COURT GOVERNANCE AND JUDICIAL INDEPENDENCE IN THE AUSTRALIAN CAPITAL TERRITORY

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Judicial independence has been described as both freedom from interference by the Executive and freedom from dependence upon the Executive.[1]

Regrettably, the ACT court governance structure compromises judicial independence.

Rather than responding "Yes, Minister" – the script really reads "Yes, please, consultant".

My judicial role, from the perspective of the ACT bureaucracy, is head of the Supreme Court, which is a sub-branch of the 'Law Courts and Tribunals' 'Business Centre'.

Buried deep within the labyrinth of administrative and executive bureaucracy, the ACT Law Courts & Tribunals Business Centre is part of the Department of Justice and Community Safety or 'JACS'. Adopting Justice Smith's description of the Victorian equivalent, JACS is a 'behemoth', encompassing everything from fair-trading to fire-fighting.

The classification of the ACT Law Courts and Tribunals as a 'Business Centre' is both a curiosity and a concern, particularly in terms of the status afforded to the judicial arm of government.

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[*] I would like to acknowledge the research and drafting assistance provided by my Associate, Ms Anna Haynes.

[1] Sir Guy Green cited in Justice R D Nicholson, 'Judicial Independence and Accountability: Can They Co-Exist?' (1993) 67 *The Australian Law Journal* 404, 405.

The ‘Business Centre’ comprises five parts, listed in your printed copies.

- The Supreme Court and Magistrate Court registries;
- The Sheriff’s Office;
- The Library, which is situated in the Supreme Court but which services both the Magistrates Court and Tribunals;
- The Business Services Unit, which organises human resources, finances, organisational services and IT; and
- The Executive, which comprises:
    - the Courts Administrator;
    - the Registrars and Deputy Registrars of both the Supreme Court and Magistrates Court;
    - the Business Services Unit Manager;
    - a Library representative; and
    - the Registry Manager

The mandate of the Business Centre is to provide integrated administrative, policy and operational support to the Judiciary. It is also charged to direct registry, case management and associated services to the ‘clients’ and ‘stakeholders’ of the court system.[2]

The use of terms such as ‘Business Centre’ and ‘stakeholders’ highlights the divergent approach of judges and administrators to court governance. Accordingly, court administration is fertile ground for both research and reform as legal notions such as the separation of powers and the rule of law meet the school of management.

A further example is the recent introduction of ‘Customer Service Surveys’ undertaken in both the Supreme Court and Magistrates Court. The surveys purport to measure administrative efficiency, as viewed by practitioners and litigants. Survey results are then reported in the JACS Annual Report and in ‘Business Plan

[2] ACT Department of Justice and Community Safety, *Annual Report 2004-2005* (Vol 1), 35.

performance indicators'[3] and as such, have some impact upon court administration, be it in terms of budgeting or personnel management.

On one view these surveys are symptomatic of what Chief Justice Spigelman has described as a 'managerialist ideology' that is both inappropriate and degrading to the judicial process.[4]

On another view they are a poor use for precious finances, which are otherwise directed from worthy resources such as the Supreme Court library.

The Law Courts and Tribunals are headed by a Courts Administrator who answers to the Chief Executive Officer of JACS. The very positioning of the Courts Administration under a Departmental Head clearly demonstrates that the independence of the judicial arm of Government from the Executive and indeed, the Legislature is compromised.

Furthermore, the Courts Administrator position can be described as inimical to judicial independence as the Courts Administrator has 'conflicting accountabilities to the Attorney-General, the Chief Executive of JACS, the Chief Justice and the Chief Magistrate.'[5]

The same can be said for the position of the Registrar of each of the Courts, who is both a statutory office holder and a public servant, performing a variety of functions including directions lists, listing conferences and staff management. As such, the Registrar is answerable to both the Courts Administrator and the relevant Head of Jurisdiction.

[3] ACT Law Courts and Tribunals, *Customer Service Survey 2004-2005*, Results Report & Comparative Analysis (November 2005), 6.
[4] Chief Justice J J Spigelman, 'Measuring Court Performance' (Speech delivered at the Annual Conference of the AIJA, Adelaide, 16 September 2006).
[5] ACT Auditor-General's Office, *Courts Administration*, Performance Audit Report (September 2005), 4.

The fundamental problem with the mega-department model is that it distances the courts from the public servants who make the decisions that impact upon the courts, particularly regarding finances, personnel and infrastructure.[6]

In 2005 the ACT Auditor-General completed a report on courts administration. Therein it was observed that:

> *The ACT judiciary currently plays a limited role in generating budget proposals or approving expenditure* [as] *these activities are left primarily to the LC&T Unit* [Law Courts and Tribunals] *and JACS.*[7]

This situation may indeed worsen with the proposed introduction of a new corporate structure for the Department. This is in response to the significant expansion of JACS since the release of the 2006/2007 ACT Budget. Under this proposal, an extra layer will be added to the administrative hierarchy so that the Courts Administrator answers to one of two Deputy Chief Executives.

Given that the Law Courts and Tribunals are just one of many sub-groups vying for a portion of the same pie, it is not surprising that the budget is of constant concern, a point acknowledged by the Auditor-General.[8] Most recently, the budget for the Russell Fox library, situated in the Supreme Court and servicing the profession, the public, and the Judges' and Magistrates' chambers, has been severely cut.

My predecessor Chief Justice Miles, observed in 1992 that 'the Supreme Court is significantly under-resourced and inadequately accommodated'.[9] His Honour was speaking at a time when both the Magistrates Court and Supreme Court were housed in the same Law Courts Building, and the Registrar and Master operated from additional buildings located across Canberra City.

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[6] John Alford, Royston Gustavson and Philip Williams, *The Governance of Australia's Courts: A Managerial* Perspective (AIJA, 2004) 85.
[7] ACT Auditor-General's Office, above n 5, 6.
[8] Ibid 6.
[9] Chief Justice Jeffrey Miles, 'Justice at the Seat of Government' (1992) 66 *Australian Law* Journal 555, 564.

Since then a separate Magistrates Court was erected in July 1996 but the Supreme Court building remains as a working museum, so to speak. The refurbishment and/or replacement of the current structure, erected in 1963 has been on and off the Government's agenda for many years. The prospect of gaining the attention of the Federal Government was eliminated with the advent of self-government in 1989 and most recently, the Territory Government has directed funds towards a new prison.

On this note, the perspective of a former Territory Attorney-General, Justice Terry Connolly, is illuminating. Justice Connolly has viewed the budget debate from both angles. Recounting his time in politics, his Honour described the potent cocktail that influenced the funding, citing the 'enormous pressure to fund high profile, media-driven causes' such as schools or hospitals.[10] That in no way denies the importance of those causes, but emphasises the difficulty in highlighting less popular issues such as a lack of courtrooms or asbestos-riddled public buildings.

In terms of increasing the potential for lodging such issues on the Government's agenda, I have some confidence in a recent development in ACT court administration. That is, the establishment of a Court Governance Committee comprising:

- the Attorney General;
- the Chief Executive Officer;
- the Courts Administrator;
- the Chief Justice of the Supreme Court;
- the President of the Court of Appeal; and
- the Chief Magistrate.

This initiative responds to the first of twenty-four recommendations of the Auditor-General that a more collaborative relationship between the judiciary and Department be established, putting in place regular forums for communication and providing greater administrative independence for the Courts.[11]

[10] Master Terry Connolly, 'Relations Between the Judicial and Executive Branches of Government' (1997) 6(4) *Journal of Judicial Administration* 215, 220.
[11] ACT Auditor-General's Office, above n 5, 8.

The Committee provides a forum in which the Courts, the Department and the Executive are able to present and discuss courts administration issues from all perspectives. The Committee model promotes dialogue between the key figureheads in a collective setting – avoiding any to-ing and fro-ing between the Head of Department and the Head of Jurisdiction, which would necessitate further sub-communications. In this context, it is to be hoped that the conflicting accountability of the Courts Administrator may be alleviated. The Committee also provides a direct line of communication from the Judiciary to the Executive and vice versa.

Before I move on to discuss an alternative model of court governance, I wish to note the results of the latest Productivity Commission Report on Government Services.[12] The Report indicates that the ACT Supreme Court is both a busy court and an efficient court.[13] In terms of efficiency, the national real net expenditure of civil and criminal matters is $5,794 per finalisation, compared with $3,885 in the ACT, a figure that has reduced from $6,221 in 2001-2002.[14]

However, these figures are not indicative of busy and efficient courts Territory-wide. On the contrary, the ACT Magistrates Court was the second worst performer on real net expenditure, with a figure of $467 compared to the national figure of $275.[15] That is, it should be said, no reflection on the Magistrates who comprise the Court.

The factors that shape these results are more complex than the raw data indicates and as such, I do not wish to place undue emphasis on statistics. However, the demands of one court, necessarily impact on the resources available to another. The ACT is a small jurisdiction, with a two-tiered court system. The one government department administers both courts. As such, it is in the interest of the whole of ACT Law Courts and Tribunals to increase efficiency. Again, I note that the introduction of the Court Governance Committee is a positive development.

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[12] Steering Committee for the Review of Government Service Provision, *Report on Government Services 2006*, Vol 1.
[13] For example: For the most recent survey period the Report recorded 81 lodgments of criminal matters (per 100,000 population) compared to the national figure of 25 (Table 6A.3). In civil matters, 342 matters were lodged, compared with 181 nationally (Table 6A.4). However it needs to be noted that there is no intermediate court in the ACT.
[14] Table 6A.25.
[15] Ibid.

An alternative model

What I propose to do now is to conduct a brief examination of the court system in the Republic of Ireland, which is very much in the common law tradition and which I believe represents a workable model for court administration.

The modern Irish court system was set up by the *Courts (Establishment and Constitution) Act 1961*. The structure, in civil proceedings, is not dissimilar to Australian jurisdictions. There is a District Court dealing with claims in the vicinity of €6000; and a Circuit Court, which has limited, but more extensive jurisdiction than the District Court. The High Court equates with Australian Supreme Courts. The Supreme Court of Ireland is the ultimate Court of Appeal, equivalent to the High Court of Australia. I leave aside the Special Criminal Court for terrorist or security matters.

In 1995 a movement to modernise the administrative infrastructure of the Courts commenced. The structure had, up to that time, been similar to the ACT, whereby administration of the Courts was the responsibility of a Government Department, responsible to a Minister of State. Each Court had a separate sub-administration under the Head of Department.[16]

The difficulties and defects then plaguing the Irish Court system included unacceptable delays in the determination of cases; overworked and poorly organised court staff; and inadequate court buildings.[17]

A Working Group was established in October 1995, which ultimately proposed the establishment of an independent and permanent body to manage a unified Courts system. This recommendation culminated in the *Courts Service Act 1998*.

[16] Working Group on a Courts Commission (First Report) *Management and Financing of the Courts* (April 1996), 20.
[17] Ibid 35.

The Courts Service is a body corporate, mandated to provide an annual report to each House of Parliament (Oireachtas).[18] Specifically, the Courts Service is to:

- manage the courts;
- provide services for the judges;
- provide information on the courts system to the public;
- provide, manage and maintain court buildings; and
- provide facilities for users of the courts.[19]

The judicial functions of the Courts are specifically preserved[20] and the courts are not to be subject to ministerial or legislative control.

The Courts Service centralises the financial and management administration in a unified system.[21] At the heart of the Courts Service is the Board of the Service comprising 17 members and representatives of all four courts – you will find the list in your printed copies.

The Board includes:

- the Chief Justice or a Supreme Court judge nominated by him/her;
- the President of the High Court or a judge of that court nominated by him/her;
- a judge of the Supreme Court elected by the ordinary Judiciary of that court;
- a judge of the High Court elected by the ordinary Judiciary of that court;
- the President of the Circuit Court or a judge of that court nominated by him/her;
- a judge of the Circuit Court elected by the ordinary Judiciary of that court;
- the President of the District Court or a judge of that court nominated by him/her;
- a judge of the District Court elected by the ordinary Judiciary of that court;
- a judge nominated by the Chief Justice in respect of expertise in a specific area of court business;
- the Chief Executive;

[18] C*ourts Service Act 1998* (Ireland) s8.

[19] C*ourts Service Act 1998* (Ireland) s5.

[20] C*ourts Service Act 1998* (Ireland) s9.

[21] Working Group on a Courts Commission (First Report), above n 16, 45.

- a practising barrister nominated by the Chairman of the Council of the Bar of Ireland;
- a practising solicitor nominated by the President of the Law Society of Ireland;
- an elected staff member;
- an officer of the Minister for Justice, Equality and Law Reform;
- a nominee of the Minister representing consumers of the services provided by the courts;
- a nominee of the Irish Congress of Trade Unions; and
- a nominee of the Minister, following consultation, of a person with knowledge and experience in commerce, finance or administration.[22]

Whilst the Chief Justice is the chairperson of the Board, he or she has no right of veto over its decisions, only a casting vote in the event of an equality of votes.[23]

The Chief Executive is appointed on contract by the Board and is responsible, not to the Minister, but to the Board for the performance of functions and implementation of the Board's policies.[24] The Chief Executive is accountable to the Parliament (Oireachtas) and is required to attend before its Committees to answer questions concerning the administration of the Courts. However, any such Committee is forbidden from seeking clarification of an exercise of judicial function. Furthermore, there is no question of the Legislature identifying the dividing line between administration of the Courts and judicial decision-making, with the High Court determining what is or is not a 'judicial function'.[25] That is a matter for the judiciary alone (as in South Australia).

It is apparent that the independence of the judiciary, both real and perceived, would be greatly enhanced by the adoption of a model of court governance similar to that adopted in Ireland. Furthermore, the judiciary, whilst enhancing its independence, would be obliged to work co-operatively with the Government and the Legislature so as to ensure adequate resources and accountability. Such reform would provide an

[22] C*ourts Service Act 1998* (Ireland) s17.
[23] C*ourts Service Act 1998* (Ireland) ss11, 14.
[24] C*ourts Service Act 1998* (Ireland) s17, 20.
[25] C*ourts Service Act 1998* (Ireland) s21.

opportunity for the Courts themselves to be more accountable and innovative in dealing with the public and with the Government of the day.

Conclusion

The creation of a Courts Services Board for the Territory, by whatever name, particularly one that reports publicly and annually to the Legislative Assembly, can much more powerfully attach itself to the budgetary process and more directly address the needs of the judicial arm of government. It can also be a powerful vehicle for promoting an understanding of the role, purpose and function of the judiciary.

In promoting reform I am not, I should say, advocating a copy of the Irish system, but rather a model that allows more responsibility to the Courts for their own administration. This aspiration is supported by the ACT Auditor-General's Report on Courts Administration.[26]

Until such reform is undertaken, I place some hope in the Court Governance Committee recently established, which improves upon the mega-department model.

The departmental model of court governance is not viewed as 'optimal' for judicial independence. The AIJA's 2004 Report on Court Governance noted problems with divided loyalties between the judiciary and the public service and a feeling of lack of control on the part of judges over areas such as staff, IT, infrastructure and libraries.[27] I have identified these same issues in the ACT context. As such, there is a need to continually review the court structure, not only in a bid for efficiency and accountability, but so as to enhance judicial independence.

After all, major reform aimed at enhancing judicial independence has been undertaken in the ACT before. In 1992, under the tenure of then ACT Attorney-General Terry Connolly, amendments to the *Australian Capital Territory (Self-Government) Act 1988* were initiated.

[26] Specifically, Recommendation 1(c) states: JACS should work with the judiciary with a view to establishing a governance model for the courts that provides greater administrative independence and hence better alignment of courts' responsibility with public accountability. Above n 5, 8.

These reforms were borne out of the fact that the original Self-Government Act provided for the existence and structure of the Legislative Assembly and the Executive, but failed to mention the third arm of Government. Thus with the addition of Part VA, the independent status of the ACT Judiciary was secured in Commonwealth statute.[28]

This formal recognition of the judiciary, however, needs to be accompanied by institutional independence – afforded by a court governance structure that lends credence to the separation of powers, so that it is not merely a theoretical notion or ideal but a practical reality. In this vein I will share an extract from the Report produced by the Working Group that reviewed the Irish courts system in the late 1990's:

> *Alongside the concept of the separation of powers is the related principle of the independence of the judiciary. This is an independence in the exercise of judicial duties and responsibilities. In principle there should be provided an adequate infrastructure to the judiciary to carry out their functions. If the functions of the judiciary are limited by an absence of adequate administrative infrastructure and resources there is an impingement on the capacity of the judiciary to exercise these functions.*[29]

[27] Alford, Gustavson and Williams, above n 6, 86.
[28] Connolly, above n 10, 218.
[29] Working Group on a Courts Commission (First Report), above n 16, 18-19.