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THE STATE OF THE JUDICATURE

OPENING OF 30TH AUSTRALIAN LEGAL CONVENTION

MELBOURNE, 19 SEPTEMBER 1997

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Chief Justice of Australia

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Every society has a Judicature - the dictatorship as well as the democracy, the simpler societies of earlier centuries as well as the sophisticated societies of the modern day. It is the institution which avoids self-help in resolving disputes and controls excesses of power. Its decrees give concrete effect to the laws of the State. What the Judicature does or does not do largely determines the character of the society in which we live. So the State of the Judicature is the concern not only, nor even chiefly, of the officers of the Judicature; rather it is the concern of the people of Australia who are protected by, and are subject to, its jurisdiction.

What are the functions which the Australian people expect the Judicature to perform? That question is hard to answer unless we have answers to some even more fundamental questions: should there be protection against excesses of governmental power, including the police power? how far should a majority's will or a

majority's interest prevail over the will or interest of a minority? should the powers of a democratically-elected legislature be limited? should the policies and actions of an executive government be subject to judicial review or control? should there be any regulation of economic and industrial power other than the market? The answers which most Australians would give to these and other fundamental questions all point to the obvious conclusion that Australians, like every civilized society, wish to be ruled by law, not by popular clamour or by raw power. Australia has no place for the police State, the show trial, the oppression of minorities, unfettered and arbitrary governmental power, or the tyranny of officialdom or great economic or industrial might. The law, impartially and competently administered, is the infrastructure of our society and the protector from conduct that would disrupt it. It is our assent to the rule of law that makes us a free and confident nation.

If we are to be governed by the rule of law, we must have a Judicature to administer it. The characteristics of that Judicature reflect the functions it is charged to perform. First, it must be a Judicature that is and is seen to be impartial, independent of government and of any other centre of financial or social power, incorruptible by prospects of reward or personal advancement and fearless in applying the law irrespective of popular acclaim or criticism. Second, it must be a competent Judicature; there must be

judges and practitioners who know the law and its purpose, who are alive to the connection between abstract legal principle and its practical effect, who accept and observe the limitations on judicial power and who, within those limitations, develop or assist in developing the law to answer the needs of society from time to time. Third, it must be a Judicature that has the confidence of the people, without which it loses its authority and thereby loses its ability to perform its functions. Fourth, it must be a Judicature that is reasonably accessible to those who have a genuine need for its remedies.

These being the criteria of a Judicature required to maintain the rule of law in a free and confident nation, they are the reference points for considering the State of the Judicature.

1. Impartiality

Impartiality is the supreme judicial virtue[1]. Partiality and the appearance of partiality are both incompatible with the proper

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1 "Judges and Lawmakers", (1976) 39 *Modern Law Review* 1 at 4.

exercise of judicial power. The one poisons the stream of justice at its source; the other dries it up. Lord Devlin commented[2] that -

> "The Judge who does not appear impartial is as useless to the process as an umpire who allows the trial by battle to be fouled or an augurer who tampers with the entrails."

That is why judges and lawyers place such emphasis on judicial independence. In July this year, the American Bar Association Commission's *Report on Separation of Powers and Judicial Independence* noted that "Judicial independence is not an end in itself but is a means to promote impartial decision-making and to preserve the supreme law of the land". Chief Justice Lamer of Canada acknowledges[3] that the fundamental purpose of judicial independence is the maintenance of the rule of law but, he observes -

> "There is an unfortunate tendency on the part of some to characterize judicial independence as a principle that enures primarily if not exclusively to the benefit of the judiciary itself. While it would be disingenuous to deny that the judiciary benefits from security of tenure and financial security, it must be emphasized that the

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2 ibid.

3 "The Tension Between Judicial Accountability and Judicial Independence: A Canadian Perspective" by Rt Hon Antonio Lamer, PC, Singapore Academy of Law Annual Lecture (1996) at 4.

primary beneficiary of the principle of judicial independence is society as a whole."

One of the most important doctrines to emerge in recent times is the doctrine of constitutional incompatibility which precludes federal Judges from being appointed to perform functions incompatible with the holding of judicial office[4]. No occasion has arisen for determining whether a similar doctrine applies in relation to State judges.

In April of this year, the Chief Justices of the States and Territories drew pointed attention to the threat to judicial independence in the appointment of acting judges "to avoid meeting a need for a permanent appointment". And they objected to the appointment by the Executive Government of a serving judge to any position of seniority, administrative responsibility, increased status or emoluments where continuance in the office was in the discretion of the Executive Government. Judicial independence is at risk when future appointment or security of tenure is within the gift of the Executive. Notwithstanding the clear intent of the Chief Justices' declaration, it seems that economic considerations induce

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4 See *Wilson v The Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 70 ALJR 743; 138 ALR 220.

Governments to make acting appointments. However, the increasing volume of litigation must lead ultimately to permanent appointment sufficient to cope with the workload. In New South Wales, there are currently 5 acting judges on the Supreme Court and over 30 on the District Court. These appointments are said to be necessary to dispose of a temporary backlog.

In Canada, judicial independence has been held to require what the Supreme Court has called "institutional independence", that is "the institutional independence of the court or tribunal over which [a judge] presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government."[5] Chief Justice Dickson said[6]:

> "The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system."

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5 *Valente v The Queen* [1985] 2 SCR 673 at 687; *The Queen v Beauregarde* [1986] 2 SCR 56 at 70; see Ian Greene, "The Doctrine of Judicial Independence Developed by the Supreme Court of Canada", (1988) 26 *Osgoode Hall Law Journal* 178.

6 *Beauregarde* [1986] 2 SCR 56 at 72.

The theory behind the concept is not hard to discern. It is the same theory that underlies the Australian doctrine of incompatibility. The Courts must not be permitted to be too closely associated with or affected by the political branches of government. But some association is involved in the obtaining of resources. A Government which effectively controls the administrative and financial resources required by a Court could, if it were ill-advised enough to do so, withhold what the Court requires if the decisions of the Court were unpalatable to that Government. A decision taken on those grounds would, of course, be a blatant attempt to influence judicial decision-making.

The concept of institutional independence presents some jurisprudential difficulties. The Constitution reposes the power of appropriation[7] in the Parliament on a recommendation by message from the head of the Executive Government[8]. Similar provisions govern appropriation of funds for State Courts. It has always been the practice - indeed, an essential constitutional convention - that Executive Governments, both of the Commonwealth and the States,

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7 Constitution, ss 53, 83.
8 Constitution, s 56.

seek an appropriation and Parliament appropriate sufficient funds to permit the Courts to perform their constitutional functions. In times of financial stringency, there is a risk that Governments might regard the Courts simply as another Executive agency, to be trimmed in accordance with the Executive's discretion in the same way as the Executive is free to trim expenditure on the functions of its own agencies. It cannot be too firmly stated that the Courts are not an Executive agency. The law, including the laws enacted by Parliaments or by Executive regulation and including Executive orders affecting the government of the country, goes unadministered if the Courts are unable to deal with ordinary litigation. It is insufficiently appreciated that laws, regulations and orders, which may give effect to high government policy, would be mere points for argument if the Courts were not giving them effect in ordinary litigation.

The Courts cannot trim their judicial functions. They are bound to hear and determine cases brought within their jurisdiction. If they were constrained to cancel sittings or to decline to hear the cases that they are bound to entertain, the rule of law would be immediately imperilled. This would not be merely a problem of increasing the back-log; it would be a problem of failing to provide the dispute-resolving mechanism that is the precondition of the rule of law.

It should never be forgotten that the availability and operation of the domestic Courts is the unspoken assumption on which the provisions of our Constitution and laws are effected, on which the operation of the entire structure of government depends, on which peace and order are maintained, on which commercial and social intercourse relies and on which our international credibility is based. Constitutional convention, if not constitutional doctrine, requires the provision of adequate funds and services for the performance of curial functions.

Courts, being labour intensive, draw on the public purse for their maintenance. So do the political branches of government, the Parliament and the Executive. Governments have been attracted to the notion of "user pays" in order to assist in the defraying of the costs of the judicial branch, seemingly disregarding the fundamental importance of ensuring the effective enforcement of the rule of law. Sir Richard Scott, head of the Chancery Division in England, in a recent speech[9] said:

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9 Cited by Lord Ackner, House of Lords Hansard of 14 July 1997 at 865; see also Sir Richard's interview reported in "*The Times*", 2 December 1996.

> "the civil justice system is an integral and indispensable part of the structure of administration of justice that must be put in place by every State in which public and private affairs are to be conducted in accordance with the rule of law; and ... a policy which treats the civil justice system merely as a service to be offered at cost in the market place, and to be paid for by those who choose to use it, profoundly and dangerously mistakes the nature of the system and its constitutional function".

Recently, the English Divisional Court judicially reviewed the Lord Chancellor's Order which increased the scale of Court fees and repealed provisions that had previously relieved litigants in person who were in receipt of income support from the obligation to pay fees. In declaring the repeal to be unlawful, Laws J said[10]:

> "Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically - in effect by express provision - permits the executive to turn people away from the court door."

The Lord Chancellor did not appeal. "User pays" is consistent with the rule of law only to the extent that every genuine would-be user can pay. "User pays" puts a premium not on genuine need for legal protection but on financial power.

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10 *R v Lord Chancellor; Ex parte Witham* [1997] 2 All ER 779.

The passage of legislation which adds to a Court's caseload is not always matched by an increase in the Court's resources. In modern times, when so many personal and social problems have been thought to be amenable to legal solution, Parliaments have created what are deemed to be appropriate rights or liabilities and thus curial jurisdiction has been extended. The impact of these laws on the Executive and its agencies may be factored in to the legislative decision, but the increase in caseloads seems to be a less pressing consideration. If economic stringency invites reconsideration of the funding levels for Courts, the first question that arises is: what laws must be repealed or what special provisions must be enacted to lighten the Court's caseload?

The Executive Government is not the only threat to judicial independence, though the Executive's powers of appointment and preferment and its influence, if not control, over judicial remuneration and judicial resources make independence from Executive influence a continual concern for the Judiciary. Judges are conscious of other influences that may appear to affect their impartiality. To avoid any such appearance, judges often withdraw from political, financial or social contacts which they would otherwise enjoy. Sometimes prudence and a high regard for the judicial office are regrettably misinterpreted as a withdrawal to an ivory tower.

An embarrassing erosion of judicial impartiality can originate from a judge's expression of a view touching either a political issue or an issue that might arise in the course of litigation. If such a view is expressed in a speech, the judge has obviously thought about the topic and become publicly committed to the view. But judges must not become committed to views which might disqualify them from sitting. The public perception of judicial impartiality has been nurtured by a traditional reticence in speaking publicly on many topics. Clearly judges must refrain from intruding into political matters and from expressing committed views on matters of public controversy. The desirable policy was expressed by my distinguished predecessor, Sir Anthony Mason, in these terms[11]:

> "Putting to one side the exceptional case which requires an exceptional response, I favour a cautious approach. Judicial reticence has much to commend it. It preserves the neutrality of the judge; it shields him or her from controversy. And it deters the more loquacious members of the Judiciary from exposing their colleagues to controversy."

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11 "Judicial Independence and the Separation of Powers - Some Problems Old and New", *The Leon Ladner Lecture*, (1989) at 21.

Chief Justice Lamer has drawn attention to another matter which, if not properly understood and developed, would pose some threat to judicial impartiality. He speaks[12] of "social context education" which is "designed to make judges both more aware of and better able to respond to the many social, cultural, economic and other differences that exist in the highly pluralistic society in which ... judges now perform their important duties." The Chief Justice welcomes the availability of programmes of this kind. And so do I. The AIJA Seminar on Equality and Justice in October 1995 sharpened judicial awareness of the need to guard against stereotypes or assumptions based on gender, aboriginality and cultural awareness. But, the Chief Justice warns, it is essential that the ultimate control of the design of such programmes remain with the Judiciary. Again I respectfully agree. No instruction or advice about judging, however seemingly innocuous it may be, can be accepted by judges from the Executive Government. It is equally inappropriate to permit non-governmental interest groups to control the design of judicial educational programmes touching their own special interests,

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12 "The Tension Between Judicial Accountability and Judicial Independence: A Canadian Perspective" by Rt Hon Antonio Lamer, PC, Singapore Academy of Law Annual Lecture (1996) at 9.

especially when those interest groups are likely to appear in litigation or to stimulate litigation to promote their agenda.

2. Judicial and Practitioner competence

The level of competence among practitioners who appear before the Courts is sustained by professional structures, especially by the professional and financial independence of barristers who continue to perform most of the work of advocacy. That independence is conducive to the discharge of the advocate's duty to the Court on which the efficient disposition of cases depends. However, a recently emerging phenomenon occasions some misgiving. Some advocates have assumed the role of public relations officers for their clients, making their client's case to the media and offering comment on the Court's judgment. That role is inconsistent with the advocate's duty to the Court. The Court can have no confidence that such an advocate will fairly and candidly assist the Court on both fact and law. And the accolade or lament that the advocate presumes to express about the Court's judgment belittles the Court's authority. It is commendable for advocates to provide journalists with information to assist in the accurate reporting of a case, so far as the material is on the public record, but if Court proceedings were the postscript or the prelude to counsel's media

release or court door interview, the courtroom becomes a mere backdrop to counsel's media performance.

The competence of the judiciary has not hitherto given grounds for concern. Nevertheless, the Council of Chief Justices of Australia and New Zealand encouraged an initiative on the part of the Australian Institute of Judicial Administration to establish a National Judicial College. The project was examined but was abandoned for want of funding. The AIJA, in conjunction with the Judicial Commission of New South Wales, has instituted a highly successful and much appreciated Judicial Orientation Course. It has the support not only of the Council of Chief Justices but also of some of the Pacific Courts which have nominated newly-appointed judges to attend. The availability of places and the frequency of courses are limited by the available resources.

In recent times and with comparatively few exceptions, the professional skills of the judge have been adequate for the discharge of his or her judicial duties. Of course, stories of judicial idiosyncrasies abound in the common rooms of the Bar, but the proportion of cases in which judicial incompetence has been the cause of a failure to do justice according to law has been small. For the most part, Executive Governments of Commonwealth and State have been conscious of the need to make judicial appointments on

merit, although infrequently political or personal commitments by governments have raised a doubt about a particular appointee.

Judicial competence is not instantly acquired. It is the product of long professional study and experience. The call for more judges to deal with increasing caseloads and the diminished attractions of judicial office now give some ground for concern about the ability of Governments to continue to recruit judges possessed of the desirable levels of scholarship and experience. Where are those judges to be found?

Leading advocates have traditionally been the source of judicial recruitment and, in my opinion, rightly so. That status gives an assurance that the appointee is qualified in the opinion of the Court in which he or she usually practises to research, identify and refine the principle of law applicable to a case and to deal efficiently with evidentiary questions, that the appointee is accustomed to subordinate personal convenience to legal duty, that the appointee is accustomed to act in a public forum, to be exposed to criticism in the event of a failure to live up to high professional standards and has demonstrated an independence of mind and conduct that will stand him or her in good stead in a judicial office.

The need for practical experience is not restricted to the trial Courts. In the Appellate Courts, where there is more room for development of the law than in the Courts of first instance, knowledge of legal authorities and a capacity for logical analysis are not a sufficient warrant of competence. Experience and the elusive quality of wisdom are needed to develop and articulate legal principle consonant with the enduring values and practical needs of society. Efficiency, no less than independence, requires that the judges of every level of Courts be accustomed to the sophisticated dialogue between fact and law, between principle and practice.

But, you may ask, how can the judicial recruiting of leading advocates be maintained? The attractions of judicial office have diminished in recent years. The problem is not merely financial, although that has been significant enough. The disparity between the earnings of experienced advocates and the remuneration of judges has been notorious and Governments have often been unable to obtain the services of those who are most qualified for judicial office. Practitioners are being invited to accept appointment at a younger age - an age when they are at the peak of their earning capacities and when the costs of educating their children and meeting their mortgage commitments are at a maximum. Nevertheless, many were prepared to accept the honour of judicial appointment for two reasons. First, there was the security of an

indexed pension which conferred on the appointee and his spouse a security that might have been missing in the practice of the profession. Secondly, and perhaps more significantly, appointment was accepted because of the public respect shown to, and the status of, the office of a Judge. The attractive force of both of these inducements has been diminished.

The Commonwealth Government is proposing in future to subject judicial pensions to a 15% reduction, on the footing that the reduction is analogous to the impost on funded superannuation schemes. I note, however, that the Senate Select Committee on Superannuation published a Report earlier this month which concluded:

> "... that the judicial pension scheme does indeed have a greater role than just being part of a remuneration package. The Committee recognises that judicial independence is a guarantee of the impartiality of the judiciary, which underpins the federal nature of the Commonwealth, and the protection of individual rights. The Committee shares the widespread view that secure and adequate remuneration, during retirement as well as during service, is essential to judicial independence."

In consequence the Committee's unanimous recommendation maintains with some improvement of benefits the provisions of the *Judges' Pensions Act* 1968 (Cth) which applies to federal Judges.

A reduction in the non-contributory judicial pension otherwise than by the imposition of the general tax on income would create a belief that the financial security of judicial office is chancy. That would compound the problems of judicial recruitment and of premature judicial retirement. These are problems that are of real concern for the maintenance of a highly-qualified judiciary. A contrary approach was taken in Singapore, a highly-commercialised society. Terms and conditions of judicial service were raised to a level sufficient to induce professional leaders including those practising in commercial fields to accept appointment to the Bench, judicial strength was increased to match the caseload and modern technology was introduced to assist Court administration. The policy was pursued to secure a highly-qualified judiciary so as to foster, inter alia, investment, commerce and international trade.

The respect for, and status of, the office of a Judge was and, to a great extent, still is an inducement to accept judicial office. But it is clear that intemperate and ill-informed attacks on particular members of the judiciary, the trumpeting of criticism by commentators who have little knowledge of the judicial method and the absence of effective defence of judicial institutions by the political branches of government have damaged that respect and status to some extent. I shall refer to these factors in connection with public confidence in the judiciary. In the present context, the

significance of these developments is that it becomes more difficult to attract practitioners who value both their reputation and their privacy.

The result is that it can no longer be said that leading advocates will necessarily regard an offer of judicial appointment as the fulfilment of a professional ambition. Consequently, there is a risk that Governments will seek or will be forced to seek recruitment from sources that may not yield judges of the same competence as the judiciary of earlier times. That is not to say that competent judges have not been appointed from among the ranks of practising solicitors, academics and government lawyers but, as Sir Anthony Mason says[13], the "problem is to identify the lawyers from a different background who have the capacity to adapt", especially in those jurisdictions in which complex evidentiary or procedural problems require speedy disposition.

Suggestions are sometimes made that the judiciary is not properly representative. In some respects, that is true. There are too few women judges and too few from what might be termed an

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13 "Fragile Bastion", Judicial Commission of New South Wales at 3.

"ethnic" background. That under-representation reflects the under-representation of women and minorities among our leading advocates. The real question is how to remove the obstacles and attitudes that restrain the under-represented groups from advancing to the ranks of the leading advocates and thence to judicial appointment. Particular and valuable insights are contributed by competent judges drawn from groups that are now under-represented. Other things being equal, it would strengthen the judiciary to have an increase in the proportion of women judges and judges drawn from minority groups[14]. Yet it would be an erroneous policy, demeaning of an appointee's dignity, to appoint a judge on grounds other than merit. The judiciary cannot be appointed to represent a class or interest; it is appointed to find the facts accurately, to apply the law impartially and to exercise judicial discretions reasonably, irrespective of the class or interest to which any litigant belongs.

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14 As Sir Anthony Mason commented 4 years ago in the last "State of the Judicature" Address, (1994) 68 *Australian Law Journal* 125 at 131-132.

3. Public Confidence

Perhaps there is no more significant issue affecting the State of the modern Judicature than the issue of public confidence in the Judiciary. Twenty years ago, the Judiciary was revered as a treasured institution - "like the navy ... admired to excess" said Lord Devlin[15]. But Madam Justice McLachlin of the Supreme Court of Canada is close to the modern mark when she says[16]:

> "Judging is not what it used to be. Judges are more important now; judges are more criticized."

Recent criticism has often been focused on the judge personally, not on the judge's decisions much less on the reasons for the judge's decision. And if the critic is criticized, the criticism is defended on the ground that judges must be "accountable". Clearly the time has come when some ground rules should be spelt out.

In the first place, there can be no inhibition on proper criticism of Court judgments. Judgments are too important to be exempt from public discussion, especially judgments which have significance for

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15 *The Judge*, (1979) at 25.
16 (1994) 110 *Law Quarterly Review* 260 at 261.

the wider community. It would be absurd to suggest that the *Mabo*[17], *Wik*[18] and *Ha and Hammond*[19] judgments of the High Court could not and should not be subject to critical examination. They affect interests far wider than those of the particular parties and decide controversial issues touching the very nature of our society. If Judges pronounce judgments of that significance, should they not be accountable for the exercise of their powers? Of course they should. And they are. They spend their days and nights giving an account of the exercise of those powers. The account is called "Reasons for Judgment". A full account of the exercise of judicial power must always be given for the reason that Sir Frank Kitto so clearly stated[20]:

> "The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance."

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17 *Mabo v Queensland* (1992) 175 CLR 1.
18 *Wik Peoples v Queensland* (1996) 187 CLR 1.
19 *Ha v New South Wales; Walter Hammond & Associates Pty Ltd v New South Wales* (1997) 71 ALJR 1080; 146 ALR 355.
20 "Why Write Judgments?" (1992) 66 *Australian Law Journal* 787 at 790.

Reasons for judgment in important and difficult cases cover page after page, statute after statute, precedent after precedent. They are often technical, because they are judgments "according to law". What else should they be? Judgments to suit the government of the day? Judgments to earn popularity or to satisfy the demands of those with power and influence? Judgments that will attract the accolades of the media? Not at all. The rule of law is most valuable when it protects the vulnerable and the unpopular.

Sometimes judges are reproached for exercising power without having been elected to do so. The suggestion is that judges should be accountable to the electorate as politicians are accountable. The duties of the judiciary are not owed to the electorate; they are owed to the law, which is there for the peace, order and good government of all the community[21]. Change that view of judicial duty and you have destroyed your own security. I recall again the words which Robert Bolt has Thomas More saying to Roper in *A Man for All Seasons*[22] -

> "This country's planted thick with laws from coast to coast ... and if you cut them down ... d'you really think

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21 See Lamer, op cit at 6.
22 Act 1 [p 39].

> you could stand upright in the winds that would blow then?"

The real problem of accountability for the exercise of judicial power is not the giving of the account, it is the reporting and critical appreciation of the account that is given.

Some Courts have appointed media officers to assist the media in the reporting of decisions. No doubt that has proved to be of assistance, especially in cases at first instance where the facts are found and a single set of reasons is delivered. A media officer can ensure that every reasonable and lawful request for assistance in reporting the work of the Courts is met; but a media officer is not an advertising agent, seeking to influence favourable publicity or issuing releases designed to put a favourable spin on Court decisions. The prerogative of and the responsibility for reporting and offering interpretation and criticism of Court decisions must rest with the media. That is one of the great services that the media perform. It is the means by which the judiciary's account for the exercise of their powers reaches the people. So regarded, legal reporting and comment are necessary elements in our constitutional arrangements. They call for a high level of journalistic skill.

By employing an informed and critical faculty, the media justifies its freedom; conversely, ill-informed criticism abuses that

freedom. Of course, there are often two stories to be written about an important case. One story is the account given by judges for the decision that the Court has reached: that will often be a dreary and technical story, even though it is the story in which any unwarranted departure from the rule of law would be found and in which the principle that will govern future cases could be stated. The other story is the political, financial or social fall-out of the decision. This is more familiar territory to the majority of journalists and, of course, to politicians. When the case is important, both stories could and should be run. But that brings me to the second ground rule: the restriction on political criticism of Court decisions.

From time to time, strident and sustained criticism is made of Court decisions, usually decisions on sentencing or decisions in cases of major public significance. Sentencing is one of the most anxious of judicial functions, so much depending on the particular facts of each crime and of each criminal. Community interests and standards are taken into account but the judge has to distinguish those standards from an ephemeral cry for vengeance or a stimulated wave of concern about offences of a particular kind. Political capital about sentencing can be earned by speeches on a law and order theme and public feeling can be aroused by reports which fail to disclose all the facts, especially any circumstances of mitigation. It is difficult for judges in the criminal Courts to perform

their duty calmly, impartially and in accordance with law if politicians and special interest groups arouse public feeling about the level of sentences generally, ignoring the unique circumstances of each case. The safety valve for manifestly inadequate sentencing is the Crown's appeal against sentence.

Over recent years, politicians and other interested parties, showing little interest in the Court's function of administering the law but versed in the techniques of political struggle, public controversy and media relations, have criticized the Courts, not for their reasons for decision but for the decisions they have made. Criticism which pays little or no attention to the reasons for decision may be politically successful because, as surveys have shown, the public generally are not familiar with the Constitution and with the powers which are distributed under it. Even less is the public familiar with statute law and less again with the common law. Nor is the public familiar with the step by step reasoning that leads a judge to a conclusion in accordance with his or her understanding of the law. But the public is accustomed to the cut and thrust of political debate. Consequently, if no defence is made to a political attack on a Court, some will regard the attack as unanswered or unanswerable. No effective answer can be given by the Courts themselves. The Courts cannot be advocates to plead their own cause in justification of their judgments. If they were, they would be

induced to temper their judgments to protect their own interests. Impartiality would be gone, traded for protection from attacks. To quote Sir Frank Kitto again[23]:

> "Every Judge worthy of the name recognises that he must take each man's censure; he knows full well that as a Judge he is born to censure as the sparks fly upwards; but neither in preparing a judgment nor in retrospect may it weigh with him that the harvest he gleans is praise or blame, approval or scorn. He will reply to neither; he will defend himself not at all."

In earlier days, attacks on Courts or judges with reference to their decisions brought an immediate response from the Attorney-General. And attacks by members of the political branches of government were almost unknown. That is no longer the case. Attorneys-General, both Federal and State, have been singularly quiet in defence of the Courts at times when the Courts have been subject to the most acute and often ill-informed criticisms. Of course, the Attorneys-General of today are seen and apparently see themselves as political figures rather than as Ministers with a peculiar responsibility for the judicial branch of Government. The

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23 "Why Write Judgments?" (1992) 66 *Australian Law Journal* 787 at 790; see also per Lord Denning in *Reg v Commissioner of Police of the Metropolis; Ex parte Blackburn (No 2)* [1968] 2 QB 150 at 155 and Myers CJ in *Attorney-General v Blundell* [1942] NZLR 287 at 289.

consequence is that they are politically hamstrung in the response that they can make or are willing to make when one of their political colleagues launches a political attack on the Courts or the judges. The Federal Attorney-General, Mr Daryl Williams, AM QC, a distinguished lawyer whose resolute integrity is not open to doubt, has recently accepted this position[24]:

> "In essence, I do not believe that the public perceives that the Attorney-General acts independently of political imperatives. An Attorney-General cannot be a wholly independent counsel who rushes to the defence of the judiciary when under attack. This is particularly the case when the attack comes from the executive arm of government."

He had earlier written[25] that:

> " ... it is more compatible with the independence of the judiciary from the executive government, and more compatible with being so seen, that the judiciary not rely on the attorney-general to represent or defend it in public debate in the media. The judiciary should accept the position that it no longer expects the attorney-general to defend its reputation and make that position known publicly."

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24 Who will Defend the Courts? In course of publication in *Australian Bar Review.*
25 Collection of Papers from a National Conference, "Courts in a Representative Democracy", Canberra, 11-13 November 1994 at 192.

Mr Williams rightly seeks the best way of keeping the courts out of the political arena. I venture to suggest that an Attorney's silence is not the way.

The Courts do not need an Attorney-General to attempt to justify their reasons for decision. That is not the function of an Attorney-General. But why should an Attorney not defend the reputation of the judiciary, explain the nature of the judicial process and repel attacks based on grounds irrelevant to the application of the rule of law? Can an Attorney not explain publicly that Courts must apply the law whatever the consequences, that the facts of each case and not some unbending policy must govern the exercise of judicial discretions including sentencing discretions, that the Courts have no political agenda, that the only valid ground of criticism is an error in the facts that the Court has found or in a step in the legal reasoning or in the exercise of a judicial discretion? It has been suggested that the Judicial Conference of Australia might be the defender of a Court against an attack on a Court's decision. But no Conference spokesman, if a judge, could presume to defend another judge's or another Court's decision. The Conference, which seeks to foster an understanding of judicial independence is neither intended nor equipped to respond to such attacks. And, if the attack is from a political source, the response must be from a political identity.

If it be politically unrealistic to expect an Attorney publicly to defend the integrity of the judicial process, it must be because governments now perceive the Courts to be players in the political game. That is a false perception but - frightening though the thought may be - governments have the power to make that perception a self-fulfilling prophecy. Political attacks on Courts will inevitably lead some judges into political responses. Treating Courts as political players will lead politicians to make political appointments, to offer personal or institutional rewards for judicial conduct that is politically desirable and to impose penalties for decisions that are politically unacceptable. Mutual understanding of and respect for the functions of each branch of government is essential to rebuild and preserve an appropriate relationship between the judicial and the political branches. The American Bar Association, speaking of "An Independent Judiciary"[26] has pointed out that -

> "The key to managing interbranch tension and maintaining the essentially sound state of judicial independence and accountability in a system of separated powers is mutual restraint."

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26 "Report of the Commission on Separation of Powers and Judicial Independence", 4 July 1997.

The third ground rule relates to the substance and character of legitimate criticism. Exceptional and scandalous cases aside, any valid ground for criticism of a Court or judge in relation to a judgment must be found in the reasons for judgment or in some blemish in the conduct of the proceedings. These are on the public record. If the record shows that the facts have been properly found, that the law has been properly applied and that any discretion has been properly exercised, it is beside the point that the result is unpalatable. If the critic does not consult the public record or does not understand it, the criticism is mischievous. That said, there is ample room for reasoned criticism. Every dissenting judgment in an appeal Court will reveal tenable grounds for criticizing the majority judgment. If the criticism relates to supposed defects in legal reasoning, the critic must distinguish between reasoning which interprets the Constitution, reasoning which interprets a statute and reasoning which develops the common law. Only in the last case is there room for judicial policy to affect the reasoning[27] and for criticism about the wisdom - as distinct from the correctness - of a judicial development of the law.

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27 As I have explained in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 142-144.

Recent criticisms of decisions of the Courts, especially decisions made in sentencing offenders and in constitutional and native title cases, have seldom referred to, or even revealed any acquaintance with, the relevant facts or the reasons for judgment. Postures have been adopted and declarations have been made as to what the decisions ought to have been in order to satisfy some non-legal criterion which the critic embraces. Such criticism does not reveal a valid ground for attack on a Court or the judge or judges who constitute it. By all means let defects in applying the judicial method be criticized - trenchantly criticized if need be - but unless the rule of law has been misapplied, criticism of a decision is destructive of public confidence in the institution on which the rule of law depends.

4. Access to Justice

Access to justice is the immediate concern of those with a genuine need for the law's protection. Two factors affect the availability of legal remedies. The first is the need for expert advice and assistance; the second is the practice and procedure that govern the obtaining of legal remedies.

Advice and assistance for those who cannot afford to retain lawyers of their own choice depends largely on government funding

supplemented by pro bono work undertaken by the profession. Shop front legal services and legal aid schemes have allowed a legal system of increasing complexity to serve many members of the public who otherwise would have been denied justice. Moreover, these services and schemes have contributed greatly to the ability of the Courts to dispose of cases efficiently. Apart from anecdotal evidence, concern about the denial of justice is raised by a survey of Victorian practitioners conducted in November 1996 by the Federation of Community Legal Centres - a survey which was not fully processed and may not be statistically accurate. But it is said to have shown that "26% of respondents - [legal practitioners] - indicated that clients had been forced to plead guilty to criminal charges inappropriately"[28]. If that is accurate, it is truly disturbing. Anecdotal evidence from the registries of the Courts indicates that an increasing proportion of registry time is spent in managing the matters involving litigants in person. In the High Court, the estimate of that time is 25%. The Australian Law Reform Commission's Background Paper on "The Unrepresented Party" points to the consequences of parties being unrepresented. Increased judicial,

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28 "Justice for All", the Federation's "Report into the Impact of Legal Aid Guideline Changes since March 1996" at 3 par 4.

courtroom and registry time is taken in dealing with litigants in person. In *Cachia v Hanes*[29], the majority said:

> " Whilst the right of a litigant to appear in person is fundamental, it would be disregarding the obvious to fail to recognize that the presence of litigants in person in increasing numbers is creating a problem for the courts".

Procedural changes have to be made in all Courts not only to assist litigants but to assist the Courts to cope with the burden of litigation in which one or more of the parties is unfamiliar with the practice and procedure of the Court and even with the nature of the issues which the Court has jurisdiction to determine. In the High Court, the rules relating to the seeking of special leave were amended to require the filing of summaries of argument identifying the facts and propositions relied on or contested and by imposing a time limitation on oral argument. These rules abrogate the special rules which previously governed applications by litigants in person but impose a greater burden on registry staff in advising litigants of the Court's requirements.

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29 (1994) 179 CLR 403 at 415.

Of course, the major cost of litigation for the privately funded litigant is usually professional fees. It cannot be otherwise. Professional work must be properly remunerated and litigation is labour intensive. As you know, various proposals for limiting professional costs have been advanced and some criticism has been made of the current level of professional fees, especially those charged by the leaders of the profession. Some of those proposals are matters for government policy - for example, the abolition of tax deductibility of litigation expenses - and on those I would not comment. But two professional practices should be mentioned. The first is the "cab rank" rule which obliges a barrister, if available, to accept any brief in a field in which he or she ordinarily practises if a reasonable fee is offered. Reasonableness is a matter of assessment but it should be remembered that professional remuneration is earned within the framework of professional rules.

Next, the practice, now widespread, of charging out on a time basis seems to raise two questions worthy of consideration. First, does it not place a premium on inefficiency? And, secondly, does it involve a conflict of interest and duty to the client? I am sure most practitioners would resolve that conflict in favour of the client, but

experience in the law teaches that conflicts of interest and duty are best avoided. I respectfully agree with Justice Geoff Davies of the Queensland Court of Appeal who writes[30]:

> "It is not that lawyers' fees are generally too high for the work which they do. I do not believe that generally either the rate at which lawyers are paid is too high or the incomes of lawyers are too high. My main concern is rather that our system in general and our costs system in particular discourage efficiency and, on the contrary, offer incentives to inefficiency and over servicing."

The solution which his Honour advances is "a costs system based on the amount of work which should be performed, or best practice, and which will make costs more predictable."[31] The Federal Review of Scales of Legal Professional Fees on which the profession is represented has engaged the Business School of Melbourne University to advise. No doubt the method of charging for litigious work will receive consideration. It is a question which warrants continued consideration also by the relevant professional bodies.

Finally, I pass to the procedural changes which the Courts have introduced to streamline the handling of cases.

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30 (1997) 15 *Australian Bar Review* 109 at 114-115.
31 "Managing the Work of the Courts", AIJA Asia-Pacific Courts Conference, Sydney, 22 August 1997 at 3.

In the great majority of trial Courts mediation has been introduced as part of the Court process. The form of mediation varies: in some Courts mediation is performed by Court officers and is free; in others it is performed by persons outside the Court system, but appointed by a judge, at the parties' cost. The latter form is not objectionable in principle, unless the payment of the mediator's fees is a condition of being allowed to proceed. Where that is the case, there are two in principle objections. Access to justice is denied unless a fee is paid to a third party - that is one objection - and the third party who is to receive the fee is nominated by the judge - that is another.

Some State Courts also provide a system of case appraisal which allows an experienced practitioner to make an informal assessment of the likely result of a trial. The parties may accept that assessment as binding or proceed to trial at a risk of costs in the event of not achieving a better result than that assessed.

In some Courts, discovery, which can be a major cost in commercial actions, is limited to documents directly relevant to an issue in the proceeding. New rules also ensure easier access to opponents' documents. Interrogatories have been abolished in many jurisdictions except by leave. Again in some jurisdictions a wide

discretion has been conferred on judges to admit evidence otherwise inadmissible and evidence is taken by video link or telephone. In Western Australia there are now rules giving judges control over the form (whether oral or in writing) and length of evidence, power to limit examination-in-chief and cross-examination and control over the length and form of addresses.

Case management, in one form or another, exists in most trial Courts. Case management varies, as you know, from a system of fairly automatic triggering events through to intensive individual management by judges.

In the Federal Court, after extensive investigation and expert advice and after introduction of a pilot scheme in the Melbourne Registry, an individual docket scheme has been introduced. Cases will be allocated randomly to particular judges who will monitor their cases to conclusion. Fixed but few conferences will ensure, inter alia, compliance with directions and the diversion of appropriate cases to non-curial assisted dispute resolution (ADR). Special panels of judges will be constituted to deal with cases requiring particular expertise.

Extensive case management is not universally accepted as desirable in all classes of litigation[32] but it is probably true to say that all Courts and their registries are now more actively engaged in managing their case flows and the preparation of complex cases for trial than they were in earlier times. The Family Court, with an enormous caseload and with an especial concern for litigants in person, has been a leader in introducing mediation and user-friendly procedures. Mega litigation has also produced technologically assisted responses. The Rothwells litigation in Western Australia, the Fairfax litigation in New South Wales and the Estate Mortgages litigation in Victoria demanded the creation of courtrooms equipped with sophisticated electronic technology.

Information technology has been embraced by Australian Courts. The judgments of the High Court of Australia are available on the Internet minutes after they are handed down in Court. So are the judgments of the Federal Court, the Family Court, and the Supreme Courts of New South Wales, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory. High Court

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32 See, for example, the observations of Davies JA in "Managing the Work of the Courts", AIJA Asia-Pacific Courts Conference, Sydney, 22 August 1997, at 8-9.

transcripts are available shortly after a matter is heard. The High Court Home Page will be providing information relating to the progress and listing of cases. All of these services are provided free of charge. In March the council of Chief Justices of Australia and New Zealand gave in principle support to the concept of "media-neutral" citation, which will enable reference to electronic reports of the decisions in the Courts as well as to the hard copy reports.

The Council of Chief Justices is currently sponsoring work on an Electronic Appeals Project designed to reduce the necessity to reproduce masses of printed material from trial Courts and to permit the standardising of the printed and electronic material in all appellate Courts including the High Court. Appellate Court rules are under review at the same time.

Courts and judges have been active in seeking ways to improve the efficiency of the Courts and thereby to improve access to justice. With respect to other and grander studies about the justice system and the way it operates, I wonder whether better results can be achieved than those which are devised by practical and hard-nosed practitioners and administrators (in which I include judges) with experience in the justice system.

It is beyond the time I should have asked you to sit to hear of the State of the Judicature. At base, the State of the Judicature means the quality of the judges and their ability to perform their functions. Judges, from the viewpoint of a practitioner, may be a varied group. Mostly polite in Court, some judges may be sharp; mostly quick and industrious, some judges may not always reveal it; mostly with a generous view of human nature, sometimes a more straitened view emerges. But in the years I have been privileged to be a judge, I have not known a corrupt judge; none has sought to do anything except justice according to law as he or she honestly saw it; none would yield to improper pressure that might impermissibly tilt the scales of judgment. The Judicature is, and has been, in a good state. But that state has not been achieved by accident or by mere good fortune. It is the consequence of the structures, the traditions and the values of the judiciary and the profession - recognized, if not articulated - and enforced by the pressure of an honourable peer group.

As the work of the Judiciary impacts more on public than on private issues, there will be danger to the impartiality and the competence of the judiciary and to public confidence in the institution. As society and the law become more complex, obstacles to public access to justice will grow. Those dangers will be contained, and the State of the Judicature will be strengthened, only if governments and the public generally and the profession in

particular understand the fundamental significance of the Judicature to Australian society and the conditions which must be maintained in order that it can continue to serve the Australian people.