SUPREME AND FEDERAL COURT JUDGES' CONFERENCE

AUCKLAND 27 JANUARY 2004

SUMMARY OF REMARKS AT CONFERENCE OPENING

Murray Gleeson AC*

1. The Australian judges present are all most grateful to Chief Justice Elias and the members of the New Zealand judiciary for the warmth of their welcome and their hospitality. There is a long history of participation by New Zealand judges in this Conference, and this is the second occasion on which it has been held in Auckland. In recent years there has been increasing interaction between the judiciaries of our two countries. In particular, Chief Justice Elias, and her predecessor Chief Justice Eichelbaum, have participated in the work of the Council of Chief Justices and made a valuable contribution to that work.

2. This is a year of major change in the New Zealand judiciary. A new Supreme Court has been created and will commence to function this year. Appeals to the Privy Council will come to an end. New Zealand's judges are assured of the goodwill and support of their Australian colleagues. We have many

---

* Chief Justice of Australia

common interests and challenges. However, my present purpose is to make comments about a challenge facing the Australian judiciary. I cannot say to what extent my remarks may apply to New Zealand.

3. One of the advantages of the ageing process is that it is possible to identify problems that other people will have to solve. What I want to speak about this morning is such a problem.

4. In August 2003, an article in the Sydney Morning Herald developed the theme that, of all public institutions, only the judiciary had managed to maintain what the author called its mystique. He sought to explain why this was so. He observed that the judiciary still manages to present a disciplined appearance. There is a paradox in this. The judiciary is an institution that prides itself above all on its independence. At the same time, its members, generally speaking, still conform, to a relatively high degree, to commonly held standards of performance and personal conduct. This is against the trend. How long will it last?

5. The nature of their task requires of judges a high level of predictability and consistency of behaviour. In the area of civil justice, the great majority of potential legal disputes never go to court, because citizens and their lawyers have a good idea

of what the result would be if there were litigation. Of the tiny fraction of disputes that result in court proceedings, most are settled without judicial decision. Again, this is usually because the parties and their lawyers share a common understanding of the likely outcome. It is generally regarded as unjust, indeed scandalous, if a lawyer has to advise a client that the result of a case will depend mainly on the identity of the judge who is assigned to hear the case. In the area of criminal justice, the same applies. It was alleged inconsistency, not leniency, of sentencing practice that led to the creation of the Judicial Commission of New South Wales. The viability of the system of civil justice, and the integrity of the system of criminal justice, depend upon a substantial level of predictability and consistency of judicial behaviour.

6. How has this been maintained? In the past, it has been assisted by a feature of the judiciary that is commonly overlooked: it is small. There are not many judges. There are fewer than 1000 judges and magistrates in Australia. That is changing. The judiciary, as an institution, is rapidly becoming larger and more diverse. This will bring benefits, but it also creates a challenge.

7. The increase in the size of the judiciary, which reflects increases both in population and in litigation, may be seen from the following figures.

In the 20 years from 1983 to 2003, the population increased from about 15 million to about 20 million - an increase of 33%.

Over the same period, the number of judges of State and Territory Supreme Courts, the Federal Court and the Family Court increased by 184 to 248. This figure, however, is misleading if considered alone. It leaves out of account the strong trend, in most jurisdictions, to expand the jurisdiction of the magistracy and the District Courts. In both civil and criminal justice, Australian governments have responded to increasing demands on court resources by transferring jurisdiction away from superior courts. For example, over the period of 20 years mentioned, the size of the District Court of New South Wales increased by 63%, and the size of the Queensland District Court increased by 71%. In all jurisdictions the size of the magistracy grew rapidly, and in recent years a new federal magistracy has been created.

There are now many more judicial officers, and this growth in numbers is likely to continue.

8. Another factor bearing upon this issue is the change in the size and diversity of the professional group from which most judicial officers are drawn: practising lawyers. In time,

changes in the ethos of the legal professional will necessarily affect the judiciary. Consider, for example, the change in recent years in the profession's standards relating to conduct that in the past, would have been regarded as objectionable self-promotion. Some such conduct is now regarded as healthy competition. A professional culture of modesty and restraint in relation to anything that could be regarded as personal advertising has been transformed. The interaction between lawyers and the media, often involving public commentary on pending or part-heard litigation, has brought a new dimension to the conduct of some court proceedings. Some of the lawyers we see on television discussing the merits of cases in which they are involved are tomorrow's judges. Most of today's judges operated in a professional environment that strongly discouraged forms of behaviour now regarded as normal and acceptable. How will this influence the behaviour of judges drawn from the new professional culture?

9. The increasing size of the profession and the judiciary will make the process of judicial appointment less amenable to personal assessment. In the past, most lawyers regarded as candidates for appointment to the senior judiciary have been known personally or by repute to those influential in the appointment process. There are still some Australian jurisdictions in which the Chief Justice of the State of Territory

would know, personally, or by repute, all the judges and magistrates in the jurisdiction. That has long since ceased to be true in the larger jurisdictions. One consequence is increasing reliance on an appointment process more in line with public service recruitment. Expressions of interest are called for, even in relation to the most senior judicial offices. It may come to be regarded as normal for people to apply for judicial appointment, and to be required to display their personal, professional, and perhaps ideological, credentials, to selection panels.

10. Some of these developments may or may not be regarded as beneficial. That is beside the point. To a large extent, they are outside our control. Judges do not select themselves; and the composition of the judiciary is ultimately a matter for government. However, we have an interest in maintaining our own professional standards and there is a public interest in the preservation of the level of predictability and consistency of judicial behaviour which is essential to the justice system.

11. Some members of the public, and governments, may seek to respond to what they regard as a decrease in judicial self-discipline, if it occurs by the imposition of a regime of performance assessment. That is a difficult and dangerous issue, with implications that extend far beyond the relatively benign forms of assessment of such matters as court delays.

Some judges may think that all that is meant by performance assessment is measurement of court backlogs, so that Treasuries can provide more resources if they are needed. There is a great deal more to the subject than that. What kind of performance will be assessed? (For some people the answer is: any kind that can be measured) Who will do the assessing. And by what criteria? What will be the consequences of under-performance? Watching the answers to these questions unfold may be an interesting part of my retirement.

12. Another form of response likely to appeal to governments and some sections of the public, but with its own dangers to judicial independence, and morale, is a demand for increasingly detailed and prescriptive "codes" of judicial conduct. The Council of Chief Justices, working together with the Australian Institute of Judicial Administration, over a number of years developed, and recently published, Guidelines for Judicial Conduct. These guidelines were the result of extensive consultation within the judiciary and they were formulated and approved by the heads of jurisdiction of all of Australia's superior courts; judges who themselves had substantial experience in dealing with complaints about judicial behaviour. They are the product of consultation and experience, and they reflect a consensus among persons appointed to positions of leadership responsibility. They reflect Australian experience

and local conditions. They were not prescriptive and did not in any sense purport to be a code of conduct.

There is a serious issue of legitimacy about prescriptive codes of conduct for judges. By what authority are they promulgated? In the absence of legislative power, or representative capacity, who can bind Australian judges to detailed rules of professional or personal behaviour? Judges, of course, must obey the law, and common law and statute provide a legitimate source of many rules of judicial conduct. Beyond that, however, it is professional consensus, ascertained and declared after appropriate consultation and deliberation, that sets the standards accepted by right-thinking members of the judicial profession. Both inside and outside the judiciary, there are many who have opinions about the way judges should behave, professionally and personally. They are entitled to their opinions, and the reasons they offer for them may compel general acceptance. But in the absence of such general acceptance, how do they become binding on these judges who conscientiously disagree with them, and who have never undertaken to be bound by them?

An example of this problem is the differing views of judges concerning the appropriateness of certain kinds of post-retirement professional activity. Suppose that, at a particular time, a majority of the members of a court are of the opinion

that a particular form of activity is inappropriate. How does that opinion bind the minority? How does it bind other courts? How does it bind future judges? And, above all, how does it bind people who were judges in the past, but are judges no longer?

Apart from the issue of legitimacy, prescribing detailed rules of behaviour sometimes entails unwarranted intrusion into the personal freedoms of judges. Such intrusion does nothing to encourage recruitment to the judiciary, and may reflect a well-intentioned, but fundamentally unsound, desire to regulate behaviour which is the judge's own business. There may be various forms of personal behaviour in which some judges would prefer that other judges did not engage. Even so, limiting freedom to engage in lawful behaviour is a serious matter.

13. Increased emphasis upon judicial training and education provides an appropriate and legitimate method of securing the knowledge and observance of generally accepted standards of professional and personal behaviour. That is the most effective method of securing a proper level of predictability, consistency and propriety of behaviour in a larger and more diverse judiciary. Provided such training and educational programmes are under the control of the judicial profession itself, they will provide an important method of passing on the

standards of the profession to new members. This is one reason why I attach so much importance to the future of the National Judicial College.

14. Engagement between judges at professional conferences, such as the present, is also an important means of securing the maintenance of our standards.

I congratulate all those who have helped to arrange the Conference, and I am delighted to declare it open.