

**THE IDEA OF THE PROFESSIONAL JUDGE:
THE CHALLENGES OF COMMUNICATION***

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Colleagues,

Thank you for your kind invitation to speak to this Conference.

The idea

With the eight hundredth anniversary of the signing of Magna Carta to be celebrated next year, I thought that it might be appropriate, this morning, to reflect upon Ch 45 of the Great Charter in which King John promised that: "We will appoint as justices, constables, sheriffs or other officials, only men that know the law of the realm and are minded to keep it well." In the historical record, this section of Magna Carta was the birth notice of the judiciary as an arm of government.

The idea that what our judges do in exercising the judicial power of the State is, and should always be, informed by an expert understanding of the law through long training and experience and a professional ethos of disinterested personal restraint has been a central theme of the common law since its first moments of self-consciousness.

At the time John signed Magna Carta, the judges had considerable personal contact with the King himself. We know this because they "often marked their cases 'loquendum cum rege'", that is, "to be discussed with the king". The practice reflected the political reality that the judges were not then independent of the executive government of the day; they were institutionally connected to, and directly dependent for their authority upon, the King. It may even be that this practice gave rise, to some extent, to the grievance addressed by Ch 45 of Magna Carta.

The direct connection between the judges and sovereign power proved to be a source of self-confidence in the English judiciary. This confidence showed itself to be increasingly resistant to the other great institution with a claim upon their allegiance and influence upon their professional ethos – the Catholic Church. That self-confidence proved to be a potent dynamic in the development of the common law as supplanting canon law and civil law ideas derived from continental jurisprudence.

But the very fact that the great promise in Ch 45 of Magna Carta was made at all, even though all the powers of government were still concentrated in the hands of the monarch as sovereign, suggests that Ralph Turner was right in his suggestion that the judges and lawyers were, and

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were seen to be, beginning to develop a view of themselves as members of a profession dedicated to the administration of justice¹.

Thereafter, the idea that there was something independent about the legal profession and the judiciary developed apace. That development was sufficiently assured by the end of the 14th Century that the rights of subjects were being vigorously enforced, even against the King himself in his own courts.

There was, for example, the celebrated litigation in the 15th Century between the Abbess of Syon, the head of a cloistered order of nuns, and Henry VI which arose when the King dispossessed the abbey of an endowment given to it by his father, Henry V. The rights of the nuns were vindicated by the independent judiciary assisted by equally independent counsel. Incidentally, the nuns did not forget. The King's name was not mentioned again in the names of the eminent persons for whom the nuns prayed until 1937².

In the legal tradition that developed over the eight hundred years after Magna Carta, and as the activities of government came to be the responsibility of separate organs of sovereign power, it became the function of the legal profession and the judges produced from it to ensure that the law is enforced by those who "know the law of the realm" and whose professional ethos ensures that they are "minded to keep it well".

The common law which developed over that time was distinguished by its incremental development by judges (and juries) in contrast to the theory-driven work of continental scholars whose first allegiance was to the academy and the Church.

In the tradition of the common law, the names of most of the participants in the most important episodes along the way of the stuttering iterative process, whereby an independent legal profession and judiciary emerged over the centuries, are today virtually unknown.

To be sure, there were some great judges whose names we all know, but, in truth, the common law developed as described by J W Burrow: "The common law is not a creation of heroic judges but the slow, anonymous sedimentation of immemorial custom; the constitution is no gift but the continuous self-defining public activity of the nation."³

In the United States the claims of democracy, asserted most vigorously during the presidency of Andrew Jackson, trumped the claims of professionalism and led to the adoption of an elected judiciary in many of the states. There is some irony in the circumstance that the argument for tenured judges, appointed from the ranks of the legal profession, was made most eloquently by an American. Writing in No 78 of "The Federalist"⁴, Alexander Hamilton said:

¹ Ralph V Turner, "The English Judiciary in the Age of Glanvill and Bracton", (1985) *Cambridge University Press* at 159.

² E Mankowski, "English Nuns and the Law in the Middle Ages: Cloistered Nuns and their Lawyers", 1293-1540 (Studies in the History of Medieval Religion, vol xxxix.). Woodbridge, The Boydell Press, 2012, Ch 4.

³ Quoted by F Mount, *No Theatricks*, London Review of Books, 21 August 2014, 14 at 16.

⁴ *New American Library*, (2003) at 470.

"It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them."

The defining characteristic of our modern judiciary is politically neutral professionalism.

Edmund Burke, like Alexander Hamilton, favoured the "cold neutrality of an impartial judge"⁵ over the idea of the exercise by judicial proxy of the popular will. Burke's idea of cold neutrality has modern echoes in Sir Owen Dixon's idea of legalism, and in the observation of Laurence Tribe, the distinguished American scholar of constitutional law, that "the whole **point** of an independent judiciary is to be 'anti-democratic'."⁶

In the long run, the judiciary, as the unelected third branch of government, is tolerable in a democracy only because of our professional competence and because of a professional background apt to inculcate political neutrality in the exercise of our functions.

It is certainly timely for the JCA in this conference to focus upon the interrelation of the courts, the media, politicians and the public. A pressing challenge for the Australian judiciary, and for the JCA as our representative body, is in communicating the value of this idea of politically neutral professionalism to ensure that it continues to be recognised by the broader community.

Misconceptions

Some members of the public and some in the media have a view that the judges see themselves as a self-important, if not self-interested, elite who are far too smart for their own or anyone else's good. One might expect that some of these commentators would know better.

Professor James Allan of the University of Queensland, and a regular commentator on legal matters in "The Australian", in a recent opinion piece concerning the controversy surrounding the appointment of Chief Justice Carmody, wrote:

"If, like me, you want your judges committed to interpreting the legal texts in the way they were intended by the democratically elected legislature, and in line with their plain meaning, then uber-smart judges are simply those with the resources to avoid such constraints ... Put differently, the unspoken premise among the 'top judges need to be the biggest brains in the room' crowd is that we want our judges to be out there pursuing social justice (or their version of it, to be a little more exact) and indulging in social engineering from the bench and that you can't do that in any plausible way unless you are really, really smart ... I think that there

⁵ E Burke, *To His Constituents*, "Translator's Preface", J P Brissot (1794).

⁶ L Tribe, *Abortion: The Clash of Absolutes*, (1990) at 80 (emphasis in the original).

are plenty of people out there who would make perfectly acceptable chief justices. Sure, a really smart person might make a great chief justice. But the same he or she is also more likely, in my opinion, to make an awful one."⁷

Just think about that: a really smart person ... is more likely to make an awful judge.

Perhaps Professor Allan should try to get out and meet more judges.

Even within the executive governments of the Commonwealth and States, there is a profound lack of understanding of the function of the judiciary. Getting the message across to those of the managerialist mindset in government is a challenge which needs continually to be addressed.

Judges in Australia write our judgments. Not everyone understands that. I say that, not only in respect of the angry unreflective people who are ignorant about what we do.

The most worrying misconception I have encountered is the belief among officers of the executive government that judges do not actually write their own judgments.

When I was Chief Justice of the Federal Court, I was told by one of my colleagues who was responsible for negotiations concerning judicial salaries, that in the course of discussions with officers of the executive government, those officers had expressed disbelief when told that our judges spend more time writing judgments than sitting in court. The bureaucrats assumed that we delegate the writing of judgments to our associates.

It may be that this misunderstanding is a consequence of the high profile of the US Supreme Court and the fact that justices of that Court have four clerks each whose task it is to prepare opinions for the consideration of the Justices. Anecdotal evidence suggests some of the Justices do little actual writing. It is said that one former Justice did not even make that level of contribution to the opinions that appeared under his name. The suggestion was that the Justice's contribution was limited to an instruction as to the desired outcome and then checking the citations made by his clerk. It was said that his Honour was "one hell of a cite-checker".

This practice does not seem to be confined to the US Supreme Court. Some thoughtful Americans deprecate it. Judge Richard Posner, of the 7th Circuit Court of Appeals, writing extra-judicially, has said that judges cannot hope that "by careful editing they can make a judicial opinion (written by a clerk) their own."⁸

It is difficult to imagine how the integrity of this judgment-writing process can be upheld when the selection from the record of the material facts on which the decision is based is made by a person who does not have the professional experience which, presumably, justified the appointment of the judge in the first place.

⁷ James Allan, "Objections must be ruled out of order", (2014) *The Australian*.

⁸ R A Posner, "Reflections on Judging", (2013) *Harvard University Press*.

One might also observe that the attractions of clinging to office well into one's eighth or ninth decade might be reduced if the judge were required to do the hard grind of actually writing his or her judgments.

And there is a broader problem of the perception of our role. Even among sophisticated professionals, such as the Productivity Commission, there is the view that the courts are simply part of the mix of service providers in the dispute resolution industry. This view has powerful implications for the level of support which the political branch provides the courts.

If you view the courts as service providers, then it might make sense to adopt a cost recovery model as the basis for fixing court fees. We all know the other famous chapter of Magna Carta: "To no one will we deny or delay or sell justice"; but it doesn't seem to loom large in the managerialist consciousness.

But to see the courts as providers of services is a constitutional nonsense.

An accused person who is tried, convicted and sentenced is not being provided with a service. And when a civil court resolves a dispute between citizens or between a citizen and the State, the parties are not being rendered a service; they are being governed. And the decision which resolves their dispute is the most concrete expression of the law of the land and saves further litigation because it enables the profession to advise their clients so as to avoid litigation.

By way of an interesting footnote here, the Supreme Court of Canada in *Trial Lawyers' Association of British Columbia v British Columbia (Attorney-General)*⁹ recently held that court hearing fees imposed by regulation in British Columbia were unconstitutional because they interfered with access to the constitutionally protected core jurisdiction of the provincial superior courts and the rule of law as a fundamental constitutional principle.

The media

It is of the essence of what we do that we operate in public. Our decisions are the rational application of predetermined laws to facts found on evidence adduced by the litigants in open court. Unlike decision-makers in the other arms of government, our decisions are entirely subject to public scrutiny. And that is a very good thing.

It is a vital aspect of our democracy that our newspapers and other media should not be afraid of criticising our work, just as it is vital that they should not be afraid of criticising the political branches of government. But the media are rarely our natural allies. Indeed, in some respects, with the best will on both sides, unfortunately, we are natural enemies.

Some of you may have seen recently the outrage in the US media when the US Supreme Court declined to review a lower court's order requiring a reporter for the New York Times to testify in a case of espionage brought against a former officer of the CIA. The reporter claimed reporter's privilege to protect his confidential source. The reportage emphasised that the reporter was highly respected: indeed he had won a Pulitzer Prize.

⁹ 2014 SCC 59.

What was significant for our purposes was that, even in the quality newspapers, there was not the faintest mention of the importance of the evidence to actually doing justice, and of the enormous social harm involved in disabling the system from getting at the real truth. If the judicial system is disabled in this way, then justice becomes only something that journalists talk about, not something that we actually do as a community.

And it is fair to say that the media do not value the careful thought and reflection which characterises the work of what has become indisputably the most deliberative branch of government. That is understandable, given that the demands of the market and the news cycle necessarily breed a "preference for heat over light and simplicity over nuance"¹⁰.

So far we have been speaking of differences which are perfectly understandable given the different roles, each legitimate, which these different institutions perform. But these differences don't explain the emergence of a wave of intemperate criticism of judges which politicians of a populist bent seek to ride.

In an important paper published in 2008 in the *Journal of Judicial Administration*¹¹, Pamela Schulz recorded the results of a number of studies into coverage of the courts by sections of the Australian media. From these studies Dr Schulz discerned a "consistent pattern of reporting which inexorably demands that the justice system be modified"¹². The conclusion of a further article by Dr Schulz and Dr Andrew Cannon¹³ was that:

"It is no longer sufficient, or safe, to rely on traditional media to translate or deliver the information to the public, because they no longer just deliver an accurate records of events. Rather, court reports are now infotainment which is simplified by the use of the discourse of time to create a discourse of disrespect and control over the judicial process."

And of course, this discourse of disrespect enables the political arms of government to delegitimise the work of the courts knowing that they will be supported by the media and will thus garner popular support.

The most pressing challenge comes from media comment in the area of criminal law, and sentencing in particular. Judges are today subjected to a level of criticism which was unknown when I began my time as a lawyer.

It is the sad fact that bad news is more saleable than good news; and a simple story is more saleable than a complex one.

¹⁰ T Mauro, "Five Ways Appellate Courts Can Help The News Media", (2007) 9 *Journal of Appellate Practice and Process* 311 at 312.

¹¹ Pamela D Schulz, "Rougher Than Usual Media Treatment: A Discourse Analysis of Media Reporting and Justice on Trial", (2008) 17 *Journal of Judicial Administration* 223.

¹² Pamela D Schulz, *ibid*, 223.

¹³ Pamela Schulz and Andrew Cannon, "Public Opinion, Media, Judges and the Discourse of Time", (2011) 21 *Journal of Judicial Administration* 8 at 18.

In 1997, Gleeson CJ delivered the Sir Earle Page Memorial Oration. On that occasion he spoke of the problem created by the reaction of politicians to media agitation for "a tough on crime" stance which leads to the cynicism of the law and order situation. Gleeson said:

"It always has been the case that some courts have attracted public attention and some individual cases have received a lot of publicity. However, what constituted widespread publicity even 30 years [ago] was very different from what constitutes widespread publicity today.

It has been said that the public attitude to war in the USA underwent a great change when American families sat down each night to watch television news programmes depicting casualties with unprecedented visual and emotional impact. To an extent, a similar phenomenon may account for the fact that modern societies have become convinced that they are living in the middle of a crime wave. Night after night they see, on their TV screens, victims, or relatives of victims, of violent crime, telling their stories, and being asked whether they are satisfied with the sentences imposed on convicted offenders. Talkback radio programs are filled with people expressing feelings of insecurity and demanding ever-increasing severity of penalties. To all of this, politicians respond by competing with one another to be tough on crime.

This phenomenon is not peculiar to NSW, or to Australia. The same thing is happening in America, England and New Zealand. "¹⁴

This state of affairs has not improved in the years since Murray Gleeson's speech. We cannot allow it to go unchallenged.

There are reasons to think that crime rates are coming down across the countries of the first world. In the July 20th edition of *The Economist* magazine, there appeared a number of articles detailing the fall over the past fifteen years of rates of crimes against persons and property in the western democracies.

In America, for example, the number of violent crimes across the country as a whole has fallen by 32 per cent since 1990 and in the biggest cities by 64 per cent. No-one quite knows why this has occurred.

One suggestion is that the ageing population means that the proportion of 16-24 year old males – the most crime-prone demographic – has declined. The repopulation of the inner cities is also thought to be a contributing factor. Another view is that the increase in incarceration rates is responsible.

The supporters of this view point out that over the past 20 years, the prison population has doubled in the United Kingdom and almost doubled in Australia and the USA. This seems unlikely to be the answer because in Canada and the Netherlands prison populations have actually reduced at the same time as the crime rate reduced. And in the United States, there is

¹⁴ "Who Do Judges Think They Are?", Sir Earle Page Memorial Oration, 22 October 1997.

growing disquiet with the increasing levels of incarceration both on the grounds of expense and effectiveness and on the ground of fairness, given that the prison population clearly reflects social disadvantage due to ethnic background.

The Economist suggests that the explanation for falling crime rates is to be found in better policing, including the advent of DNA testing, surveillance cameras, and private security, all of which have increased the risk of an offender being caught. And cultural change matters too: domestic violence has fallen as wife-beating has been socially stigmatized. Since 1994 self-reported domestic violence has fallen by three-quarters in Britain and two-thirds in the United States.

Our public discourse should be informed by awareness of these realities. But the media has little interest in publishing this information; and governments will not do it because of the political advantages adverted to by Gleeson CJ, or because it would open a debate about the doubtful value of ever more deterrence in sentencing and the mounting costs of imprisoning ever larger portions of our population.

Perhaps it is a job for the JCA, in liaison with Australia's legal professional bodies and our schools, to outflank the media. I wonder whether it might not be feasible to ensure that legal studies' courses at secondary schools and criminal law and criminology courses at our universities are offered written materials or a guest lecture or two on these topics by practising lawyers. That strategy seems to offer a prospect, over time, of deterrorising our populace.

A particularly galling aspect of the media's discourse of disrespect, indeed, almost mystifying, is the now constant refrain that judges are "out of touch" with our fellow citizens because of our elitist self-regard. I say that it is galling, and mystifying, because in Australia at this time in history, the judiciary is more of the people than ever. Most of the people in this room are members of the first generation in their families to attend university.

In recent times, Chief Justice Gleeson¹⁵, Chief Justice de Jersey¹⁶ and Chief Justice Bathurst¹⁷ have all spoken out to make the point that their general experience of life is no narrower than the members of other occupational groups. And why would anyone doubt that in the open and egalitarian society which has flourished in Australia since the Second World War?

In the March 2014 issue of *Current Issues in Criminal Justice*¹⁸, Warner, Davis, Walter and Spiranovic considered media claims and public opinion surveys which suggest that there is a broad public perception that judges are out of touch with what ordinary people think, especially in relation to sentences, which are thought to be too lenient, so that the public is less likely to have confidence in the work of the courts. The article proceeded to examine these perceptions

¹⁵ Gleeson AM, "Out of touch or out of reach", (2005) *The Judicial Review* 7, at 241-253.

¹⁶ de Jersey P, "Address", speech delivered at the Central Queensland Law Association Annual Conference, Yeppoon, 26 August 2006.

¹⁷ Bathurst T F, "Community Participation In Criminal Justice", (2012) *Law Society of New South Wales Journal* 50 at 55-59.

¹⁸ "Are Judges Out of Touch?", (2014) 25 *Current Issues in Criminal Justice* at 729.

by a study of the views of jurors, that is to say, those members of the public who have been most closely exposed to the actual work of the courts.

Their findings were that most jurors did not agree that judges were out of touch with public opinion on sentencing. Even more interesting was the circumstance that some jurors who were prepared to accept that judges were "out of touch" did not think that this was necessarily a bad thing. These were the jurors who themselves disapproved of the populist demand for more punitive sentences¹⁹.

But we are talking about only that small proportion of our fellow citizens who actually serve on juries.

What can judges do?

There is little scope for judges to reach out individually to the broader community. Attempts to do so are likely to foster the perception that we are a proselytising elite who see ourselves as discharging the role of tribune of the people.

An example, not too close to home to be unduly uncomfortable, is Justice Sonia Sotomayor of the United States Supreme Court. Her Honour has made television appearances with Jon Stewart, Stephen Colbert, Katie Couric and Oprah Winfrey. She has appeared twice on Sesame Street. She made appearances at bookstores across the United States promoting her autobiography and on New Year's Day this year she presided over the ball drop in Times Square in New York alongside Miley Cyrus.

Now call me old-fashioned

In April this year, an article in *The Wall Street Journal* quoted Professor David Fontana of George Washington University Law School as saying that by being more accessible and showing a willingness to talk candidly about herself, Justice Sotomayor is exerting a new kind of influence and that by appearing in different places and talking about the law in a different language, her Honour has the potential to be a new kind of liberal judge by appealing to a broader audience. Her fame might bring new followers to the liberal cause. Her humanity, it is said, might make her followers appreciate the liberal cause even more. She has the potential to become what Professor Fontana calls "the people's justice".

Her Honour has obvious popular appeal. It might be something that could translate into a political candidacy. Indeed, it is difficult to see how her efforts are not calculated to serve that agenda rather than an educative role on behalf of the judiciary as a whole. One would not suggest that her enthusiastic accessibility is apt, of itself, to undermine the confidence in which the US public holds its Supreme Court; but what if all nine justices pursued the public cultivation of political constituencies? And perhaps more fundamentally, if the notion of a "people's justice" has any real meaning at all, the way to achieve it is by election of judges.

In this regard, one might cite, as proof of the cynicism if not the intellectual bankruptcy of the criticisms that our judges are "out of touch", that for all the populist sound and fury generated by

¹⁹ Ibid, 739-740.

the shock jocks, there has been no suggestion that the system should be overhauled by the introduction of an elected judiciary. In truth, of course, no sensible person would suggest that change to our community. But we need to be alert to lull the cat promptly should such a suggestion be made. It is not a difficult task.

In the United States, of course, judges in many states are elected. The most startling thing about that is that huge amounts are spent on judicial election campaigns although judicial salaries are low – much lower than in Australia – and, relatively speaking, at an historical low throughout the United States. Last year, Wallace B Jefferson, the highly respected former Chief Justice of the Supreme Court of Texas, resigned his position and returned to private practice in order to ensure that he would be able to send his children to college.

When one pauses to consider how a campaign expenditure of \$1 million for four years' occupation of a job which pays \$150,000 pa can be justified, the answer, however charitable one may be inclined to be, cannot be consistent with judicial independence whether apparent or actual. It is impossible to believe that campaign finance does not come with an expectation of some form of quid pro quo.

Corporations, political parties, unions, trial lawyers, unabashedly seek ideologically compatible state judges because their rulings can affect electoral redistributions, and decisions on workers' compensation and medical malpractice suits.

In 2012, \$30 million was spent nationwide on television advertising alone for state court campaigns, and attack ads are not uncommon.

The content of the advertising which appears in the course of campaigns for judicial office is sometimes nothing short of appalling.

In April this year, an advertisement appeared on television in North Carolina alleging that Justice Robin Hudson had coddled child molesters and sided with predators in a dissenting judgment on the Supreme Court of North Carolina. The advertisement was shown frequently until the primary election. It was not published by either of the judge's opponents in the election, but by a group that received \$650,000 from the Republican State Leadership Committee in Washington, which raises money to promote conservative candidates at the State level. Justice Hudson was forced to respond to the attack on her by spending \$86,000 on an advertisement defending her record.

At the end of April, the Republican State Leadership Committee, which had previously focused on elections to state legislatures and for state governors, announced a Judicial Fairness Initiative²⁰ focused "on educating voters to better understand the ideology of candidates up for judicial branch elections."²¹

²⁰ Eric Eckholm, "Outside Spending Enters Arena of Judicial Races", *New York Times*, 5 May 2014, <http://nyti.ms/lie> (S17).

²¹ Walter, quoted in: Eric Eckholm, "Outside Spending Enters Arena of Judicial Races", *New York Times*, 5 May 2014, <http://nyti.ms/lie> (S17).

The September 1 issue of *Politico Magazine*, an article entitled "Justice for Sale"²² contained some harrowing details in relation to the influence of money on elective judgeships in the United States. In the United States, state courts dispose of 98 per cent of all cases and more than 85 per cent of state judges are elected. Since 2000, state judges vying for election have raised more than \$275 million in campaign funds. There had not been a problem on this scale until that time. The explosion occurred as a result of the work of the political consultant, Karl Rove, who organised the campaign to win majorities on the Supreme Courts of Texas and Alabama.

It is in the state Supreme Courts where the nation's tort wars are waged in cases relating to product liability, workers' compensation and insurance claims. The author of the *Politico* article cites an official of the American Federation of Labor and Congress of Industrial Organizations (the peak union body equivalent to our Australian Council of Trade Unions) as saying: "We figured out a long time ago that it's easier to elect seven judges than it is to elect 132 legislators."

The judges themselves feel the pinch. In 2004, two judges competing for a single state Supreme Court seat raised \$9.3 million between them. That was more than was raised in 18 out of 34 races for the US Senate that year. The winner was Justice Lloyd Karmeier, who commented about the expenditure: "That's obscene for a judicial race. How can people have faith in the system?"

That we have avoided the appalling state of affairs which afflicts the judiciary in the United States is, no doubt, due to a number of factors, structural and cultural. I would venture the suggestion that prominent among these is the professionalism which characterises the work of our courts in which, faithful to the model established so long ago in the relationship between the Inns of Court and the Courts at Westminster, the judges and the legal profession share a common experience of professional development, and lawyers still regard themselves first and foremost as servants of the administration of justice.

The professionalism which is the basis for our claim to legitimacy as the department of government whose province it is to say what the law is, is a bulwark against threats from outside as well as within that department.

The professional associations which have moulded us are our natural allies in this endeavour. They have an enduring historical stake in the success of our institution. The professional bodies are the trustees of the best traditions of the legal profession. They both influence and reflect public perceptions of the judiciary. Rightly, they have a stake in judicial appointments and their views should be heeded. When the professional bodies approve of an appointment they are, and are seen to be, expressing the confidence of the community in the new appointee as a proxy for the citizenry.

The professional bodies which represent the legal profession are our natural allies in ensuring that the public have an accurate understanding of what it is that we do. For this reason we should be exploring strategies of closer engagement with them.

²² Bert Brandenburg, "Justice for Sale", *Politico Magazine*, 1 September 2014, www.politico.com/magazine/story/2014/09/elected-judges-110397.html.

Individual and institutional responsibility

For most of our professional lives the statement of Bowen LJ in *Cropper v Smith*²³, which was cited with approval by the High Court in *J L Holdings Pty Ltd v Queensland*²⁴, served to identify the mission of the courts as focused upon the achievement of justice in the individual case. You are all probably familiar with the passage, but I will read it out nevertheless because it is a beautifully expressed articulation of a great ideal:

"Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace."

In *J L Holdings*, this statement of principle held its ground against the claims of efficient case management as an answer to the growing demands on the system of the administration of justice. The plurality, Dawson, Gaudron and McHugh JJ, said that while "case management ... is an important and useful aid for ensuring the prompt and efficient disposal of litigation" it is not an end in itself and that the "ultimate aim of a court is the attainment of justice"²⁵. And when their Honours spoke of the attainment of justice, they were speaking of justice in the ultimate resolution of a particular case²⁶.

*Aon Risk Services Australia Limited v Australian National University*²⁷, and notably in a joint judgment by Gummow, Hayne, Crennan, Kiefel and Bell JJ, rejected the *Cropper v Smith* approach, and decisively recognised that the doing of justice in the modern world of multitudinous claims on the limited resources of the judicial system is an institutional project with a necessarily systemic element. This recognition was no more than due deference to legislated changes in the rules governing the conduct of litigation which reflected the pragmatic judgment that "[s]peed and efficiency, in the sense of minimum delay and expense, are ... essential to a just resolution of proceedings"²⁸, and that the institutional responsibility of the courts is to "do justice to all litigants."²⁹ The procedures of the court must, therefore, operate with an awareness of the impact of unreasonable demands by individual litigants upon the system of doing justice and upon the reasonable expectations of all litigants that justice will be rendered efficiently and without unnecessary delay.

²³ (1884) 26 Ch D 700 at 710.

²⁴ (1997) 189 CLR 146 at 152-153.

²⁵ (1997) 189 CLR 146 at 154.

²⁶ (1997) 189 CLR 146 at 155.

²⁷ (2009) 239 CLR 175 at 217 [111].

²⁸ (2009) 239 CLR 175 at 213 [98].

²⁹ (2009) 239 CLR 175 at 212 [94].

It behoves us all to accept that the great idea expressed in *Cropper v Smith* is an idea whose time has passed. That is, in my personal view, an occasion for regret; but we cannot indulge that regret so that it becomes recalcitrance.

This institutional and systemic perspective of the work of the courts has implications beyond the need to support case management.

Multiple judgments or joint judgments

And we as judges need to be mindful of how we discharge our institutional role. The administration of justice is not the work of individual judges. Our work is the work of an institution, and we have responsibilities for that institution. Those responsibilities are discharged most directly in the writing of judgments.

In this context, may I turn now to make some brief remarks about the vexed question of multiple or single judgments on appellate courts³⁰?

We have to start with the basic proposition that it is the undeniable right of a judge to give a reasoned judgment in the terms which he or she wants.

Multiple judgments by an appeal court have been described as "one of the glories of the system"³¹. For all that gloriousness though, multiple judgments may also lead to uncertainty and unpredictability, give rise to "extra work for lawyers and, in some cases, [are] responsible for the cost of avoidable litigation."³²

Many of you will have read Mr Heydon QC's essay "Threats to judicial independence: The enemy within"³³ in which he attacks joint judgments, pre and post hearing conferences and other forms of judicial cooperation and collegiate behaviour generally. His thesis is that the avoidance of conferences about cases and adherence to the practice of individual judgments are essential to the maintenance of judicial integrity on appellate courts. Otherwise, individual judges may be overborne by stronger personalities so that there is a failure of the institution.

Mr Heydon QC also expressed the view that it is through diverse reasoning, *obiter dicta* and concurring and dissenting judgments that the incremental development of the common law is promoted. In this respect, he is in eminent company.

Lord Reid, in *Broome v Cassell*³⁴, even thought that multiple judgments conduce to clarity:

"When there are two or more speeches they must be read together and then it is generally much easier to see what are the principles involved and what are merely illustrations of it."

³⁰ Heydon, "Threats to judicial independence or the enemy within", (2013) 129 *Law Quarterly Review* 205.

³¹ R Fox, "Justice in the Twenty-first Century", (2000) Cavendish Publishing Limited at 107.

³² "Justice in the Twenty-first Century", (2000) at 107-108.

³³ (2013) 129 *Law Quarterly Review* 205.

³⁴ [1972] AC 1027 at 1085.

In 2008, Dame Mary Arden described multiple judgments as an expression of judicial independence, in the sense of decisional independence, and accountability³⁵.

Lord Neuburger recently said³⁶ that a single judgment of an appeal court:

"often looks as if it is a work of profound compromise: drafting by committee is rarely a happy or, from the law's perspective, a helpful experience. All too often reasoning can be jettisoned on the road to agreement; thus producing a judgment gnomonic in brevity and founded on the lowest common denominator. Such judgments impede rather than develop the law, and reduce its clarity and predictability."

It has to be said that there can be a real tension between the proper concern not to go beyond a statement of what is strictly necessary to decide a particular case and giving a clear, coherent and forthright statement of why one thinks that a given case should be decided in a particular way. It is, I think, a fair criticism of some joint judgments that it can be difficult to understand why the case has been decided in a particular way.

All this having been said, the right of each appellate judge to write his or her own judgment, like all rights, carries with it institutional responsibilities, one of which is to provide clear, practical guidance to the community and the legal profession. We cannot pretend that we work in isolation: we have institutional responsibilities which those writing academic treatises do not.

In response to "The Enemy Within", Peter Heerey QC wrote in last year's ALJ³⁷:

"In common law systems, judgments are part of the law. One of the functions of law is to provide a guide for conduct. Most citizens want to obey the law, to know what are their rights and obligations in particular circumstances. So there is need, one might almost say a constitutional need, for as much clarity and certainty as possible in judgments. Often it is difficult for lawyers, let alone lay citizens, to wade through multiple judgments, pondering the subtle nuances which emerge and how they impact on the ratio decidendi, if there is one. This is quite apart from the time taken merely in reading multiple accounts of non-contentious factual narrative and procedural history."

Timeliness

One point which can be made here is that a judge who insists upon always writing separately is likely to cause delay in the completion of the work of the court. Only rarely would it be consistent with the irreducible level of professional commitment to the success of our institution for any judge to delay the giving of a decision in any case by insisting that his or her voice be heard. Especially is that so when that voice will not affect the outcome of the case.

³⁵ Arden, "A Matter of Style? The form of judgments in common law jurisdictions: A comparison", Conference in Honour of Lord Bingham, 20 June 2008, at 6.

³⁶ "Developing Equity: A view from the Court of Appeal", Chancery Bar Association Conference, 20 January 2012, at 6 [22].

³⁷ Heerey, "The Judicial Herd: Seduced by suave glittering phrases?", (2013) 87 *Australian Law Journal* 460 at 463.

A failure by the courts to resolve the controversies which come before them as expeditiously as possible means that the courts, as institutions, are letting the community down. They are also risking irrelevance.

If one looks at CLR's for the last two years of each of the Mason, Brennan and Gleeson Courts and the most recent two years of the French Court, one sees some interesting figures. In the last two years of the Mason Court, there were 78 reported cases; there was a single majority judgment in 36 of them. The average time between argument and judgment was 241 days.

In the Brennan Court, there were 65 reported cases, but only 12 were decided by a single majority judgment. The average time between hearing and judgment was 224 days.

In the Gleeson Court, there were 96 reported decisions, of which 30 involved a single majority judgment. The average time between hearing and judgment was 138 days.

Over the last two years of the French Court, there were 96 reported decisions, of which 38 involved a single majority judgment. The average time between hearing and judgment was 87 days.

Now obviously one cannot make too much of these figures. For example, the Mason and Brennan Courts found themselves deciding more of what we regard as landmark cases than has been the case more recently when it might fairly be said that we are in a period of consolidation.

But the figures are not entirely without significance. They do tell us some things: first, it is evident that there has been a trend towards more joint judgments; and secondly, that trend is associated with a substantial reduction in the delay between hearing and judgment. And that is not a bad thing.

Coherence and clarity

Lack of clarity and predictability in the law creates "more litigation"³⁸. More litigation means greater cost in terms of money and time, and is wasteful of the resources of the community. It is essential therefore that, as far as it can reasonably and properly be, the law is clear, certain and predictable.

A single judgment may sometimes be the best way to afford authoritative decisive guidance. Sometimes, not always, it may be the only effective way. And where they are possible, judgments of the Court are desirable because they are inherently more authoritative, and have the potential, at least, to be more conducive to clarity.

Anything that can be done to help lawyers give confident advice and so lessen litigation is a good thing. By providing a clear and authoritative ratio in a single majority judgment, we can try to reduce the legal costs, lost opportunities and inefficiencies which are consequential on

³⁸ Atiyah, "Justice and Predictability in the Common Law", (1992) 15 *University of New South Wales Law Journal* 448 at 451.

uncertainty – and in this the courts fulfil their duty to the development of the law, and their duty to society.

Coherence and authority

Even Sir Frank Kitto, who was not generally in favour of joint judgments, acknowledged³⁹ that "one great benefit of a joint judgment" is the certainty of the statement of the legal rule because "with several judgments reaching the same ultimate conclusion there is often uncertainty as to whether differences of opinion or emphasis indicate differences of substance."

Anyone who doubts the desirability of a single judgment as a means of providing clear authoritative guidance to lower courts, and to the legal profession, and through it, to the community, should read the High Court's decision in *HML v The Queen*⁴⁰ where there were six separate and disparate judgments concerning the admissibility of evidence of uncharged acts in cases of alleged sexual assaults and the appropriate directions to be given by trial judges to jurors.

In the area of admissibility of evidence and directions to juries, clarity, above all else, is a necessary attribute of authority; and if guidance is to be worthwhile it must be authoritative.

And there is a larger implication here for the institution which makes the common law. If judges can't get within cooe of agreement on the articulation of a rule of law, then perhaps there is either something wrong with the rule, or with the functioning of the institution whose function it is to articulate it.

In addition to *HML*, can I add some examples of civil cases where multiple judgments have led to an embarrassing lack of coherence: *Northern Sandblasting Pty Ltd v Harris*⁴¹; and *The Commonwealth v Verwayen*⁴².

In tort law, there is *Perre v Apand Pty Ltd*⁴³ where the seven separate judgments on the recovery of negligently inflicted economic loss did little to clarify the learned muddle of the five separate judgments (out of five) delivered in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*⁴⁴.

In *Crimmins v Stevedoring Industry Finance Committee*⁴⁵, six different points of view were developed in relation to the circumstances when the common law duty of care will oblige a statutory authority to exercise its statutory powers. A significant measure of clarity and coherence was restored by the agreement of Gaudron J with Gummow and Hayne JJ as members of the four to three majority in *Graham Barclay Oysters Pty Ltd v Ryan*⁴⁶.

³⁹ Kitto, "Why write judgments?", (1992) 66 *Australian Law Journal* 787 at 797.

⁴⁰ (2008) 235 CLR 334.

⁴¹ (1997) 188 CLR 313.

⁴² (1990) 170 CLR 394.

⁴³ (1999) 198 CLR 180.

⁴⁴ (1976) 136 CLR 529.

⁴⁵ (1999) 200 CLR 1.

⁴⁶ (2002) 211 CLR 540 at 570 [58], 596-597 [145]-[147].

In the fields of constitutional and defamation law, the muddles which were *Theophanous v Herald & Weekly Times Ltd*⁴⁷ and *Stephens v West Australian Newspapers Ltd*⁴⁸ were an embarrassment until the unanimous judgment in *Lange v Australian Broadcasting Corporation*⁴⁹.

Lange is a great example of the value of a joint judgment in settling the law. It may not be too much to say that the idea of an implied constitutional guarantee of free political communication may not have survived if it had continued to fray at the edges as individual attempts to articulate the content of the freedom failed to provide sufficient common ground to allay scepticism as to whether the discovery of the implied freedom was an unprincipled overreach.

By way of another and even more venerable example, the immediate authority of the *Engineer's Case*⁵⁰ was due in no small part to the power of the single voice in which the majority view was expressed. It resolved great constitutional questions, but its decisive power could not be attributed to the felicity of its expression – Sir Isaac Isaacs' rather orotund prose is not a pleasurable read – nor the logical force of his argument. The abiding influence of the decision rests upon the authority of its unified statement of the position, rather than upon the quality of the reasoning and expression of the judgment itself, which Professor Sawyer described, not unfairly, as "one of the worst written and organised in Australian judicial history"⁵¹.

Similarly, it was the authority of the single voice of the joint majority judgment in *R v Kirby; ex parte Boilermakers' Society of Australia*⁵² which gave the quietus to the heresy which had prevailed between 1926 and 1953 in the line of cases cited by Williams J in dissent⁵³ that the Arbitration Court was a body properly constituted as a federal court created under Ch III of the Constitution.

The joint judgment in *Cole v Whitfield*⁵⁴ afforded an authoritative statement of the scope and effect of s 92 of the Constitution. It may be said, as it usually is, that the Court, having established the settled test in *Cole v Whitfield*, then fractured it in the very next case, *Bath v Alston*⁵⁵, as to the application of that test to the facts of the case. But to focus on that circumstance is to fail to recognise the historic success of *Cole v Whitfield* in removing the uncertainty surrounding s 92, its success being reflected in the vast reduction in litigation concerning s 92. Section 92 cases have become, over the last 20 years, a rarity. And that, too, is a good thing.

⁴⁷ (1994) 182 CLR 104.

⁴⁸ (1994) 182 CLR 211.

⁴⁹ (1997) 189 CLR 520.

⁵⁰ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

⁵¹ G Sawyer, "Australian Federalism in the Courts", (1967) at 130, cited by Callinan J in *Australian Workers' Union v The Commonwealth of Australia (The Work Choices Case)* (2006) 229 CLR 1 at 308 [747].

⁵² (1956) 94 CLR 254.

⁵³ (1956) 94 CLR 254 at 316.

⁵⁴ (1988) 165 CLR 360.

⁵⁵ (1988) 165 CLR 411.

And the same point may be made of the plurality decision in relation to s 90 of the Constitution and excise duties in *Ha v New South Wales*⁵⁶ after decades of uncertainty generated by multiple judgments in which a "ratio decidendi" could not be discerned.

The High Court

Clarity of statement is important for all appellate courts, but it is especially important for the High Court, as a court of ultimate appeal. It is to be remembered that the legislature was persuaded thirty years ago to allow the Court to determine which appeals it should take up, in order to allow the court better to perform its function of settling controversies involving questions of legal principle. Given the history of the adoption of the special leave filter, it is particularly incumbent on judges of the High Court as an institution to strive to achieve that end.

Gleeson CJ, writing extra-judicially in 2000, referred to the criticism of the length and diversity of the reasons for judgment given by the High Court. He attributed the phenomena which gave rise to this criticism to "the individualistic spirit" of the judges who constitute the Court⁵⁷. Significantly, however, he did not seek to suggest that the criticism was devoid of justification.

No doubt it is of the first importance that every judge should decide each case conscientiously, and to do that it may be necessary to go a long way towards completing one's own draft. But that does not mean that one must publish a separate judgment.

As our colleague Kiefel J noted in last year's Sir Richard Blackburn Lecture, Sir Robert Menzies believed that at the earliest days of the High Court, Barton J, wrote separate reasons for judgment, but hearing Griffith CJ read his reasons in court (as they did in those days), would put his draft away and simply concur with the Chief Justice on the basis that to seek to add to the principal judgment was to risk compromising its clarity⁵⁸.

The practices of collaboration which are developing within most of the appellate courts in Australia are not out of line with modern practice in the United Kingdom. In Professor Alan Paterson's recently published book *Final Judgment: The Last Law Lords and the Supreme Court*, there is an account of his interviews with the judges of the House of Lords in its last few years before October 2009 and the Supreme Court of the United Kingdom thereafter. It is apparent from these accounts that some of the Law Lords lobby others, some are willing to consider changes to their draft judgments, and some are not.

What is particularly interesting for us is Professor Paterson's observation that since the creation of the Supreme Court, there has been a "notable increase in collaborative team-working and interactive dialogue."⁵⁹ They have adopted the practice of short pre-hearing meetings, more debate after the hearing and working together to produce joint judgments.

Lord Neuberger, speaking at the Annual Conference of the Supreme Court of New South Wales on 1 August this year, "emphatically disagreed" with the view that discussions between appellate

⁵⁶ (1997) 189 CLR 465.

⁵⁷ M Gleeson, *Rule of Law and the Constitution*, ABC Books, Sydney (2008) at 89.

⁵⁸ "Reflections on the High Court: its Judges and Judgments", (2013) 37 *Australian Bar Review* 102 at 103, fn 1.

⁵⁹ A Paterson, "Final Judgment: The Last Law Lords and the Supreme Court", (2013), Hart Publishing.

judges about their judgments are wrong in principle. Lord Neuberger's view was that the collegiate character of a court which consists of more than one judge obliges each individual judge to do his or her best to ensure that the court "produces as clear and coherent a judgment or set of judgments as is consistent with each member's opinion."⁶⁰

It has been my experience that collaboration sharpens up a joint judgment and actually contributes to the rigour and richness of the reasoning. To the extent that this removes unnecessary or hazy or self-indulgent commentary or observations, that too is a good thing.

I should say that it has been my experience that there are real advantages to judicial cooperation in terms of doing my job as an individual judge. I find the insights of colleagues very valuable. There are often angles to the case or details of the evidence which I have missed while reading the parties' written submissions before the hearings and which are supplied at the pre-hearing conference. I do not think that there is any harm in being open to this kind of assistance.

Indeed, it seems to me that there is something distinctly quixotic in the notion that one should make a deliberate effort to avoid assistance from people who are quite likely to be the best lawyers to have considered the problem at hand.

In summary on this point, I would respectfully adopt what was said by our colleague, Kiefel J, in this year's Blackburn Lecture⁶¹:

"While joint judgments are not always possible, for the most part reasonable attempts should be made to reduce the number of judgments in any matter. It is the institutional responsibility of the members of a court to do so, in the pursuit of clarity, certainty and timeliness. A court may be comprised of individual judges, yet the expression of their individualism should on occasions be tempered. I do not suggest that judges should not write separately from their colleagues. I merely suggest that we should ask ourselves: for what reason am I doing so?"

Conclusion

While a judge must ultimately decide cases in the loneliness of his or her conscience, the ideal of fairness to which we seek to give effect is not the product of individual virtue or wisdom or intuition; it is an institutional achievement. It depends on the understanding and disciplined observance of rules deriving from the practice of a distinctive professional ethos developed over a millennium.

It was the professional association of barristers and judges which originated in the Inns of Court, aided no doubt by the Reformation, which fixed the character of the common law and its processes as something quite different from the civil law system rooted in the academic treatment of Roman law and canon law.

⁶⁰ Lord Neuberger, "Sausages and the Judicial Process: the Limits of Transparency", Annual Conference of the Supreme Court of New South Wales, 1 August 2014.

⁶¹ S Kiefel, "The Individual Judge", (2014) 88 *Australian Law Journal* 554 at 560.

That professional association and the ethos which binds its members has been one of the major dynamics in the development of the common law in Australia. It has been, and remains, crucially important.

Sometimes, in our enthusiasm to maintain our independence, including our independence from each other, we lose sight of these institutional connections without which we could not even begin to face the challenges of doing justice to our rights-conscious and self-confident fellow citizens.

I conclude by saying that the institutional ethos which enlivens that institution is a practical expression of the best of us. We cannot hope to be wiser or better than the institution of which we are a part. We, as members of our ancient profession, must address the implications of this truth for the way in which we discharge our judicial functions.