

## **A JUDICIAL PERSPECTIVE ON SUPREME COURT DEVELOPMENTS**

Australian Lawyers Alliance Conference

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### ***Introduction***

Good morning and thank you for inviting me here today to provide the keynote address for your 2012 conference. This morning I wish to provide a judicial, or, perhaps, an insider's, perspective on developments at the ACT Supreme Court. Such developments include the recent Blitz period experienced by the Court, the current implementation of the docket system, and the future of the Supreme Court building. My perspective is such that I experience such developments in the context of court governance that often restrains particular development and impinges upon the independence of the Judiciary. Often developments do not occur when or in the manner desired by the Court itself and often is a result of a considerable amount of compromise.

### ***Court Governance and Administration***

Firstly, I will outline the way in which the Court is administered. It is in the context of the way in which the Court is administered that any present and future developments of the Court can be appreciated and understood.

While judicial independence is described as both “freedom from interference by the Executive and freedom from dependence upon the Executive”,<sup>1</sup> the reality in the ACT is that the Courts are administered by a Government department.

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 Directorate 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. Thus, the ACT Supreme Court is but one of several branches that constitute the JACS tree. Other branches include the Legal Aid Office, the Director of Public Prosecutions, the Government Solicitor’s Office, the Office of the Community Advocate and the Human Rights Office.

I also note that the Law Courts and Tribunal of the ACT are headed by an Administrator, who in turn answers to a Director-General of the Directorate. The positioning of the Courts Administrator under a departmental head clearly demonstrates the compromise of independence of the judicial arm from Government to the Executive and indeed, the Legislature. The Courts Administrator has “conflicting accountabilities to the Attorney-General, the [Director-General] of JACS, the Chief Justice and the Chief Magistrate.”<sup>2</sup> 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

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<sup>1</sup> Sir Guy Green cited in Justice R D Nicholson, ‘Judicial Independence and Accountability: Can They Co-Exist?’ (1993) 67 *The Australian Law Journal* 404 at 405.

<sup>2</sup> ACT Auditor-General’s Office, *Courts Administration*, Performance Audit Report (September 2005), 4.

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.

The current governance system in the ACT is one where the Executive 'effectively controls the administration of the Courts'.<sup>3</sup> This is to be contrasted with models that grant partial or total control administration to the relevant Court itself.

I believe that such a structure and form of Governance compromises judicial independence. The fact is that the Judiciary remains a sub-departmental branch of a Territory or State Government; there can be no true sense of judicial independence; at least not the kind envisioned by Montesquieu or the purists, who when penning the constitution foresaw the Judiciary as an independent third arm of Government and the separation of powers as a check and a balance against the wielding of arbitrary power.

Unfortunately, we live in a society in which, for better or worse, success is increasingly measured solely by reference to rather crude commercial criteria. And while that may be fine for accountants, stockbrokers and the modern adherence to economic rationalism, lawyers and judges have traditionally been required to adhere to altogether more substantive and exacting standards of conduct, standards by which, as of today, you are bound.

The efficiency of an organisation can often be attributed to the quality of the governance of that organisation. In this sense, the Court is no different. Like any other organisation, the effectiveness of the Courts is heavily influenced by the

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<sup>3</sup> John Alford, Royston Gustavson and Philip Williams, *The Governance of Australia's Courts: A Managerial Perspective* (AIJA, 2004) 13.

decisions made by its governing bodies. In our case, this means the provision of our service, which is the ability of the community to access justice through the Courts, is directly affected by the way our Courts are governed. Thus any developments in the Courts are a result of decisions made by the Government rather than decisions made by the Judiciary.

Our current reality in the ACT is one where the operations of the Court are entirely reliant on the administrative decisions and financial support of Government agencies and departments. This creates a situation where the independence of the Courts “is contingent upon the observance by the political and administrative chiefs of the department of a convention not to exercise their authority over Court staff to the detriment of the independence of the Courts”<sup>4</sup>.

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. The perspective of a former Territory Attorney-General, and Judicial Officer, is illuminating. The late Justice Terry Connolly viewed the budget debate from both angles. Recounting his time in politics, his Honour described the potent cocktail, which influenced the funding of particular causes, citing the ‘enormous pressure to fund high profile, media-driven causes’ such as schools or hospitals.<sup>5</sup> That in no way denies the importance of those causes.

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<sup>4</sup> The Hon. Len King AC QC, (1999) paper presented at The Fourth Annual Judicial Conference of Australia Colloquium *‘The Attorney General, Politics and the Judiciary’* as cited in Sallmann P (2007) ‘Courts Governance: A Thorn in the Crown of Judicial independence?’ 16 *Journal of Judicial Administration* 139

<sup>5</sup> Master Terry Connolly, ‘Relations Between the Judicial and Executive Branches of Government’ (1997) 6(4) *Journal of Judicial Administration* 215, 220.

As rightly stated by Alexander Hamilton in the *Federalist Papers* the Judiciary is the weakest of the three branches of Government because it controls neither the sword nor the purse.’<sup>6</sup>

Courts and the Judiciary are more often than not in the media, rarely because politicians are crying foul over a lack of courtrooms or an OH&S Regulation-offending staircase. Nor has there been a media exposè of the asbestos-riddled public buildings in the ACT. Instead, media attention, nationwide, is often limited to claims of lenient sentences and long delays. Just as papers are not sold by in-depth examinations of the intricacies and vicissitudes of a criminal sentence, elections are not won with a platform advocating new court facilities.

Justice Warren of the Victorian Supreme Court, in her remarks in a public forum at the University of Melbourne earlier this year, pointed out that “..it is difficult for courts to compete against the palpable human demands on Government of medical care, educational needs and housing and accommodation requirements....however, if we do not have courts applying the rule of law and delivering a justice system we put at risk the very provision of health, education and housing services. Without the courts, there will be no civil society or democracy”.<sup>7</sup>

In 2006 a Court Governance Committee was established. This Committee comprises:

- the Attorney General;

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<sup>6</sup> ‘The Feeblest Branch’, *The Economist* (online), 1 October 2011 , <<http://www.economist.com/node/21530985>>.

<sup>7</sup> Chief Justice Marilyn Warren AC, ‘Courts and Our Democracy- Just Another Government Agency?’ (Speech delivered at Public Forum, Centre for Public Policy, University of Melbourne, 1 May 2012).

- the Director-General, Justice and Community Safety Directorate;
- the Courts Administrator;
- the Chief Justice of the Supreme Court;
- the Chief Magistrate;
- the President of the ACT Civil and Administrative Tribunal; and
- until recently, the President of the Court of Appeal.

This initiative responds to recommendations of the Auditor-General in 2005/2006 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.<sup>8</sup>

The Committee provides a forum in which the Courts, the Department and the Executive are able to present and discuss courts administration 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. There is also a direct line of communication from the Judiciary to the Executive and vice versa.

I hope that the Committee will go some of the way in realising and addressing what has been described as ‘the divergent and to some extent inconsistent requirements

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<sup>8</sup> ACT Auditor-General’s Office, *Courts Administration*, Performance Audit Report (September 2005), 8.

of public accountability, judicial independence, and efficiency in the administration of justice.’<sup>9</sup>

### ***The Judicial ‘Blitz’***

As I mentioned earlier there is a considerable amount of media and public attention on long delays experienced in the ACT Supreme Court. This jurisdiction was not only plagued with a backlog of cases upon the tragic death of the Justice Connolly and the retirement of Justice Crispin, but the Court has a large volume of incoming matters. For as long as I can remember the Judiciary have consistently voiced our concern of the lack of judges in addressing the growing need of the jurisdiction and have expressed a need for a fifth resident judge. However, this is not a decision the Judiciary can make. Instead we are dependent upon the Government and their budget, vying for a piece of the pie. Instead of providing a much needed extra resident judge the Government have instead provided us with the use of visiting judges in 2010/2011 and more recently provided funding for a judicial blitz. We, of course, welcome any initiative from the Government to assist in the backlog and managing incoming caseload.

Commencing in April and ending August this year, the ACT Supreme Court has now witnessed its first Judicial ‘Blitz’. The 12 weeks utilised by the blitz saw a considerably large caseload pass through the Supreme Court, in an effort to reduce the large backlog of this jurisdiction. The ACT Government’s funding of the blitz included the provision of two acting judges, Acting Justices John Nield and Margaret Sidis, additional prosecutors, and additional Legal Aid and Court staff.

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<sup>9</sup> Lord Hailsham, ‘Democracy and Judicial Independence’ (1979) 28 U New Brunswick LJ 7, 8.

Over the 12 week period, 151 civil hearings and 99 criminal trials were listed. The 151 civil matters that were listed represented 115 separate civil matters, only four of which were either vacated or not reached by the end of the blitz. Not surprisingly, the settlement rate was about average for civil matters at about 74%. Approximately two and a half months of court time has been saved. Currently, civil hearings before the Master are being listed in the second half of 2013. In consideration of Master Harper's retirement next May, the four months prior to which he will not be given any listings, the time gained with the blitz will offset the period we will have without the Master, ensuring we will not fall any further behind during this time. The Government has also provided for Margaret Sidis to return as an Acting Judge to assist while the Master is out of court.

Of the 99 criminal matters listed, 91 were resolved with almost three-quarters of them being resolved without a trial through either the accused changing their plea or the Director of Public Prosecutions declining to proceed. Based on the number of matters resolved and the courts current criminal listing capacities, the court has saved about four months of listing time. This is a successful result as it has brought the current court listing of criminal matters to early 2014 rather than five months later in the year, if we had not had the blitz.

This result is one that the ACT should be pleased with. The blitz has not only reduced a substantial amount of this backlog, but has been a positive experience all round. We hope that this blitz has also encouraged a cultural shift in the way matters are approached by all parties in the court.

However, I am of the view that the blitz is that, by itself, has provided temporary relief to a larger systemic problem. While the blitz brought forward a number of matters



which were set down for hearing later this year and early next year, it has not solved the long term problem of the large case load this jurisdiction is burdened with. As the population of the ACT continues to grow, so too does the number of cases that come before its courts. I am confident that, at least in the short term, the efforts of those involved has not gone unrewarded. Indeed, it only stands to reason that the expedited hearing of listed proceedings will have an impact on the Court's current caseload.

However, any expectations viewing the judicial blitz as an antidote to the administrative ills of a judicial system and expecting that once the immediate delays have been resolved, we will be left with some kind of utopian *tabula rasa*, is, in my view, incorrect.

By itself, the blitz can only provide temporary relief to a situation that has more systemic causes. As the population of the Territory grows, so too does the number of cases that come before its courts. That is a reality which, to my mind, can be adequately addressed only by the appointment of a resident fifth judge. To delay such an appointment is, I think, to do the people of the ACT a considerable disservice.

This backlog reduction technique has been employed in a number of jurisdictions. For example, it contributed to a significant decrease in delays within the New South Wales Supreme Court. Such results are undoubtedly encouraging. Certainly, measures which provide incentive for practitioners to settle cases and enable judges to dispose of a large number of matters in a short period of time are to be welcomed. It is not, however, itself a panacea . Improved case management in New South Wales has only been achieved through a multiplicity of measures, including an

increase in the jurisdiction of the District Court and the appointment of additional judges, both full time and acting.

Despite the inferences that one might draw from comments made in and by the media, the current delays are not the result of inefficient judicial practices. Indeed, the recent Report on Government Services indicates that the ACT has the highest rate of both lodgements and finalisations of any comparable court in Australia. A recent report by the Productivity Commission ranks the ACT Supreme Court first among Australia's superior courts in terms of case finalisations *vis a vis* cases lodged.<sup>10</sup> Thus while the Court unreservedly welcomes such measures in assisting the court such a measures will likely provide only temporary relief to what is, on the current evidence, primarily a systemic problem.

The blitz was the product of an open and honest collaboration between the Court, the legal community and the ACT Government. One hopes that it may lead to more formalised cooperation between these stakeholders and, ultimately, to the courts having a greater say in the amount of funding they receive and the manner in which it is spent. Indeed, there is little doubt that the introduction of self-administration for the Courts would result in improved responsibility, accountability and efficiency in court operations.

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<sup>10</sup> See, eg, Chris Merritt, 'NSW court judged supremely inefficient', *The Australian* (online), 31 January 2012 <http://www.theaustralian.com.au/business/legal-affairs/nsw-court-judged-supremely-inefficient/story-e6frg97x-1226257741255>

## ***The Implementation of the Docket System***

The blitz has significantly reduced the number of pending matters in a timely fashion for the implementation of the docket system, which began just one week after the end of the blitz. This decrease in backlog has provided a great foundation for the allocation of cases in the new docket system framework.

The docket system was formally commenced last month and is an effort to improve case management practices within the Court.<sup>11</sup> Basically a docket is the list of matters being handled by a judicial officer. The essence of such a system is that each matter of the selected kind that is filed in the court is assigned to a specified judicial officer at an early stage, so that the judicial officer not only conducts any trial that eventuates from the matter but manages the earlier stages of the litigation. Such practices allow for greater control by judicial officers to case manage each matter before them.

A docket system makes each judicial officer accountable for his or her matters, while also allowing the judicial officer greater control over the management of the workload. It is hoped that active case management by a docket judge will result in earlier settlements, more settlements, and more efficient trials. A docket system enables each judicial officer to manage his or her own workload more efficiently, and in a way that suits them. A judge can schedule judgment writing time immediately after a trial that is likely to require a written judgment which means that judge is more likely to be able to produce timely judgments.

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<sup>11</sup> Justice Hilary Penfold, 'ACT Supreme Court Docket System: An Overview, (Speech delivered at ACT Law Society Event, Canberra Club, 23 August 2012).

Indeed better case management practices are welcomed and will assist in the way in which matters are handled in the Court. It will allow judges to handle their case load in a manner in which it best suits them and can use individual case management practices. It is obviously early days so the effect of the docket system in the management of caseload in the Court is yet unknown. However, my view is that the docket system will highlight the volume of matters coming before the court and the need for an extra judge in order to effectively manage the incoming case load.

Developments such as the blitz and the docket system are beneficial to the court and the way in which it delivers its services to the community. However, such developments are not decided and managed solely by the Judiciary. Instead, developments are dependent on the Government and their willingness to support such measures. While we may believe that a fifth judge will enable us to better serve the community, the decisions as to how we deliver our services are decided by the executive, compromising the separation of powers doctrine.

## ***The ACT Supreme Court Building***

The provision of more appropriately constructed court rooms, though in the pipeline, is another limiting factor of this jurisdiction.

As I am sure all you would be only too aware, our Supreme Court building has seen better days. Unfortunately these 'better days' took place before the moon landing. Nevertheless, we can take heart in the fact that the Government is currently undertaking a feasibility study with respect to the construction of a new building. This is truly exciting because it brings us one step closer to our apparent goal of being the first jurisdiction with an appellate court built entirely from feasibility studies.

With respect to a potential re-housing of the Court, back in 2004/05 Annual Report of the Department of Justice and Community Safety listed the negotiation of a plan for major capital works, including a new Supreme Court, as a key objective for that financial year. However, the progress report indicated that efforts are 'yet to yield a satisfactory outcome'.<sup>12</sup> Accordingly one of the targets of the 05/06 financial year was to re-submit a funding proposal for that project to the Government. It is now 2012 and The ACT Government informs me that a refurbishment is imminent. I am reliably informed that the Government is committed to 'forward design work' and will soon undertake 'concept design activities'. And as soon as I find out what that actually means, I will let you all know. I suspect we will eventually have to take matters into our own hands.

Indeed, I sometimes wonder whether we shouldn't start charging an entrance fee to this building, given that it effectively doubles as a working museum.

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<sup>12</sup> ACT Department of Justice and Community Safety, *Annual Report 2004-2005* (Vol 1), 41.

My predecessor Chief Justice Miles, observed in 1992, that ‘the Supreme Court is significantly under-resourced and inadequately accommodated’.<sup>13</sup> 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. 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.

Unfortunately an underwhelming Supreme Court building does not constitute a high profile, media driven cause in order for the Government to commit to a new Supreme Court building. Rather, proposals for a new building have been discussed since 1992. We have been waiting for a new Court building since and have intermittently made progress which then appears to have been swept under the carpet for perhaps more ‘media driven’ causes which captures the attention and thus funding of the Government.

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<sup>13</sup> Chief Justice Jeffrey Miles, ‘Justice at the Seat of Government’ (1992) 66 *Australian Law Journal* 555 at p 564.

## ***Conclusion***

In Justice Warren's remarks at a public forum earlier this year her Honour correctly pointed out that citizens are entitled to certain expectations of the Court.<sup>14</sup> These expectations include that there are sufficient judges assigned to hear their cases, that court lists will be controlled and managed in a way to enable cases to be heard expeditiously, that courtrooms would be available for judges to sit and determine cases. Finally, her Honour states that above all every citizen should expect a Judiciary free from interference and control from the Executive.

I believe that in order to make improvements and improve service delivery to the ACT community, the courts should be enabled to operate independently.

Thank you again for inviting me this morning and I hope you all enjoy the rest of the day, and the rest of the conference.

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<sup>14</sup> Warren, above n 6.