LAW INSTITUTE OF VICTORIA DINNER 1995 The Hon Sir Gerard Brennan, AC KBE Chief Justice of Australia

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MELBOURNE - 26 MAY 1995 The Hon Sir Gerard Brennan, AC KBE

Chief Justice of Australia

The task which your President has assigned to me is to respond to the welcome which has been extended to your guests. Your guests are drawn from many walks of life, and the diversity of our occupations is a pointer to the varied fields in which your members practise and thus to the significance of legal practice to the public and commercial life of Victoria. The law has become more complex as demand increases for legal solutions to contemporary problems. Some of those problems did not exist in earlier times; others were solved by earlier generations according to manners and morals then generally accepted. Many of the problems which once were taken to parents or mutual friends, to priest or minister, to the member of Parliament, to the local doctor or sergeant of police or to the bookkeeper in the store are now taken directly to the solicitor's office and sometimes to the courts. Today, lawyering has become a multi-faceted skill.

I suspect that legal practice has become less enjoyable as the pressures have mounted. Indeed, if I hark back nearly half a century I can remember a dear old friend who regarded his undemanding practice at the Bar as a pleasant backdrop to a life of bibulous discussion of literature, history and humanity. He was briefed by the Crown as a junior to a very demanding leader who asked him to dig out all the cases on a minor point in the pending litigation. "I'll get out a couple of the main cases" was his undertaking at a conference with the instructing solicitor and the head of the client department. "No" said the leader "I must have every case on the point before we go into Court, otherwise I shall not be able to argue the case." "Well" said my friend who never understood why he lost the patronage of the Crown Solicitor from that time onwards "you can stay in your seat while I argue it myself!" Characters, as we all know, seem to have left the law.

This is not the occasion to speak about specialization, office and personnel management and professional standards. But it is appropriate to recognize the increased significance of the role of the political branches of government - the Legislature and the Executive - in the solution of today's legal problems. They are the makers of our statutes and regulations, the promulgators of guidelines and policies that affect significantly so many aspects of modern life.

Sometimes there appears to be a tension between judicial power and the powers of the Legislature and the Executive. In some respects, there must be a tension. It is the function of the judicial branch to ensure that the exercise of power by the other branches of government conforms to the law - that is, there is no assumption of power that has not been lawfully conferred and the power is exercised in a manner which is procedurally fair. If legislative or executive power were exercised without the limits of the law, injustice if not tyranny could run without restraint. As the judicial branch of government is appointed to interpret and administer the law, it is inevitable that the law's application will be seen by some to be a frustration of the powers of an elected government. This is a misconception, but it has gained some popular currency. The courts do not have nor do they claim a jurisdiction to frustrate the powers of an elected government, but they have and must exercise a jurisdiction to prevent an elected government from exercising powers which it does not have or from exercising the powers which it does have by a procedure which is unfair.

Except on those rare occasions when a legislature goes beyond its powers, the Courts uniformly defer to the legislative will. Sometimes there will

be a judicial comment on the injustice or inefficiency of a particular statute where that injustice or inefficiency has surfaced in litigation. But the respect for the Legislature is profound and respect for the expression of the legislative will is absolute. This attitude depends on more than legal theory or judicial acknowledgment of the importance of a separation of powers. The Courts acknowledge the superior ability of the Legislature to acquire the information necessary for just legislation; to balance the interests of varying groups in the community; to estimate the costs of a particular proposal and, most significantly of all, to interpret the will of the community. It is the very lack of independence from popular influence that fits the political branches of government for the exercise of legislative power. It is politicians, not judges, who must take responsibility for the laws enacted by the Parliament and for their operation. A cry of injustice when the statute laws are applied sounds on deaf judicial ears. Such cries must be addressed to the political branches of government. This is at the heart of our representative democracy. In matters of statute law, the courts are not the translators of democratic opinion; theirs is the more pedestrian role of interpreting the language of the law enacted by the Parliament. If it were otherwise, the rule of law and the democratic process would be subverted.

To no less extent does the judicial branch of government acknowledge the proper role of the Executive and its superior capacity to exercise the prerogative and discretionary powers confided to it, to administer budgets, to set priorities, to provide public services and to manage a bureaucracy. The legitimacy of executive power is rooted in the Westminster system of responsible government. Subject to any review on the merits which the Parliament may have empowered an Administrative Appeals Tribunal to exercise, the bureaucracy is responsible to the Minister and the Minister to the Parliament for the exercise of executive power. The Courts will review executive action only to ensure that the exercise of executive power is within the boundaries of the law, and by a procedure that accords natural justice to the affected party or parties. But the Courts do not and cannot review the desirability of legitimate policies or strike down decisions which are fairly made in accordance with legitimate policies. The Courts are fitted to determine and enforce individual rights; they are ill-fitted to settle administrative policies that must take account of the diverse interests of the whole community.

A Westminster democracy is a complex system. It requires the experience and expertise, the diverse backgrounds, the intelligence and industry of those in the political branches of government. Political skills are sometimes derided for subjecting principle to expediency but, in a changing and multi-cultural society when divergent aspirations must be evaluated in the formation or alteration of the law, expediency is not always an impermissible or undesirable influence. But as expediency is foreign to the judicial process, the Courts must leave law reform of the statute law and even some rules of the common law to the political branches of government.

The democratic system calls for skilled politicians but it calls also for an independent and competent judiciary which will apply the law equally to the powerful and those on the inner circles of society on the one hand and to the unempowered and those on the margins of society on the other. It is a sobering reflection that any restriction imposed on the Courts' power to extend the protection of the law may leave those who today favour the restriction without the protection of the law tomorrow. The protection of the law depends upon a competent judiciary independent of any class, interest group or power base. It is, of course, the responsibility of the Executive Government to ensure that our society has and retains such a judiciary. A faithful performance of this duty makes political sense; and patent dereliction of this duty spells political trouble, for the community understands the importance of a competent and independent judiciary to a free society.

Each of the three branches of government must maintain that mutual respect for the functions of the other branches which the doctrine of separation of powers requires. Such tension as exists between the judicial branch and the political branches of government should be merely the manifestation of

the checks and balances which the separation of powers creates. The purpose of that separation is to maintain a society free from injustice and tyranny.

I fear I have been speaking at a high level of abstraction, but it has a real significance to today's forms of legal practice. The client whose interests require advocacy before the political branches of government may call for services of a very different kind from those which are required for advocacy before the courts. Advice of a kind not found in the books may be needed to achieve the legitimate objectives which the client seeks. It may not always be the function of the legal practitioner to provide these services, but if they are to be provided, more than the traditional skills are required and engagement with other professions may be necessary.

Among your guests this evening you have members of the political branches of government and representatives of other professions. The Law Institute represents practitioners who have met the challenge of our complex society and have ventured into fields beyond those occupied by practitioners in earlier times. Nonetheless, I respectfully suggest that it is necessary to keep in mind that the ethos of the profession, the relationship between practitioners and its standards of service and ethical conduct are derived from the character of the profession as Ministers of the Judicial branch of government.

I thank you for your hospitality on behalf of all your guests and in particular my wife and I thank you for the warmth of your reception.