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AUSTRALIAN LEGAL CONVENTION

CANBERRA, 10 OCTOBER 1999

THE STATE OF THE JUDICATURE

THE HON MURRAY GLEESON AC

CHIEF JUSTICE OF AUSTRALIA

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Murray Gleeson

As we address the promises, and challenges, of a new era, the Australian courts seek to discharge their functions of upholding the Constitution, maintaining the rule of law, and administering civil and criminal justice, in a rapidly changing environment. The community is entitled to expect that they will respond appropriately to change and, at the same time, adhere to their fundamental values. Foremost among those values are independence, impartiality, professionalism, and a commitment to justice.

In the Statement of Principles of the Independence of the Judiciary adopted by Chief Justices of the Asia-Pacific region at Beijing in 1995, it was declared that the objectives and functions of the judiciary include the following:

(a) to ensure that all persons are able to live securely under the Rule of Law;

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(c) to administer the law impartially among persons and between persons and the State.

Our society attaches importance to accountability on the part of all governmental institutions. People seek ways of evaluating the performance of judges at a personal level, and of courts at an institutional level. This is appropriate, so long as the mechanics of evaluation are not permitted to define the objectives of the courts. The starting point for any examination of performance is an understanding of the objectives of the person or institution whose performance is under scrutiny. What is set out above is a fair statement of the principal objectives of the judicature. Just as the public are entitled to expect appropriate accountability of the courts, they are also entitled to expect that assessments of judicial performance will be based upon a recognition of those principal objectives.

We are fortunate to live in a society which has inherited, and embraces, a tradition of legalism. The Rule of Law is established as a principle upon which our nation's affairs are conducted. The

decisions of courts, whether popular or controversial, are routinely accepted and, acted upon, by citizens and governments. The integrity and impartiality of the judiciary, and the freedom of courts from influence by governments or powerful interests, are largely taken for granted. These are matters beyond arithmetical calculation, but they are of the first importance.

The community also takes for granted that we have a well-educated, and professionally trained, judiciary and magistracy. The decisions of judicial officers are given in public, they must be supported by reasons, and they are generally subject to appellate review on their merits. The transparency of our system of administering justice is as complete as that of any judicial system in the world.

Before turning to the challenges confronting the judiciary at the beginning of the 21st century, it is useful to remind ourselves of the secure and stable foundation upon which our society rests, and of the role of the courts in maintaining that security and stability.

A national legal system

The first State of the Judicature address was delivered by Sir Garfield Barwick in 1977. It is interesting to note the changes that have occurred in the intervening 22 years.

In 1977 there were still appeals from State Courts to the Judicial Committee of the Privy Council. This subject occupied much of Sir Garfield's attention. The continuance of such appeals was seen as an impediment to the development of a unified system of Australian law. Such appeals have since been abolished, and the High Court has observed, in *Lange v Australian Broadcasting Corporation*[1], that "(t)here is but one common law in Australia which is declared by (the High) Court as the final court of appeal". This is the principal unifying force in our legal system.

Under the Constitution, our nation is organized as a federation. Legislative, executive and judicial power is divided between the political entities of which the federation is composed. Laws are made, and administered, by Federal, State and Territory parliaments and governments. Subject to the role of the High Court as a national institution, the court system is similarly divided. In Australia, as in other federations, the legal profession is organized primarily on a State (or Territory) basis. Even so, our sense of nationhood drives a search for arrangements which appropriately express our unity.

In a federation, references to a national legal or court system mean different things to different people. The assumption that the tide of history should constantly flow in the direction of centralism is not shared by all Australians.

Since 1977 there has been an increase in the size and role of the federal judiciary, largely resulting from the establishment of the Federal Court of Australia, and the increase in the work of the Family Court of Australia. Until relatively recently, the Federal Government appointed few judicial officers, and even today the State governments of New South Wales, Victoria and Queensland appoint more judicial officers than the Federal Government.

A recent decision of the High Court in *Re Wakim; Ex parte McNally*[2], declaring invalid certain aspects of the legislation concerning cross-vesting of jurisdiction between Federal, State and Territory courts, has prompted reconsideration of issues concerning the structure of the Australian judicial system. It is not yet known what the outcome of that reconsideration will be. However, it is useful to put the matter into historical perspective.

For the first 70 years of the Australian Federation, the federal judiciary was small. Reliance was placed upon the expedient provided for in section 77(iii) of the Constitution, which empowered the Federal Parliament to invest State courts with federal jurisdiction. The duality of jurisdiction, State and federal, reflected in Chapter III of the Constitution, has been criticised, and some of the provisions of Chapter III have given rise to difficulties of interpretation. Even so, the investing of State courts with federal jurisdiction, provided for in the Constitution, was accepted for most of this century as working tolerably well in practice.

A major change came with the creation of two important new federal courts, the Federal Court of Australia and the Family Court of Australia. The jurisdictional pattern was further complicated by the enactment of legislation making parts of the jurisdiction of those courts exclusive, and in that respect reversing the previous system of investing State courts with Federal jurisdiction. Considerations which were influential in the creation of the Federal Court included a need to relieve the High Court of an increasing workload in its original jurisdiction, and an understandable desire on the part of the Federal Government to appoint the judges who were particularly concerned with the interpretation and application of Federal statutes.

Opponents of the creation of the Federal Court argued that the result would be jurisdictional conflict and complication. Those claims were rejected in his second State of the Judicature Address[3] by Sir Garfield Barwick, who was a supporter of the creation of the Federal Court. He referred to a speech made by Sir Nigel Bowen, who, as Commonwealth Attorney-General, had been an important driving force behind the establishment of the court, and who became its first Chief Justice. He said:

> "Sir Nigel convincingly dissipated the oft repeated criticism that the inauguration of the Federal Court would plunge Australia into a morass of parallel jurisdictions much as it is said obtains in the United States of America. Sir Nigel emphasised the limited nature of the jurisdiction of the Federal Court. He pointed out that that jurisdiction had never been exercised by State courts: that there was in fact no

> parallelism, the litigant not really having a choice of forum. At the margins of the Federal and State jurisdictions, problems connected chiefly with ancillary relief might well be experienced: but such problems were of a kind for which good sense and goodwill should readily provide an accommodation."[4]

Those predictions were not entirely borne out. The emphasis placed on the limited nature of the jurisdiction of the Federal Court reads strangely, less than 20 years later. Experience shows that, in Australia, it is in the nature of federal jurisdiction to expand, rather than to conform to narrow limits. The next State of Judicature Address was given in 1981 by Sir Harry Gibbs[5]. In the course of that address there was reference to jurisdictional problems resulting from the creation of the Federal Court and the Family Court, and to possible solutions[6].

One of the subjects that was examined by the Constitutional Commission established in December 1985 was the structure of the Australian judicial system. The Commission delivered its Final Report on 30 June 1988. In Chapter 6 of the Report, the Commission considered recent legislation for cross-vesting of jurisdiction, which had been proposed and adopted as a practical solution to some of the problems which were said to have arisen as a result of the creation of the Federal Court and the Family Court. The Commission supported the idea of cross-vesting, but referred to doubts concerning the constitutional validity of the legislation. It recommended that the Constitution be amended to empower State and territorial legislatures, with the consent of the Federal

Parliament, to confer State and territorial jurisdiction, respectively, on Federal courts. The Commission, in its Report anticipated the arguments that later prevailed in *Re Wakim* in the absence of any constitutional amendment[7]. The proposal for constitutional amendment was not taken up. The legislation was ultimately held to be invalid.

The Constitutional Commission in 1988 also addressed a wider question raised by proposals that the Constitution should be altered to provide for the integration of the court systems of the Commonwealth and the States. Like the word "national", the word "integration", when used in relation to a federation, is ambiguous. The Commission did not recommend integration. If it had, it would have been necessary to go further and specify the kind of integration that was envisaged. One of the reasons for the Commission's view was that it was thought desirable to wait and see what the practical outcome of cross-vesting was to be, assuming that its validity was secured by the constitutional amendment recommended.

One of the considerations taken into account by the Constitutional Commission in deciding not to recommend an integrated court system is of continuing significance. In each of the entities which make up the Australian Federation there are three branches of government: the legislature, the executive, and the judiciary. Although their separateness, to varying degrees, is an

aspect of each entity's constitutional arrangements, there are also important aspects of inter-relationship. In all jurisdictions, judges are appointed by the executive governments. The power to remove judges resides in the respective parliaments. Laws enacted by parliament have an important effect upon the operations of the courts, and their workload. Executive governments fund the court systems, and play a major role in their administration. Ministers bear political responsibility for aspects of the performance of courts. If the consideration that the Federal Government should appoint the judges who interpret and apply Federal statutes is influential, then it has an obvious corollary in relation to the appointment of the judges who interpret and apply State statutes. Governments, from time to time, have different policies as to judicial appointment, and the terms and conditions of judicial service. More than a quarter of Australia's judicial officers are appointed by the New South Wales government. In the last ten years that State has made extensive use of acting judges. Other States have used them sparingly, if at all. The Federal government, under the Constitution, has no power to appoint acting judges. The age of compulsory retirement for New South Wales judges is different from the corresponding age for Federal judges and for judges in most other jurisdictions. Different arrangements as to remuneration apply. The court systems of the various States are different in certain respects. The laws of evidence differ between jurisdictions. The legislation embodied in the *Evidence Act* 1995 has so far been taken up only

in relation to the federal courts and in New South Wales and the Australian Capital Territory.

In brief, different jurisdictions have different policies about a range of matters affecting the operations of courts. Some people regret this diversity. Others accept it simply as an aspect of federalism. Considerations such as these explain a long-standing reluctance to seek greater integration of the Australian court system. Whether they continue to prevail might depend in part upon the responses made by the governments to the invalidation of the cross-vesting legislation, and upon a realistic appraisal of the true extent of the jurisdictional problems which inspired the legislation in the first place.

This chapter of Australia's legal history is still being written.

National Judicial Associations

Australia has 889 judicial officers (judges and magistrates). Of these, 109 are Federal, 754 are State, and 26 are Territorial. There are three principal national associations concerned with judicial affairs. They are the Council of Chief Justices of Australia and New Zealand, the Australian Institute of Judicial Administration, and the Judicial Conference of Australia.

The Council of Chief Justices of Australia and New Zealand meets twice a year. It is chaired by the Chief Justice of Australia. Its other members are the Chief Justice of New Zealand, the Chief Justices of each Australian State and Territory, and the Chief Justices of the Federal Court and the Family Court. Its secretary is the Chief Executive Officer and Principal Registrar of the High Court. The Council took its present form five years ago. It evolved from what was originally a gathering, every two years, of State and Territory Chief Justices. Its growth in size, and the greater frequency of its meetings, reflects an increasing need for the leaders of the judiciary to exchange ideas and information, and to formulate common policies, where appropriate, on issues of judicial administration and governance, including issues concerning relations between the judicial and executive branches of government.

The Australian Institute of Judicial Administration (AIJA) was established in 1986. It has a membership of 1020, most of whom are judicial officers, but which also includes legal practitioners, court administrators and law teachers. The current President is Justice Catherine Branson, of the Federal Court. The Deputy President is Justice James Wood, the Chief Judge at Common Law of the Supreme Court of New South Wales. The AIJA has a permanent secretariat based in Melbourne. Its Executive Director is Professor Reinhardt. The Institute conducts major conferences concerned with judicial work and administration, such as the 1997

AIJA Asia-Pacific Courts' Conference, the Technology for Justice Conference held in March 1998, which is to be followed up by a similar conference in October 2000, regular Court Administrators' Conferences, a Conference on Reform of Court Rules and Procedures held in July 1998, and a regular Conference of Court Librarians. Its educational programme includes conducting an Annual Judicial Orientation Programme in conjunction with the Judicial Commission of New South Wales. The AIJA has recently published a report of Professor Parker entitled "Courts and the Public", and the results of a comprehensive survey of Australian judges, conducted by Dr Ian Freckleton, on issues associated with the use of expert evidence.

The Judicial Conference of Australia, established in 1993, is a voluntary association of judges and magistrates. Its principal functions are to promote judicial independence, to inform the public about the work of the courts in today's society, to carry out programmes of research and education in relation to matters concerning the administration of justice, and to represent the interests of its members where necessary and appropriate. The present membership of the Conference is 464, which is a little more than half of the number of Australian judicial officers. It has a permanent secretariat based in Victoria. The current Chairman is Mr Justice McPherson of the Queensland Court of Appeal. Acknowledgment should be made of the work of its former

Chairman, Justice Lockhart of the Federal Court, who has recently retired from judicial office.

Judicial Education and Training

In the last ten years there has been a developing acceptance of the importance of training and continuing education for judges and magistrates. It is no longer sufficient to assume that most persons appointed to judicial office are professional advocates whose background has provided them with such information and experience as is necessary for the competent performance of judicial duties. There are number of reasons for this. First, it is no longer the case, even in relation to appointments to superior courts, that persons appointed to judicial office can be assumed to have appeared regularly in the jurisdictions to which they are appointed and to be familiar with all the work of those jurisdictions. With increasing specialisation in the legal profession, even experienced advocates often find that, upon appointment to judicial office, they are called upon to deal with matters and issues that are new to them. Furthermore, governments are becoming increasingly willing, and in some cases anxious, to look beyond the practising bar when considering possible candidates for judicial appointment. Secondly, judicial work is becoming more complex and demanding. Thirdly, the rate of legal development and change is such that it cannot reasonably be assumed that judicial officers will keep abreast of it without continuing instruction. Fourthly, some of the skills required of a judge or magistrate are not of a kind that can be acquired as a result of experience as an advocate.

The courts in most Australian jurisdictions have developed programmes of judicial education. The leader in the field of formal judicial training is the Judicial Commission of New South Wales, which has for twelve years provided programmes of orientation and continuing legal education for judges and magistrates. Its work has received international recognition.

In cooperation with the Australian Institute of Judicial Administration, the Judicial Commission of New South Wales conducts annual orientation programmes for newly appointed judges. To date, 144 judges have attended. Participants have come from most Australian jurisdictions and from Papua New Guinea, the Solomon Islands, Indonesia and Hong Kong. The programme covers a wide range of topics including trial management, decision making, judgment writing and the use of information technology. Issues such as cultural diversity and gender awareness are addressed. In addition, the Judicial Commission conducts an annual orientation programme for magistrates.

There is no national judicial college in Australia of the kind that exists in England (the Judicial Studies Board), Canada (the National Judicial Institute), and New Zealand (the Institute of Judicial Studies). In a recent discussion paper on the federal judicial system the Australian Law Reform Commission recommended the establishment of such a body along the lines of the Judicial Commission of New South Wales. The Council of Chief Justices of Australia and New Zealand has supported the

idea of a national judicial college as has the AIJA. I hope that the proposal will be pursued by government.

Two issues to be addressed in connection with such a proposal are control and funding. In the case of most overseas judicial training institutions, as in the case of the Judicial Commission of New South Wales, control is with the judiciary. This is important for reasons both of theory and of practice. As a matter of principle, it is necessary that arrangements for judicial education should not conflict with principles of judicial independence. There are many within the community who would welcome the opportunity to proselytise judicial officers. The dividing line between appropriate training and education, and inappropriate indoctrination, is sometimes blurred. Furthermore, as a practical matter, the experience of the Judicial Commission of New South Wales, and of overseas judicial training bodies, has shown that the success of judicial education programmes depends largely upon the co-operation of judicial officers themselves. The success of the Judicial Commission is largely attributable to its high standing in the estimation of New South Wales judges and magistrates.

Judicial training institutes in other common law countries emphasise the "peer group educational model", as appropriate to adult professionals, rather than the pedagogical model[8]. A primary aim of the curriculum is to help judges develop the practical skills and understanding they need to do their work, and experience has shown that the persons best qualified to do that are experienced serving or former judges. In a paper delivered in September 1999 to the 8th Conference of Chief Justices of Asia and the Pacific at

Seoul, Korea, on the topic of "Judicial Education", the Hon J Clifford Wallace, an American expert on the subject, said[9]:

> My experience is that nothing happens in judicial education without effective leadership. Given the importance of the administrative leadership to the overall success of the education program, the governing organization with the greatest interest in its success should control the program. In this case the judicial branch of government has the greatest interest in effective training. Thus, it is logical to place such control under the judiciary".

As to the matter of funding, the New South Wales Government has supported and been willing to support the work of the Judicial Commission. There should be no reason to doubt that all Australian governments, upon proper terms and conditions, would be willing to follow that example. The funding requirements of the Judicial Commission have been modest, partly because of the extent to which serving and retired judicial officers have been willing to participate in its educational activities.

Evaluation of Court Performance

All aspects of government are subjected to demands for accountability, and the judicial branch is no exception. There are, however, two issues that need to be addressed. First, reconciliation of the requirements for accountability with the constitutional imperative of judicial independence can give rise to difficulties. Secondly, there is little agreement upon the appropriate measures of court performance. Much has been said on the first, and this is not the occasion to add to it. The second issue, however, has not been sufficiently discussed.

It is natural, and proper, that, when governments are asked to provide additional funding for the court system, they should seek some kind of assurance that the money will be well spent. Governments, the public, and litigants, all have an interest in the efficiency with which courts operate, and in the competence and efficiency with which courts, and judges, go about their business. How are these things evaluated?

The first thing that needs to be clarified is what it is that is being evaluated. If standards of performance are to be established, whose performance is in question?

Consider, for example, the matter of court delays. The length of time which a court takes to dispose of cases brought before it depends upon three factors. The first is the number of cases coming before the court. The second is the resources, human, material, and financial, made available to the court, including the number of judicial officers appointed to the court. The third is the method by which the court, as an institution, and the judicial officers as individuals, go about handling and deciding the cases. In most courts, the first and second of those three factors are outside the control of the court. The number of cases instituted in the court will be determined by a variety of matters, including legislation enacted from time to time, and the court itself will have no control, or even influence, over the matter. As to the second factor, it is the executive government which determines the resources, including the number of judges or magistrates that will be made available to a court. As to the third factor, in most Australian jurisdictions the

registries of courts are staffed by public servants, but the judicial officers who constitute the court, as well as deciding how individual cases will be heard and determined, either control or strongly influence the procedures and practices adopted by the registries.

No one, it is hoped, would be so foolish as to seek to evaluate the performance of a court by reference to bare statistics as to time taken to dispose of cases, without taking into consideration the number of cases coming before the court, and the extent of the resources made available to the court. Even when those additional factors are appropriately taken into account, whose performance is being evaluated? If there are lengthy delays, is that a measure of the performance of the judges or magistrates who constitute the court, or of the performance of those in the executive government responsible for providing resources to the court, or of the lawyers and the litigants? The answer to that question both affects, and is affected by, the measure of performance that is adopted. The fact that cases are brought to trial within six months in one jurisdiction and within eighteen months in another jurisdiction may simply result from the circumstance that more cases are awaiting trial, before fewer judges, in the second jurisdiction. It may indicate that there is a problem to be addressed in the second jurisdiction, but it does not identify the nature of the problem. If one were to observe that there was no difference between the judicial techniques adopted in the respective jurisdictions, that the average length of cases in each jurisdiction was about the same, and that the trial procedures were identical, then that might suggest that the figures are a measure of the comparative performance of the executive governments of the jurisdictions in providing resources to

their respective court systems. If, on the other hand, it appeared, upon investigation, that there was some material difference between the ways in which the respective courts dealt with cases coming before them, and that explained at least in part the delays in the second jurisdiction, then it might be reasonable to conclude that the comparative figures were a measure of judicial performance. Figures as to time taken to dispose of cases may raise questions, but they rarely provide answers.

If courts are to undertake a commitment to dispose of cases within a specified time, then it would be misleading to represent to the public that fulfilment of such a commitment is in the hands of the judiciary. In so far as the capacity of a court to achieve certain time standards depends upon the resources made available to the court by the executive government, then such a commitment is only credible if the executive government itself is a party to the commitment. It should not be difficult, and it may often be useful, for governments and courts to agree upon what would be a reasonable time to take to dispose of certain types of cases. If courts are to publish time standards, then those whose provision of resources is necessary to the achievement of such standards should commit themselves as parties to the standards.

One of the problems in measuring the performance of "the justice system" is that, in some respects it is not a system at all. Litigants, lawyers, court administrators, judges, and the executive government all influence the time and expense involved in the process of litigation. Their interests often conflict. In civil litigation, for example, plaintiffs and defendants, and their respective lawyers,

do not have common interests. Most defendants are brought before courts unwillingly, and some may see it as in their interests to maximise the expense and delay with which their opponents are confronted. Persons who are accused of criminal offences are not always anxious to have a speedy trial. The process of litigation is not co-operative. This does not mean that it is chaotic, but it is unrealistic to expect that it can be managed with a view to producing an outcome satisfactory to everybody.

The most important measure of the performance of the court system is the extent to which the public have confidence in its independence, integrity and impartiality.

Courts, the Public and Technology

Among the initiatives adopted in recent years has been the introduction of Public Information Officers in many of the courts. The Supreme Court of New South Wales first appointed a Public Information Officer in 1993 and in the following years other Courts have created similar positions. Most Australian courts, including the High Court, publish Annual Reports or Annual Reviews of their operations.

Australian courts are making extensive use of information technology. For example, in the High Court, summaries of the facts and issues in pending cases were included on the Court's Internet site from November 1998. Judgments are available on the Internet,

usually within an hour after they have been delivered. Transcripts of hearings before the Court are also available on the Internet. The Court's site has been re-designed in a more convenient format, utilising frames which keep the most frequently sought information readily available at all times. The site averages 5000 "hits" per month. When taken together with the Australian Legal Information Institute (AUSTLII) site, where the Court's judgments and transcripts are held, there are in excess of 40,000 "hits" per month. Most Australian courts have established their own "home pages" for providing court users with information on practice and procedure, answering questions about the court's work, and giving access to decisions.

Video links are now routinely used by courts, including the High Court, for the convenience of litigants and the profession.

Computerised case management systems assist the work of court administrators. A case management system developed in 1997 for the High Court was recently purchased by the United States Center for State Courts (NCSC), after a world-wide investigation, for use in a project to improve court administration in Egypt. The High Court's system will be converted to Arabic script and installed by the NCSC and the Egyptian Ministry of Justice throughout the Egyptian court system. New South Wales, Western Australia and South Australia have also developed judicial support systems which have attracted overseas interest. Recently the Law

Reform Committee of the Victorian Parliament published a report which found a high level of acceptance and use of information technology among judges, court administrators and members of the legal profession. The Supreme Court of Victoria, with its Mega Case Litigation Project and with the development by an Australian firm, Ringtail Solutions of the Cyber Court Book, has been closely involved in the adaptation of technology to the needs of courts.

Court facilities

A good deal is said about what the profession and the public are entitled to expect of courts in the institutional sense. We should not overlook what they are entitled to expect of courts in the physical sense. Litigants, witnesses, jurors, lawyers and judges need court rooms and precincts, registries, and offices, that are constructed, maintained and equipped to a reasonable standard. In this respect, the situation across various jurisdictions is somewhat uneven. In one sense it is unfortunate that some court buildings, which are of historic significance and are unlikely to be rebuilt, are old and expensive to maintain and renovate. As a rule, federal courts appear to be well served in this matter, but in some other jurisdictions there are serious accommodation problems to be addressed.

The Role of the Jury

Juries, civil and criminal, represent an important point of contact between the administration of justice and the community.

The jury system involves cost. Jury trials tend to be slower than trials by judge alone, and, for many people, jury service is inconvenient. Even so, the common law tradition of having disputed issues of fact determined by a jury did much to keep the courts in touch with the public, and with community standards.

The role of the jury in the administration of civil justice has greatly diminished, and in some Australian jurisdictions has virtually disappeared.

In the administration of criminal justice, the role of the jury remains important, notwithstanding a clear trend, in many jurisdictions, to legislate to make more and more offences triable summarily, either in the discretion of the prosecution, or at the election of the accused. Whether, in absolute terms, the number of jury trials is decreasing, may be doubted, but the proportion of offences that are dealt with summarily has substantially increased.

The orality of jury trials is at odds with the modern tendency for an increasing amount of evidence, and argument, to be presented in written form, often electronically. This development is capable of being accommodated. There is no reason to assume that modern juries have difficulty with documentary, or electronic, information. The fact that juries do not give reasons for their decisions, but pronounce generally inscrutable verdicts, is also at odds with the modern emphasis upon openness in decision making. Nevertheless, whilst trial by jury is a diminishing part of our system of justice, it continues to serve a number of important

purposes, which include citizen participation in the administration of justice.

The experiences of citizens as members of juries form the basis of a substantial part of the community's perception of the law and of judges and court administrators. It may be assumed that most jurors find the responsibility of decision making burdensome, but the experience of judges is that they approach the task conscientiously. They take away from the courtroom strong impressions about the fairness, impartiality and competence of judges and lawyers. They also gain an insight into the responsibilities of judicial decision making.

In New South Wales, under the auspices of the Attorney-General, surveys have been conducted with a view to evaluating the work of the modern jury and to identifying ways in which courts can make that work more effective. This is a subject which merits the attention of judges and lawyers.

The unrepresented litigant

In its recent Discussion Paper on the Federal Justice System, the Australian Law Reform Commission pointed out that labelling of the common law and civil law systems of justice as "adversarial" or "inquisitorial" often ignores the increasing extent to which each system has adopted features of the other, and distracts attention from serious analysis of problems, especially cost and delays, common to both systems. There is, however, one notable

difference between the two systems which is partly explained by the distinction reflected in those labels. It concerns the respective functions of judicial officers (judges and magistrates) and lawyers.

The insistence of the common law that the judge is a neutral and impartial adjudicator, and that it is for the parties and their legal representatives to formulate the issues which arise for decision, find the witnesses, investigate the facts, lead the evidence, and make competing submissions about the legal principles to be applied, in the resolution of a civil dispute, means that the judge takes no part in the preparation and presentation of the case. Similarly, in our system of criminal justice, the court (the judge, with or without a jury, or the magistrate) acts as adjudicator, abstaining from any part in the investigation or prosecution of the crime[10].

The work done by barristers and solicitors in the preparation and conduct of civil and criminal cases, although sometimes the subject of justifiable criticism, is an indispensable resource upon which the courts place much reliance. Trial courts, and to a lesser extent appellate courts, depend upon counsel to raise and argue the relevant legal principles, and they depend almost entirely upon counsel to present and define the relevant facts.

The system depends, not only for the justice of the ultimate outcome, but also for the efficiency with which the proceedings are conducted, upon the assumption that the competing cases are

being put, to their best advantage, by professionals who have the skills necessary to marshal evidence and argument, to identify the issues to be determined, to present the facts capably, and to understand and argue the law.

For a system based upon that assumption, the unrepresented litigant is a serious problem. People cannot be compelled to be legally represented. Some are unrepresented of their own choice, but most unrepresented litigants are unrepresented because they have been unable, usually for financial reasons, to obtain the services of a lawyer. The resulting problem has two aspects. The first relates to justice; the second relates to cost and efficiency.

Our system proceeds upon the assumption that a just outcome is most likely to result from a contest in which strong arguments are put on both sides of the question, and the court adopts the role of a neutral and impartial adjudicator. If parties are not legally represented, then the assumption is often invalidated, partly or completely. A senior English judge said that "the adversary system calls for legal representation if it is to operate with such justice as is vouchsafed to humankind"[11].

What is not so well understood outside the court system and the legal profession is the cost to the system, and the community, in terms of disruption and delay, of the unrepresented litigant. If the

work which the courts routinely leave to be done by lawyers is left in the hands of the litigants themselves, in most cases the work will either not be done at all, or it will be done slowly, wastefully, and ineffectively. If the judge or magistrate intervenes then his or her impartiality is likely to be compromised, and the time of the court will be occupied in activities which would ordinarily be unnecessary. The result is often confusion and delay in the instant case, with consequences for other litigants waiting their turn in overburdened court lists.

This is a problem with substantial practical dimensions. In the High Court, during the year ended 30 June 1999, in proceedings before single Justices, 28 per cent of litigants were unrepresented. In approximately 25 per cent of applications for special leave to appeal, the applicants were unrepresented. The Chief Justice of the Family Court has said that, in more than one-third of contested cases in that court, either one party is unrepresented, or both parties are unrepresented. It would be instructive to have corresponding figures for other courts. Certainly, the issue is one which concerns judges and administrators in most jurisdictions.

Legal aid is a controversial subject, with political implications, and it is not my intention to intrude into political debate. Resources are limited, and governments must establish priorities between competing needs. Governments are also entitled, and bound, to

see that public funds are not poured into a bottomless pit. There is, however, one point that judges are well-placed to make. The expense which governments incur in funding legal aid is obvious and measurable. What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation. Much of that cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid.

Legal aid funding is a complex and difficult issue, involving the allocation of scarce resources, and the setting of priorities between competing needs. In a democratic society, such issues are resolved through the political process. It is not the function of judges to engage in that process, but their special knowledge of some of the relevant facts and issues ought to be available to those who are engaged in the process.

Trans-national litigation

One aspect of the late twentieth century phenomenon of "globalization" has been a rapid and substantial increase in the movement across national boundaries of people, goods, and capital, and the dissemination of information by technology which makes such boundaries in many respects irrelevant. International communication is now so swift and easy, trade and commerce

between nations so routine, and movement of persons across borders so free, that the legal systems of nation states are being forced to come to terms with a new reality.

It has always been the case that the expense, delay, and uncertainty of domestic litigation is greatly magnified if there is a need to serve process abroad, take evidence in another jurisdiction, perhaps one with an unfamiliar legal system, or enforce a judgment in a distant place. Traders have adopted various expedients to avoid being entangled in foreign litigation; a prospect which they have regarded with even more dismay than the possibility of being entangled in local litigation. Even those devices, such as the use of letters of credit, ultimately depend for their efficacy upon the ability to enforce rights and liabilities in a court.

Much litigation, especially commercial litigation, now has an international element, because of the nationality of one or more of the parties, or the place of residence of witnesses, or the location of the subject matter of the disputes. It is beyond the scope of this address to consider the effect of this upon legal principles relating to such issues as the role of international law in the interpretation of local statutes, or the development of the common law of forum non conveniens, or anti-suit injunctions. What is of present concern is its effect upon the judicial process.

The procedures whereby courts of different countries undertake arrangements for service of process or taking of evidence abroad, or for the recognition and enforcement of foreign judgments, which are usually referred to by the somewhat misleading description of "judicial assistance", have not kept pace with the demands created by current circumstances.

In the criminal area, international cooperation is relatively well developed, but in the area of civil and commercial litigation it has been recognized that there is a need for more effective arrangements to deal with the increasing number of cases where the just resolution of a dispute in an Australian court requires foreign assistance. There have, in the past, been multi-lateral treaties covering some aspects of this subject[12]. However, only a relatively small number of countries were signatories to those conventions. This year the Hague Conference drafted a Convention on the Recognition and Enforceability of Civil and Commercial Judgments. Last month Australia and the Republic of Korea entered into a Treaty on Judicial Assistance in Civil and Commercial Matters. That bi-lateral agreement contains a number of interesting provisions aimed at facilitating legal proceedings in one of the two countries which require assistance in the other. For example, the treaty provides for the use of video-conferencing to take the evidence of a witness resident in one jurisdiction for use in proceedings in the other jurisdiction.

One of the practical problems which the Korea-Australia Treaty had to address was the interaction between a civil law system and a common law system. The respective roles of judges and legal practitioners in the taking of evidence are different in the two systems. Evidence taken by a Korean judge, in accordance with civil law procedures, will not be tested by cross-examination. Problems of admissibility of evidence may arise. The matter of the cost of lawyers' services in litigation, which varies according to the role they play in the taking of evidence, can be an obstacle to practical cooperation. Even so, this new Treaty, which is a relatively isolated example of a bi-lateral arrangement for judicial assistance in commercial and civil matters in the Asia-Pacific region, an area of international trade of major importance to Australia, provides an example which is worth pursuing with other trading partners.

The whole topic of judicial assistance deserves attention. In the area of family law, for example, trans-national disputes concerning the custody or welfare of children, or property rights, or issues of maintenance, will become increasingly common. There is a need for an empirical study to determine how often parties to civil and commercial litigation require international assistance, and how often, at the present time, parties simply give up in the face of the complication, expense, and delay, resulting from the intrusion into local litigation of a foreign element.

The court system can no longer be regarded as an institution operating exclusively behind national walls. The system now functions increasingly in an international environment, and must respond to that circumstance.

The High Court

It seems appropriate to conclude with a particular reference to the High Court. The Court's Annual Report for the year ended 30 June 1999 will shortly be sent to the Attorney-General and tabled in Parliament. That Report contains detailed information as to the business of the Court. One point referred to in the Report should be mentioned on this occasion.

For many years the Justices have met regularly, during the sittings of the Court in Canberra, to review the administration of the Court with the Chief Executive and Principal Registrar. It is at these Business Meetings that decisions are made on the budget, expenditure of funds and issues of policy that affect the Court's administration.

During the year commencing 1 July 1998 a new series of regular meetings of the Justices was commenced. Between sittings of the Court, the Justices now meet regularly in a formal session to consider the list of reserved decisions, the priorities that should be attached to the completion of cases, and any urgent

matters of administration that arise between their regular Business Meetings.

One of the principal purposes of the new series of meetings has been to facilitate discussion of the opinions of the Justices on matters that are reserved and awaiting decision. In the past, there has always been informal discussion on such matters. The new series of meetings has formalized the arrangements to a greater extent and provided the occasion for the review of current thinking of the Justices concerning the cases reserved for decision. The discussion has contributed in some cases to agreement upon single opinions for the Court, following the concurrence of opinion amongst the Justices both as to the result and the reasons for the result. It has also facilitated arrangements for the acceptance of obligations, on the part of particular Justices, to prepare a first draft for the Court's consideration. Such a division of labour promotes efficiency. It can also assist in the early delivery of decisions. At present, there is no case awaiting decision in the High Court where judgement has been reserved for more than 22 weeks. All but four of the cases presently awaiting decision were heard after the beginning of August 1999. Other final appellate courts have established systems, many of them long standing, for formal discussion amongst the Justices of the kind now introduced in the High Court of Australia. The discussions will not always secure agreement between the Justices. Even where important differences exist, discussion can help to clarify and refine opinions

and reasoning. Such meetings also contribute to the collegiality of the Court and to relationships between the Justices and their understanding of their respective opinions.

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[1] (1997) 189 CLR 520 at 563.

[2] (1999) 73 ALJR 839.

[3] (1979) 53 ALJ 487.

[4] (1979) 53 ALJ 487 at 488-489.

[5] (1981) 55 ALJ 677.

[6] (1981) 55 ALJ 677 at 678-679.

[7] Final Report, 1988, Volume 1, 6.36.

[8] Paul M Li, *How Judicial Schools Compare to the Rest of the World,* 34 No.1 JUDGES J17 (Winter 1995); Charles Claxton, *Characteristics of Judicial Education Programs,* 76 JUDICATURE 11 (1992).

[9] At page 11.

[10] (An example of a recent proposal for modification of a civil law system is to be seen in the public statement of Premier President Truche, the head of the Cour de Cassation, upon his retirement, proposing abolition of the role in the French system of the investigating judges: "Il n'est pas sain d'instruire et de juger en même temps". Le Figaro, 28 June, 1999.

[11] Lord Simon of Glaisdale in *Waugh v British Railways Board* [1980] AC 521 at 536.

[12] eg the Convention on Civil Procedure adopted by the Hague Conference on Private International Law 1954; the Convention and the Taking of Evidence Abroad in Civil and Commercial Matters, 1970.