and Executive.

The present situation is, however, of long-standing and the actions of the Executive are no doubt conditioned by the many years in which the current structure has applied. In fact, under the current structure, one would not expect a Department of Justice to act any differently.

### **5.5.3 Recent developments as to governance arrangements**

The Department of Justice and the Courts and VCAT are discussing the issue of governance and it should be acknowledged that some changes have occurred. As noted above, the approach to budgeting is under review. Further, a separate Courts Services Section has been created in the Department of Justice headed by an Executive Director (a position immediately below the Secretary).<sup>63</sup> This separates the Courts and VCAT within the Department of Justice. It also elevates their status to a degree but to the same level as Police, Prisons, Gaming and Racing. They remain part of the Department and the administration and controls remain the same.

### **5.5.4 Need for structural change**

The experience revealed by the above examples suggest that so long as the present structure remains, the Department's fundamental view of the Courts and VCAT will not change and they will never achieve a proper level of independence.

The problem of governance can be satisfactorily addressed only by introducing structural change which will significantly increase institutional independence. At the same time, in reviewing governance and considering alternatives, due recognition and weight must be given to the constitutional responsibility of the Executive branch to the Parliament and of both to the community to oversee the expenditure of taxpayers' funds.

### **5.5.5 Other issues – different internal administration in Courts and VCAT**

Because of its importance, the governance issue tends to dominate. Other issues should not be overlooked. In particular, the separate and independent development of the internal administration of the courts and VCAT has resulted in differences between them in a number of areas. Those areas include the recruitment and

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<sup>62</sup> See also 'Draft Operations and Resources Report', above.

<sup>63</sup> Thus returning to the situation that existed in 1991 – a "Courts Management Division" headed by a Deputy Secretary. Church and Sallmann, *op cit*, 15-16.

development of registry staff, different security protocols and different approaches to data collection, output measurement and reporting. This has prevented, for example, the development of a career path for those interested in judicial administration particularly in the registry area. While the differences may reflect to a considerable extent the differences in the nature of the work done in the different Courts and VCAT, a coordinated approach to those areas may well produce efficiencies and better systems. Bearing in mind also that whatever be the system, there will be competition between the Courts and VCAT for resources, the assessment of needs is made more difficult if there are different approaches to data collection and case flow measurement.

The development of a better co-ordinated, or integrated, administration for Courts and VCAT would be best achieved by a separate and independent administrative structure. This would not only address the above issues but also enhance the institutional independence of the Judicial branch. These issues, however, are discussed further below in the context of strategic directions for court administrators.

**PART B: STRATEGIC DIRECTIONS STATEMENT**

**Appendix B**

## 1 The Justice System

### 1.1 The Role of the Courts In Society

#### 1.1.1 Vital Element

We are fortunate to live in a society that aspires to equal justice for all its members and is free and democratic, stable and functioning. It is underpinned by general community acceptance of the rule of law under which all are bound by and equal before the law. Its preservation requires constant vigilance and should never be taken for granted.

The Courts constitute a vital element of such a society. They and our system of law are the "foundation and the steel framework" of our community<sup>64</sup>. They underpin the way the economy and society functions and citizens interact<sup>65</sup>.

#### 1.2 Roles and Responsibilities of the Courts and VCAT

All the Courts in this State and VCAT play a vital role in the administration of justice, including, the preservation of the rule of law. In so doing, they exercise significant power over the actions, rights, freedoms and property of individuals and organisations, including various branches of the government. They are constantly called upon to stand between “*government and the governed, the wealthy and the poor, the strong and the weak*”.<sup>66</sup>

The Courts and VCAT also play a significant role in the economic life of the community by providing an environment in which business can proceed with confidence. This is an important role that benefits the State of Victoria as markets are globalised and competition increases between the States and Territories for business developments.

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<sup>64</sup> Sir Owen Dixon, Address upon taking the oath of office in Sydney as Chief Justice of the High Court of Australia, in *Jesting Pilate*, Law Book Company, 249; see also Justice R E McGarvie, ‘The Foundations of Judicial Independence in a Modern Democracy’ (1991) 1 *Journal of Judicial Administration* 4 and Sir Gerard Brennan, ‘Courts, Democracy and the Law’ (1991) 65 *Australian Law Journal* 32.

<sup>65</sup> New Zealand Law Commission, *Delivering Justice for All*, 2004, 3.

<sup>66</sup> Sir Gerard Brennan, “Courts, Democracy and the Law” (1991) 65 ALJ 32, 40.

## **1.2 Fundamental Features of the Justice System**

### **1.2.1 Independence of the Judicial Branch of Government<sup>67</sup>**

To secure a free and democratic society it is essential that the Courts be independent of the Executive branch of government<sup>68</sup>. They cannot be truly separate and independent of the Executive branch unless judicial officers are independent. The importance of the requirement of independence has long been recognised. It has been recognised internationally by the Universal Declaration of Human Rights (1948) Article 10 and the International Covenant on Civil and Political Rights (1966) Article 14.<sup>69</sup> Recent history has shown that it must not be taken for granted.<sup>70</sup>

It is the community that is the beneficiary of judicial independence, and only incidentally the judicial officers themselves:

*"Judicial independence does not exist to serve the judiciary; nor to serve the interests of the other two branches of government. It exists to serve and protect not the governors but the governed."<sup>71</sup>*

The judicial power is held on trust for the community.<sup>72</sup>

The foundation on which the independence of the Judicial branch from the Executive branch is built is the security of tenure of the individual judicial officers. This requires<sup>73</sup>:

- Appointment to office until an appropriate retirement age;<sup>74</sup>
- No temporary appointments; and
- Appropriate protection from removal from office.

Individual independence also requires:

### **PART B: STRATEGIC DIRECTIONS STATEMENT**

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- Preclusion from taking other employment while in office;
- The payment of adequate remuneration, pensions and entitlements and the protection of them;

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<sup>67</sup> For an important collection of relevant material see *Judicial Independence -- A collection of material for members of the Judicial Conference of Australia*, compiled and edited by Julie Debeljak, February, 2003, available from the Judicial Conference of Australia. Its web site is <http://www.jca.asn.au/>. See also, Australian Bar Association's "Charter of Judicial Independence 2004".

<sup>68</sup> Wheeler, *Judicial Administration: Its Relation to Judicial Independence*, National Centre for State Courts, 1988.

<sup>69</sup> Australia is a party to the International Covenants.

<sup>70</sup> Courts have been abolished without the re-appointment of judicial officers, part-time judges have been appointed, areas of jurisdiction have been transferred from courts to tribunals that do not have tenure, Attorneys-General have refused to defend the judiciary from ill-informed criticism and limits have been placed on the power of the superior courts to judicially review administrative and tribunal decisions.

<sup>71</sup> Sir Gerard Brennan, 'Judicial Independence', (Paper presented at the Australian Judicial Conference, Australian National University, Canberra, 2 November 1996); <http://www.law.monash.edu.au/JCA./Brennan.html>.

<sup>72</sup> Chief Justice Gleeson, 'Judicial Legitimacy' in *The Rule of Law and the Constitution*, Boyer Lectures 2000, ABC Books, 125.

<sup>73</sup> Justice R E McGarvie, 'The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence' (1992) 4 *Journal of Judicial Administration* 237, 246.

<sup>74</sup> Not less than 65 under the Australian Bar Association's "Charter of Judicial Independence", para 16.

- Immunity from being sued for things done while exercising power; and
- Determination of remuneration, pensions and entitlements by persons independent of the Executive.<sup>75</sup>

Institutional and individual independence from the Executive branch can also be affected by the methods used by the Executive branch to appoint judicial officers and monitor their performance.

### 1.2.2 The need for Community Confidence in the Judicial Branch

In totalitarian States, the Judicial branch of government is generally the agent of the government. In our free and democratic society it is not. In performing its vital role, the Judicial branch is responsible, not to any governmental power, but to the community. The ultimate protection of judicial independence lies in "a community consensus that judicial independence is worth protecting."<sup>76</sup>

The Courts lack the power of the other branches of government. They can be described as the "least dangerous" of the three branches of government<sup>77</sup>. Their power and authority depends on community acceptance and support.<sup>78</sup> If there is confidence and respect for the law and the Judicial branch, the law will be readily obeyed and the decisions of the Judicial branch readily accepted. If there is not, the law will be ignored and people will take the law into their own hands. As the Appeal Division of the Supreme Court stated:

*"Confidence in those who constitute its Courts and Tribunals is a basic necessity for a successful civilised democracy."<sup>79</sup>*

### 1.2.3 Maintaining Community Confidence

To maintain community confidence, Courts must be and be seen to be institutionally and individually independent of the other branches of government and powerful groups. Its judicial officers must also be and be seen to be impartial. This will not occur if they and their institutions are not, or are not seen to be, independent.

The Courts must also work well and be seen to work well. Accordingly, judicial officers must be and be seen to be:

- acting in accordance with the law;
- applying the law consistently and equally to all;
- providing fair hearings;
- acting with integrity; and

## PART B: STRATEGIC DIRECTIONS STATEMENT

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- appropriately skilled.

The Courts must also be and be seen to be:

- adequately resourced;
- accessible;
- efficient, providing timely hearings and decisions;
- open to public scrutiny;

<sup>75</sup> See Second Reading Speech of the Attorney-General, Judicial Remuneration Tribunal (Amendment) Bill, Hansard Legislative Assembly, 18 October 2001, 1210.

<sup>76</sup> Sir Ninian Stephen, 'Judicial Independence – A Fragile Bastion' (1982) 13 *Melbourne University Law Review* 339.

<sup>77</sup> Hamilton, *The Federalist Papers*.

<sup>78</sup> Sir Ninian Stephen, *op cit*.

<sup>79</sup> *St Kilda, City of v Evindon Pty Ltd* [1990] VR 771, 777.



- aware of informed community concerns; and
- responsive to justified criticism.

These objectives should be pursued in any event but take on added importance because of their significance for community confidence in the courts.

To sustain community confidence, it is also necessary that the courts that review or hear appeals from decisions of other courts and tribunals be and be seen to be independent of those other courts and tribunals. Thus Supreme Court, which has the constitutional responsibility to supervise all other courts and tribunals, should be and be seen to be independent of those other courts and tribunals<sup>80</sup>. Similarly, the County Court, which hears appeals from the Magistrates' Court and the Children's Court, should be and be seen to be independent of those courts.

#### **1.2.4 Responsibility for Maintaining Independence and Community Confidence**

Whilst immediate responsibility for maintaining the reality and appearance of independence and confidence in, and respect for, the courts, is in their hands it is a fundamental obligation of the Executive and Parliament to appropriate sufficient resources to the courts to preserve their independence and proper working.<sup>81</sup> In particular:

##### ***Parliament and the Executive***

It is the Parliament that passes laws, proposed by the Executive, which:

- creates courts other than the Supreme Court;
- defines their jurisdictions and powers; and
- specifies the tenure of the judges and magistrates.

Under amendments to the *Judicial Remuneration Tribunal Act 1995*<sup>82</sup>, the “Parliament” may decide whether to disallow Judicial Remuneration Tribunal determinations as to remuneration of judges and magistrates. Recent events, however, indicate that the Executive, in reality, still claims that right.

The Executive refers to the Parliament, for it to determine, the question whether the judges of the Supreme Court or County Court should be removed from office. Members of the Parliament and the Executive by their statements, can strongly influence public opinions. Their comments can profoundly strengthen or weaken community confidence in the Judicial branch.

#### **PART B: STRATEGIC DIRECTIONS STATEMENT**

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##### ***Executive***

It is the Executive that:

- appoints the judicial officers; and
- fixes the fees charged to litigants for using the Courts.

The Executive’s actions in the above areas directly affect the quality, performance and accessibility of the courts and, so, community confidence in them. The importance of its role cannot be overemphasised.

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<sup>80</sup> The Supreme Court of Appeal has been organised in such a way as to maximise the reality and appearance of its independence from the Supreme Court Trial Division.

<sup>81</sup> “Beijing Statement of Principles of Judicial Independence of the Judiciary in the LAWASIA Region”, para 37; Australian Bar Association’s “Charter of Judicial Independence”, para 26.

<sup>82</sup> Amended by Act No 4 of 2002.

### 1.3 The Position of VCAT

#### 1.3.1 The Structure of VCAT<sup>83</sup>

Over the last fifty years the Victorian Parliament has increasingly vested decision making in tribunals. This has been the case in relation to both the administrative review of administrative decisions *and* the resolution of civil disputes. Boards have also been created to exercise original powers. Thus in the past Victoria has had a planning appeals tribunal, a tribunal to deal with residential tenancy disputes and a board dealing with guardianship matters.

On 1 July 1998 the Victorian Civil and Administrative Tribunal amalgamated all or part of 14 former boards and tribunals. VCAT now comprises three divisions: Civil, Administrative and Human Rights. Each division has a number of lists that specialise in particular types of cases.

VCAT has a hierarchy of members. The President of VCAT must be a Supreme Court judge. The Vice Presidents of VCAT must be County Court judges. VCAT then has Deputy Presidents, Senior Members and Ordinary Members (Senior Members and Ordinary Members may be full-time or sessional). Members are assigned to specific lists by the President according to their expertise and experience. Thus, although VCAT operates as a single unit, the various lists of VCAT operate as specialist tribunals.

The work in some of the jurisdictions of VCAT resembles work done by courts. VCAT has an obligation to observe the rules of natural justice, conduct proceedings in public and give reasons for decisions.

#### 1.3.2 Relevance of policy issues and framework to VCAT

Thus the fundamental policy issues identified above, and the policy framework articulated below, are equally applicable to VCAT. This is not to say that the structure, composition or procedures of VCAT ought to mirror those of the Courts. Although VCAT will generally be performing a similar role to the courts it will do so in a different manner, which may require some modification to the principles or practices generally applicable to courts.

### 1.4 Resulting Policy Framework for Strategic Directions

In light of the above analysis, the fundamental policy objectives to be borne in mind in critically examining the Courts and VCAT and identifying and assessing possible future Strategic Directions are:

- ensuring just and fair proceedings and outcomes for all members of the community;

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- enhancing the reality and the appearance of the institutional and individual independence of the Courts and, where applicable, VCAT, from the Executive and each other; and
- enhancing community confidence in the Courts and VCAT.

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<sup>83</sup>

VCAT, 2002-03 Annual Report, Organisational Structure as at 30 June 2003, 24.

## **Appendix C**

The recent Canadian report<sup>84</sup> identified a number of international instruments which reflect on the requirements of judicial independence. In particular, it noted that they recognise the importance of court administration in fleshing out the general principles of judicial independence. These instruments include

- The Tokyo Principles on the Independence of the Judiciary in the Lawasia Region, 1982 (LAWASIA Human Rights Standing Committee)
- The International Bar Association Code of Minimum Standards of Judicial Independence, New Delhi 1982 (International Bar Association)
- The Montreal Universal Declaration on the Independence of Justice 1983 (World Conference of the Independence of Justice)
- The UN Basic Principles on the Independence of the Judiciary, 1985 (General Assembly endorsement)
- The Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, 1995 (Conference of Chief Justices of Asia and the Pacific Region)
- The Latimer House Guidelines of Parliamentary Supremacy and Judicial Independence, 1998 (Commonwealth Parliamentary Association, Commonwealth Magistrates' and Judges' Association, Commonwealth Lawyers' Association and Commonwealth Legal Education Association)
- The European Charter on the statute for judges, 1998 (Council of Europe),
- The Beirut Declaration 1999 (First Arab Justice Conference, Arab Centre for the Independence of the Judiciary and the Legal Profession, in cooperation with the Centre for the Independence of Judges and Lawyers)
- The Cairo Declaration on Judicial Independence 2003 (Second Arab Justice Conference, Arab Centre for the Independence of the Judiciary and the Legal Profession, in cooperation with the United Nations High Commissioner for Human Rights and the United Nations Development Program).

The Canadian Report commented

“These international instruments all recognize the importance of administrative autonomy and consider at least some aspects thereof to be requirements of judicial independence”.

It summarised details in relation to finance, budgeting and administration as follows:

**Figure 4.1 International Soft-Law Requirements**

Financing	<ul style="list-style-type: none"> <li>● Must be sufficient to enable the judiciary to perform its functions (<i>Syracuse 24, European Charter 1.6, Un Principles 7</i>) . . . to the highest standards (<i>Latimer House II 2</i>);</li> <li>● It is a priority of the highest order for the state to provide adequate resources to allow for the due administration of justice (<i>Tokyo 13, Montreal II ix 2.41</i>);</li> <li>● The amount allotted should be sufficient to enable each court to function without an excessive workload (<i>Syracuse 25, Beijing 37</i>);</li> </ul>
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<sup>84</sup> *ibid*, 68 and 69.

	<ul style="list-style-type: none"> <li>• The judiciary must have an opportunity to be heard or must participate in the determination of the envelope (<i>Syracuse 25, European Charter 1.8</i>)</li> <li>• The State shall guarantee an independent budget for the judiciary (<i>Beirut 2, Cairo 1</i>)</li> </ul>
Budgeting	<ul style="list-style-type: none"> <li>• The budget of the courts shall be prepared by, in collaboration with or upon the advice of the judiciary (<i>Beijing 37, Montreal II ix 2.42, European Charter 1.8, Beirut 2, Cairo 1</i>);</li> </ul>
Administration	<ul style="list-style-type: none"> <li>• The main responsibility for Court administration shall best in the judiciary (<i>Montreal II ix 2.40</i>) or in a joint body (<i>New Delhi 9, Beijing 36</i>);</li> <li>• This includes appointment, supervision and disciplinary control of administrative personnel and support staff (<i>Beijing 36</i>) and control of the monies allocated to the judiciary (<i>Latimer House II 2</i>)</li> </ul>