

The State of the Australian Judicature

Law Council of Australia and Australian Bar Association

Chief Justice Robert French AC

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I express my appreciation to the Law Council of Australia and the Australian Bar Association for hosting this occasion for the delivery of the State of the Judicature Address.

Historically, the Address was delivered by the Chief Justice of Australia in conjunction with the Australian Legal Convention, which was held every two years. The first was given by Sir Garfield Barwick in July 1977 in Sydney.¹ Thirty years later, in 2007, my predecessor, Murray Gleeson, delivering the Address said: "[f]ew things in life are certain, but one is that I will not be giving the next such address."² That prediction was fulfilled. Following on from him in my first and most recent State of the Judicature Address in 2009, I said that: "[a]ssuming my continuing existence and that of the Australian Legal Convention I expect to deliver three more such addresses as Chief Justice."³ That prediction was not fulfilled, not because it was wrong but because one of the conditions upon which it was expressly based was not met. I continued to exist but the Australian Legal Convention did not.

This evening we resume the tradition. We do so thanks to the Law Council and the Australian Bar Association who have arranged this dinner for that purpose. It follows upon a meeting of the Council of Chief Justices of Australia and New Zealand ("CCJ"), generously hosted by the Chief Justice of Tasmania. The presence of the Chief Justices along with representatives of the national profession provides a fitting setting for reinstatement of the Address. In commencing my remarks, however, may I adopt and repeat with confidence, and

¹ Sir Garfield Barwick, "The State of the Australian Judicature" (1977) 51 *Australian Law Journal* 480.

² Murray Gleeson, "The state of the judicature" (2007) 14 *Australian Journal of Administrative Law* 118.

³ Chief Justice Robert French, "The State of the Australian Judicature" (Speech delivered at the 36th Australian Legal Convention, 18 September 2009, Perth).

this time without qualification, what my predecessor said in 2007: "[f]ew things in life are certain, but one is that I will not be giving the next such address."⁴

The theme of these remarks is the national character of our judiciary and legal profession. In that context I want to say something about the CCJ, the Law Council and the Australian Bar Association and some issues affecting Australian courts and their international legal environment.

The origins of the CCJ go back to 1962 with the convening at the Supreme Court of Victoria of a Conference of the Chief Justices of the Supreme Courts of the States of Australia. In 1993, at the 17th such Conference, it was decided to reconstitute it as the Council of Chief Justices and to invite the Chief Justice of the High Court to become a member and permanent chairman. Chief Justice Anthony Mason accepted that invitation. The CCJ has continued to be chaired by the Chief Justice of Australia and has met twice a year. It comprises the Chief Justices of the States and Territories and of the Federal and Family Courts and the Chief Justice of New Zealand.

The CCJ is a forum for exchange of information between its members. It also communicates with governments on matters of concern to its members. It has promoted the formation and development of the National Judicial College of Australia, from which it receives regular reports. It has supported the formation of the Judicial Council on Cultural Diversity, which also reports to it. It receives reports on matters relating to admissions, practical legal training and legal education from the Law Admissions Consultative Committee ("LACC"). It has a Harmonisation Committee, which works on harmonisation of court rules and practice in particular areas according to referrals from the CCJ.

In 2009, the CCJ adopted a Working Protocol reflecting its evolved character. Its stated objects are:

- 1 To provide a forum within which its members may discuss matters of common concern and exchange information and advice.

⁴ Gleeson, above n 2, 18.

- 2 To advance and maintain the rule of law and the independence of the judiciary in Australia and New Zealand.
- 3 To advance and maintain the principle that Australian courts together constitute a national judicial system operating within a federal framework.
- 4 To ensure that its members are aware of proposals by and developments within governments and the legal profession relevant to the preceding objects.

Maintenance of the independence of the Australian judiciary is a continuing priority for the CCJ. Generally speaking the essentials of judicial independence are accepted by Commonwealth and State Governments and the wider Australian community. They are supported at the federal level by the constitutional doctrine of the separation of powers and in respect of State and Territory courts by convention and in recent times by the line of decisions of the High Court which began with *Kable v The Director of Public Prosecutions (NSW)*⁵ in 1996. On occasions, however, members of the executive and the legislature say or do things which reflect a view of courts, in the words of the late Professor Gordon Reid, as "an inconvenient differentiation of government". It is necessary that Australian courts do not take for granted the universal acceptance of what they regard as the fundamentals of the judicial system.

In 2014, the CCJ adopted a set of Guidelines for Communications and Relationships between the Judicial Branch of Government and the Legislative and Executive Branches. Those Guidelines were provided to the Commonwealth Attorney-General and the Attorneys-General for the States and Territories.

The Guidelines identify categories of legislative and executive action which may affect courts and upon which it is appropriate for courts to be invited to offer their views and respond. They include proposed laws abolishing or creating courts significantly affecting their jurisdiction and powers, affecting the appointment, removal, obligations, continuing education and discipline of judicial officers and affecting the judicial function by mandating procedures, creating exclusionary rules in relation to evidence, directing particular modes of

⁵ (1996) 189 CLR 51.

taking evidence, or prescribing matters to be taken into account in making certain kinds of judicial decisions.

The Guidelines also cover laws affecting the administration of courts and their distinctive character, including laws which lump courts in with agencies or authorities of the executive government or which confer functions on the courts which are functions of an executive character.

The Guidelines do not assume that courts will oppose laws in any of these categories but simply say:

It is appropriate for the courts to expect, and to respond to, consultation by the executive branch of government in relation to the above categories of proposed laws.⁶

Any such response should be given by the head of jurisdiction after consultation with the members of his or her court. The Guidelines caution against heads of jurisdiction offering interpretations of a proposed law or opinions as to its validity as they might be matters which could come before the court. The CCJ also agreed that courts should not engage in public policy debates save to the extent necessary to protect their legitimate institutional interests.

The Guidelines deal with criticism of courts and funding of the courts. The Guidelines caution restraint by heads of jurisdiction in responding to criticism of the institution or individual judges. It is generally undesirable for a head of jurisdiction to become involved in public exchanges with members of the executive or parliament in relation to such criticism. Where a public response is necessary the preferable course is a formal statement by the head of jurisdiction on behalf of the court. That being said, neither courts nor judges are immune from scrutiny and criticism any more than any other public institution or official. The Guidelines do not operate on any contrary assumption.

Communication between the courts and the executive in relation to matters affecting the funding of the courts and judicial remuneration is essential. It should not generally be

⁶ Council of Chief Justices of Australia and New Zealand, *Guidelines for Communications and Relationships between the Judicial Branch of Government and the Legislative and Executive Branches*, [5].

conducted as a public debate unless the head of jurisdiction considers it necessary to do so in order to protect the legitimate interests of the court.

The Guidelines have been used recently by Chief Justice Warren of the Supreme Court of Victoria in the formulation of a Memorandum of Understanding between the executive government of that State and the Courts Council which is the governing body of Court Services Victoria. Court Services Victoria is an independent statutory body created to provide support for the Victorian courts. The Memorandum sets out mechanisms for consultation between the courts and government and, in relation to proposed legislation, adopts the categories set out in the Guidelines.

The Guidelines will no doubt be revised from time to time in the light of experience. Their practical utility is that they can provide a non-binding framework within which heads of jurisdiction can consider responses to proposed laws and executive or parliamentary action affecting the courts or their judges.

A less elaborate arrangement between governments and courts arose out of a suggestion by the CCJ, in October 2013, for a Protocol between it and the Law, Crime and Community Safety Council ("LCCSC"), which comprises the Attorneys-General of the Commonwealth and of the States and Territories. The suggestion was for a Protocol under which the LCCSC could refer to the CCJ matters likely to affect the Australian judiciary in whole or in part. A Protocol responding to that suggestion was agreed to at the inaugural meeting of the LCCSC on 4 July 2014 and incorporated into its operating procedures which operate in conjunction with its terms of reference.

The use of the Protocol is discretionary. Nevertheless, it marked a step forward as a collective acknowledgement by the Attorneys-General of the position of the Australian judiciary as the third branch of government. In advising of the LCCSC's decision, the Commonwealth Attorney-General also referred to an existing guide to consultation with the federal courts. That guide emphasises, for all Commonwealth agencies, the importance of early consultation with the federal courts about proposals affecting their funding, administration or jurisdiction. Against that background it is useful to turn to some specific issues that have come before the CCJ and associated bodies.

One such issue is that of Australia's cultural diversity and the problems facing migrants and Aboriginal and Torres Strait Islander people in their interactions with the court system. The occasions for misunderstanding between courts and practitioners on the one hand and parties or witnesses of differing cultural backgrounds and differing English language skills on the other are legion. Recognising the importance of the problem, the Migration Council of Australia, after consulting with the CCJ and obtaining its support for terms of reference and a constitution, established a Judicial Council on Cultural Diversity in 2014. It provides advice to the CCJ and seeks to assist Australian courts to engage with people of various cultural backgrounds and limited English language ability so as to mitigate the disadvantages under which they may operate in invoking or responding to the justice system. It is chaired by Chief Justice Wayne Martin and comprises Judges, representative of the range of Australian jurisdictions, along with representatives of the Australasian Institute of Judicial Administration, the Judicial College of Victoria, the Judicial Commission of New South Wales and the Migration Council. It has a relationship with the CCJ analogous to that of the LACC.

The Judicial Council has recently undertaken two significant projects. The first concerns interpretation and translation. It has developed Model Court Rules, a Model Practice Note for the Courts, National Standards for Working with Interpreters in the Legal System and a document setting out key principles and guidelines. The documents have been submitted to the CCJ who have agreed to their distribution for consultation with the interpreting community, the judiciary and the legal profession.

In 2015, the Judicial Council commenced a project on access to justice for migrant and refugee women and indigenous women particularly in the context of domestic violence. Following a consultation process supported by Commonwealth Government funding, it has produced two reports: one relating to migrant and refugee women and the other relating to Aboriginal and Torres Strait Islander women. Both set out the experiences of those groups in the Australian court system and make recommendations. The Judicial Council intends to use the Reports as a basis for the development of a policy framework for consideration by courts and other related agencies. With the approval of the CCJ it will commence a consultation about those drafts and its proposed policy framework.

The importance of the work of the Judicial Council in these areas cannot be overstated. The support it has from the CCJ and their close working connection reflects the focus of the CCJ upon its object of advancing and maintaining the rule of law. Equal justice, a necessary element of the rule of law, cannot be provided if the courts cannot appropriately respond to cultural and linguistic barriers, to access to them and engagement with them.

From the domestic to the international, our judiciaries, no less than the legal profession, operate in an internationalised legal environment. Important aspects of our law on such topics as crime, money laundering, company regulation, intellectual property, competition, taxation, insolvency and commercial transactions cross national boundaries. Many of our laws give effect to international conventions of one kind or another. The use of international commercial arbitration to effect dispute resolution across national boundaries without complexities that can arise between different judicial systems is in part a response to the internationalised legal environment.

While arbitral processes are supported by Commonwealth and State laws, it is necessary that the role of the courts in the development of commercial law and the affirmation of the rule of law through that development not be diminished. Concerns about the balance between commercial arbitration and particularly international commercial arbitration and the function of the courts in developing the commercial law have recently been expressed by the President of the United Kingdom Supreme Court, Lord Neuberger,⁷ Chief Justice Menon of Singapore,⁸ the Lord Chief Justice of England and Wales, Lord Chief Justice Thomas,⁹ Chief Justice Bathurst¹⁰ and myself.¹¹

One response to that concern is to ensure that the choice of courts as a means of determining disputes in commercial matters is not unnecessarily impeded by considerations

⁷ Lord Neuberger, "Arbitration and the Rule of Law" (Paper presented at the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 20 March 2015) 12.

⁸ Chief Justice Sundaresh Menon, 'Standards in Need of Bearers: Encouraging Reform from Within' (Paper presented at the Chartered Institute of Arbitrators, Singapore Centenary Conference, Singapore, 3 September 2015) 16.

⁹ The Right Hon The Lord Thomas of Cwmgiedd, 'Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration (Speech delivered at The BAILII Lecture 2016, London, 9 March 2016) [5].

¹⁰ Chief Justice Bathurst, "The Importance of Developing Convergent Commercial Law Systems Procedurally and Substantively" (Paper delivered at 15th Conference of Chief Justices of Asia and the Pacific, Singapore, October 2013) 11.

¹¹ Chief Justice Robert French, "Convergence of Commercial Laws — Fence Lines and Fields" (Paper delivered at the Doing Business Across Asia — Legal Convergence in an Asian Century Conference, 22 January 2016, Singapore).

of cost, efficiency, expertise, or limits on the ability of a litigant to secure recognition and enforcement of a court's judgment in other national jurisdictions.

A measure directed to enhancing flexibility in the choice of courts to determine international commercial disputes is the *Hague (Choice of Courts) Agreement Convention 2005*. In November 2014, following a resolution of the CCJ, I wrote to the Commonwealth Attorney-General supporting Australia's accession to that Convention. One of its objects is to promote international trade and investment through enhanced judicial cooperation. The States parties to the Convention agree to give effect to exclusive Choice of Court Agreements between parties to commercial transactions and to provide for the recognition and enforcement of judgments resulting from proceedings based on such agreements. It provides a degree of flexibility and recognition of party autonomy that is one of the advantages that arbitration has traditionally had over litigation in this area.

Last year the Commonwealth Attorney-General advised the CCJ that he proposed to develop legislation to implement the Convention and the Hague Principles on Choice of Law in International Contracts 2015, with a view to harmonising Australia's international commercial law with developments overseas. He requested the assistance of the CCJ in developing Model Rules of Court to give effect to the Convention and Principles. The Harmonisation Committee of the CCJ has agreed to provide assistance in the preparation of Model Rules.

The *Hague (Choice of Courts) Agreement Convention* and a national interest analysis relating to it were tabled in the Commonwealth Parliament on 15 March 2016. The proposed legislation to implement the Convention and the Principles will be structured to allow for future developments in international private law, including the implementation of a future multi-lateral convention for the recognition of judgments. In that connection, the Attorney has also advised his Department is participating in efforts, through the Hague Conference on Private International Law, to develop a new global convention for the recognition and enforcement of civil and commercial judgments which would complement the *(Choice of Courts) Agreement Convention*.

The measures now in train will create additional opportunities for judicial cooperation across national boundaries. There are already in place Conventions and Treaties to which Australia is a party which are designed to facilitate such cooperation. A well-developed

process in which the CCJ has taken an interest is cooperation between national jurisdictions in cross-border insolvency. Australia has adopted the UNCITRAL Model Law on cross-border insolvency. Since it did so, the American Law Institute ("ALI") has developed an extensive set of Global Principles to enhance such cooperation. They have not yet been adopted in Australia although an earlier more narrowly based version has been referenced in harmonised practice directions in the Federal Court and the Supreme Courts of New South Wales, the Northern Territory, Tasmania and Western Australia.

About three years ago, the CCJ asked the Australian Academy of Law ("AAL") to review the ALI's Global Principles to determine whether they provided more extensive scope for cooperation than the UNCITRAL Model Law. A study was undertaken for the AAL by Sheryl Jackson, Rosalind Mason and Mark Wellard of Queensland University of Technology.¹² In October 2013, the CCJ set up a committee comprising Chief Justices Warren, Bathurst and Allsop to prepare a paper making recommendations on the study. In March 2015, the recommendations of that committee were agreed to by the CCJ. A working group of the Harmonisation Committee has commenced examining the formation of harmonised rules with a view to the preparation of a draft Rule and a draft Practice Note. In the meantime, Chief Justices Menon of Singapore, Ma of Hong Kong, Bathurst of New South Wales and Allsop of the Federal Court, have agreed to create a working group from their four courts to establish Protocols for court-to-court communications and guiding principles for cooperation with a view to regional harmonisation. No doubt that exercise will feed into the CCJ's Harmonisation Committee's deliberations.

A related development of regional significance has been the establishment, in January of this year, of an Asian Business Law Institute ("the Institute") based in Singapore to promote the convergence of commercial law and practice in the region. Australia is a founding member of the Institute, along with China, India and Singapore. The Institute is supported by the Singapore Academy of Law and chaired by the Chief Justice of Singapore, who is also the Chairman of the Academy. Chief Justice Warren, Mr Kevin Lindgren and I are members of the Board of Governors. There will also be three Australian members on an Advisory Committee of the Institute. One of those is the President of the Law Council. The

¹² The fruits of the study have been published in the *University of New South Wales Law Journal*: "Developments in Court to Court Communications in International Insolvency Cases" (2014) 37 UNSWLJ 507; see also Wellard and Mason, "Global Rules on Conflict of Laws Matters in International Insolvency Cases: An Australian Perspective" (2015) 23 *Insolvency Law Journal* 5.

first project of the Institute concerns the law and practice governing the recognition and enforcement of foreign judgments in the region.

In September I will lead an Australian delegation to visit the Supreme People's Court of China in Beijing at the invitation of the President of that Court, Zhou Qiang. Other members of the delegation will be Kiefel J, Allsop CJ, Fiona McLeod as President-Elect of the Law Council and the Chief Executive and Principal Registrar of the High Court. There is no doubt that the Chinese judiciary is interested in engaging with judiciaries of the world as an aspect of the development of its own judicial system. The proposed visit will be an opportunity to contribute to that engagement. The involvement of the Law Council is important, as it has already begun negotiating with relevant Chinese bodies about the delivery of legal services in and between our two countries in light of the China/Australia Free Trade Agreement.

There have also been a number of engagements and capacity-building exercises involving individual Australian courts in the region. The CCJ provides a forum for its member jurisdictions to share information about those matters. It can also provide, in the national interest, a vehicle for the development of strategic approaches across the whole Australian judiciary to our global and regional engagements.

I have pointed to the importance to be attached to a vision of Australian courts as part of a national integrated judicial system, able to engage with its international environment. Similarly, the objectives, composition and activities of the profession's peak bodies, the Law Council and the Australian Bar Association, reflect a vision that embraces the diversity of the firms, large and small, and the practices of those of the Independent Bars of the States and Territories.

The existence of those two peak bodies reflects the reality that we have what in substance is a national profession. That reality is not yet embodied in a national uniform law framework for the whole profession. That task is a work in progress. A legal framework has been put in place for New South Wales and Victoria with a Uniform Law enacted by Victoria and adopted by New South Wales. The law builds upon existing regulatory arrangements and does not disturb the existing jurisdictions of the Supreme Courts.

Accession to the Uniform Law is, of course, a matter for each jurisdiction but it is to be hoped that all Australian jurisdictions will eventually see their way clear to join it. Like the standard gauge railway, it is an important micro-economic reform and should enhance our national capacity to engage in useful discussions with other jurisdictions in relation to cross-border provision of legal services following the coming into effect of recent Free Trade Agreements.

The Law Council and the Australian Bar Association are engaged not only with the interests of those whom they represent, but the wider public interest and our justice system. By way of example of the latter, both bodies have recently released statements about the impact of mandatory minimum sentencing in respect of alcohol-related offences on Australia's appallingly high rate of indigenous incarceration.

The public debate about such laws, is one to which the profession through its representative bodies and supported by the knowledge and experience of its members can contribute. The Law Council has called for a Senate Inquiry into the topic. The Australian Bar Association has pointed out that indigenous Australians are imprisoned at rates at least 16 times higher than non-indigenous Australians.

The terrible problem of indigenous incarceration is linked to a complex of factors with no simple answer. Mandatory minimum sentences are not the answer. Nor is it an answer simply to call for their removal. The Law Council and the Australian Bar Association recognise that a nuanced approach, including the concept of justice reinvestment, is required to which they are prepared to contribute in order to address this national tragedy.

Another pressing issue, already alluded to is that of family violence, which was highlighted in the recent Report of the Victorian Royal Commission into that topic. The Law Council has called upon the Council of Australian Governments to take the opportunity provided by the Report to:

- reduce the fragmentation of jurisdictions in cases involving family violence;
- develop a single national database;
- develop a National Family Violence Court framework;

- expand resourcing for legal services;
- develop safety hubs;
- streamline court processes for families affected by domestic violence.

The challenges for the profession and the courts of responding to domestic violence is particularly acute in cases involving Aboriginal and Torres Strait Islander women and migrant and refugee women, whose interactions with the justice system can be impaired by culture and language. The Reports recently provided by the Judicial Council will create an opportunity for both the judiciary and the profession to make their contribution to ensuring equal justice to those who have to respond to court processes in this very difficult area.

The last topic to which I would like to refer briefly is the recent release by the Australian Law Reform Commission ("ALRC") of a Report¹³ identifying and critically examining Commonwealth laws that encroach upon traditional rights, freedoms and privileges recognised by the common law. The Report was prepared at the request of the Commonwealth Attorney-General, Senator Brandis. In its extensive review, the ALRC concluded that a range of Commonwealth laws appear to warrant what it called "further consideration or review". It sets out a list of laws affecting freedom of speech, freedom of movement, association and assembly, fair trial, the burden of proof, the privilege against self-incrimination, legal professional privilege, procedural fairness, property rights, access to judicial review, retrospective laws and laws imposing strict or absolute liability. The request to the ALRC by the Commonwealth Attorney-General was a most welcome initiative. The importance of the Report cannot be overstated. Each encroachment by statute, regulation, rule or by-law on common law rights and freedoms is, if acknowledged at all as an encroachment, supported by appeals to common sense objectives and operational realities. Many such encroachments, taken individually, arguably have little effect. Taken cumulatively over time and across State, Territory and Commonwealth jurisdictions they can be the death by a thousand cuts of significant aspects of those rights and freedoms.

¹³ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report No 129, (2016).

We have a successful and robust representative democracy. In that democracy encroachments on rights and freedoms can be openly and vigorously debated, although sometimes political imperatives mean that there is no contradictor in the political sphere. The courts protect our rights and freedoms to a degree, but are limited by the framework of the law. They tend to adopt conservative approaches to the interpretation of laws which affect those rights and freedoms. The Constitution provides for a limited range of express and implied guarantees. Ultimately, however, if the laws are valid and the language clear, the courts must apply them. A public, political and legal culture which demands strong justification for any such encroachments is the only protection in the end that really matters. The Law Council and the Australian Bar Association and their constituent bodies have an important part to play in that regard. They should not accept, nor should anybody else, that public advocacy for the protection of traditional common law rights and freedoms is anything other than the expression of an essentially conservative position.

Conclusion

If I were asked to try to sum up the state of the judicature, I would say that it continues to meet the reference points advanced by Sir Gerard Brennan in his State of the Judicature Address in 1997¹⁴, that is a judicature that is seen to be impartial, independent and fearless in applying the law, a competent judicature with judges and practitioners who know the law and its purposes and who are alive to the connection between abstract legal principle and its practical effect and who accept and observe the limitations on judicial power and within those limitations develop or assist in developing the law to answer the needs of society from time to time. It is a judicature that, generally speaking, has the confidence of the people and endeavours, within the limits of its resources, to be reasonably accessible to those who have a genuine need for its remedies. I would add another reference point and that is effective engagement with the international legal order. Within their proper limits, the judiciary and the profession have important parts to play to ensure that the reference points continue to be met and that advocacy for equal justice and for the preservation of our liberties continues to be heard.

¹⁴ Sir Gerard Brennan, "The State of the Judicature" (1998) 72 *Australian Law Journal* 33-34.