NATIONAL JUDICIAL ORIENTATION PROGRAMME

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THE ROLE OF THE JUDGE AND BECOMING A JUDGE

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In the past I have, from time to time, set out to explain the role of a judge to gatherings of parliamentarians, legal practitioners, students, and people with an interest in public affairs. This, however, is quite a different occasion. I am speaking to a small group of experienced lawyers, all with a special and professional interest in the subject, and all of whom are likely to have some fairly well developed ideas of their own on the topic. Most of you have already had some judicial experience, and all of you have spent a substantial part of your professional lives observing judges at work. My remarks to you, therefore, will not take the form of a lecture. Rather, I will remind you of some principles of which you are already aware, and relate those principles to some practical observations that I hope may be of assistance to you in your future judicial careers.

There are four aspects of judicial status or performance that will form the basis of my remarks. These are independence, impartiality, fairness, and competence.

Independence

The constitutional principle sometimes referred to as the separation of powers is acknowledged, at least in theory, in most western societies, even though its implications are in some respects a matter of debate. The judiciary is seen as the third arm of government, separate from and independent of the two political arms, the legislature, and the executive. Judges maintain the rule of law, uphold the constitution, and administer civil and criminal justice according to law.

Because the executive government is itself a major litigant, the independence of the judiciary from the executive government is indispensable if there is to be public confidence in the administration of justice. Almost all criminal cases are conducted in the form of a contest between the executive government and a citizen. The executive government, either directly, or through corporations, in which it has an interest, is a party to much civil litigation. Civil litigation is often concerned with rights and obligations as between the government and citizens. Constitutional cases are often fought out between different governments in our Federal structure. Courts decide whether legislation is valid, and determine as between governments the boundaries of their respective powers. I think it is fair to say that the Australian public

accept that, in a dispute between the government and a citizen which comes before an Australian court of law the citizen will receive equal treatment. The importance of that should not be underestimated. If it were no longer accepted, or assumed, that citizens will receive equal treatment before the law when in dispute with governments the consequences for our society would be extremely grave.

Although judges are servants of the public, they are not public servants. The tenure which they enjoy, the procedures which are required in the case of a proposal for their removal, and their institutional separateness from the executive arm of government, are all aimed at securing that position. The essential obligation of a public servant is, consistently with the law, to give effect to the policy of the government of the day. The duty of a judge is different. The duty of a judge is to administer justice according to law, without fear or favour, and without regard to the wishes or policy of the executive government. Judges, of course, give effect to the will of parliament as expressed in legislation, but their duty is to behave impartially in conflicts between a citizen and the executive. There may be a big difference between the will of parliament as expressed in legislation and the policy of the executive government from time to time.

Most members of the community tend to regard judges as public servants, at least until they begin to reflect upon the significance of the principles just mentioned. Judges, however,

should know better. There is, on occasion, pressure from some quarters for judges to be treated, or to permit themselves to be treated, as though they were public servants. Sometimes, people in public life express frustration or indignation at the unwillingness of judges to conform to the policy of the executive government. Just as nature abhors a vacuum, so there is often an institutional bureaucratic abhorrence of independence. This is not surprising. Independence of any kind is likely to be regarded as a threat to a government's capacity to govern. Government would in some respects be more efficient, and life for those in power would be easier, if judges were public servants and were obliged to conform to government policy. However, efficiency, and an easy life for those in power, are not the primary aspirations of a democratic society. Those considerations are overridden by the demands of justice, and our community's idea of a just society is one in which the judiciary is, and is seen to be, independent of the executive government.

It is the duty of all judges to respect and maintain that independence. That does not involve maintaining an attitude of abrasive antagonism towards everyone in government. On the contrary, there is a great deal to be achieved through appropriate co-operation between the three arms of government. Yet, if judges do not respect and value their own independence, no one else will.

The independence of judges should not be seen, either by the community or by judges, as some kind of perquisite of office. Sometimes there is an unfortunate tendency to overstate the principle of independence and to invoke it in circumstances where it is not, in truth, under threat. There is a tendency in some people to turn every disagreement about the terms and conditions of judicial service, or the funding of the court system, into an issue of judicial independence. This creates a degree of cynicism. Such cynicism is not always unjustified. It debases the currency of principle if we overstate our case. Subject to that caution, however, I would encourage all judges to take a close and informed interest in questions relating to the independence of the judiciary.

Impartiality

Throughout the ages, and in all societies, impartiality has been regarded as of the essence of the administration of justice. The image of the just judge as one who favours neither the rich nor the poor, but gives a true verdict according to the evidence, appears in texts going back to the origins of our civilisation.

In our post modern, deconstructionist, society, there are those who regard impartiality as an illusion. Rejecting as fraudulent the notion that anyone is capable of being truly impartial, some people promote the idea that the only decent judge is one who sets out to be actively partial, using judicial power to address the injustices of society, redistribute assets,

promote the interests of some social group seen as worthy of support, and administer justice, not according to law, but according to some overriding standard existing outside the law. People who take this approach consider that impartiality is bogus, and the pretence that it exists, or is capable of being achieved, is an impediment to true justice.

Judges, however, are supposed to be dedicated to the proposition that the administration of justice requires both the reality and the appearance of impartiality, and that both are attainable. Anyone who does not believe that should not be a judge.

It has been wisely observed that enthusiasm for a cause is usually incompatible with impartiality, and is always incompatible with the appearance of impartiality.

I need say nothing to this audience about the reality of impartiality. You have all made a sworn commitment to it. I will not insult you by convassing the possibility that you might dishonour that commitment.

It may be necessary, however, to emphasise the importance of maintaining the appearance of impartiality. This is where, for some judges, difficulties can arise.

It is essential for a judge to maintain, in court, a demeanor which gives to the parties an assurance that their

case will be heard and determined on its merits, and not according to some personal predisposition on the part of the judge. Human nature being what it is, some people are better than others at maintaining such a demeanor. I imagine that everybody here has, at one time or another, observed the performance of a judge who failed to live up to the ideal in this respect. In our experience as practitioners we have all seen judges behaving well, and, on occasion, we have seen judges not behaving well. The point requires little elaboration, but we all have our own models of judicial behaviour.

Modern lawyers, litigants, and witnesses, and the public generally, are much more ready to criticise judges whose behaviour departs from appropriate standards of civility and judicial detachment. This is a good thing. If judges behave inappropriately, they should be criticised. Of course, on occasions, some judges are exposed to wrongheaded, extravagant, or unfair criticism. That is the price that has to be paid to remind all judges of the necessity to conduct themselves with dignity and decorum.

There are two practical aspects of this subject which may not be obvious, and which are worth mentioning on an occasion such as this.

The first concerns prejudgment. Complaints of apprehended bias often involve, not a suggestion of personal prejudice, but a suggestion that the judge has made up his or

her mind, and become committed to a particular outcome, before the parties have had a full and fair opportunity to present their evidence and their arguments. This can be a particular problem in an age when there is a great deal of pressure on judges to deal with matters expeditiously, to discourage time wasting and delay on the part of litigants and lawyers, and to dispose of huge caseloads in a managerial rather than a judicial fashion. Some judges respond to these pressures over enthusiastically, and in doing so fall into the trap of giving the appearance of pre judgment. There is a balance to be held between the needs of efficiency and the imperative of maintaining both the appearance and the reality an open mind up until the point of decision making.

The second matter to be mentioned concerns what might generously be described as judicial humour. Some judges, out of personal good nature, or out of a desire to break the tension that can develop in a courtroom, occasionally feel it appropriate to treat a captive audience to a display of wit. Sometimes this is appreciated by the audience, but sometimes it is not. When it is not the consequences can be very unfortunate. Judges and legal practitioners may underestimate the seriousness which litigants attach to legal proceedings, and they can become insensitive to the misunderstandings which might arise if the judge appears to be taking the occasion lightly or, even worse, if the judge appears to be making fun of someone involved in the case. Without wishing to appear to be a killjoy, I would caution against giving too much scope to your natural

humour or high spirits when presiding in a courtroom. Most litigants and witnesses do not find court cases at all funny. In almost ten years of dealing with complaints against judicial officers to the Judicial Commission of New South Wales I have seen many cases where flippant behaviour has caused unintended but deep offence.

Fairness

You are all familiar with the essential requirements of fairness in the conduct of court proceedings. The judge must give both parties a proper opportunity to put their evidence and their arguments, the judge must listen to the evidence in the arguments, and must approach decision making with an open mind.

There are, however, some practical aspects of the requirements of fairness that it is easy to overlook.

In our adversary system of litigation the parties, through their legal representatives, decide the issues that will be presented for judicial determination, and the evidence that will be relied upon for that purpose. This is not the occasion to go into the merits of the adversary system as compared other systems. It is the occasion, however, to emphasise one important aspect of that system. The judge only addresses such issues as the parties invite the judge to address, and learns only so much of the facts of the case as will appear from the evidence that is tendered in the course of the

proceedings. Fairness, to the parties, and perhaps to third parties, requires that the ultimate judgment be expressed in the light of an understanding of the limitations inherent in the process.

Judges in the course of delivering reasons for judgment, sometimes make findings or comments which reflect a lack of appreciation of those limitations. There may, for example, be a background to litigation, of which the judge will get only a partial glimpse. It may be quite unfair for the judge, in those circumstances, to express unnecessary value judgments, or opinions, or general conclusions of fact, without knowing the whole of the background in question.

Again, evidence may be given which affects some third party not involved in the litigation but which is not challenged by the other party to the proceedings. It can cause great unfairness to third parties if judges make findings of fact or comments which pay no regard to this matter. As a general rule, it is inappropriate, and often unfair, for a judge, in reasons for judgment, to make an unqualified adverse finding concerning someone who is not a party to litigation and who has had no opportunity to answer the allegation in question.

Some types of proceeding are, by their nature, particularly apt to give rise to problems of this kind. The best example I can bring to mind is sentencing proceedings. Especially in connection with pleas in mitigation, material is often put before

a sentencing judge which is not in admissible form, which has never been challenged or properly tested, and which might be highly prejudicial to people who are not involved in the sentencing proceedings, including victims of crime. Such people usually have no opportunity of calling that material into question. It may be perfectly appropriate for the sentencing judge to accept and act on the basis of that material for the purpose of sentencing, but extremely unfortunate consequences can ensue if the remarks on sentence are expressed in an unqualified fashion which pays no attention to the circumstance that there might be someone who would want to have an opportunity to challenge the material if it were made public. It can be very unjust to a victim of a crime, for example, to wake up one morning and read in a newspaper an account of the events of a case which may have come from the offender, or from a witness relating at second or third hand what the witness has been told, or from a police officer, without the victim having had an opportunity to put his or her version of events. Fairness will often require that a sentencing judge express remarks on sentence in an appropriately qualified fashion to take account of this possibility. The absolute privilege which attaches to fair reports of court proceedings should lead judges to be conscious of the harm that may be done, unfairly, to third parties by an incautious manner of expressing reasons for judgment. It is not only fairness to the parties that should be operating as part of a judge's concern. Non-parties can often be seriously damaged by a judge's manner of expressing reasons for judgment. Sometimes this

may be the result of mere thoughtlessness. A judge should never cause unnecessary hurt.

Competence

We live in an age of accountability. What is required of judges is changing. That is a good thing, but it does not make life easier for judges.

A good deal of what will be said to you during this orientation programme will be directed to various aspects of judicial performance. The very fact that such a programme is now conducted, annually, by the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration, itself speaks volumes as to the change that has occurred in the expectations of the profession and the public.

I will refer to a few random aspects of judicial performance in the hope that this may be of some practical assistance.

You are to receive a paper upon the preparation and delivery of judgments. Without wishing to cut across anything that will be said in that paper, it is possible that you will be referred to an article written some years ago by Sir Frank Kitto, entitled "Why Write Judgments?" That is a subject which should regularly be revisited. I would like to place particular emphasis upon the second word in that question.

There is, I believe, a major difference between the performance of Australian judges and the performance of English judges in relation to the manner in which they deliver their judgments. English judges, including judges of appeal, are encouraged to deliver ex tempore judgments, and develop considerable facility in doing so. It is a facility I would like to see developed by more Australian judges. I acknowledge that it may be that demands by our appellate courts have to some extent resulted in an increased emphasis on production of written judgments. If that is the case, then such demands should not have been made, and I regret them.

One of the major contributing factors to this over emphasis on reserving judgments is the modern tendency for more and more of the material, including argumentative material, to be presented in writing. The corollary is that, at least in New South Wales, a judge is expected, at the conclusion of the hearing of a case, to reserve his or her decision and go on immediately with the hearing of the next case, on the assumption that in due course, and when time permits, a reserved judgment will be produced, largely by reference to written material. This is extremely burdensome for judges. If cases were conducted and argued upon the assumption, shared by the lawyers, and by the judge, that an oral judgment would be delivered either at the conclusion of argument or within a very short time thereafter, the litigation itself might, in some respects, proceed more slowly, but the

time of the judge would be used more productively, and the ultimate result would be reached much more quickly.

Regrettably, perhaps because the judge is often the lowest paid lawyer in the courtroom, court procedures are sometimes arranged in a manner which undervalues the time of the judge and is aimed at saving the time of the lawyers. Judges, I think, should reassert themselves in this respect.

When it is necessary to reserve a judgment, it is usually both possible and prudent for the judge, immediately following the conclusion of the argument, to prepare at least the first part of a reserved judgment, that is to say, the part which outlines the facts and formulates the issues that arise for decision. This makes it much easier to come back to the judgment at some future time. The difficulty of writing a reserved judgment is increased enormously if, at the end of the hearing, the judge simply puts the papers away and goes on with the next case. When I hear a succession of cases I very quickly forget what the last case was about. Renewing acquaintance with a transcript and written submissions involves considerable effort. It is much easier to come back to a half written judgment than to a clean slate. If you find it necessary to reserve a judgment, I would advise you at least to get something down on paper before you become engrossed in the next case.

It is important that judges should maximise the assistance they receive from counsel. There are various techniques that experienced judges adopt in this regard. For example, in cases involving the assessment of damages, judges, as a matter of routine, should require the opposing counsel to provide them with detailed submissions as to the calculations for which they respectively contend. Similarly, when it comes to formulating the orders in a particular case, both sides should be required to specify, in detail, what they seek. Unless it is unavoidable, counsel should not be permitted to thrust lengthy written submissions before a judge with a casual observation that the judge can read those submissions later in chambers and counsel will move on to some other subject. We are constantly told that counsel are there to assist the judge. Obtaining maximum benefit from such assistance is part of the judicial technique. Developing that skill will greatly improve the quality of your judicial lives.

Reasons for judgments are not legal essays, or articles prepared for a law journal. The purpose of a judgment is to make a decision about the issues that have been presented for decision, and to express the reasons for such decision. Just as a judge who presides at a murder trial does not undertake to provide the jury with a dissertation on the law of homicide, but should confine his or her directions to such principles of law as the jury must understand in order to decide the particular case, so the reasons for judgment of a trial judge should address, and address only, the issues that require determination. The

question: "Why write judgments?" prompts another question: "Who reads them?" Your style of judgment composition might be affected if, you ask yourselves who wants to hear or read what you propose to say, and for what purpose. A succinct method of expressing judgments will be valued by your audience just as you, as the audience, value the same quality in an advocate.

These observations are not intended to carry the suggestion that you suppress your individuality or that you should conform to some tedious and inflexible routine. On the contrary, the most important piece of practical advice I can give you is that you should enjoy being a judge. The work of administering justice according to law is important and honourable. The task of preparing reasons for judgment, oral or in writing, is often demanding but it is also capable of giving intellectual satisfaction. Responding to the challenge of being a just and efficient judge is a task worthy of any lawyer's mettle. I wish you success and happiness in your judicial careers.