



The Law Society of Western Australia presents
Law Week 2004:

Role of the Chief Justice

(“Lunch with the Press”)

Wednesday, 5 May 2004

By

The Hon David K Malcolm AC CitWA
Chief Justice of Western Australia

Western Australia Club
101 St Georges Terrace, Perth



[The Hon Justice Tolcon – of the Family Court]

[Her Honour Chief Judge Kennedy - Chief Judge of the District Court]

[His Honour Judge Reynolds – President of the Children’s Court]

[Mr Heath – Chief Stipendiary Magistrate]

Ladies and Gentlemen,

It is a pleasure to be invited here today as a guest of the Law Society, and to offer my support for the continued success of Law Week, with this year’s theme being that “*No-one is above the Law*”. I have been invited to speak to you on a topic of which I have a particularly unique perspective, having fulfilled this responsibility for more than 15 years – the role 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 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

¹ The Hon Chief Justice Murray Gleeson, *The Role of a Judge and Becoming a Judge*, National Judicial Orientation Programme, Sydney, 16 August 1988, http://www.highcourt.gov.au/speeches/cj/cj_njop.htm, 6 September 2001



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.

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 their work with reasonable efficiency.

The view can be taken that Chief Justices have the authority and responsibility for the administration of the Court. The Chief Justice has the ultimate authority for determining the distribution of 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

² Ibid.

³ Id.

⁴ The Hon Chief Justice John Doyle, *The Role of the Chief Justice*, The Supreme and Federal Court Judges' Conference, Hobart, January 2001, at p.3



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.⁶ 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. It has been held by courts of appeal both in this country and in Canada that the Chief Justice has a responsibility to ensure the effective operation of the Court.

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.⁷ 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 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.

However, there is 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

⁵ Ibid.

⁶ Doyle CJ, *op cit.*, at p.4



- 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.⁸

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.⁹

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 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. 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.

⁷ Ibid., at p.7

⁸ Id., at p.11



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.

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 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.

We live in an age of accountability.¹⁰ What is required of judges is changing. Sentences are widely discussed and criticised and are a topic about which everyone has a view. In 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 more severely administered by the courts the crime would be controlled, if not disappear altogether.

Appeals and applications for leave to appeal are the only objective measure of the State and offenders' dissatisfaction with sentences. In 2003, there were 21 appeals and applications for leave to appeal from sentences imposed by Judges in the Supreme Court of Western Australia of which 5

⁹ Id.

¹⁰ Gleeson CJ, *op cit*.



were allowed and 16 dismissed.¹¹ The statistics over the last 5 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 75 appeals and applications, of which 19 were allowed and 56 dismissed. The number of appeals represents a tiny proportion of the sentences imposed.

The most recent statistics from the Crime Research Centre, based at the University of Western Australia, reveal that in calendar 2002, more than 3,300 people were dealt with in respect of 9,600 charges in the District Court and the Supreme Court¹². Of these charges, convictions were recorded for 77%.

The most common sentence imposed in the Supreme and District Courts was imprisonment. Prison sentences were imposed on 62 % of charges – with imprisonment imposed in 76% of cases involving offences against a person.

The public expects a high degree of 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.¹³ 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.¹⁴

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. The media reports these decisions,

¹¹ The Hon. The Chief Justice David Malcolm, *2003 Annual Review of Western Australian Courts* (2003)

¹² Fernandez J & N Loh (2003) *Crime and Justice Statistics for Western Australia: 2002*, University of Western Australia, Crime Research Centre.

¹³ The Hon Justice R D Nicholson, *Judicial Independence and Accountability: Can they Co-exist?*, (1993) 67 ALJ 404, pp 413-414



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. It is entirely appropriate that decisions by Judges should be analysed and criticised as part of the process of accountability -- the critical issue is that the debate should be informed and balanced.

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 Judges should not publicly debate the merits of their own decisions. It is my firm belief, however, 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 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 and opposition to changes that will adversely effect the administration of justice.

Exposure to public scrutiny and informed criticism can do no harm to the independence of the judiciary.

Conclusion

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

¹⁴ Jenny Brockie, *Panel Discussion*, [1999] UTSLR 17; (1999) 1 UTSLR 159



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.