

# **The Changing Face of Judicial Leadership: A Western Australian Perspective**

## **David Malcolm Annual Memorial Lecture**

Chief Justice Robert French AC

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Many of us have fond and clear memories of David Malcolm — his energy, his intelligence, his infectious exuberance and above all his commitment to the service of the law and judicial administration in Western Australia and nationally over his many years in legal practice and as Chief Justice of Western Australia. Kaaren, his wife, who is here tonight, and Manisha, his daughter, also carry with them memories of him as husband and father. His love for them and pride in them was manifest to all who knew him. I knew him as both advocate and as Chief Justice and appeared as counsel with him and against him. My memories of him are still strong.

David Malcolm was a natural leader. As Chief Justice he strove to modernise his Court and to engage and communicate with the wider community in ways that the temper of our times demand. He had a vision which extended well beyond the quotidian requirements of his judicial role to wider social justice issues, including gender equality and indigenous cultural awareness. He was a regional internationalist, as demonstrated by his close involvement with the judiciary of the Asia/Pacific region. His time as Chief Justice of Western Australia left a unique imprint on our legal history and on the Western Australian judiciary. It is a privilege to be able to honour his memory with this Lecture.

David Malcolm's particular legacy raises a general question about the nature of judicial leadership. Does it have some useful meaning which can be applied in some way to how we choose and how we weigh up the work of the persons appointed to head our courts? Or is it really a conceptual desert populated by many single instances of leadership — each a product of the personality of the office holder, the composition of the court during the term of office and the other contingencies of history including the personal relationships between the Chief Justice and the Attorney-General, the profile of the cases that come before the court and their impact on civil society?

Diverse and historically contingent legacies within a gradual evolution of the role of Chief Justice are illustrated by the 13 Chief Justices that Western Australia has had up to and including the current holder of that office, Chief Justice Wayne Martin. It is useful to refer briefly to them and to the lessons they offer us about judicial leadership. In relation to the historical survey, I acknowledge my debt to the history of the Supreme Court, *May it Please Your Honour* co-authored by the late Professor Geoffrey Bolton and by Geraldine Byrne.<sup>1</sup>

The first Chief Justice was Sir Archibald Burt. He had been a considerable public figure on his birthplace on the island of St Kitts in the West Indies and a participant in its Legislative and Executive Government. He had also been a successful barrister, but when the revenues from his practice were declining, and with eleven children to support, he wrote to the Secretary of the State for the Colonies advising that he was willing to serve the Crown in any of Her Majesty's possessions. In 1860, he was offered and accepted the position of Civil Commissioner and Chairman of Quarter Sessions in Western Australia at a salary of £1,000 per year. The family arrived in Western Australia in January 1861.

The jurisdiction of the existing courts was limited. Very shortly after his arrival, Burt procured the passage of a *Supreme Court Ordinance*, which established the Supreme Court of Western Australia as a Court of Judicature with all the powers of the Courts of Queens Bench, Common Pleas and Exchequer, a Court of Equity and a Court of Ecclesiastical Jurisdiction. He became its Chief Justice and only Judge on 18 June 1861. He promulgated Rules of Court which he described as 'models of brevity'.<sup>2</sup> There were only two of them, one prescribing regular court sittings and the other relating to the making of affidavits. He otherwise relied upon the English rules.

Burt was not overwhelmed with judicial work and engaged in non-judicial activities including the provision of advice to the Governor, John Stephen Hampton, on a variety of matters. Hampton preferred Burt's advice to that of the Attorney-General, George Stone, who, in his opinion, lacked firmness and independence to such an extent that he could not rely on him in a difficulty. Nor did Hampton feel he could rely on the Crown Solicitor,

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<sup>1</sup> Geoffrey Bolton and Geraldine Byrne, *May it Please Your Honour A History of the Supreme Court of Western Australia from 1861-2005* (Scott Print, 2005).

<sup>2</sup> J M Bennett, *Sir Archibald Burt First Chief Justice of Western Australia 1861-1879* (Federation Press, 2002) 30.

George Walpole Leake, whose 'impetuous temperament render[ed] him a dangerous legal advisor'.<sup>3</sup>

The phenomenon of Chief Justices dipping their fingers into the executive pie was not at all unusual in colonial times and continued after federation. Professor Geoffrey Sawer wrote in 1977:

The Chief Justices of State and previously colonial Supreme Courts have always been regarded as proper sources of advice to State Governors ...<sup>4</sup>

The advisory role with respect to the Executive was reflected in the action of Sir Samuel Griffith who, as Chief Justice of the High Court, wrote to the Governor-General in 1916 warning him that the validity of proposed War Regulations imposing conscription was about to be challenged in the High Court. He suggested to the Governor-General that he warn the Ministers of the danger that the Regulations would be struck down. He also offered to help in framing any necessary legislation. Indeed, he had already informed Prime Minister Hughes to that effect.<sup>5</sup> The most recent example, and no doubt the last, was the action of the Chief Justice of the High Court, Sir Garfield Barwick, in advising the Governor-General, Sir John Kerr, in 1975 concerning the dismissal of Prime Minister Gough Whitlam.

Even today, in a survival from colonial times, a number of Chief Justices, including the Chief Justice of Western Australia, hold the office of Lieutenant Governor and act as Governor from time to time. That role is not an aspect of judicial leadership and continues to be the subject of discussion among constitutional lawyers.<sup>6</sup>

Sir Archibald Burt as Chief Justice became a large figure in the colony but on occasions attracted controversy. He regarded the local profession as inexperienced. He did not get on well with the Crown Solicitor. He had a famous confrontation with the local press

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<sup>3</sup> Bolton and Byrne, above n 1, 44.

<sup>4</sup> Geoffrey Sawer, *Federation under Strain: Australia 1972-1975* (Melbourne University Press, 1977) 157.

<sup>5</sup> See R S French, 'The Chief Justice and the Governor-General' (2009) 33 *Melbourne University Law Review* 647; Don Markwell, 'Griffith, Barton and the Early Governor-Generals: Aspects of Australia's Constitutional Development' (1999) 10 *Public Law Review* 280.

<sup>6</sup> See generally Rebecca Ananian-Welsh and George Williams, 'Judges in Vice-Regal Roles' (2015) 43 *Federal Law Review* 119, 146.

and with Stephen Parker, a practitioner who was destined to become Chief Justice in 1906. The matter ended up with fines for contempt all round, followed by apologies and representations to the Colonial Office which thought the Chief Justice could have acted with a greater degree of sensitivity and discretion than he had.<sup>7</sup>

Burt got into more hot water when he presided over a trial by jury of a pastoralist charged with killing an Aboriginal person with intent to kill. In his direction to the jury he made the observation that 'Blacks and whites are equal in the eye of the law.'<sup>8</sup> The jury found the defendant, Burges, guilty of manslaughter and Burt sentenced him to five years imprisonment. White outrage followed and ultimately the Colonial Office instructed the Governor that Burges' sentence should be reduced to one year of imprisonment, albeit without any reflection on the correctness of Burt's disposition. Another controversy concerned an attempt by some barristers, supported by the *Perth Gazette*, to make it unlawful for Burt's son, Septimus Burt, later to become Attorney-General, to practice in the Court while Burt was the sole judge. The proposal did not attract sufficient support to proceed. Burt went back to St Kitts for a short time in 1873–1874 to seek appointment to a new judicial position there. In his absence, the Attorney-General, Henry Hocking, acted as Chief Justice. In the event, Burt returned and resumed his office.

When Archibald Burt died in 1879 his contributions to the development of the Western Australian legal system were acknowledged. In one particular tribute it was said:

For a time a sort of settled gloom seemed to pervade society. It was felt that one of the best of good men, a man ill to be spared at any time, had gone from us, and much work which it was hoped he would have accomplished had been left undone.<sup>9</sup>

The first Chief Justice had no one in his Court to lead yet, despite the controversies in which he was involved, he demonstrated many of the attributes of leadership necessary to the development of the judiciary in the still young colony of Western Australia.

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<sup>7</sup> Bolton and Byrne, above n 1, 53.

<sup>8</sup> Ibid 54.

<sup>9</sup> Bennett, above n 2, 112.

Burt's successor, Sir Henry Wrenfordsley, was a different kettle of fish entirely. He served as Chief Justice from 1879 to 1883. He had an undistinguished career as a solicitor in Dublin, then as a barrister in England, resorting ultimately to the Colonial service. After 18 months as a Judge in Mauritius where he unsuccessfully lobbied to become Chief Justice, he was offered the job of Attorney-General in Jamaica. Before he could take that up he was found to be a convenient person to fill the vacancy of Chief Justice in Western Australia. He arrived here in 1880, the same year in which the Legislative Council of Western Australia enacted the *Supreme Court Act 1880* providing for the appointment of one or more Puisne Justices in addition to the Chief Justice.

Wrenfordsley's judicial manner has been described as 'alternately hectoring and frivolous'.<sup>10</sup> He took much pride in his introduction of new Rules of Court in 1881, based on the *Judicature Act* and rather prematurely claimed them as a legacy. They were not well received. *The West Australian* newspaper described them as a mere transcript of certain South Australian rules, which in turn were a transcript of the first English rules before their modification into a workable form.<sup>11</sup> He left Western Australia after falling out with the Colonial Secretary, Lord Gifford, who refused to agree to him appointing his 17 year old nephew as his associate. An unseemly altercation ensued between the two men at a function at the Weld Club, of which Wrenfordsley was President. Governor Robinson, who was a guest of the Club on that occasion, objected to Wrenfordsley's behaviour. Gifford complained to the Club Committee. The matter reached the ears of the Colonial Office which, in typical form, sent Robinson to govern South Australia, Gifford to be Colonial Secretary of Gibraltar and Wrenfordsley to be Chief Justice of Fiji.

Wrenfordsley lasted nine months in the office of Chief Justice in Fiji, departing after a dispute with the Governor. He was later appointed to a temporary judicial post in Hobart, then commenced practice as a barrister in Victoria in July 1887. He was appointed as an Acting Judge of the Supreme Court of Victoria in 1888, much to the distress of the Victorian Bar. He later returned to Western Australia in circumstances I shall shortly recount. I think it can fairly be said, at least from the secondary historical record, that his was a tenure which seems to have left no positive imprint on Western Australian society.

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<sup>10</sup> J M Bennett, 'Sir Henry Wrenfordsley: A Journeyman Judge' (1977) 13 *University of Western Australia Law Review* 25, 32.

<sup>11</sup> *Ibid* 34.

Sir Alexander Onslow succeeded Wrenfordsley in 1883. He had been appointed Attorney-General in 1880. Initially he got on well with Governor Broome and became friends with the Attorney-General, Alfred Hensman, who had arrived from England in May 1884. He was cut from a much higher quality cloth than his predecessor. Nevertheless, there was trouble on the horizon involving the clash of large colonial egos. He fell out with Governor Broome after disclosing to Attorney-General Hensman and Surveyor General John Forrest confidential correspondence from Broome which criticised them. Broome purported to suspend Onslow from office. Broome however was not particularly popular and his effigy was burned in Roe Street.<sup>12</sup> The Colonial Office overrode him and Onslow was reinstated.

More trouble arose when Onslow found for the Attorney-General, Hensman, in a defamation action brought against the proprietors of *The West Australian* newspaper, including the powerful John Winthrop Hackett. They complained to Broome of the Chief Justice's bias. The Legislative Council endorsed some of the complaints. Onslow went on extended leave. Edward Stone, his Puisne Judge, declined appointment as Acting Chief Justice because he had given evidence favourable to Onslow. It was at this point that Sir Henry Wrenfordsley rode to the rescue and accepted reappointment. His return was not welcomed. The newspaper of the day observed of him that 'he had failed to secure the respect of the Bar or the esteem of the community.'<sup>13</sup> Eventually he decamped to the Leeward Islands in the West Indies where he served as Chief Justice for ten years before retiring to the South of France.

In 1890, when Forrest became Premier, Onslow was invited back. He was the beneficiary of a warm, almost gushing, editorial from *The West Australian* newspaper which had previously complained of his bias. The paper said that Onslow's return would be greeted with genuine happiness and satisfaction by a large number of people of the colony — 'old griefs have lost their power, old sores have been healed over by the gentle influence of time.'<sup>14</sup> The newspaper added 'let the quarrels of bygone days be dropped into oblivion'.<sup>15</sup> Onslow remained as Chief Justice until 1901. During that time the Supreme Court was expanded to three, one of which was Hensman. A Master was appointed. The *Legal*

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<sup>12</sup> Bolton and Byrne, above n 1, 81.

<sup>13</sup> Ibid 84.

<sup>14</sup> Bolton and Byrne, above n 1, 85.

<sup>15</sup> Ibid.

*Practitioners Act 1893* (WA) was enacted and the fused profession was established. Onslow was instrumental in setting up the Western Australian Law Reports in 1899.

Both Burt and Onslow were considerable judicial figures in the history of the colony and could properly be described as early exemplars of judicial leadership. However, if there is one lesson to be learnt from their tenures which has contemporary relevance, it is the importance of avoiding controversies collateral to the discharge of the judicial role and of maintaining proper and functional relationships with the government of the day and, in particular, the Attorney-General of the day. It should not be surprising, of course, that in a small community, as Perth then was, with a small circle of local elites, particular personality conflicts could loom large. Even in these times however, conflicts between Chief Justices and Attorneys-General have occurred around Australia. When they have it is not always easy to point the finger and to say that the head of jurisdiction or the government of the day is at fault. Sometimes the conflict is simply a product of circumstances. It may have to do with resources or appointments to the court, or lack of either. It may have to do with laws affecting the jurisdiction or powers of the court. It is one of the leadership responsibilities of the Chief Justice in any jurisdiction to endeavour to maintain functional communications with the government and to ensure that division and conflict does not grow and become entrenched. That approach is reflected in part in Guidelines adopted in 2014 by the Council of Chief Justices of Australia and New Zealand dealing with communications between the judiciary and the Legislative and Executive branches of Government, to which I will refer briefly now.<sup>16</sup>

Those Guidelines set out the kinds of legislative and executive actions which may affect courts and upon which it is appropriate for courts to be invited, by the Executive Government, to offer their views and to respond. Courts should be consulted about proposed laws which significantly affect their jurisdiction and powers or the appointment, removal, obligations, continuing education and discipline of judicial officers. They should be consulted about laws which affect judicial functions, for example by directing that evidence is to be taken in particular ways or that certain matters have to be taken into account in making certain kinds of judicial decisions. Laws affecting the administration of courts and their distinctive character or seeking to confer functions of an executive character on them

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<sup>16</sup> Council of Chief Justices of Australia and New Zealand, *Guidelines for Communications and Relationships between the Judicial Branch of Government and the Legislative and Executive Branches* (23 April 2014).

should not be made without consultation with the head of jurisdiction. Heads of jurisdiction should offer responses to such consultation after talking with members of their court. The Council of Chief Justices has also agreed that courts, through their Chief Justice or otherwise, should not engage in public policy debates except to the extent necessary to protect their legitimate institutional interests.

The Guidelines also deal with criticism of the courts and judges and caution restraint by Chief Justices in responding. It is generally undesirable for a Chief Justice to become involved in public exchanges with members of the Executive or Parliament. If some response is necessary, the best course is a formal statement by the Chief Justice on behalf of the court. Communication with the Executive in relation to matters affecting funding and judicial remuneration is obviously essential. Again, the Guidelines provide that such communication should not be conducted as a public debate unless the relevant Chief Justice considers it necessary to do so in order to protect the legitimate interests of the court. The Guidelines have recently been used in Victoria as the basis for a Memorandum of Understanding<sup>17</sup> between the Executive Government of that State and the Courts Council, which is the governing body of Court Services Victoria and is chaired by Chief Justice Warren.

The existence of the Council of Chief Justices means that there is a national forum in which Chief Justices as judicial leaders can talk with each other on a regular basis about a range of issues relevant to their role as judicial leaders. The Guidelines are a product of that dialogue and directly relevant to the way in which the relationships between judicial leaders and leaders of the Executive Government should be conducted.

Returning to our whistle-stop tour of Western Australian Chief Justices, Sir Alexander Onslow was followed by Sir Edward Albert Stone, who was the Senior Puisne Judge at the time of his appointment as Chief Justice in 1901. The succession of the Senior Puisne Judge to the office of Chief Justice became a convention over the next 80 years until David Malcolm's appointment in 1987. Stone was the first Western Australian-born Chief Justice. He had served in various governmental roles as Clerk to the Legislative Council, as a Member of the Legislative Council, as Acting Attorney-General, Crown Solicitor and Acting Chief Justice.

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<sup>17</sup> Court Services Victoria, *Memorandum of Understanding between the Attorney-General, Victoria and The Courts Council of Court Services Victoria* (7 May 2015).

Stone's term contrasted with those of Onslow and Wrenfordsley. There is no report of any of the controversy that attached to the tenures of his predecessors. The *Australian Dictionary of Biography* describes his term as 'uneventful'.<sup>18</sup> He was evidently a popular Chief Justice, described by one of his admirers as '[a] very loveable man, and in addition a good lawyer and a keen and painstaking judge.'<sup>19</sup> He was prepared to admit when he was wrong. That virtue was demonstrated when sitting, as was the custom on a Full Court on appeal from one of his own judgments, he agreed that it should be set aside.<sup>20</sup> During his term, the size of the Supreme Court was enlarged to four. The Supreme Court building was constructed and opened in 1904. The first version of the *Criminal Code* was enacted during his tenure in 1903.

Sir Edward Stone retired in February 1906 and was succeeded by Sir Stephen Parker, who was his Senior Puisne Judge. He was one of the founders, with his brother, George, of the firm which became known as Parker & Parker and which has mutated into Herbert Smith Freehills. He had also served in the Legislative Council and later, concurrently, in the Legislative Assembly and Legislative Council. He was one of the promoters of responsible government for Western Australia. When responsible government came, his aspirations to be Western Australia's first Premier were not realised. John Forrest took that office and Parker served for two years as his Colonial Secretary until 1894. He was appointed as a Puisne Judge in 1901. In the office of Chief Justice, Stephen Parker pursued legal reform. The Court of Criminal Appeal was established in 1911 and the criminal law amended with the enactment of the *Criminal Code Act Compilation Act 1913* (WA).

Parker resigned in 1913 and was succeeded by Sir Robert McMillan who served from 1913 until 1931. He was highly respected for his legal skills. He attracted a rather rare encomium from Sir Owen Dixon, who described him as '[a] man, who you could see at once, was an ornament to the judiciary; one who struck the imagination of any young judge as a man of the highest refinement and character, representing the best traditions of the judiciary in the English-speaking world.'<sup>21</sup> McMillan was born in the United Kingdom. He had done

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<sup>18</sup> F M Robinson, 'Stone, Sir Edward Albert' in John Ritchie (ed), *Australian Dictionary of Biography*, (Melbourne University Press, 1990) vol 12, 98.

<sup>19</sup> Bolton and Byrne, above n 1, 101 citing M G Lavan, 'Reminiscences of Law and Lawyers' *The Magistrate* Ed John E Virtue, 30 September 1930, Pt IX Vol XIV, 67.

<sup>20</sup> Bolton and Byrne, above n 1, 101.

<sup>21</sup> Bolton and Byrne, above n 1, 137 citing J M Bennett, 'Robert Furse McMillan - The Supreme Court of Western Australia, Its Early History', (1963) 6 *University of Western Australia Law Review* 173, 189.

well at the English Bar before being invited to apply for the vacant Puisne Judge position in Western Australia in 1902. His output as a judge was prodigious. 828 of his judgments appear reported over his 28 years on the Bench, which far exceeded the output of all other judges of the Supreme Court during the first half of the 20th century. Importantly, and by way of contrast to his predecessors, he had a reputation for being understanding and tolerant and making it a point never to reprimand counsel in court. He would congratulate young barristers through his associate after a well-argued case. However, he maintained a degree of social reticence and avoided close personal attachments in order properly to fulfil his duties as a judge and build up 'an atmosphere of dignified reserve' around him.<sup>22</sup>

Paul Hasluck wrote of the period between the World Wars when McMillan was Chief Justice, observing that:

The Supreme Court of those days had great dignity and, while I do not know whether the judges were good lawyers or not, they certainly had presence and a status that belonged to the great traditions of the law.<sup>23</sup>

Referring to the Chief Justice and his judges and the leaders at the Bar, James, Keenan, Dwyer, Keall and Downing, Hasluck said: '[t]hey were stately and mannered men, very careful and precise in their use of the English language.'<sup>24</sup>

In 1931, Sir Robert McMillan, at the age of 73 delivered the vote of thanks when the then Governor, Sir William Campion, laid the foundation stone of St George's College. After offering a tribute to Sir Winthrop Hackett, who had endowed the College, McMillan sat down and a few minutes later collapsed and died. In a tribute to his leadership delivered in the Supreme Court the following day, Sir Walter James said:

He moved with his characteristic modesty and quietness but in time he asserted his powers of leadership in the Bench of this Court. He always impressed me by his open-mindedness ... he was always good-tempered, and in addition to his patience

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<sup>22</sup> Ibid.

<sup>23</sup> Bolton and Byrne, above n 1, 145 citing Paul Hasluck, *Mucking About - An Autobiography* (Melbourne University Press, 1977) 115–20,

<sup>24</sup> Ibid.

with, and difference to, litigants and witnesses, he showed unfailing courtesy to the members of this Bar ... May I say with diffidence, having regard to those who have gone before, that Sir Robert McMillan was the most distinguished Chief Justice that this State has had.<sup>25</sup>

In those remarks we see a concept of judicial leadership expressed not in terms of dominance or force of personality but by reference to example in personal conduct in addition to possession of the judicial skills which are essential to the discharge of the office.

McMillan was succeeded by Sir John Northmore, who served from 1931 to 1945. Northmore had already served 17 years on the Supreme Court under McMillan. He had a reputation for testiness. He was variously described as irascible, bad tempered and very unpleasant to appear before. On the other hand, he was regarded as being as capable a judge as his predecessor. The Court whose leadership he assumed was one person down because the puisne judge position which he had vacated was not filled. During his time the *Supreme Court Act 1935 (WA)* was enacted. It limited the number of judges to four, including the Chief Justice. However, the fourth judge, Albert Wolff, was not appointed until 1938. For all but two years of Northmore's tenure as Chief Justice there were only three judges on the Supreme Court including himself. Because of the workload he restricted his other public engagements, although he was Administrator and Lieutenant Governor for two years at the beginning of his tenure. Chief Justice Northmore retired in 1945. He was 80 years of age.

Northmore was succeeded by Sir John Dwyer who served from 1945 until 1969. He had been born in Victoria and had come to Western Australia as a young barrister in 1904. He was appointed as a puisne judge in 1930. He had something of a national reputation. He had been invited by John Curtin and H V Evatt to serve on the Federal Court of Bankruptcy and as an additional judge of the Australian Capital Territory.

After he became Chief Justice, the size of the Supreme Court was expanded to its full establishment of four judges. Sir John Dwyer had a reputation for being difficult in much the same way as Northmore had been. Sir Francis Burt said of him: '[e]veryone was absolutely petrified of Dwyer ... he really had a great capacity for frightening people.'<sup>26</sup> This approach was evidently a little infectious among his fellow judges. He was nevertheless widely

<sup>25</sup> Bolton and Byrne, above n 1, 167 citing *The Western Australian*, Perth, 25 April 1931, 7.

<sup>26</sup> Bolton and Byrne, above n 1, 190 citing Geraldine Byrne, Interview with Sir Francis Burt (Perth, 9 April 2004).

respected and admired, and thought of highly by the community at large. Bolton and Byrne record that 'Dwyer was probably the last of the old breed, holding himself at a distance from society, but admired and consulted by a wide spectrum of citizens.'<sup>27</sup>

The reputations for testiness of Northmore and Dwyer suggest a further observation about judicial leadership. Courtesy, patience and tact on the Bench are not simply human virtues. They are incidents of judicial professionalism. Rudeness, impatience and sarcasm may have satisfied the deep visceral needs of some judges in times past. Today they should be seen as no more than static impeding the flow of communication between the Bench and the Bar table and unnecessarily raising the level of tension in the courtroom potentially adversely affecting counsel, parties and witnesses alike. As a young practitioner in Western Australia, I was fortunate to have observed only rarely incidents of what might be called generically judicial bullying. The negative practical implications of such behaviour for the proper discharge of the judicial function are significant and, if chronic, go to a person's suitability for judicial office. Rudeness and impatience are not indicators of judicial leadership. That being said, the judicial role does require firmness and seriousness of purpose and a commitment, in the interests of all parties and the public purse, to ensure that litigation is conducted without time-wasting behaviour.<sup>28</sup> There should be a very low threshold of tolerance for tactical gaming of the litigious process unrelated to its proper purposes.

Sir John Dwyer's successor was Sir Albert Wolff, only the third Western Australian to be appointed to the Bench. He had been a Crown Prosecutor, Crown Solicitor and Parliamentary Draftsman. He was appointed as a puisne judge in 1938. He was very efficient and was instrumental in clearing up an enormous backlog of matters in the Court of Arbitration to which he was seconded upon his appointment. He also served on a number of Royal Commissions. He had been a Supreme Court Judge for 20 years when he was appointed Chief Justice in 1945. His courtesy marked a departure from the style of his predecessors. He had a reputation as a reformer in relation to judicial administration and had good relationships with the government of the day. He said:

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<sup>27</sup> Bolton and Byrne, above n 1, 199.

<sup>28</sup> *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

When I took office as Chief Justice I determined that I would not tolerate any backlog of cases and I have always worked to prevent of [sic] any piling up of arrears. In that respect our State has stood pre-eminent amongst the States in not having a stack of arrears of Court work and that has only been done with the co-operation of the Government — when the occasion called for it, I have not hesitated to ask for assistance and I have always got it.<sup>29</sup>

He established the Council of Law Reporting, which developed the Western Australian Law Reports into the new series that continues today as the Western Australian Reports. His concept of judicial leadership plainly extended to ensuring the efficient operation of the Court and the timely disposition of the matters before it. It also involved the maintenance of good working relations with the government of the day.

Sir Lawrence Jackson, who succeeded Sir Albert Wolff, served from 1969 to 1977. He had been appointed to the Supreme Court in 1949 at the age of 36 on the basis that he would serve as President of the Arbitration Court for 10 years and then would resume a role as a fulltime puisne judge. In the event, he served five years as President before he was asked to become a puisne judge because of the demands of the Supreme Court List. He was heavily engaged within the community as President of the WA Cricket Association, Foundation Chairman of the National Trust, a member of the Council for the Commonwealth Games, a Member of the Senate of the University of Western Australia for ten years, and ultimately its Chancellor. He also chaired a committee to examine the future needs of tertiary education in Western Australia.

Sir Lawrence Jackson's time as Chief Justice marked more sharply than that of his predecessor a change in the culture of the Court in the direction of courtesy and efficiency. Sir Francis Burt recalled that before Sir Lawrence Jackson was appointed the atmosphere between the Bench and Bar had been combative. Sir Lawrence almost single-handedly changed all that. The relationship between the Bench and the Bar improved enormously, as did the feeling within the Court itself. The Chief Justice encouraged his colleagues to help each other out with their lists when settlements occurred. There were large changes in the jurisdiction and procedures of the Court during his term, which also saw the creation of the District Court in 1969 and the promulgation of new *Rules of the Supreme Court* in 1971. Sir

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<sup>29</sup> Bolton and Byrne, above n 1, 207 citing The Hon Chief Justice Albert Wolff, KCMG, *Curriculum Vitae* and Some Random Notes.

John Virtue credited Jackson's 'inspiration, energy and guiding hand, as well as the considerable labour he put into perfecting the drafts that was largely responsible for the results achieved'.<sup>30</sup> His judicial leadership may be said to have been characterised by cultural change in the external and internal relations of the Court. It was also characterised by a very positive engagement with the wider Western Australian community which enhanced the respect in which the Court was held.

Sir Lawrence Jackson retired from the Supreme Court in 1977 and lived until 1993. His successor was Sir Francis Burt who had been appointed as a Puisne Judge in 1969 and was Senior Puisne Judge at the time of his appointment as Chief Justice in 1977. At the time of his appointment to the Bench he had been the leading Queens Counsel at the Western Australian Bar, which he had established in 1962. His was a dominating intellect. For the advocate, the prospect of appearing before him as a trial judge or on a Full Court was a great incentive to more than usually strenuous efforts in preparation. He had a reputation sometimes for putting to counsel a series of innocent sounding questions at the end of which counsel would be located somewhere on the thinner portion of a branch about to detach itself from the tree trunk of a carefully nurtured argument. Sir Francis Burt was an intellectual force on the Court and had a natural authority coupled with a calm courtesy that suited him to the role of Chief Justice. His reputation as a judge was such that he was sounded out for possible appointment to the High Court of Australia by Tom Hughes QC during his time as Attorney-General. Burt disclaimed any interest in such an appointment.

During his time the workload of the Court and of courts generally within Australia increased. The Chief Justice was well aware of the limitations of the accommodation of the Supreme Court. With his support an inquiry was initiated into the future organisation of the Western Australian legal profession, chaired by Justice Peter Brinsden. It recommended an improved Law Library to service both the Supreme Court and the existing court. The new building came to be and was opened in April 1987.

Sir Francis Burt believed in the importance of the public's understanding of the legal system. He supported the expansion of Law Day activities in May each year. He even took the role of a magistrate when the Law Society held its first mock trial between schools. He also believed in the importance of understanding of the legal system on the part of law-

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<sup>30</sup> Nicholas Hasluck, 'Sir Lawrence Walter Jackson' (2015) 39 *University of Western Australia Law Review* 84, 95.

makers and members of the Executive Government. He said in a speech made in May 1987 that when he joined the Air Force as a pilot it was assumed that he should be taught the basic principles of aerodynamics so that the number of take-offs would not exceed the number of landings. He said:

In the same way it would seem to me that it would be obvious that if a democracy is to be a system of government ultimately resting upon the ordinary men and women living within it, they being the people who in the ultimate analysis are responsible for it, then they should know how it works and how to work it.<sup>31</sup>

In that engagement, he laid a developing strand of judicial leadership which was taken up by his successor, David Malcolm — that is representing the judiciary to the wider community.

David Malcolm succeeded Sir Francis Burt in May 1988 and retired in February 2006. He was the first Chief Justice appointed directly from the Bar in over 80 years. He came to the Court with a high reputation as Western Australia's leading Senior Counsel. His term as Chief Justice stamped him as a judicial leader in each of the ways that I have already mentioned. He assumed his office at a time of considerable change in the composition of the Court. At the time of his appointment it comprised nine judges. At the time of his retirement, it had increased to 18.

As Chief Justice, David Malcolm demonstrated the key attributes of a modern judicial leader. He initiated procedural innovations to improve the efficiency of civil trials, including the introduction of specialist lists and a rolling duty judge system. He promoted the increased use of information technology by the judges, in the Court library, in record keeping and in file and case management. He promoted the use of video technology and video links to remote areas. Case management reforms were introduced into the Criminal List and the Rules of Criminal Procedure rewritten. Aboriginal Liaison Officers were attached to the Supreme Court and other courts to enhance access by Indigenous people. A Media Liaison Officer was appointed to improve communications with the media and to enhance understanding of court procedures.

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<sup>31</sup> Bolton and Byrne, above n 1, 263 citing Sir Francis Burt, 'New Concepts and Old Buildings: The Francis Burt Law Centre'; Brief, May 1987, 14.

Chief Justice Malcolm also supported the establishment of the State Administrative Tribunal, which reflected a vision for the rationalisation of administrative tribunals which he had put forward years before as a member of the Law Reform Commission of Western Australia. He achieved the creation of a Court of Appeal for Western Australia, a move which improved the quality and consistency of the Court's appellate judgments.

He engaged with the wider community through a variety of organisations on which he served as Patron, Vice-Patron, Chairperson or Trustee. In the international sphere he chaired for an extended period the Judicial Section of LAWASIA and convened the biennial Conference of Chief Justices of Asia and the Pacific. He was closely involved with the drafting and promulgation of the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, which was subsequently adopted by at least 32 countries.

Chief Justice Malcolm brought together the various strands of what can usefully be described as modern judicial leadership — a multi-dimensional concept reflecting the character of our courts and their relations with the other branches of Government. They are not temples from which oracles dispense the law in more or less Delphic language. They are distinctive and distinct institutions of government, each engaged fully with the community which it serves.

David Malcolm's successor Chief Justice Wayne Martin, who assumed office in 2006, and continues in office today, has maintained and extended the concept of judicial leadership reflected in his predecessor's term. He has taken a prominent national role as a member of the Council of Chief Justices, as Chairman of the National Judicial College of Australia and presently as Chairman of the Judicial Council on Cultural Diversity. Through those roles and through his wider community engagement, he has developed a national identity not only as the Chief Justice of Western Australia but as one of a number of Australian judicial leaders who are active participants in the ongoing evolution of our national integrated judicial system.

There is little that is written down in our constitutions or statutes about the roles and powers of Chief Justices. The Constitution, in s 71, states that the High Court of Australia shall comprise a Chief Justice and so many other Justices, not less than two, as the Parliament prescribes. That is all it tells us. That is perhaps just as well for as this little history has demonstrated, the leadership function of Chief Justices changes over time. In a Law Week

Address in May 2004<sup>32</sup>, David Malcolm pointed out that the powers of Chief Justices generally are quite limited. He listed some of what he called their unwritten functions, including:

- Leadership as spokesperson and representative of the State judiciary to the community and in its dealings with Executive Government.
- An executive function as head of the Court and head of the Judiciary in the State.
- Authority for determining the distribution of the judicial workload.
- Responsibility for the effective functioning of the court.

Generally speaking, each occupant of the office must construct the role anew having regard to the history and traditions of the office and the need to adapt it to contemporary society and the particular demands of the time in which he or she serves. As I hope I have demonstrated, David Malcolm was a great Western Australian exemplar of that proposition.

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<sup>32</sup> David Malcolm, 'Role of the Chief Justice' (Speech delivered for Law Week 2004, Perth, 5 May 2004)