SEVENTH AUSTRALASIAN AND PACIFIC CONFERENCE ON DELEGATED LEGISLATION
FOURTH AUSTRALASIAN AND PACIFIC CONFERENCE ON THE SCRUTINY OF BILLS

Parliament House, Macquarie Street, Sydney

21 July 1999

MURRAY GLEESON*

I am delighted to have the opportunity to participate in the opening of your important Conference. I have already had the opportunity to read in advance some of the papers that will be delivered, and it is obvious that you have substantial issues to discuss.

It would be unfortunate if those issues were regarded as of concern only to specialists, and to people with a highly developed understanding of public affairs. Whilst it would be unrealistic to expect that the subjects that you will be debating would ever be of wide popular interest, it is not unreasonable to hope that there

---

* The Honourable Murray Gleeson AC, Chief Justice of Australia.

could be more public awareness of the importance of such matters, and of some of the issues at stake. They have a substantial bearing on the quality of life in our community.

To understand government is not necessarily to admire all its ways. But we can hardly expect the community to value the work of government, and the institutions upon which our society is based, unless two conditions are satisfied. First, there is need to make the public more aware of the work of those institutions. Secondly, those involved in the various branches of government need to maintain what might be described as institutional self-respect.

The division of governmental powers into legislative, executive, and judicial, provides a useful framework for analysis of many problems, but, as has often been observed, the separation is neither strict nor comprehensive. Important issues arise out of the tension that exists from time to time between branches of government. We have developed considerable skill in addressing those issues. What I want to raise for consideration is the matter of the opportunities that might exist for more productive cooperation between the three arms of government.

I sometimes wonder whether our commitment to an adversarial system of government, and to the benefits of creative

tension, does not obscure other possibilities which are worth consideration.

Let me give a couple of examples. I have no doubt that many people here could think of, and develop, others.

You will not be surprised to hear that my examples relate to interaction between the judiciary and the other branches of government.

Consider the question of court delays. The time which a court takes to dispose of cases coming before it depends upon a combination of three circumstances: first, the number of cases commenced in the court; secondly, the resources, human and financial, made available to the court to handle its workload; and thirdly, the methods and procedures adopted by the court in dealing with its business. The first and second of those matters are entirely outside the control of the judiciary. The third matter is within the control of the judiciary, subject to any valid legislation which Parliament may enact. As to the second matter, the matter of resources, it is the executive government which determines the resources that will be made available to courts, and in so doing, contends with issues of priorities, having regard to other necessary avenues of expenditure, and to limitations on funds available. As to the first of the three matters mentioned, the business that comes before the courts, Parliament has a significant influence, through

legislation which is enacted from time to time. For instance, in the first year after the New South Wales Parliament enacted legislation concerning the availability of apprehended violence orders, 50,000 applications for such orders were commenced in Local Courts in New South Wales. The implications for the capacity of the Local Courts to handle their workloads within a reasonable time was obvious.

The interests of the public in reducing court delays can never be met if there is a standoff between the three branches of government, none of which has it within its capacity, separately and individually, to solve the problem. If there is to be a realistic and credible commitment to reducing delays in dealing with cases, then that must be a joint commitment to which all those who have the capacity to determine the outcome subscribe. I am not suggesting that the Executive Government should surrender, or compromise, its capacity to decide what funds will be made available to courts, any more than I am suggesting that the judiciary should surrender or compromise its capacity to determine what the requirements of justice dictate in relation to the disposition of cases. Judges cannot force governments to provide them with resources, and governments cannot force judges to adopt procedures for the disposition of cases which are unjust. Even so, there is an opportunity to work together to develop joint commitments which could operate for the benefit of the public.

One of the reasons for an absence of cooperation can be a form of mutual suspicion. People who have the responsibility of allocating scarce resources between competing demands, each with its own claim for priority, find it easy to persuade themselves that their problems are not really understood by particular interest groups. They believe they see a big picture, of which others have little understanding. A parliamentarian once responded to my complaints about inadequate funding for the New South Wales court system by asserting that I wanted the government to build a bigger sandpit for lawyers to play in. Perhaps some people also regard hospitals as sandpits for doctors to play in. But it is the interests of patients and litigants that need to be addressed. Judges, on the other hand, sometimes tend to resign themselves to the belief that there are no votes in courts, and to assume that any political commentary on inefficiencies in the justice system is a cynical attempt to divert attention away from a government's unwillingness to provide proper funding. Although these respective attitudes may be understandable, both are wrong. There is much that could be achieved by addressing both the real financial needs of the court system and the real opportunities that exist for improving efficiency. But these things cannot be done separately. No government is going to commit funds to a system which does not seek to apply them effectively. Judges cannot be expected to sustain enthusiasm for a succession of temporary expedients aimed at compensating for a lack of proper resources. It is unrealistic and naive to expect the judiciary to engage in dialogue

about improving the justice system if the question of resources is excluded from the agenda.

A related subject, which provides another avenue for more cooperation, is the matter of accountability. We live in a managerial society committed to the concept of quantitative measurement as a basic instrument of accountability, suspicious of leaving anything to qualitative judgment, and dedicated to the primacy of outcomes over process.

Attempts to standardise the disparate, and to measure the unmeasurable, are bound to be met with derision and, on occasion, hostility. But there is room for better understanding on both sides. There are aspects of performance of the justice system which ought to be capable of being measured. At the same time, crude attempts to impose quantitative evaluation upon what are essentially matters for qualitative assessment will get nowhere. Let me take an example away from Australia in an endeavour to make the point uncontroversially. The Supreme Court of the United States decides about 80 appeals each year. It sits to hear appeals on the mornings of 40 days each year. Its performance as a constitutional and appellate court is the subject of constant scrutiny, debate and assessment. No one would be so foolish as to suggest that a measure of its performance is the number of cases it decides, or the number of days on which it sits. It does most of its work on the papers. Any one case which it decides may be of

enormous importance. No one would suggest that its performance would improve by 10 per cent if, next year, it heard 88 cases rather than 80. On the other hand, a trial court, handling thousands of cases each year, most of which are relatively standardised, might have its performance assessed at least in part on its capacity to process its cases, provided, of course, that the extent of its workload, and the resources made available to it, enter into the process of assessment. If the court has long delays because it has a large workload, and inadequate resources, then those delays may be a reflection on the funding performance of the government rather than on the judicial or managerial performance of the court. An attempt to assess a court's performance by reference to time taken to process cases, without taking account of workload and resources, is absurd. However, I have seen such attempts made. They are counter-productive, and are more likely to generate suspicion of the motives of those who undertake them than useful co-operation.

An area for productive activity involving both the courts and Parliament is that of providing public information and education about the working of government. The lack of understanding of our governmental arrangements can be demoralising. Often, for example, statements are made which indicate a belief that the Judicial Commission of New South Wales has the capacity to instruct judges as to how to decide cases, and to tell them to be more severe, or more lenient, when they impose sentence, or to be

more ready, or less ready, to grant adjournments or make orders of certain kinds. Similarly, there is room for a great deal of improvement of the understanding that most members of the community have of the workings of various aspects of the parliamentary system.

One of the principal benefits of exploring avenues for greater co-operation between the three branches of government is that this would contribute to institutional self esteem. You can hardly expect the public to value the work we do if we do not appear to value it ourselves.

I hope that your deliberations will be stimulating and fruitful and I wish you a successful Conference.