

THE ROLE OF THE CHIEF JUSTICE

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I retired as Chief Justice of Western Australia in February 2006. I was then the longest serving Chief Justice of Western Australia.

I came to the Bench 32 years after commencing study of the law. Although my practice was primarily in areas of law other than criminal law, as a student I was fascinated by criminal law. In 1957–58 there was a great debate going on concerning the abolition of capital punishment. As a Christian, I regard the sanctity of human life as fundamental. If we value human life, we cannot condone the organised killing of a fellow human being as punishment. It is simply revenge. My opposition to the death penalty took me into the streets as a demonstrator.

I joined the independent Bar on 1 January 1980 and was appointed a Queen's Counsel in June 1980. I practised at the Bar until my appointment as Chief Justice of Western Australia. I was Chief Justice for some 18 years. Since 1990 I have also been Lieutenant Governor. Whenever the Governor is ill or absent I take over the role as Acting Governor. In this article I wish to set down from my perspective my views about the role of the judiciary and, in particular, that of the Chief Justice.

There are four major aspects of judicial status or performance – independence, impartiality, fairness and competence.¹ The independence of the judiciary from the executive government is indispensable if there is to be public confidence in the administration of justice. The executive is a party to much civil litigation, which is often concerned with rights and obligations as between the government and citizens. If it were not accepted that in a dispute between the government and a citizen that comes before a court of

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¹ Chief Justice Murray Gleeson, 'The Role of a Judge and Becoming a Judge' (Speech delivered at the National Judicial Orientation Programme, Sydney, 16 August 1998) <http://www.highcourt.gov.au/speeches/cj/cj_njop.htm> at 6 September 2001.

law, both parties would receive equal treatment, the consequences for our society would be extremely grave.²

Although judges are servants of the public, they are not public servants. The duty of a judge is not to give effect to the policy of the government of the day, but to administer justice according to law, without fear or favour and without regard to the policies of the executive government.³

In both case law and legislation, there is very little that defines the role of the Chief Justice.⁴ The powers of a Chief Justice are in fact, quite limited. Each judge holds a commission which authorises and requires the judge to exercise judicial office and which entitles the judge to do so without interference from the others, while the judge acts according to law.⁵ It is a common misconception that the Chief Justice holds a commission as a judge and as Chief Justice. All Australian Chief Justices hold a single commission as Chief Justice and are not correctly identified as a Justice of the Court. My legal title was Chief Justice of Western Australia. It was that which made me the head of the judiciary in Western Australia.

The role of a Chief Justice is one of leadership. The Chief Justice is expected to be the spokesperson and representative of the judiciary in the State in its dealings with the executive government and the community. The Chief Justice has an executive role as the head of the Court as well as the head of the judiciary in the State. It is by no means clear, however, what actions a Chief Justice is empowered to take to deal with a judge who is failing to discharge his or her work with reasonable efficiency. Although one may find general observations in the case law about the responsibilities of a Chief Justice, such as in *The Honourable Justice Vince Bruce v The Honourable Terence Cole & Ors*,⁶ where Spigelman CJ referred to:

² Ibid.

³ Ibid.

⁴ Chief Justice John Doyle, 'The Role of the Chief Justice' (Paper presented at the Supreme and Federal Court Judges' Conference, Hobart, January 2001) 3.

⁵ Ibid.

⁶ (1998) 45 NSWLR 163.

‘ensure[ing] the effective operation of the Court’, there is not a great deal more to be found than that.

The view can be taken that Chief Justices have the authority and responsibility for the administration of the Court – ‘administration’ in this context referring to both the allocation of judicial resources and the usual sense in which the term is used. The Chief Justice has the ultimate authority for determining the distribution of the judicial workload. This may be best achieved by consultation and consensus with the judiciary and the Court administrators, taking into account individual judges’ interests and abilities. Ultimate control over the assignment of cases to judges, however, belongs to the chief judicial officer of the relevant court. There is a fine line that needs to be observed however, so that judges do not become total specialists in just one area, but are able to sit on a range of matters.

There is, however, no power in a Chief Justice to intrude upon the independent exercise by a judge of that judge’s judicial function.⁷ There is also uncertainty surrounding the question of whether and when a Chief Justice can require a judge to exercise or not to exercise the judge’s judicial function, other than as an aspect of the normal rostering of judges or allocation of judicial resources. In the New South Wales Court of Appeal decision on the case mentioned before,⁸ it was stated that the Chief Justice acted on the basis of his authority, indeed his responsibility, to ensure the effective operation of the Court. The exercise of this role was held to be well set out in *Canada (Minister of Citizenship and Immigration) v Tobias*,⁹ in the Canadian Federal Court of Appeal. Marceau JA said in that case:

In my judgment, a Chief Justice cannot entirely disinterest himself or herself from the pace of progress of a timeliness of disposition of the cases the court has to deal with. He or she has a responsibility to ensure that the court provides ‘timely justice’. Indeed, it is his or her duty to take an active and supervisory role in this respect. Obviously, given the profound effect the decisions

⁷ Doyle CJ, above n 4, 4.

⁸ *The Honourable Justice Vince Bruce v The Honourable Terence Cole & Ors* [1998] NSWSC 260 (Unreported, Spigelman CJ, Mason P and Priestly, Sheller and Powell JJA, 12 June 1998).

⁹ (1997) 142 DLR (4th) 270.

relative of the timely management of a proceeding can possibly have on its ultimate outcome, this role would normally be exercised at a general overseeing level and only quite rarely will it need to be exercised with respect to specific cases. But, if a matter appears to a Chief Justice to be moving abnormally slowly, a perception that is dependent on the subject matter of the proceedings, and if he or she has grounds to suspect that the duties of the court are not being carried with due dispatch, then his or her mandate not only authorises, but, I believe imposes a positive duty to investigate. Of course, if the Chief Justice's inquiries reveal that the delay has even a remotely adjudicative cause, then he or she must immediately desist, but the simple act imposing a question can certainly not be considered, in itself, an interference with the judicial independence of the presiding judge.¹⁰

On appeal, the Supreme Court of Canada delivered a joint judgment,¹¹ which found that certain aspects of the Chief Justice's conduct in that case were not appropriate. However the Court affirmed the basic principle: 'We agree with Pratte JA that a Chief Justice is responsible for the expeditious progress of cases through his or her court and may under certain circumstances be obligated to take steps to correct tardiness.'¹²

If a dispute arises between the Chief Justice and a judge or judges, it is not clear what the scope of the Chief Justice's powers would be.¹³ Chief Justices rely very much on tradition and accepted practice, common sense and mutual respect in relation to their administrative role.

The two most obvious functions of a Chief Justice are to exercise judicial power as a judge of the Court and to assume responsibility of the administration of the Court.¹⁴ These functions arise either because they are empowered by law to do so, or due to a sensible and practical collegiate delegation of authority to do so. So far as I

¹⁰ Ibid 282–3.

¹¹ *Canada (Minister of Citizenship and Immigration) v Tobias* (1997) 151 DLR (4th) 119.

¹² Ibid 143.

¹³ Doyle CJ, above n 4, 6.

¹⁴ Ibid 7.

am aware, all Chief Justices in Australia regularly sit in Court. It is inconceivable that a Chief Justice would act entirely as an administrator and never sit as a judge. A Chief Justice is chosen and appointed to be a judge and is expected to demonstrate leadership in that capacity.

There is, however, a real issue as to how a Chief Justice should strike a balance between time spent in Court and judgment writing, and time spent on the administration of judicial resources and on administration generally. In times of significant legislative and procedural change and reform, the amount of time spent on administration can be very substantial – as much as 50 per cent of the time. Reviewing papers, files, reports, correspondence, community liaison, maintaining contact with the profession and dealing with issues raised by judges and the Court administrators is all time consuming.

The role of a Chief Justice is obviously much more than that of judge and administrator. In representing the judiciary as an institution, the Chief Justice exercises a responsibility that goes beyond that of the Chief Justice's own Court. There are a number of roles that come with this. At official functions the Chief Justice represents the Court and often the judiciary as a whole. This is a significant aspect of the work of a Chief Justice. It is necessary to remind the public and the other arms of government that the judiciary is an equal and independent arm of the government.¹⁵

The Chief Justice must be ready to speak for the judiciary of the nation, or of a State or Territory, on issues such as those that affect judicial independence and attacks on the judiciary. The Chief Justice has a responsibility to ensure that relations with the legislative and executive arms of the government are appropriate, mutually respectful and cordial.¹⁶

The obligation, whether imposed by law or undertaken as a matter of sound administration and accountability, of the Chief Justice to provide an annual report, to collect and to make available statistics relating to the work of the Court, along with the responsibility to

¹⁵ Ibid 11.

¹⁶ Ibid.

ensure that public money appropriated for the work of the Court is appropriately spent, means that Chief Justices are seen as the point of judicial accountability, both for their own courts and the judiciary.

These days Chief Justices also have an important responsibility in relation to communication with the public about the work of the courts and dealings with the media. When I succeeded Sir Francis Burt in 1988 he told me that he realised only recently that he had failed to communicate with the community regarding the role of the judiciary and the work of the courts. Although the Chief Justice may not always do this personally, it is necessary for this function to be appropriately overseen and managed and the Chief Justice is the obvious person to do that. Public surveys and feedback are an important part of communication between the courts and the public. The media are renowned for taking a section of a judgment out of context and generating negative information about the judge or the judiciary in general.

Chief Justices have a general responsibility to ensure that the Court promotes change and reform as appropriate. In general, judges and Court administrators need little encouragement in this respect, but a Chief Justice must look to the appropriateness and need for the reforms that are to take place.

The fact is that the State makes a large investment in its judicial officers, and the Chief Justice may be the only person able to take some responsibility for their welfare and job satisfaction.¹⁷ This is contrary to the tradition of lawyers who usually work alone or in small teams, looking after themselves and relying on friends and family in times of stress. The reality is that there are judges who become dissatisfied with their work or develop traits that interfere with the sound administration of justice. Management these days requires more than just being reactive when a crisis develops, but deciding at what point and how to respond is not easy.

Chief Justices are in a position to promote a strong understanding of the place of the Court in the legal system and of the values of justice and impartiality the Court proclaims mainly through their judicial

¹⁷ Ibid 14.

work. But there is also a wider responsibility to ensure that the values that the Court espouses are understood by all involved in the work of the Court, and reflected by the manner in which people are treated when they have contact with the Court. There is a problem if reasonable people who come to a court think they have not been dealt with fairly and courteously, or in the manner in which one would expect an institution committed to the administration of justice to treat them. Should this be left to the administrators, or does not the Chief Justice have an ultimate responsibility for the values projected by the Court, not just through its judgments, but by the manner in which it deals with those who come into contact with it, regardless of in what capacity?

We live in an age of accountability.¹⁸ What is required of judges is changing. Sentences are widely discussed and criticised and are a topic about which everyone has a view. In our society there is much concern about serious crime, particularly crimes of violence. The idea is mistakenly held that if the criminal law and punishment were properly administered by the courts crime would be controlled, if not disappear altogether. This is fuelled by media reports that provide the barest of details of both the offence and the sentence. One of the results of the television age is that television news is now a source of entertainment as well as a source of information. As a flagship of an evening's viewing, it is designed to capture and hold an audience. This has also influenced a gradual change in the editorial policy of the print media.

Appeals and applications for leave to appeal are the only objective measure of the Crown and offenders' dissatisfaction with sentences. In 2004, there were 28 appeals and applications for leave to appeal from sentences imposed by judges in the Supreme Court of Western Australia of which 11 were allowed and 17 dismissed.¹⁹ Whilst this marked a slight increase in the total from 2003, the statistics over the previous five years show a steady decline in total appeals and appeals allowed, which reflects a level of consistency in regards to sentencing. From District Court matters, there were 66 appeals and

¹⁸ Gleeson CJ, above n 1.

¹⁹ Chief Justice David Malcolm, *2003 Annual Review of Western Australian Courts* (2003).

applications, of which 26 were allowed and 40 dismissed. The number of appeals represents a tiny proportion of the sentences imposed.

The public expects high accountability in all forms of government and the judiciary is no exception. Judicial accountability manifests itself in many ways. Court business, except in extraordinary circumstances, is conducted in public.²⁰ The majority of people however, do not go into a courtroom and sit in the public gallery. They rely on the media for coverage of court cases.²¹ The infamous O J Simpson trial in the United States was televised. People tuning in and expecting *Law & Order* or *The Practice* and instead seeing the trial bogged down in legal argument, must have been amazed at just how boring the legal system can be at times.²²

What judges say in court is not immune from criticism. Judges have an obligation to publish full reasons for their decisions, which are then subject to appeal as well as criticism by academics and lawyers. Newspapers report these decisions, which informs the public and in turn leads to further debate and criticism. Judges are not in a position to respond to criticism of their own judgments. Traditionally it was the responsibility of the Attorney-General of the day to respond to such criticisms and defend the judges where that was appropriate. In some cases of course, the criticism may well be justified. It is entirely appropriate that decisions by judges should be analysed and criticised as part of the process of accountability.

Consistently with the need for judicial independence there is a general restraint on judges expressing views on matters of current political controversy. The boundaries of this restraint are not clearly drawn. Clearly a judge should not publicly debate the merits of a decision made by the judge. It is my firm belief that a judge should be fully entitled to speak out on a matter related to the administration of justice, even a matter of public controversy, so

²⁰ Justice R D Nicholson, 'Judicial Independence and Accountability: Can they Co-exist?' (1993) 67 *Australian Law Journal* 404, 413–14.

²¹ Jenny Brockie, 'Panel Discussion' (1999) 1 *University of Technology Sydney Law Review* 159; [1999] *University of Technology Sydney Law Review* 17.

²² *Ibid.*

long as he or she does not give people cause for suspecting bias or partiality in the cases to be heard in the Court. A judge must also refrain from comment on matters of political controversy. There are however, matters that involve the administration of justice on which members of the judiciary may have not only a right but a duty to speak out. These matters may include the need for reform of the law in particular areas, opposition to changes that will adversely effect the administration of justice and controversial subjects such as mandatory sentencing and the death penalty, for example.

Exposure to public scrutiny and informed criticism can do no harm to the independence of the judiciary. As is often quoted: 'Justice is not a cloistered virtue, she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary [people].'²³

For society to maintain its respect for the law, the law must bear relevance to the society to which it is applied. There are many occasions upon which a judge is required to decide what is just, what is fair or what is reasonable. In cases of that kind a judge necessarily seeks to apply basic values representative of community values. In doing so, he or she cannot merely reflect transient shifts in public opinion. The judge must objectively determine what is just, fair or reasonable so that while reflecting the basic values of the community the judge does not allow himself or herself to be influenced merely by temporary shifts in public opinion or by prejudice, emotion or sentiment. The guiding principle is adherence to the rule of law.

²³ Lord Atkin in *Ambard v Attorney-General for Trinidad and Tobago* (1936) AC 322, 335.

