



The Law Society of Western Australia presents
Law Week 2005:

Independence of the Legal Profession and Judiciary

(“The Church Service”)

Monday, 9 May 2005

By

The Hon David K Malcolm AC
Chief Justice of Western Australia

St George’s Cathedral
St Georges Terrace, Perth

Your Honours**Members of the legal profession****Ladies and Gentlemen,**

I am very pleased to have the honour and the opportunity to once again support the ongoing success of Law Week. This year marks the first upon which we have moved the Church Service to an afternoon ceremony in order to increase awareness and participation amongst all members of the legal profession. I have chosen today, to speak on a topic which is of key importance to the efficiency and integrity of our justice system - The Independence of the Legal Profession and the Judiciary with particular emphasis on the profession.

The concept of judicial independence is that all Judges should be free from interference in the exercise of their powers. Neutrality, independence of mind and the absence of external interference in the application of the law and the administration of justice are central to judicial independence. The maintenance of an independent judiciary is an integral part of ensuring adherence by the State to the principles of the Rule of Law. By the Rule of Law I mean the principle that individuals are governed, and their disputes settled, by reference to laws enacted in accordance with legislative processes established by a constitution or constitutional convention, or the law as pronounced by a properly constituted court or tribunal. In the context of the common law, the

judiciary both determine the content of the law and, when the occasion demands, develop it and sometimes at the highest level, change it.

It is almost universally acknowledged that one of the most fundamental aspects of adherence to the Rule of Law is the existence and maintenance of an independent judiciary. If the community is to have faith in our legal system, not only must they be assured that our judiciary is free from bias and unafraid to make unpopular decisions in the face of powerful interests, but we must also have lawyers and related members of the legal profession who are willing to defend the rights of people they may morally abhor, and advocate unpopular causes without fear or favour where this is consistent with the Rule of Law. By adhering to the Rule of Law, in the face of wealthy and powerful interests or popular opinion fuelled by misinformation or paranoia, both lawyers and Judges are a necessary resource in our community for protecting the rights of minority groups and individual citizens.

Independence of the judiciary and the legal profession is recognised internationally as a core element of any civilised society. Documents such as the *Beijing Statement of Principles of the Independence of the Judiciary*, adopted at the Conference of Chief Justices of Asia and the Pacific in Beijing in 1995, drafted by Justice Nicholson and myself, has been adopted by Chief Justices of 38 countries in the region with many different legal structures and institutions. The Statement is a testament to the widely held belief that the

independence of the judiciary and the independence of the legal profession is for the protection of the people, and is the backbone of a free and democratic society.

The independence of the legal profession requires that lawyers should be free to perform their work without fear of reprisal or outside interference. All lawyers have a duty to the court to assist in upholding the law, but must balance this with their professional duty to their client. In times past, including when I was in practice, the approach to the practice of the law was somewhat different to the approach adopted today. Briefs to counsel would be marked with a proposed fee or there would be negotiations on the fee, including a daily rate. In the late 1960s and early 1970s time costing was introduced, initially as an administrative measure as a check on the extent to which the agreed fee proved to be appropriate for the time and effort involved. There was a keen sense of the need to turn over cases as quickly and efficiently as possible.

Although it is inevitable that our profession would always become more commercial, we must always keep in mind our commitment to the Rule of Law and cherish our independence. We must always be willing to confront issues which challenge this independence – this could manifest itself in the form of restrictions on forming independent professional organisations; limitations on which clients you are able to represent; intimidation or harassment by taking on the unpopular cause; or unreasonable interference or sanctions imposed

preventing you from undertaking your professional duties. In today's global society, there are many examples which show how fragile the state of independence actually is. Where these challenges arise, as lawyers, it is our duty to maintain a steadfast position and always adhere to the Rule of Law. It is necessary for lawyers to guard against the erosion of independence if the principle of independence is going to be respected by our society.

The offices of the Solicitor General, The State and Commonwealth Directors of Public Prosecutions, prosecutors, and lawyers in private practice must continue to ensure independence of the profession. Those who hold the power to prosecute controversial figures in a hostile environment must do so without fear or favour from the Government, and with a keen sense of how this will affect the community. We have established systems of checks and balances, providing accountability, which resides at the core of independence. All of us, as unelected officials wielding the power over people's livelihoods must accept the level of responsibility and accountability that comes with the job. The legal profession must foster an environment where lawyers are unafraid to work *pro bono* for human rights causes, protecting the weak and unpopular. We must all strive to continue to play a constructive and positive role in fiercely upholding the independence of the legal profession and the judiciary. I fully support the concept of Law Week and congratulate the Law Society on its continuing efforts to promote a better understanding of the law, lawyers, judges and the administration of justice.