PUBLIC CONFIDENCE IN THE JUDICIARY

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Murray Gleeson*

One of the more pleasant duties of a Chief Justice is to receive courtesy calls from newly appointed Ambassadors of foreign countries. Some years ago the Ambassador of the Republic of Ireland called on Chief Justice Mason. The Ambassador remarked that, at the time, six of the seven Justices of the High Court were wholly or partly of Irish descent. Sir Anthony said: "Please do not make that generally known. It could damage public confidence in the Court." I am not sure whether the Ambassador shared Sir Anthony's sense of humour.

Judges, individually and collectively, attach great importance to maintaining the confidence of the public. (In the term "judges" I include all judicial officers). Public confidence is invoked as a guiding principle in relation to the conduct of judges, on and off the bench, and in relation to the institutional conduct of courts. And it is a value that plays a part in

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* Chief Justice of Australia

the development of legal principle[1]. It is necessary for the effective performance of the judicial function. As Alexander Hamilton famously recognised[2], in a body politic where legislative, executive, and judicial powers are separated, the legislature controls money, the executive controls force, and the judiciary controls neither. The general acceptance of judicial decisions, by citizens and by governments, which is essential for the peace, welfare and good government of the community, rests, not upon coercion, but upon public confidence. Not only is the judicial branch, as Hamilton said, the least dangerous. It is also the most dependent upon habitual conformity to its decisions on the part of the community and the other branches of government. That habit of conformity only exists because the public have a certain attitude towards judicial power, and those who exercise it; an attitude we describe as confidence. But what exactly does it mean? How do we know what will sustain it; or what will diminish it?

In truth, we are talking about something that exists at various levels. We are not just talking about public opinion, and its short-term response to events and issues. Like any occupational group, judges want to be well-regarded by the rest of the community; they are pleased

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1 eg *Bunning v Cross* (1978) 141 CLR 54 at 74-78; *Grollo v Palmer* (1995) 184 CLR 348 at 365; *Ridgeway v The Queen* (1995) 184 CLR 19 at 31; *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 at 107-108; *Johnson v Johnson* (2000) 201 CLR 488 at 492-493.

2 Hamilton, *The Federalist Papers*, No 78, New York, Random House, 504.

if their work is valued; they are concerned by criticism that is fair; and they are offended by criticism that is unfair. But confidence goes deeper than that. It goes beyond public reaction to legal issues that, from time to time, become newsworthy. Sentencing has been such an issue in recent years. What Americans call tort law reform has recently become a political issue here; it has been an issue in the United States for years. Discussion of topics of this kind inevitably includes comment, some well-informed, some ill-informed, on the courts. Such comment has an effect on public opinion. We cannot afford to ignore it; and we look for appropriate ways to respond to unjustified criticism. How this can be done is a subject that has been discussed at many conferences like this; and I believe it will be discussed at this conference. But my present purpose is to address something more basic.

The difference between these matters of substantial, but temporary, importance, and what might be described as structural, or institutional, issues, can be illustrated by an example concerning the legislative branch of government. In any democracy, there is a constant state of contention about topical issues. Political figures rise and fall in the estimation of voters. But there is a difference between asking whether particular political figures are popular, or whether voters have a high opinion of politicians generally, and asking whether the public has confidence in the system of representative democracy. At any given time, the electorate might be politically volatile, and there might be dissatisfaction with the performance of some or all of the leading political figures, but at the same time there may be a general acceptance that the

system is fair and democratic, and that parliaments reflect the will of the electorate to the extent that such a thing is reasonably practicable.

We regularly see news reports of elections in other countries where there are serious doubts about the integrity of the electoral process. We would be affronted by a suggestion that a team of international observers should be sent to Australia to report on whether our elections are free and fair. We seem to take it for granted that they are. Most Australians would have no idea of the administrative and legal procedures that underpin our electoral process. How many people know that the High Court is the federal Court of Disputed Returns? How many people ever hear of the work of the Electoral Commissioner? Yet there appears to be a general acceptance that our electoral system is honest. That is a fundamentally important form of confidence. If it were to be shaken, then the nature of our political life would change.

Confidence in the integrity of the electoral system can co-exist with disapproval of the outcome of an election. In fact, the greater the level of confidence in the integrity of the system, the greater the freedom, and assurance, with which people can engage in the political process. It is precisely because we do not have to concern ourselves about whether all the votes will be counted, or whether the armed forces might intervene if they disapprove of the result of an election, that we are able to engage in vigorous and open political contest about the issues of the day.

A recent example of public confidence in the law was the peaceful acceptance, in the United States, of the outcome of a Presidential election that was ultimately settled by judicial decision. Doubts about the electoral process were resolved by recourse to law, and the nation accepted the result. Dissatisfaction with the outcome on the part of about half of the voters, and criticism of the decision of the court, co-existed with peaceful acceptance of the consequences of that decision.

It is confidence of that kind, and at that level, that really matters.

The importance to the rule of law of such a state of confidence in the judiciary that people, and governments, routinely accept and comply with judicial decisions is self-evident. And this acceptance is most necessary in the case of decisions that are controversial and unpopular. The plainest example of that is a judicial decision declaring legislation that enjoys community approval to be unconstitutional and invalid. But, every day, courts make decisions that injure or offend some people; perhaps many people. The rule of law depends upon peaceful acceptance of those decisions, and compliance with court orders, even if they are strongly resented. There are places in the world where enforcement of judicial decisions is a major problem; especially if decisions go against governments, or organisations in which governments have a stake. Enforcement of judgments and orders, generally speaking, is not an issue in Australia. Why not? The answer can only lie in that aspect of the relationship between the courts and the community that is described as public confidence. It is good that we can

count on that. But there ought to be a clear understanding of why it exists, what might put it at risk, and what we need to do to preserve it.

Confidence is not maintained by stifling legitimate criticism of courts or of their decisions. Judges have never sought, or received, immunity from criticism. There has never been a Golden Age of respect for judges as individuals. Consider the following appraisal of the work of the High Court in 1935, by the editor of the Sydney Sun[3]:

> "Some time ago the Assistant Treasurer (Mr Casey) complained of the manner in which the High Court knocked holes in the Federal laws. Those laws have certainly been perforated by the keen legal intelligences of the High Court Bench. One of the results of this game (a very expensive game for taxpayers) is that the law which was relied upon to keep Australia white is in a state of suspended animation. A noted Czechoslovakian author, whose books nobody appears to have read, arrived in Australia recently, very much against the will of the Government ... Jumping ashore and spraining his ankle in the process, he was promptly put in gaol under the Act which gave the Government the right to keep undesirables out. Friends of the humble and oppressed tested the law, and to the horror of everybody except the Little Brothers of the Soviet and kindred intelligentsia, the High Court declared that Mr Kisch must be given his freedom. We all, of course, ought to thank this distinguished literateur for his discovery of a flaw in one of our most important Acts, a flaw which is to be mended some time or other, when Parliament deigns to sit again. When the amendments are made, we should invite him to jump ashore again to see whether the new Act pleases the High Court any better than the old, or whether the ingenuity of five bewigged heads cannot discover another flaw. Upon another ... occasion, though it was declared by the representative of the party which passed an Act that his intention was to include secondhand dealers in the provisions of the sales tax, the High Court, with the keen, microscopic vision for splitting hairs which is the admiration of all laymen, discovered that they were not included, and

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3 *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434 at 435-436.

> that a tax had been illegally collected for over four years. Well may the Caseys and Kellys cry, like the historic British monarch, for some gallant champion to rid them of this pestilent Court".

There you have the High Court, more than 65 years ago, rebuked for frustrating the government's attempts at border protection, and for defeating Parliament's intention to broaden the tax base. Those who complain that times are not what they used to be, ought to consider the possibility that they never were. Even so, we live in an age when the attitude of the general community towards authority, and institutions, is more consistently questioning, and even challenging, than in the past. This is a good thing. It is better that people who exercise authority feel uncomfortable than that they feel complacent.

Those who are alarmed by what appears to them to be an increase in criticism of, and complaints about, judges may have a somewhat romantic idea about what occurred in former times. They might also be missing a fairly obvious explanation. It may not be that the public is more cantankerous, or that judges are less disciplined. It may simply be that there are now many more judges. The increase in the size of the Australian judiciary is a matter of great practical significance. In the last 20 years the magistracy has been taken out of the public service and has become part of the judiciary. Within the last four years, a federal magistracy has been created. The size of State and Territory courts has grown substantially. Thirty years ago the federal judiciary was small. Then the Federal Court and the Family Court were created and, aided by removal of the constitutional requirement that federal

judges be appointed for life, the expansion of the federal judiciary began. (I am sure that one reason federal courts have greater administrative autonomy than State courts is that there never existed, in the federal public service, a substantial bureaucracy responsible for court administration, of the kind that had grown up in the States over 150 years. When issues of federal court administration arose, they did not threaten public service jobs. They involved no territorial threat.) The Australian Law Reform Commission recently reported on the matter of procedures for dealing with complaints against federal judges. Part of the background to that issue is that, for most of the 20th century, there were very few federal judges. The increase in the size of the judiciary is not only of practical importance in relation to complaints. It is also tied up with issues such as the need for guidelines on judicial conduct, and the move towards formal arrangements and facilities for judicial education. These are subjects to which I will return.

Confidence in the judiciary does not require a belief that all judicial decisions are wise, or all judicial behaviour impeccable, any more than confidence in representative democracy requires a belief that all politicians are enlightened and concerned for the public welfare. What it requires, however, is a satisfaction that the justice system is based upon values of independence, impartiality, integrity, and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully.

Courts and judges have a primary responsibility to conduct themselves in a manner that fosters that satisfaction. That is why judges place such emphasis upon maintaining both the reality and the appearance of independence and impartiality. In addition, built into the infrastructure of our institutional arrangements, there are rules and conventions designed to secure and maintain the same confidence.

The separation of legislative, executive and judicial powers, which is reflected in both the form and the substance of the Constitution, is there to reinforce the assurance that disputes about the meaning of the federal agreement, and the limits it imposes upon legislative and executive power, will be resolved by judges with nothing to hope, or fear, from legislative or executive influence. And it strengthens the conviction that all forms of dispute, between citizens, or between citizens and governments, will be dealt with by people who are not amenable to improper control or pressure, governmental or private.

Tenure is the primary means by which the system seeks to reinforce public confidence in the independence of judges. In the case of federal judges, this tenure is secured by Chapter III of the Constitution. State judges enjoy similar constitutional protection. Judges may only be removed from office, before they reach the age of compulsory retirement, by a formal act of the Governor-General or Governor, following a resolution of Parliament, on grounds of proved misbehaviour or incapacity. Modern employment practices, including those affecting public servants or academics, are such that tenure of this

kind is now unusual. But it exists to serve a constitutional purpose. It exists to maintain public confidence in the independence and impartiality of the judiciary. It is not for the personal benefit of judges. In the case of some judges, it operates to their personal disadvantage. There are judges, who, if they were free to negotiate individual contracts with a government, would be distinctly better off than under the present system. The inflexibility of their terms of engagement leaves some judges at a large disadvantage compared with people of comparable skill and responsibility in both the public and private sectors; but it goes with the job.

The application of private sector employment arrangements and practices to public servants is a controversial subject, and I intend to say nothing about it. But in relation to judges, it is both inappropriate, and constitutionally impossible. Public servants are part of the executive government, and if the executive government sees fit to provide them with incentives, and subject them to forms of accountability, of a kind common in the private sector, so be it. Whether it is a good thing or a bad thing, it is a legal possibility. But judges constitute a branch of government separate from the executive, and, from time to time, they sit in judgment upon the lawfulness of the actions of the executive. They stand between the executive and the citizen. The assurance that the judicial power of government will be exercised impartially would be at risk if judges could be rewarded, or punished, by the executive. Incentives and reprisals may be part of modern management practice, and ideas of efficiency and accountability, but they are incompatible with

judicial office. We inherited this principle from England, where, more than 300 years ago, Parliament, recognising that its own power depended in part upon a judiciary that was not subservient to the King, established security of judicial tenure. The modern counterpart of the Stuart or Hanoverian Kings is the executive government. Of all institutions, that which has the greatest interest in ensuring that judges have nothing to hope, and nothing to fear, from the executive, is the Parliament itself.

The independence and impartiality of the judiciary are not private rights of judges; they are rights of citizens. The *Universal Declaration of Human Rights* enshrines the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. The *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* both guarantee the exercise of this human right. There is now international acceptance of the importance of judicial tenure. The *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* provides:

> "22. Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge."

On 10 April 1997, the Chief Justices of the Australian States and Territories issued a *Declaration of Principles of Judicial Independence* which I signed in my then capacity of Chief Justice of New South Wales. It included the following:

> "(3) The holder of a judicial office shall not, during the term of that office, be dependent upon the Executive

> Government for the continuance of the right to exercise that judicial office or any particular jurisdiction or power associated with office."

It is a source of frustration to some people that judges are difficult to remove, and that the Constitution makes no provision for disciplinary measures short of removal. Of course, judges, like anyone else, are punishable for breaches of the law. But the sanction of removal is better seen as aimed at protecting the public than at punishing an individual. There may be, within a court, internal administrative measures that can properly be used to address some problems of judicial conduct. But, unless a judge does something so serious as to warrant removal following parliamentary resolution, there is generally no capacity in any person or authority to suspend, or fine, or otherwise penalise for misconduct. It is often wrongly assumed that, beyond their capacity to advise, warn, and take appropriate administrative steps, Chief Justices, and other heads of jurisdiction, have authority to penalise other judges. Judicial independence means, amongst other things, that judges are independent of each other. Judges enjoy what is, by most workplace standards, extraordinary personal independence and freedom from interference by their leadership. This is in aid of one thing: reinforcing the public's confidence that they will exercise their judicial power without fear or favour, and without the prospect of being subjected to pressure, direct or indirect, from any authority but the law itself.

Resignation by a judge the subject of a complaint is sometimes misunderstood as avoiding the consequences of misbehaviour, without any consideration being given to what the supposed alternative

consequences might be. The sole consequence provided by the Constitution is removal from office. Resignation may, in a given case, be an anticipation of that, or it may simply reflect a personal desire to avoid distressing and damaging controversy. But it produces the same ultimate result: the departure of the judicial officer concerned.

The absence of any provision for penalising judges for conduct which does not involve a breach of the law, corresponds with their immunity from civil liability[4]. It reinforces trust in their capacity to decide cases without fear or favour. Among people of all shades of political opinion, and people of no political opinion, there are those who would welcome the chance to exact reprisals for unwelcome judicial decisions. The right of citizens to be assured that disputes, including disputes to which governments are parties, will be decided independently and impartially, demands that judges go about their duties uninfluenced by the threat of reprisals or the possibility of rewards.

Within the limits established by the general principles to which I have referred, there is room for legitimate disagreement about issues such as methods of judicial appointment, the use of acting judges, judicial promotion, and procedures for dealing with complaints. As to the last matter, I would make one comment based on my experience of almost 10 years as President of the Judicial Commission of New South

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4 *Rajski v Powell* (1987) 11 NSWLR 522.

Wales. As a rule, the more serious the complaint, the easier it is to devise means to deal with it. And the converse is true. If a judge is alleged to have committed a crime, then the matter is investigated and tried in the same manner as any other allegation of crime against a citizen. If a judge is alleged to be suffering such incapacity as warrants removal, the procedures to be followed are clear. The difficult cases tend to be those in which the complaint, even if made out, would not justify removal. The complainant is likely to assume that there must be some other sanction available. It can be difficult to satisfy an aggrieved person whose complaint is justified, but who sees no form of sanction visited upon the judicial officer involved. False expectations can be created. I do not put this as an argument against having any form of complaints procedure; but it is a problem that needs to be kept in mind.

There is a fundamental problem about any course that would leave a judge in office, with both the capacity and the duty to exercise the judicial power of the Commonwealth, or of another unit of the Federation, and yet publicly discredited by censure or some other form of disciplinary action. This maybe what Gladstone had in mind when he told the United Kingdom Parliament, in relation to its powers concerning judges:[5]

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[5] 209 Parl Deb, 3rd Ser, 757 (1872) quoted in Shetreet, *Judges on Trial*, (1976) at 164. But note the author's comments on differing practice and opinions.

> "You are not to tamper with the question whether the judges are on this or that particular unassailable. You are not to inflict upon them a minor punishment. You have never thought it wise to give opinions in criticism or in reprobation of their conduct when they have gone casually astray. [If] the act [of the judge] was not an act with respect to which it would be right to ask Parliament to address the Crown for [his] removal, it was not an act of which hostile notice should be taken at all."

To some people, both inside and outside government, this is difficult to reconcile with current ideas of accountability. And, as I mentioned earlier, the size of the modern judiciary is a factor that increases their difficulty. It is all the more important, then, that we should be in a position to explain the constitutional principles that are at work.

The Judicial Officers Act of New South Wales[6] contains a limited power to suspend judicial officers while there is a pending complaint that is sufficiently serious to raise the possibility of removal, and following a charge or conviction of an offence punishable by imprisonment for 12 months or more. The power is vested in the head of jurisdiction. Subject to those qualifications, the Act provides no form of sanction short of removal. That is consistent with established principle. But it can be hard to explain to complainants, especially if their complaints appear to have merit.

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6 *Judicial Officers Act* 1986 (NSW) ss 40, 43.

There is currently a lively debate about performance standards for judges. Most of the contributors to that debate maintain a discreet silence about what seems to me a fairly obvious question: what would be the sanction for failure to comply with performance standards? Incentives and rewards for over-achievers are presumably out of the question. What do people have in mind for under-achievers? Do not assume from the silence on these topics that nobody has thought about them.

Arrangements between the three branches of government include procedures and conventions aimed at shoring up judicial independence and impartiality. One such convention, embedded in long-standing parliamentary practice, both in the United Kingdom and Australia, is that adverse imputations against certain classes of person may not be made "except on a substantive motion which allows a distinct decision of the House"[7]. In the case of a judge, personal reflections may not be made except in the context of a substantive motion for the removal of the judge from office. This practice is reflected, for example, in the Standing Orders of the Australian Senate. It goes beyond the general restraint upon abuse of parliamentary privilege that applies to parliamentary debate.

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7 Erskine May, *Parliamentary Practice,* 22nd ed., 342, 384-385.

One of the reasons for this convention is that, once the character or conduct of a judge becomes a political issue, party allegiances press people to take sides in the controversy for reasons unrelated to the merit of the complaint against the judge. Political pressures can force people into a posture of attack or defence, and the judge may be drawn into a conflict of such a nature that, whatever the outcome, the judge will be stripped of the appearance of the impartiality which is essential to the public's willingness to accept his or her authority.

These arrangements, rules, and conventions do not exist for the personal benefit of judges, any more than the freedom of the press exists for the personal advantage of journalists, or media proprietors, or the privileges of Parliament exist for the benefit of its members. They exist for the public good. In a letter written to the Australian Financial Review on 22 February 2002, the Hon Richard McGarvie said:

> "The people's confidence that they can govern themselves through the institutions whose occupants the people, or their elected governments, choose is crucial to a successful democracy."

Judges themselves are bound by conventions in their conduct, and their relations with other branches of government; conventions which have the same purpose.

Occasionally, conventions are broken. When that happens, it is important that the public should realise what is at stake. The most recent example of a breach of the parliamentary convention happened only a few weeks ago, and affected a member of the High Court. Some

commentary on that event noted the existence of the convention, but mistakenly treated it as though it existed for the personal, and discriminatory, benefit of judges. There is much more involved than that. The Council of Chief Justices, at its meeting on 3 April 2002, resolved that the Council deplored the use of parliamentary privilege in a manner damaging to the standing of the High Court and the judiciary by the making of an unjustified attack on the fitness of one of the members of the High Court to sit as a judge, and the use of parliamentary privilege to attack, on unsubstantiated grounds, the reputation of an individual and a judge. The Council shared the concerns expressed by the Executive Committee of the Judicial Conference of Australia on 21 March 2002.

So far I have referred mainly to public confidence in the independence and impartiality of the Australian judiciary. But there are other values that are also of importance, including personal and institutional integrity, and professionalism.

Maintaining the highest standards of probity is a personal and collective judicial responsibility. As you know, the Council of Chief Justices, in conjunction with the Australian Institute of Judicial Administration, has developed, and is settling in their final form, Guidelines on Judicial Conduct. These are intended to give practical assistance to judicial officers in handling problems of a kind that, in our experience, create uncertainty, and difficulty. Experienced judges, who may function in a collegiate environment, and have ready access to consultation with their colleagues, sometimes overlook the fact that

many judicial officers are not so fortunately placed, and are often confronted with problems which they have to solve alone. These guidelines will tell some of you nothing you do not already know; but for many judicial officers they will be a useful source of information, advice, and, in some respects, reassurance. They are not didactic in tone; and are not aimed at imposing contestable standards of ideological purity. But they will help to give judicial officers an understanding of what is expected of them; and of what are, or are not, problems to be avoided.

As to the matter of professionalism, the last 15 years have seen major advances in judicial education in all Australian jurisdictions. The Judicial Commission of New South Wales has been a leader in this field, and its work has achieved international recognition. Plans for a National Judicial College of Australia are progressing, with the support and cooperation of the Commonwealth Government, and the Governments of New South Wales and South Australia. The Council of the College has been constituted. This Council is inviting expressions of interest from organisations and institutions interested in producing a base for the College, administrative support, and infrastructure. The Council includes the Secretary of the Commonwealth Attorney-General's Department, and the Director-General of the New South Wales Attorney-General's Department. It is expected that the National Judicial College will have the advantage of cooperation with, and assistance from, the Judicial Commission of New South Wales. The College will be a body corporate. Membership of the Council is as follows. One member is appointed by the Chief Justices of the Federal Court and the Family Court. One

member is appointed by the Chief Justices of the States and Territories. One member is appointed by the Chief Judges of the District and County Courts. One member is appointed by the judicial heads of the Magistrates Courts, Local Courts and the Federal Magistrates Service. All those four members must be judicial officers. There are two other members: one appointed by the Commonwealth Attorney General and one appointed by State and Territory Attorneys General. The last two are not judges. The Chief Justice of the High Court nominates the presiding member, described by a kind of reverse anthropomorphism as a Chair, from among those members. I have nominated Chief Justice Doyle of South Australia.

All three governments that are supporting this important project are undertaking an important national initiative. It will offer something of immense value to the whole of the Australian judiciary. And it will reinforce public confidence in our professionalism. I urge all Australian judges and magistrates to get behind it. The Australian people are entitled to expect that a modern judiciary will have the benefit of programmes of orientation and continuing legal education to match anything that exists elsewhere in the world. We can, and we will, have that with the National Judicial College.