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the Hon. J J Spigelman, AC, Chief Justice of NSW in 2001**

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## Farewell Ceremony for the Honourable Justice Lancelot John Priestley

THE SUPREME COURT  
OF NEW SOUTH WALES  
BANCO COURT

SPIGELMAN CJ  
AND JUDGES OF  
THE  
SUPREME COURT

Tuesday 11  
December 2001

### FAREWELL CEREMONY FOR THE HONOURABLE JUSTICE LANCELOT JOHN PRIESTLEY UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES

**1 SPIGELMAN CJ:** The purpose of this ceremonial sitting of the Court is to mark the retirement from the Court of the Honourable Lancelot John Priestley known, universally, as Bill. His Honour was appointed a Judge and a Judge of Appeal of this Court on 3 June 1983.

2 The High Court is sitting in Canberra this week. Otherwise members of the High Court would also be present on this occasion. The Chief Justice of Australia, the Honourable A M Gleeson who, for a decade, served with you in this Court, has asked me to convey his apologies for his inability to be here today. He is sitting on an appeal in which you and I agreed and the President dissented. Similarly, the Chief Justice of this Court at the time of your appointment, Sir Laurence Street, has asked me to convey his apologies for his inability to be present.

3 In 1956, when you were admitted to the Bar of the Supreme Court of New South Wales, you became the first pupil of the then junior barrister, L K Street. Your Honour went on to be appointed a Queens Counsel in 1972.

4 The hallmark of your Honour's involvement with the law, both at the Bar and on the Bench, has been your unremitting intellectual energy and curiosity, which remain unabated to this day. The law is first and foremost an intellectual activity. Your Honour has always approached the ideas and concepts involved in legal thinking with a palpable joy. The contribution your Honour has made to the intellectual development of the law in Australia is of abiding significance.

5 Your primary contribution has been made in the judgments of the Court of Appeal and the Court of Criminal Appeal over the course of the eighteen years on which your Honour sat in this Court. If your Honour's judgments were brought together then, in substance, your Honour has been the author of something like fifty books. There are numerous specific contributions which will stand the test of time and which constitute an intellectual inheritance for which the administration of justice in this country is indebted to you.

6 Although basically a black-letter lawyer, your Honour has nevertheless been a liberal and reforming judge. Your Honour has shown how justice can be achieved by the traditional methods based on the proper understanding and application of legal principle and precedent.

7 It is invidious to pick out any particular judgments, because your Honour has made contributions in so many different areas of the law. I will, however, mention some. In *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, your Honour made a groundbreaking contribution in relation to the law relating to good faith in contractual performance. In *Salovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466 and *Austotel Pty Ltd v Franklin Self-serve Pty Ltd* (1989) 16 NSWLR 502, your Honour elucidated our understanding of the law of estoppel. Your Honour's judgment in *AMEV-UDC Finance Limited v Austin* (1984) 2 NSWLR 612, contained a detailed outline of the history

of the law on penalties, which has been influential in subsequent decisions.

8 Many of the judgments that your Honour delivered were, by reason of the importance of the proceedings, the subject of a successful application for special leave to the High Court. In such cases, even though the High Court may, in substance, have upheld your Honour's reasoning, it is the decisions of the High Court to which reference is now made. Nevertheless, in such judgments your Honour made contributions to the intellectual reasoning processes which were subsequently adopted, either by counsel in submissions to the High Court, or by judges of the High Court in their reasons, in both cases not always with express acknowledgement of your Honour's contribution. That is one of the functions and burdens of sitting on an intermediate Court of Appeal. I have in mind, for example, your Honour's judgments on estoppel in *Walton Stores (Interstate) v Maher* (1986) 5 NSWLR 407 and on relief against forfeiture in *Macarthur v Stern* (1986) 5 NSWLR 538.

9 It is, of course, the fate of judges of intermediate appellate courts not to always be upheld on appeal to the High Court. The judicial hierarchy is organised in layers, like Dante's Hell, and for much the same reasons. Even on those occasions, however, your Honour's judgments have been marked by great knowledge of Australian law of its history and by the application of analytical skills of the highest order. In *Spautz v Gibbs* (1990) 21 NSWLR 230, your Honour's analysis of the law of abuse of court process remains an important statement of the law, even though the High Court came to a different conclusion as to some matters of principle and upon the facts of the specific case.

10 Writing extra judicially (in 46 South Carolina Law Review 103), your Honour came to the conclusion that there was not a single common law in Australia on the basis of a complex, compelling and learned analysis of the law both in Australia and in the United States. The fact that the High Court eventually came to a different conclusion does not detract in any way from the force of your reasoning.

11 Whilst your Honour's judgments remain your primary intellectual contribution to the law, throughout your career you have been active in publishing and teaching and contributing to seminars over a wide range of topics, including contract law, estoppel, native title, taxation, corporations law, international commercial arbitration, commercial law and the law of trusts.

12 Your Honour has always had a commitment to legal education, which reflects the intellectual curiosity that your Honour has always displayed. For about a decade, you were Challis Lecturer in Bankruptcy at Sydney University Law School and a lecturer in Public Company Finance in the Master of Law's program at that School.

13 In recent years you have made a major contribution by chairing the key national committee that has determined the minimum requirements for legal education throughout Australia. Now known as the Law Admissions Consultative Committee and, until 1999, the Consultative Committee of State and Territorial Law Admitting Authorities, this group has identified the core requirements for both academic legal education and also for practical legal training. Throughout the legal education community in Australia, these two lists of subjects are known as the "Priestley Eleven" and the "Priestley Twelve". This committee reports on a regular basis to the Council of Chief Justices and I know I speak on behalf of all of the Chief Justices of Australia when I thank your Honour for the substantial contribution you have made over many years to the development of an integrated approach to legal education in this nation.

14 The administration of the Supreme Court depends upon the active participation of judges. Only by such involvement can the principles of judicial independence be ensured of practical content. Your Honour has served with distinction on numerous committees of the Court.

15 Your Honour became a member of the Supreme Court Library Committee in 1985 and have been the Presiding Member since 1993. Your Honour was appointed to the Law Courts Library Management Committee in 1985 and became Presiding Member in 1992. Between 1989 and 1991, you served as Chair of the Barristers Admission Board and the Solicitors Admission Board. You have been a member of the Supreme Court Rules Committee since 1991. You have been a member of the Chief Justice's Policy and Planning Committee since 1996.

16 I know from my own personal experience that the effective operation of the Court has been considerably enhanced by your Honour's skill, experience and dedication. I thank you for the assistance you have given and I am sure I speak on behalf of my two immediate predecessors in conveying their thanks to you for the contribution you made over many years prior to my appointment.

17 Your Honour's interests have never been confined to the law in a narrow sense. You have always taken a strong interest in the development of the society in which we live. This is reflected in the breadth of your conversation and personal interests. Your wider learning, and the perspective that provides, have been of great significance in establishing that broader understanding which has enabled you to make the intellectual contribution to the development of the law to which I have referred.

18 This breadth of perspective is also reflected in your own quest for continuing self-improvement. This led you to engage in further studies, including a Diploma of the Humanities from the University of New England in 1996 and, then, a further Bachelor of Arts from that university in 2000, to add to the Bachelor of Arts you received from the University of Sydney in 1951. This time with Honours in Latin.

19 The cumulative effect of your Honour's knowledge and understanding of the law, your Honour's broader intellectual attainments, your administrative contribution and your personal congeniality are such that I, together with all your judicial colleagues, will miss you very much.

20 On behalf of all of the members of this Court and, indeed, all the judicial officers of this State, I wish you well in your retirement and extend to yourself and your wife, Caroline, our warmest wishes for many further rich and satisfying years in this new stage of your life.

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## Quality in an Age of Measurement: The Limitations of Performance Indicators

QUALITY IN AN AGE OF MEASUREMENT: THE LIMITATIONS OF PERFORMANCE INDICATORS  
 THE SYDNEY LEADERSHIP ALUMNI LECTURE  
 THE BENEVOLENT SOCIETY  
 THE HONOURABLE J J SPIGELMAN AC,  
 CHIEF JUSTICE OF NEW SOUTH WALES  
 SYDNEY, 28 NOVEMBER 2001

The balance between quantitative and qualitative assessment of the performance of governmental functions arises in many different fields. Should art galleries or museums be judged by attendances? Should university researchers be judged by numbers of publications? Should educational institutions be judged by the earnings of their graduates? Should either the ABC or SBS be judged by television ratings? Should courts be judged by the time it takes to dispose of proceedings?

The answer to each of these questions is "Yes, in part". I do not doubt that matters capable of a measurement are relevant to a process of assessment both for internal purposes and in terms of public accountability. . The issue is the extent to which crucial decisions are made *only* or *primarily* on the basis of what can be measured.

My central proposition is a simple one. Not everything that counts can be counted. Some matters can only be judged, that is to say they can only be assessed in a qualitative way. It is of primary significance to recognise that there are major differences between one area of government activity and another as to the centrality of those matters that are capable of being reduced to quantitative terms. In some spheres of governmental decision-making the things that can be measured are the important things. In other spheres the things that are important are not measurable.

I became interested in these matters by reason of my responsibilities for the administration of the Court. I recognise that in the administration of justice certain matters, such as delay, are capable of quantification. The compilation and publication of statistics relating to the measurement of delay is a perfectly appropriate activity. Nevertheless, the most important functions performed by a court are not capable of measurement. In particular the fundamental issue of whether or not the system produces fair outcomes arrived at by fair procedures is not capable of quantification at all.

It quickly became clear to me that advocates of quantification in the context of the administration of justice do not necessarily share my opinion as to the limited significance of quantification for the determination of important decisions affecting the courts. In particular there seemed to be an expectation that the use of quantification would inevitably expand to influence and, even determine, more and more decisions. These include the proposals for national benchmarks and the publication of comparative data which would in some way lead to competition between courts, perhaps directly by indicating role models, or indirectly, through an incentive to improve performance occasioned by the publication of invidious comparisons. Furthermore, some expect that, in the future, matters of quantification would become of central significance for the determination of the allocation of resources, e.g. expanding one court in a judicial hierarchy at the expense of another or transferring jurisdiction to non-judicial tribunals. Finally, at least two of the statutory tribunals responsible for the determination of judicial salaries, those of the Commonwealth and Queensland, proposed to take into account some unspecified quantified measure of performance in the course of deciding changes in judicial salaries.

Over the course of the last two decades the organisation of governmental activity has undergone a radical transformation. It has been referred to as a "global public management revolution". In Australia, New Zealand, England and some European countries, the change has been called "the new public management". The courts are an arm of government. They have not been and cannot be insulated from changes in attitude about the proper role of government and the appropriate means to conduct governmental activity. The courts have responded and will continue to do so.

My reading of the literature of the new public management indicated that in some areas of public decision-making in which quality was of great significance, such as education and health, the

imperatives of measurement had originally been applied in much the same kind of low key way as is presently applicable or proposed in the context of the administration of justice. There are perfectly acceptable and legitimate purposes served by quantitative indicators. However, in the areas of health and education they did not stop there. Performance indicators and funding formulae have come to be applied in a mechanical and rigid way to determine budgets, remuneration and tenure with the most dramatic effects on the delivery of services and the determination of curricula and research. I was, and remain, concerned that nothing of this character should occur in the context of the administration of justice.

Perhaps the most definitive characteristic of the “new public management” is the greater salience that is given to what is called the “three E’s” – economy, efficiency and effectiveness – in competition with other values of government activity, such as accessibility, openness, fairness, impartiality, legitimacy, participation, honesty and rationality. We have not reached the stage where the “three E’s” are accepted to override completely these other values. Very real issues arise about the extent to which they ought be permitted to do so. In particular, we must recognise that the significance of these other values varies from one area of government activity to another.

The root of the difficulty is one of perception. Quantitative measurement appears to be objective and value free. Qualitative assessment appears to be subjective and value laden. In fact, quantitative measures – whether in the form of a funding formula or of a performance indicator – contain and conceal important value judgments.

The sense of precision that quantitative measurement sometimes gives can be altogether false. Nevertheless, it can also be comforting. There is an institutionalised bias against qualitative assessment, sometimes reflected in a personal fear of making qualitative judgments. There are significant benefits from decisions becoming virtually automatic, instead of requiring a formal process of assessment. Where persons, by reason of their institutional position, have ongoing relations with each other, it is easier to say that a decision is determined by a formula. It is much harder to make a decision which is based on an express assessment that one person or institution is not as good as another.

The apparent objectivity of the application of a pre-agreed formula to a particular situation is no doubt preferable to many. Judges who are used to making qualitative assessments, virtually on a daily basis, do not share the bureaucratic squeamishness about such assessments.

Of particular significance in this area of discourse is what appears to me to be a power struggle between the proponents of the “new public management” like treasury officials, departmental finance officers and auditors (to whom I find it convenient to refer as the “managers”) and persons like teachers, doctors or lawyers involved in public decision-making processes (to whom I will refer as the “professionals”). The professionals in the various areas of public sector decision-making in which they are involved tend to emphasise the significance of qualitative considerations. Managers tend to emphasise measurable indicators and objective formulae.

It is perfectly understandable why this should be so. To the extent to which qualitative considerations are given weight, the professionals will have the greater say. Unless matters can be reduced to measurable standards and indicators, the managers will not be able to exert significant influence. The managers simply do not have the capacity to make qualitative judgments. They have an inbuilt institutional bias to downgrade the significance of quality or to treat it in such a way that measurable factors actually determine the decision-making processes. As a regrettably anonymous pundit put it: “Where you stand depends on where you sit”.

The managers have a self-image of themselves as the true custodians of the objectives of an organisation and, often, as the representatives of the taxpayer in the interests of minimising expenditure and maximising efficiency. They sometimes resent the high degree of autonomy of professionals and categorise their pre-occupation with matters of quality as rent seeking activity. They tend – sometimes with reason - to regard professionals as liable to engage in self-serving conduct and to have no capacity to prioritise or to regard their professional standards as anything but absolutes. In a world where real choices have to be made about the allocation of resources, there are no such absolutes.

This conflict between managers and professionals has been reflected in numerous battles over budgets and programmes in virtually every area of public sector activity in advanced economies over the last two decades. Advocates of the new public management accept, of course, that considerations of “quality” are very important. The problem is that as a matter of practical application, experience

suggests that these incantations often have a ritualistic quality. Quality considerations receive only lip service and the matters capable of a quantification more often than not determine the actual outcome.

Quantitative measurement has, by reason of its concreteness, acquired a disproportionate and inappropriate influence over considerations of quality, which appear to be amorphous. Decisions that plainly call for judgment are now often made on the basis of partial, purportedly "objective" considerations, with dramatic consequences which, probably, no-one would have chosen in a more comprehensively based decision-making process. In many areas of public decision-making, including the administration of justice, there is simply no escaping qualitative judgment. Decisions can never be made automatic. Quantitative measurement is necessarily, by its very nature, partial and incomplete. It is implemented in the name of rationality. However, it is a very partial irrationality, which by reason of its incompleteness may in substance prove to be fundamentally irrational.

Advocates of the new public management go through a process of assessing matters of quality by means, if possible, of some kind of measurement. Reference to quality considerations is customarily included in reporting on performance. This is inspired by private sector management which has adopted quality measures such as defect rates in manufactured goods or customer complaint statistics. In the areas of public decision-making with which I am concerned there is simply no measurable indicator of quality, even at the level of defect rates or complaint levels. There is just no escaping qualitative assessment. What that must mean is that decision-making processes based substantially on quantitative measurement are defective and, in my opinion, in substance, irrational.

The difficulties of measuring quality can be illustrated by the proposal that is sometimes made by the managers as to how to assess that quality of decision-making in the courts. It is proposed that there be some form of survey of opinions about various matters including the quality of the court's decision-making processes. I have no doubt that in certain areas of court administration surveys of persons attending at court are useful, e.g. adequacy of signage, convenience of facilities and the like. I do not believe that there is any proper basis for surveys, even of lawyers let alone of litigants, for purposes of assessing the judgments of a court.

Surveys of opinion, even by legal practitioners, about courts generally or about individual judges, contain an inherent contradiction at the heart of the process. The value of the opinions depends on the quality of the person expressing it.

Some opinions are expressed by individuals of considerable capacity and with substantial experience about the court or the individual judge about whom the opinion is expressed. Other persons surveyed, including legal practitioners let alone litigants, are of much lesser capacity and may have a bitter experience about a particular proceeding or may have no relevant experience of a particular judge (as would be the case with almost all legal practitioners about any individual judge). Accordingly their "opinions" reflect a second or third-hand view with no proper foundation.

Opinion surveys about quality are, necessarily, in large measure surveys of reputation. Reputation is not necessarily related in any direct, or even rational way, to the matter sought to be assessed in this qualitative manner. They are a grotesquely unreliable form of assessing quality.

Some opinions are entitled to greater weight than others. In order to assess the value of the opinion being expressed, it is necessary to ask the very same questions about the quality of the person expressing the opinion as is being asked in the survey. Any attempt to assess the quality of the persons surveyed suffers, of course, from exactly the same difficulty as the first level of opinions being expressed. This is an infinite regression from which there is no escape.

No doubt such surveys give the appearance of being democratic, in the sense of involving a wide range of relevant opinion. It may be unfashionable to say so, but quality is by its nature not susceptible to democratic assessment. The assessment of quality is often inherently elitist, in the sense that it can only be made by persons with education and experience pertinent to the assessment being undertaken. In the case of judges and courts, surveys will not be of any utility. Quality is hard to assess. But if we ignore it, we do so at the peril of perverting the decision-making processes which we are seeking to improve.

The perennial discourse over the proper role of government can be characterised as a debate between those who emphasise government failure and those who emphasise market failure. Over the last two decades those who emphasise government failure have been in the ascendancy. This ascendancy has been reflected in a variety of changes such as privatization, contracting out, deregulation, reinventing government, value for money, re-engineering, market based solutions, downsizing, purchaser/provider

arrangements, cost benefit analyses, performance indicators, program budgeting, output and outcome frameworks, benchmarking, performance audits, mission statements – even vision statements - strategic plans, citizen charters, business plans, targets, etc. etc.

A central theme of the “new public management” is the application to the public sector of the institutional structure and decision-making techniques said to be characteristic of the private sector. One of the difficulties with this approach is that it tends to reduce citizens to consumers.

There is nothing wrong with being a consumer or in ensuring that organisations take into account how well the functions they perform meet the requirements of people as consumers or clients. Nevertheless, it is important to recognise that a person’s interest as a “consumer” is only one part of a person’s status as a citizen. The consumer analogy has become, in many respects, a feral metaphor that has acquired a disproportionate degree of prominence.

Consumers have desires or needs. Citizens have rights and duties. The perspective of citizenship is of greater significance for many areas of public activity than the perspective of consumerism. This is the case for the administration of justice.

In the context of court administration, the consumer perspective treats courts merely as a provider of dispute resolution services. Indeed, the most recent court created in Australia, the Federal Magistrates Court is, by specific statutory provision, permitted to be called the “Federal Magistrates Service”. It is the policy of the government to prefer that denotation.

The identification of the courts as merely a publicly funded dispute resolution service is too narrow. Indeed, in my opinion, it is potentially subversive of the rule of law.

Human life cannot be characterised simply as a series of consumer choices. Litigants are not consumers. Litigants have rights. They come to court to assert their rights, not to exercise some form of consumer choice. This is clearest in the criminal justice system where, in substance, the community asserts rights by way of protecting itself. In all cases, litigants are, and should be, treated in the courts as, citizens not consumers.

The courts do not deliver a “service”. The courts administer justice in accordance with law. They do not deliver a “service” in the form of judgments and decisions, than a Parliament delivers a “service” in the form of debates and statutes. I do not doubt that courts serve the people. But they do not provide services to the people. This distinction is not merely semantic, it is fundamental.

Courts perform functions that go well beyond resolving disputes. The enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by a public affirmation of who is right and who is wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of conduct by a public process with public outcomes - these are all public purposes served by the courts, even in the resolution of private disputes.

The judgments of courts are part of a broader public discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances. This is a governmental function of a broadly similar character to one of the functions performed by legislatures. This has no relevant parallel in most other spheres of public activity, let alone private activity.

I have no doubt that there are important areas of government in which the emphasis on a consumer perspective and the analogy with the free market have been adopted with substantial benefits. However not all areas of government are capable of being moulded by analogy with the operation of a free market. The administration of justice is an area in which this analogy has little useful to contribute.

No-one advocates that commercial corporations should conduct their affairs in public, nor that they should publish reasons for their decisions, or observe any of the other principles of open justice. Nor should the operations of commercial corporations be seen as having a determinative relevance to the administration of justice.

One characteristic of the administration of justice is its inefficiency when compared with some other systems of decision making. This is not an accident.

There is no doubt that a much greater volume of cases could be handled by a specific number of judges if they could sit in camera, dispense with the presumption of innocence, not be constrained by



obligations of procedural fairness or the need to provide a manifestly fair trial, could act on the basis that no-one has any rights and not to have to publish reasons for their decisions. Even greater "efficiency" would be apparent if judges had made up their minds before a case began. There are places where such a mode of decision making has been, and indeed is being, followed. We do not regard them as role models.

Our system of justice is not the most efficient mode of dispute resolution. Nor is democracy the most efficient mode of government. We have deliberately chosen inefficient ways of decision making in the law in order to protect rights and freedoms. We have deliberately chosen inefficient ways of governmental decision making in order to ensure that governments act with the consent of the government.

There is a tendency amongst managers to regard measurement as benign and that no harm can be done from quantification even if it does not prove useful. That is wrong. The process of deciding what and how to measure so called "performance", is capable of having very real effects on behaviour and to distort actual conduct in a manner that no-one would actually chose. This is a critical manifestation of the irrationality of partial rationality.

Advocates of the "new public management" like to think of themselves as business-like. They approach government decision-making with a single market driven private sector model which will, by the application of some natural law, lead to the most desirable outcome. A different perspective is available. An emphasis on strategic plans, business plans and performance indicators characterises the long tradition of socialist planning. The one thing of which there was no shortage in the former Soviet Union was performance indicators. They called it a five year plan. The Soviet experience indicates dramatically the distortions that can arise by reason of an emphasis on quantification.

Nikita Khrushchev, in one of his speeches attacking what he called the "steel eaters" of heavy industry revealed that when the five year plan for nail manufacturers identified output in terms of tonnes, every manufacturing plant in the country made large nails and there was a shortage of small nails. Accordingly, in the next five year plan output was stated in terms of numbers of nails. The inevitable happened. Everyone made small nails and there was a shortage of big nails.

It is of critical importance to recognise that measurement is not neutral in its effects. Measurement has consequences. Indeed it is expected to have consequences. However, what occurs may not be as intended. The more significant the application of quantitative measurement, the more likely it is that it will have unintended consequences. There is a hierarchy of increasing significance for the use of quantitative factors which can be set out, broadly as follows:

- (i) Internal management.
- (ii) External accountability.
- (iii) Allocation of resources.
- (iv) Job security and remuneration.

In the literature of the new public management a distinction is drawn between outputs and outcomes. To give an example of the difference in the case of occupational health and safety inspectorate, an "output" would be the number of inspections. The "outcome" is the ultimate objective such as a decline in rates of injury in the workplace. It has long been accepted that the attempt to develop measurable indicators for "outcomes" has been a failure Shead "Outcomes and Outputs – Who's Accountable for What", 1998 4 *Accountability and Performance* 89 at 90-92.

. Some managers have recently expressed concern about an "output fixation". The problem is that "outputs" can be measured, whereas "outcomes" usually cannot be. The greater the role and significance of measurement, the more likely it is that "outputs" will be targeted, if necessary at the expense of "outcomes".

This may not be of concern. In some areas of government activity what can be measured, at least on a proxy basis, may include quality aspects of "outputs" and important "outcomes". However, to the extent that what matters cannot be measured, as I contend is the case for the administration of justice, then it is necessary to be concerned about the pathology of measurement.

The example of the Soviet Five Year Plan can be matched with numerous examples in the West, including in private corporations. Performance indicators often have perverse effects, especially when they determine resource allocation and job security or remuneration.

One Harvard Business School professor calls the process "Paying People to Lie" Michael C Jensen

“Paying People to Lie: The Truth About the Budgeting Process” *Harvard Business School Working Paper No 01-072* April 2001 accessible at <http://papers.ssrn.com>.

. He reports an example of bonuses being paid on the basis of sales revenues within a certain period. At great cost and inconvenience, unfinished industrial products were shipped from the plant in England to the Netherlands, where they could be assembled close to the customer and the sales revenue could be booked before the end of the quarter. The managers made their bonuses but the company's profit was substantially reduced. In another case, management announced that prices would increase by 10% in four months time, which had the effect of bringing forward sales and meeting targets to which bonuses were tied.

Sometimes the response is fraudulent. He reports a case where the United States Securities and Exchange Commission brought charges against a company for falsely increasing earnings by several hundred millions of dollars over a certain period. This occurred because of the internal incentives and bonuses paid to managers. They brought forward revenues by backdating sales agreements, entered into secret side agreements granting rights to refunds after the relevant period, recognised revenue on disputed claims, etc. In another case fraudulent reporting of completely fictitious sales ensured that managers acquired bonuses tied to sales targets.

As the author concludes:

“Tell a manager that he or she will get a bonus when targets are realised then two things are sure to happen. First, managers will attempt to set targets that are easily reachable, and once the targets are set, they will do their best to see that the targets are met even if it damages the company to do so.”

On the issue of target setting he agrees with the observation that:

“The more people lie about how much they cannot do, the more they are rewarded.”

All of this behaviour, he says, has become an accepted part of business life, although it is “undiscussable”. He concludes:

“To stop the gaming of budgets and targets and restore integrity to the planning and management process we must begin not by telling managers to stop lying, nor by eliminating the use of budgets, but by eliminating the use of budgets and targets in compensation formulas and promotion systems.”

The distortions created by the application of rigid funding formulae which allocate resources, and by indicators that determine employment, appear to exist in the university context.

The difficulties are well stated in a recent assessment of the impact on American universities of the emphasis given to publication in the grant of tenure to American academics. It is worth quoting at some length.

“As long as the candidate proves an inoffensive teacher and a reasonable department member, only one question sits on the meeting room table: Is the research project finished? If the junior colleague has a book in hand or an acceptance letter from the director of the university press, tenure is a fait accompli. If the work remains in manuscript, promising but incomplete, no promotion. That is the employment equation. Tenure has boiled down to a six-year composition scheme. Junior faculty now face a demystified production schedule, and senior faculty enter the tenure meeting with a one-checkbox form in their heads. No more messy discussions about quality. No more anxiety about whether the department has enough discernment, or too much. Administrators have an objective criterion to point to should any outsiders challenge the proceedings. Judgment has been externalised, handed over to the university editorial board. The assistant professor has inherited a job task that takes priority over teaching students, that is, marketing his revised dissertation to academic press editors.

While the book criterion has clarified the tenure process, it has fundamentally altered the nature of scholarship in the humanities. The system discourages research that is time-consuming, that involves tracking down information secreted in libraries and archives, that may yield numerous dead ends before a discovery occurs. Junior faculty must envision book-length projects that can be executed well in advance of the crucial tenure

meeting, which takes place in the middle of the candidate's sixth year of employment. ... Books that require lengthy inquiries do not get written. ... Clear-sighted professors will avoid empirical methods, aware that it takes too much time to verify propositions about culture, to corroborate facts with multiple sources, to consult primary documents, and to compile evidence adequate to inductive conclusions. They will seek out research models whose premises are already in place, not in need of proof, and whose exercise proceeds without too much deliberation over inquiry guidelines. Speculation will prevail over fact-finding, theory and politics over erudition. Inquirers will limit their sources to a handful of primary texts and broach them with a popular academic theory or through a socio-political theme. In sum, facing a process that issues in either lifetime security or joblessness, junior faculty will relax their scruples and select a critical practice that fosters their own professional survival, a practice that offers timely shortcuts to publication and still enjoys institutional sanction." Mark Bauerlein "Social Constructionism: Philosophy for the Academic Workplace" (2001) Vol LXVIII (2) *Partisan Review* accessible at [www.bu.edu/partisanreview](http://www.bu.edu/partisanreview).

The central theme of this article is that these pressures have distorted American intellectual life by creating an environment in which post modernism in its various simplistic forms can flourish.

As can be seen from this experience, the attempt to abolish judgment and replace it by an allegedly "objective" criterion can have significant distorting effects. There is every reason to believe that in Australia an egalitarian instinct may exacerbate these kinds of distortions. The exercise of judgment may appear to be elitist. The substitution of an allegedly objective, measurable indicator can be appealing.

That such considerations may be having an impact on the Australian university is suggested in a recent address by Professor Stuart Macintyre, Dean of the Faculty of Arts at the University of Melbourne. He identified the effects of funding formulae developed over the decades for the allocation of resources to, and accordingly within, universities. He noted the significance of external research funding support in determining public funding for research. Professor McIntyre concluded:

"The new regimen has brought considerable change on the ways that universities manage their affairs and on the way that academics conduct their teaching and research. There is both an institutional and individual pre-occupation with measurement of performance. The aggregate of research funding has become a measure of the research performance of the university; its newsletter and glossy promotional literature will feature the research project that attracts the largest grant as the paradigm of excellence. Academics, who are usually so resistant to external direction of their activity, show a surprising responsiveness to these market signals. A lawyer will write a journal article rather than a case note because the former is included in the publication index and the latter is not. It becomes more difficult to find a book reviewer or a journal editor, because these activities, so necessary to the scholarly infrastructure, are not recognised as research activities for funding purposes.

The core disciplines of the sciences, social sciences and humanities are especially disadvantaged by the emphasis on research income as a determinant of funding. They find it harder to attract industry funding, which is concentrated in the biological and technological sciences. Some of the disciplines are especially disadvantaged by the new conditions on post graduate research: in linguistics or anthropology, where substantial fieldwork is required, a candidate will have great difficulty in completing his or her thesis in the time that is required for funding purposes. More generally, the application of simple aggregate measures across the range of research fields plays little heed to issues of quality. The British system where discipline panels evaluate research performance on a qualitative basis is far more conducive to breadth and excellence." Stuart Macintyre " 'Funny You Should Ask for That': Higher Education as a Market" paper to "The Idea of a University: Enterprise or Academy?" Conference organised by The Australian Institute and Manning Clark House, ANU, 26 July 2001.

In addition to external funding, the formula gives weight to number of publications. What one would expect to occur as a result of the application of a funding formula of this character is an increase in the amount of published research but a decline in the quality of that research. A recent study of Australia's research performance suggests that this has in fact occurred Linda Butler *Monitoring Australia's Scientific Research: Partial Indicators of Australia's Research Performance* Australian Academy of Science, October 2001.

. The ANU's Research Evaluation and Policy Project published in October of this year an assessment of all Australian publications indexed from 1981 to 1999 by the Institute for Scientific Information, concentrating on, although not limited to, pure science. Driven by the university sector, the number of publications and Australia's international share of publications, has increased significantly.

The report focuses not only on number of publications but on how often those publications are quoted by others: called "relative citation impact". The study concludes that over the 19 year period Australia's relative citation impact has declined, unlike other countries. The author concludes that this occurred because Australian publications tended to appear in journals of lower impact Ibid at 12-13.

. The author notes that the introduction of performance indicators for universities appeared to be responsible for the increased research output to a significant degree. However, the author concludes:

"There are indications that Australia's relative citation impact may have been adversely affected by the push to evaluate research on the basis of publication output, with little reference to the quality of that output." Ibid at 14, see also at 24-25.

This study shows the difficulty of measuring quality. The proxy measurement for "quality:" is frequency of citation. This is by no means obviously a reliable indicator of quality. Scientific research is in part a fashion industry, influenced to a degree by sources of available funds, which are differently directed in different places. Of course, this very difficulty magnifies the problem. The consequences suggested by this research – of a decline in research quality related to a system that rewards quantity – are so obviously contestable, that the congratulations which came from the increase in quantity, may not be offset by qualms about a decline in quality.

A new funding formula is to be introduced which gives greater emphasis to completion of postgraduate degrees within strict time limits. Similar distorting effects are now predicted under the new formula Ruth Neumann and James Guthrie *The Corporatisation of Research in Australian Higher Education* Macquarie Graduate School of Management May 2001.

Let us not assume that the kinds of distortions that appear in other organisations will not affect the courts. I am aware of one jurisdiction, not in Australia or the United States, in which the court administrator had a performance package related to the quantum of cases processed. Counsel contacting the court to say that a case was settled were discouraged from having the matter removed from the list by consent. Rather, settlement was done by an appearance in court. When the matter was so listed it counted for purposes of the administrator's remuneration.

Measurement, I repeat, is not neutral. It has consequences. The greater the incentives given, whether by means of performance bonuses to individuals or enhanced funds and budget allocations, the greater the likely consequences.

The internal use of information for purposes of managing the organisation does not create any significant prospect of distortion. It is the external use of this information which creates the possibility of such distortion. Distortion arises because the things that can be measured are not the only things that matter. Insofar as external judgments are made on an information base which is too narrow, then the incentives created by performance indicators will operate perversely.

Performance indicators are always partial and are always manipulable. The persons who administer the measurement system always have superior private information about how their own actions influence the measured results, than do the persons to whom the results are reported. Strategies of targeting the indicator, rather than doing the job properly, are always capable of being adopted. These rarely have adverse consequences for those responsible because of the difficulty of auditing the distortions which occur. The objectives distorted are often either not measurable or not measured.

An organisation can always improve performance as measured, by reducing quality in ways which are not necessarily detectable. In the case of a slow degradation of the quality of justice, nothing particularly dramatic would occur. More corners are cut, as more pressures for expedition are exerted. The wishes of litigants are overridden more often. The quality of justice may be progressively compromised in small, incremental and barely perceptible steps but with an ultimate consequence that is unacceptable. By then it is too late.

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## **Law and Justice Address to the Law and Justice Foundation**

### **LAW AND JUSTICE ADDRESS**

**THE HONOURABLE J J SPIGELMAN AC**

**CHIEF JUSTICE OF NEW SOUTH WALES**

**THE LAW AND JUSTICE FOUNDATION**

**SYDNEY, 8 NOVEMBER 2001**

Last week I was in Beijing lecturing at the National Judges College, with Sir Daryl Dawson, retired High Court judge, Justice Catherine Branson of the Federal Court of Australia and Justice Kellam of the Supreme Court of Victoria, the latter two being, respectively, the immediate past and current Presidents of the Australian Institute of Judicial Administration. This visit was organised by the Human Rights and Equal Opportunity Commission (HREOC).

The subject matter on which the Australian judicial team was concentrating in its participation in a training course for Chinese judges was judicial independence and judicial ethics. I know I speak on behalf of all of the members of the team when I say that our experience in Beijing was an entirely positive one.

The history of human rights abuses in the People's Republic of China is well established and requires no elaboration. Nor does the continued existence of an authoritarian governmental regime. Nevertheless, there are people in China who are endeavouring to change the way the legal system operates by reforming the judiciary. Nothing that we experienced gives any indication as to the prospects of success for this endeavour. Nevertheless, there are indications that the effort is a serious one.

Our visit to China occurred under the general umbrella of the dialogue on human rights established between the Premier of China and the Prime Minister of Australia in August 1997. This dialogue is referred to as the Human Rights Technical Co-operation Programme. It is organised under the Department of Foreign Affairs and Trade and the Australian contribution is provided through the Australian Agency for International Development (AusAID), which has entered into an arrangement pursuant to which HREOC manages the implementation of the Technical Co-operation Programme. HREOC works directly with various Chinese agencies and acts as an intermediary between such Chinese agencies and their counterpart agencies in Australia, with a view to assisting the Chinese agencies to strengthen the administration, promotion and protection of human rights in China.

The contribution HREOC is making in this regard is a significant one. HREOC has arrangements with a number of different agencies in China. It has conducted a three month long course on human rights for officials from the Ministry for Foreign Affairs, the State Family Planning Commission, the State Ethnic Affairs Commission, the Supreme People's Procuratorate, the Ministry of Public Security and the China Law Society. It has taken Australians who are prominent in human rights protection to a two day seminar in Beijing, which was attended by representatives from the China National Committee on Aging, the All China Youth Federation, the China Disabled Persons Federation, the All China Womens Federation, the Chinese Academy of Social Sciences and the Ministry of Foreign Affairs. It has also conducted a legal training workshop between officials of the All China Womens Federation and representatives of relevant Australian organisations such as the Womens Legal Resources Centre, the Domestic Violence and Advocacy Service, the Public Interest Advocacy Centre, the Waverley Domestic Violence Court Assistance Service, the Wirring Baiya Aboriginal Womens Legal Centre, the New South Wales Department of Community Services and the New South Wales Police Service.

Further seminars were held between representatives of the All Charters Womens Federation and a

local womens organisation in one province on strategies for addressing family violence. Officials from the Ministry of Justice which is responsible for prison administration have visited Australia to investigate rights of prisoners. Similarly, officials from the Ministry of Public Security have visited Australia to look at the development and application of ethical standards in police forces.

The human rights dialogue represents a low-key form of diplomacy and international co-operation of a character much more likely to be successful, particularly with Asian nations, than the brash triumphalism which, on occasions, has appeared to be a national characteristic of Australian involvement with foreigners. Such aggressive self-assertiveness is generally a manifestation of insecurity and, often, of inferiority. There are, however, some spheres of discourse in which a quiet self-confidence on the part of Australians is entirely warranted. The operation of our justice system is such a subject matter.

On a number of occasions I have emphasised the significance of the longevity of Australian institutions of governance. This is a theme which bears repetition and I trust those who have heard it before will excuse me for doing so. We Australians like to think of ourselves as a young country. Indeed the second line of our National Anthem is: "For we are young and free". However, when it comes to the basic mechanisms of governance, including both parliamentary institutions and the rule of law, this is not a young country this is an old country.

I hope that we can change our self-image in this regard. If we do so, then the national characteristic of brash self-assertiveness when dealing with foreigners may be tempered and, indeed, overcome. It is in our long-term national interest that we acquire the tone of voice that only self-confidence can bring. We surprised ourselves in this regard at the time of the Olympics. That event, in many respects, put us on our own map. Our international image and, indeed, our self-image, was altered by the recognition of a national strength. This is a place where things work. That is a basis for self-confidence. So too is our legal system.

Many of you will have heard me refer to the significance of the fact that the Supreme Court was established as long ago as 1824. If one reads the early judgments of the Court – many of which have been compiled and republished by the University of Macquarie on its website- the sense of continuity is palpable. The early judgments of the Court use concepts and manifest procedures with which we are still familiar. This continuity, now in excess of 177 years, is an extraordinary achievement by world standards. The Supreme Court has been operating in basically the same way for 125 years before the creation of the People's Republic of China, indeed it has been doing so for about twenty years before the first Opium War began the process of undermining the Ch'ing dynasty.

This year we celebrate the Centenary of Federation. In 2006 we will celebrate 150 years of representative and responsible government. The contribution that these institutions make to our social welfare and economic prosperity cannot be underestimated. They stand, of course, in an even longer tradition.

Of particular significance for the matters on which the team addressed at the National Judges College in Beijing is the creation of an independent judiciary. The Act of Settlement of 1701, the 300th anniversary of which we celebrate this year, established that judges hold office for life, in lieu of the previous position, when judges held office at the pleasure of the King. This was one of the most significant outcomes of the long period of conflict between the Parliament and the Stuart Kings. The Act created an independent, and therefore impartial, judiciary on a basis that has never been questioned since.

Not all aspects of our traditions are equally admirable. The Act of Settlement of 1701 contains a grossly discriminatory provision. It is the legislation which ensures that the monarch of Great Britain, and therefore the monarch of Australia, cannot be a Catholic or be married to a Catholic. The politics of the regal bedchamber, as they traditionally existed, continue to determine contemporary constitutional practice in a manner that would generally be regarded as unacceptable.

It is not the only such anomaly. There remains the rule that the eldest male child succeeds to the throne. If Queen Elizabeth had had a younger brother she would never have become Queen. This is not a matter which will concern us for the next two successions to the throne, but it has been of significance in the past. Queen Victoria's eldest child was a girl, also named Victoria. Once Prince Edward was born, she could no longer succeed to the throne. She was married off to the Crown Prince of Prussia and their son became Kaiser Wilhelm II, whose personal idiosyncrasies and grotesqueries of character feature high on every historian's list of the causes of World War 1. England paid a high price for its sexism.

Given the purpose and the subject matter of the visit to China it was somewhat fortuitous that these matters were touched upon by Dr Steven Fitzgerald, our first Ambassador to China and now the Chairman of the Asia-Australia Institute at the University of New South Wales, when he addressed the New South Wales Supreme Court Annual Conference a few months ago, on the topic of "Issues Facing Australia's Future in Asia". In the course of that address to the judges of the Supreme Court, Dr Fitzgerald said:

"What we have to offer the region most, beyond economic partnership, and aid to countries that need it, is not military, nor is it leadership ... It is the good governance and civil society that sustain our own rights, freedoms, accountabilities, democratic institutions and rule of law. In a range of countries across Asia, including for example China, there is increasing awareness of the place of good governance in economic performance, poverty reduction, and the capacity of societies to provide for their people generally and for the disadvantaged in particular. Because we are fortunate in these matters, our future in Asia, and the strengths of our own identity, can be secured by being a regional source and provider in governance, not simply under aid programmes but across a multitude of areas of collaboration (for example between judges and courts). And not in the jingoistic way that has often informed the projection of this idea by the United States, for example, or that we have seen in Australia in the recent past, but in the tradition of another kind of Australian, who has been in Asia since the beginning, who I have called 'the quiet Australian'. And not with the message that only our tradition counts, but collaboratively, reaching back into all our traditions, including those of Asian societies, many of which are rich in ideas about good governance, ethical government and upright conduct. To do this is a contribution to humanity. It can help the region in its own terms for its own transformation. It can secure the best of what we want in the Australian identity."

When I received the invitation from HREOC to lead the Australian judicial delegation to the training programme at the National Judges College in Beijing these observations, then so recently made by Dr Fitzgerald, acquired particular force. The subject on which we were asked to address Chinese judges was judicial independence and judicial ethics.

The members of the Australian judicial team divided up the issues and prepared papers on various subjects including judicial independence and impartiality, judicial ethics, accountability and disqualification for bias. We did so in a context of only rudimentary knowledge of the Chinese judicial system, at least in my case. It was, however, clear that the Chinese had no tradition of the rule of law or the institutionalisation of the judiciary as an independent and professional arm of government. There had been some interest expressed in the Western concepts of the rule of law and various announcements had been made, particularly in the context of the Chinese application to join the World Trade Organisation, to the effect that China's legal system would develop in that direction. On a visit to China a year plus ago Chief Justice Gleeson of the High Court of Australia had met with Li Peng formerly the Premier of China but by that time the Chairman of the People's Congress – roughly the equivalent of the Speaker of the House of Representatives. Li Peng, had gone out of his way to ask Chief Justice Gleeson to explain aspects of the rule of law to him.

There was and is a general Chinese interest in this subject. No doubt it was motivated in part by recognition of the significance of the legal system as China's economy grew and its integration with the international economy developed. There was a growing realisation that serious people with serious money took this rule of law stuff seriously. Indeed, people who were asked for money seemed to require some kind of assurance that one day they might get their money back, even from people who were not relatives.

The significance of the legal system for economic prosperity, by the protection of property and the enforcement of contracts, which enable long term investment decisions to be made, had clearly come home with some force to the rulers of China. No doubt there are limits to the degree to which this development will be permitted to undermine the power that those rulers exercise within China. However, there were clear indications in the materials available to us before we arrived in China that the independence, impartiality, competence and quality of the judiciary were being taken seriously. These were matters about which some senior Chinese officials believed they could learn from other nations, including Australia.

On the first day that we attended at the National Judges College, we were presented with a volume of materials in both in English and Chinese, including the four papers which we had ourselves prepared,.

These were the materials for the training course in which we were to participate, together with a number of Chinese lecturers. This volume included copies of the codes of conduct for judges in the United States, Canada, Italy and the laws regulating the judiciary in Germany, Canada and Russia. We were also presented, for the first time, with a Code of Judicial Ethics for Judges of the People's Republic of China, which had been promulgated only a few weeks before, on 18 October 2001, by the Judicial Committee of the Supreme People's Court of China. We also had the amendments to the national Judges Law of China which had come into effect a few months before. Together, the Code and the amendments represented a dramatic change in the organisation of the Chinese judiciary.

The purpose of the training seminar in which we participated was to convey these changes to the Chinese judiciary, for the first time. It was also to show how these new rules represented the practice of judges in other parts of the world, particularly Australia.

The hundred or so judges attending the seminar were, in large measure, we were informed, chief judges or deputy chief judges, (called Presidents and Vice Presidents) of the equivalent of District Courts throughout China. The training session commenced with a three-hour presentation by one of the Vice Presidents of the National Judges College who had clearly been closely associated with the drafting of the Code of Judicial Ethics. His presentation was interpreted for us as it was delivered.

The Code is an exemplary document. It draws on a wide range of models of such codes or guidelines throughout the world, even including the Code of Judicial Conduct of Taiwan. It contains express provision for matters of concern in China, about which we would have no concern e.g. the taking of bribes. These are matters which are appropriate for express provision in some nations and not in others. They will not receive express provision in the guidelines for judicial conduct which, I anticipate, will be issued on behalf of the Council of Chief Justices early in the New Year. The model which we regard as appropriate for Australia is a set of guidelines giving practical guidance for issues likely to arise in the Australian context. The Canadian approach is the model that we propose to adopt.

In the case of the People's Republic of China, a formal code has been promulgated precisely for the purpose of changing actual practices. Accordingly, it is expressed in directory terms of 'thou shalt' and 'thou shalt not'. No Australian judge would have any quibble with any of the fifty Articles of the Chinese Code. They are, as I said, an exemplary statement of judicial independence, of judicial impartiality and of judicial conduct.

The new Code gave a focus for the Australian judicial team. Each of us adapted our lectures to take into account the particular Articles of the Code which were relevant to our respective matters. In my own case, I was particularly concerned with the principle of open justice. The idea of open trials, where all relevant proceedings are conducted in public, was a relatively recent development in China. This was reinforced by the provisions of one Article of the new Code which required judges to give reasons for judgment.

This was one of a number of matters on which the judges in the training course entered into vigorous dialogue and questioning of the Australians, with a degree of candour which we found surprising. The problem of corruption within the judiciary was frankly acknowledged. So was the existence of limits to the freedom of discussion in which they could openly engage, although those limits were set much wider than had hitherto been the case. Of particular significance was the difficulty occasioned for the status and authority of the judiciary and for the rule of law by impediments to the enforcement of judgments.

It is clear that politically powerful administrative agencies and corporations had a capacity to ignore judgments, particularly those given against them by judges of other provinces. The issue of enforcement was raised with us and we, at first somewhat smugly, rejected any suggestion that a powerful government department or corporation would ever have the temerity to ignore a court order. We had to qualify our commentary after further consideration, because of the existence of examples in which fines imposed on trade unions by industrial courts had not been collected or had obviously been paid by employers. This was an example of an entirely salutary two way communication process that occurred in this training course.

The spirit and vigour of questioning that followed the papers was particularly welcome. It covered a wide range of matters and was often very well informed. In the context of the resource implications of the new obligation to give reasons, one of the Chinese judges asked the Australian judges to identify with precision the staff assistance they had for the purpose of preparing reasons. The judge inquired whether we in Australia had the American system in which "clerks", in effect, wrote the judgments. Many quite pointed issues were raised of a character which would cause difficulties if raised in



Australia.

For example, one judge asked whether a woman judge who had been sexually harassed should be disqualified from sitting on sexual assault cases.

It became clear as the questioning proceeded that the fundamental change in the nature of the Chinese judiciary that had been promulgated by the amendments to the Judges' law and the new Code of Judicial Ethics would not be easily implemented. There are some 170,000 judges in China. They have not in the past had a reputation for quality or impartiality. The institutionalisation of the rule of law would plainly take time. The new Judges' law required all judges to have both formal qualifications and practical training. The overwhelming majority of present judges would not qualify under the new Law. The sole qualification for many of them was that they were former officers of the Peoples' Liberation Army. This was not a background which would readily acknowledge the requirements of natural justice, sensitivity to the appearance of bias or the need for reasoned decisions. It was accepted that the changes to the institutional nature of the judiciary in China which were being advocated would, if at all possible, take time.

One can expect that in the major trading cities such as Shanghai, these changes will be brought about more readily than in outlying provinces. What the political limits to a truly independent judiciary will prove to be have yet to be seen. One thing that was clear to us is that there is a significant body of opinion in the Chinese judiciary and its associated institutions that is determined to make fundamental changes. The announcement of the entry of China into the World Trade Organisation and the sense of being subject to international scrutiny which is palpable, at least in Beijing, arising from the Olympic games to be held in Beijing in 2008, creates a favourable climate for this development.

This is a project to which Australians can contribute in a manner which will be of significance to Australia for many years to come. This represents a recognition of what Dr Fitzgerald said, in the address to which I have referred, of "good governance" being an important part of "our regional stock in trade".

This Australia-China human rights dialogue may, in a quiet but significant manner, contribute to the protection of human rights in China and, in the long term, to the strengthening of Australia's relations with China. The Australian judiciary has a role to play in this programme and I am sure that it will continue to do so.

Australian delegations to China have not always been so well organised. (Read from "The Cultural Delegate" in Frank Moorhouse *Room Service* Penguin 1988).

## Judicial Ethics: Accountability and Education - Paper to the Judicial Ethics Training Course, National Judicial College, Beijing

**JUDICIAL ETHICS: ACCOUNTABILITY AND EDUCATION  
PAPER TO THE JUDICIAL ETHICS TRAINING COURSE  
NATIONAL JUDICIAL COLLEGE, BEIJING, OCTOBER 2001  
BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES**

The Beijing Statement of Principles of the Independence of the Judiciary issued at Beijing on 19 August 1995 and amended at Manila on 28 August 1997, has been signed by thirty-two Chief Justices of the Asia and Pacific region, including on behalf of the President of the Supreme People's Court of the People's Republic of China. The Beijing Statement affirms the significance of an independent judiciary for the implementation of the right to a fair trial contained in Article 10 of the Universal Declaration of Human Rights and Article 14(1) of the International Covenant on Civil and Political Rights.

Paragraph 18 of the Beijing Statement of Principles states that "judges must have security of tenure". During the year 2001, the courts that derive their legal traditions from England, like Australia, have been celebrating the 300th anniversary of the continuous existence of such security of tenure. The Act of Settlement of 1701 resolved many issues that had arisen in the course of the conflict between Parliament and the monarchy in 17th century England. One of those issues was the lack of independence of the judiciary, who then held office "at the King's pleasure". By the Act of Settlement it was established, and has never since been challenged, that judges held office during "good behaviour".

Such security of tenure is designed to ensure independence of the judiciary. However, security raises problems of its own. Judges cannot be readily disciplined or removed even if their performance is, in some respects, deficient. What can be done to ensure that, notwithstanding security of tenure, judges behave with the competence and integrity that is required of them? In Australia, this issue has come to be discussed in recent years in terms of the "accountability" of those who exercise government power, including those in the judicial branch of government.

The English word "accountability" covers a wide range of matters. It may be that there is not a single Chinese word that is equivalent to it. "Accountability" encompasses a wide range of forms of supervision, control, reporting and responsiveness which can impinge in different ways on judicial independence. Accordingly, it is necessary to identify more precisely what topic is under consideration.

In the Australian judicial system all proceedings, including prosecutions for crime, are conducted in an "adversary" manner as a contest between two sides. The trial judge does not have responsibility for investigating the facts. The trial judge must determine the facts on the issues presented to the court by the rival parties. The most important mechanism for accountability in this system of judicial decision-making is the performance of all judicial functions in the presence of the parties and, with only minor exceptions, also in public.

The most frequently cited statement of this principle is that "Justice must not only be done but must be seen to be done". The importance of the appearance of justice is also manifest in the Australian rule enforcing the impartiality of judges. A judge must not sit on a trial where, for example by reason of the judge's personal associations with a party or a witness, it may appear to a reasonable independent observer that the judge may not bring a wholly independent mind to the proceedings. It is not necessary to show any actual bias. A mere appearance of bias will be sufficient.

These principles of open justice are the primary means of judicial accountability. Judges are required to make decisions only after they have heard full argument from all sides. Proceedings must, except in the most exceptional cases, be conducted in public. Decisions can only be made after a fair hearing has been given to the parties. The judge must state publicly reasons for the decision that he or she makes. These requirements about the procedures in any trial constitute the primary mechanism of

accountability.

In the context of accountability, the most basic issue is to identify the circumstances in which a judge may be removed from office and by whom that removal can be done.

Australia has a parliamentary system which it has inherited and developed from its past association with England. Members of Parliament are removed from office by vote of the people. Ministers with executive responsibility are removed by Parliament when, collectively or individually, they lose the confidence of the Parliament. However, judges are appointed until they attain a certain age, either seventy or seventy-two in different Australian jurisdictions.

The system established in 1701 by the Act of Settlement, and which has been in continuous use within the common law world since then, is that judges can only be removed by resolution of Parliament. This practice is reflected in the constitutions of the Australian system of government. Australia is a federal state with a national government, known as the Commonwealth, and provincial governments, known as States. The Commonwealth Constitution requires a resolution of both Houses of the Parliament "on the ground of proved misbehaviour or incapacity". The state constitutions generally refer to a judge remaining in office "during good behaviour". In both cases, it is important that misbehaviour or incapacity must be proved.

These provisions have, fortunately, rarely been invoked. In the few cases which have arisen, what constitutes misbehaviour has not been controversial. One thing is clear, over the three centuries since 1701 parliaments throughout the common law world have been extremely reluctant to take the step of removing a judge. It is an extremely rare occurrence. Parliamentarians have accepted that the independence and impartiality of the judiciary is so important that the threshold for misbehaviour must be set high.

A similar position to that which prevails in Australia is reflected in the Beijing Statement of Principles which provides in paragraph 22:

"22 Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge."

However, subsequent paragraphs recognise that differences in systems of government do exist with respect to the attainment of these objectives:

"23 It is recognised that, by reason of differences in history and culture, the procedures adopted for the removal of judges may differ in different societies. Removal by parliamentary procedures has traditionally been adopted in some societies. In other societies, that procedure is unsuitable: it is not appropriate for dealing with some grounds for removal; it is rarely if ever used; and its use other than for the most serious of reasons is apt to lead to misuse.

24 Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply, procedures for the removal of judges must be under the control of the judiciary.

25 Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply and it is proposed to take steps to secure the removal of a judge, there should, in the first instance, be an examination of the reasons suggested for the removal, for the purpose of determining whether formal proceedings should be commenced. Formal proceedings should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them."

Difficulties may arise when reforms of the administration of justice involve the abolition of courts. In Australia, at the Commonwealth level and in my own State of New South Wales, constitutional provision requires the maintenance of the status of the judicial officer. Paragraph 29 of the Beijing Statement of Principles affirms this approach:

"29 The abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or

appointed to another judicial office of equivalent status and tenure. Members of the court for whom no alternative position can be found must be fully compensated.”

The sanction of removal from office is, as I have said, exceptional. There is, however, a wide range of conduct by judicial officers which can properly be regarded as inappropriate, to which a sanction such as removal from office cannot conceivably be applied. No other formal sanctions exist. There is no power in any Australian jurisdiction to suspend a judicial officer for a period of time or to fine a judicial officer or to make deductions from his or her salary or take other such formal steps.

Australian courts operate in a collegial manner. A chief justice, or other judicial head of the jurisdiction, has responsibility, sometimes reflected in statutory form but more usually implicit, for the proper functioning of the court. Australian judges share a common professional background prior to their appointment to the judiciary. Australia does not have a system where persons expressly train for a judicial career which has a formal structure in which individuals can expect to progress up the hierarchy of courts. Judicial appointments from one court to a court higher in the hierarchy is infrequent in Australia. Judges are generally appointed from practice as a lawyer, after attaining a certain degree of seniority in the profession.

This professional background is shared by almost all judicial officers in superior courts. It forms the basis of the collegial spirit within each court. In such a context a chief justice, or other judge who is responsible for some area of court administration, will generally be able to discuss, on an informal basis, any difficulties that arise with respect to the conduct of a particular judicial officer.

Conduct falling short of conduct which could give grounds for removal is, from time to time, the subject of complaints from parties to proceedings or from the general public. There are few formal mechanisms for dealing with complaints. Generally all complaints are handled by the chief justice or judicial head of the relevant court. Some jurisdictions publish guidelines or protocols for the handling of complaints, although these are often limited to complaints about delay in the delivery by judges of reserved judgments.

Any complaint that involves an allegation of criminal misconduct or corruption would be referred to the appropriate police authorities. In the case of my own State of New South Wales, there is an Independent Commission Against Corruption which will investigate complaints of corruption.

Complaints about conduct which could be the subject of appeal or review by a court would not be entertained. Most complaints are dealt with peremptorily on the basis that they are vexatious, often reflecting a lack of understanding by litigants or members of the public about the law or judicial procedure. Complaints which justify further inquiries, will be taken up with the judicial officer concerned. Where such inquiries indicate that the complaint may have substance, but is not sufficiently serious to contemplate removal, a number of options are available to the head of jurisdiction. Counselling or training or the provision of assistance to the judge concerned may be required. In appropriate cases, the head of jurisdiction may recommend that the judge offer an apology.

In our legal system, the independence of judges is not concerned only with independence from the executive branch of government. Judges are also independent of each other. Impartiality is preserved from external influence, including influence from other judges, even a chief justice.

A chief justice or head of jurisdiction has no authority to impose any sanctions although, in an appropriate case, a chief justice may exercise his authority with respect to listing procedures in the court and refrain from listing a judge for hearing, either generally or with respect to particular categories of matters, for a short period whilst inquiries or procedures are conducted. Usually, such action pending an investigation will have occurred with the agreement of the judge concerned.

In my own State of New South Wales a more formal mechanism for considering complaints exists. By statute a Judicial Commission of New South Wales has been established. I should note that significant parts of the Australian judiciary are of the opinion that a Commission of this character is undesirable, particularly by reason of its impingement upon judicial independence. One other State is presently considering creating such a Commission.

The Commission consists of ten members, of whom six are official members, being the judicial heads of the six different courts in New South Wales. I, as Chief Justice, am President of the Commission. The principle that determination of these matters should be made by judicial officers is maintained in

this majority. This principle is reinforced in the means by which serious complaints are dealt with.

The New South Wales statute requires the Commission to dismiss complaints in a number of specified circumstances: including where there is a right of appeal, where the complaint is frivolous or trivial, or where further consideration is unnecessary or unjustifiable.

Matters that are classified as serious, in the sense that they could justify the removal of the judicial officer, must be referred to a Conduct Division which is a panel of three persons, all being judicial officers (one of which may be a retired judicial officer). A Conduct Division does not have the power to punish. Its power is directed to the presentation of a report as to whether or not the matter complained of could justify parliamentary consideration of removal of the judicial officer. Where a report making such a finding is presented, the head of jurisdiction has a statutory power to suspend an officer from duty.

Minor complaints - i.e. those not justifying removal - which are found to be substantiated are referred to the relevant head of jurisdiction. The Judicial Commission does not itself perform any disciplinary function. What happens as a result of a reference from the Judicial Commission to the head of jurisdiction is in the complete discretion of that judicial officer.

### **Education**

Formal judicial education is a comparatively recent development in Australia. The growth in complexity of the law is such that it has become generally accepted that some form of continual education is required in order to assist judges to keep up to date with current developments. There has also been a growing recognition that the skills and experience acquired in the practice of the legal profession, whilst of great significance, do not necessarily equip a person with the full range of skills required of a judicial officer.

The culmination of all of these developments is the decision this year by the governments of the Commonwealth and of all of the States, to create a new National Judicial College for Australia. The precise timetable for its establishment is not yet determined. The general principles for its organisation have been agreed. The most important principle is that the overwhelming majority of the persons appointed to the Board of Directors and positions of responsibility in the organisation of the college, will be currently serving judges.

At present each court or court system in Australia makes its own arrangements for judicial education. This usually, at the least, involves a court organising an annual conference for all its judges.

The most systematic approach to judicial education in Australia, until the creation of the new College, is that of the Judicial Commission of New South Wales, in which State there are about one-third of all the judicial officers in Australia. The Commission organises a conference and seminar programme, including annual conferences for judicial officers of each separate jurisdiction, as well as a number of ad hoc seminars. Based on the systematic evaluations that are conducted into these activities, this function of the Commission is highly valued by judicial officers.

The Commission also provides information and materials in pursuit of its education function. The Commission has developed particular expertise in the use of computers and has developed a Judicial Information Research System which provides judicial officers with rapid electronic access to a vast range of primary and secondary research material.

A particular focus of the Commission's activity is the law and practice of criminal sentencing. The Commission compiles and makes available up to date statistical information about actual sentences imposed throughout the criminal justice system of New South Wales. The Commission also provides judges and magistrates with "bench books", being comprehensive collections of material giving guidance and instruction with respect to all aspects of the criminal justice process.

The Australian Institute of Judicial Administration is a research and education institute affiliated with the University of Melbourne. It is a membership based organisation with an unrestricted membership in the sense that anyone interested in judicial administration may join. Membership is not confined to judicial officers. For some years the Judicial Commission of New South Wales has, in co-operation with the Australian Institute of Judicial Administration, conducted an orientation course for judges from all jurisdictions in Australia. This provides a short broadly based course of about one week for new judges. The AIJA also conducts conferences and organises working parties and seminars over a wide range of matters affecting the administration of justice.

In addition to the AIJA there are two national organisations which comprise only judicial officers. One conducts an annual conference. The other has a more wide ranging function of representing judges but also conducts an annual conference.

## The Dangers of Partial Rationality - Address at the launch of the University of New South Wales Law Journal

**ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
LAUNCH OF THE UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL  
SYDNEY, 28 AUGUST 2001**

### THE DANGERS OF PARTIAL RATIONALITY

It is my pleasant task to launch the most recent issue of the University of New South Wales Law Journal, being the first issue of volume 24, together with the supplement known as the Forum of that Journal. This occurs in the 30th anniversary of the Law Faculty of the University and marks twenty-seven years since the Journal was first published. Over that intervening period the Journal has clearly established a significant position in the intellectual infrastructure of legal development in Australia. Over those years it has published numerous important contributions to virtually every area of legal discourse. It is pleasing to see that the most recent issue maintains the high standards that have been established.

This latest issue contains quality contributions over a wide range of legal matters including native title, contract law, corporations law and industrial relations. There is, however, a noticeable emphasis on an international dimension, including the significance of human rights for Australian law. This is also reflected in the thematic publication Forum which has chosen the important issue of privacy as its topic for special multi faceted treatment.

The range and quality of the articles contained in these publications is a tribute to those responsible for compiling them and I congratulate the editor, Rachel Davis, and her team on their achievement.

The issues considered in the Journal and the Forum are so wide-ranging that any attempt in these brief introductory remarks to cover the field would inevitably be superficial. Perhaps you will, therefore, excuse me, if I concentrate my remarks on a development of one of the themes contained in my own contribution to the Journal, being the 14th Lionel Murphy Memorial Lecture on the subject of "Economic Rationalism and the Law". One issue touched on in that address has some relevance to issues of university governance, on which it is appropriate to elaborate on an occasion such as this.

In my address I referred to the dangers inherent in the assumption that there is a single model of human behaviour that is universally applicable to all areas of discourse. In the past, the threat of that character has come most frequently in the form of religion. In contemporary public discourse the threat takes the form of an assertion that principles of market exchange are a universally applicable mode of social organisation. As I say in my address, a monoculture is an inherently unstable system.

The way this impinges on the courts is in the form of an attempt to narrow the functions of the courts so that they are described simply as a forum for dispute resolution. I repeat myself. The courts do not deliver a "service" to litigants as consumers. The courts administer justice in accordance with law for litigants as citizens. The courts no more deliver a "service" in the form of judgments, than the parliament delivers a "service" in the form of statutes.

One of the manifestations of this exceedingly narrow approach to the role of the legal system is a preoccupation with the measurement of the so-called "outputs" of the courts as cases disposed of. In two addresses delivered during this year, I have developed these ideas in the course of assessing the gross distortions that are caused by a focus on so-called "performance" indicators in the form of measurable outcomes<sup>1</sup>.

The advocates of this approach to public sector decision-making, have variously described themselves as "the new public management" or "reinventing government" or the "global public management revolution". In practice, if not in form, they operate on the basis of the simplistic assumption that every area of public decision-making can be subject to the same formulaic approach. In particular, it is assumed that with respect to every area of public decision-making, measurable key performance indicators can be identified. It appears to be frequently assumed that these indicators

can be transformed into a decision-making structure encompassing allocation of resources and determination of employment, that is as automatic as the operation of a perfectly competitive free market.

However, in many areas of public decision-making, there is simply no escaping qualitative judgment. Decisions can never be made automatic. There is something profoundly irrational about the partial rationality manifest in any other approach to public decision-making. Indeed, few challenge the significance of quality. The trouble is that such considerations often receive only lip service and quantification acquires an entirely disproportionate and inappropriate significance in actual decision-making by reason of its concreteness.

The basic proposition is a simple one. Not everything that counts can be counted. There are major differences between one area of government activity and another, as to the centrality of those matters that are capable of being reduced to quantitative terms. In the administration of justice, issues of delay are capable of quantification, as are aspects of costs. However, the fundamental question of whether or not the system produces fair outcomes arrived at by fair procedures, is not a matter capable of quantification at all.

There is a tendency to regard measurement as benign and that no harm can be done from quantification even if it does not prove useful. That is wrong. The process of deciding what and how to measure so called "performance", is capable of having very real effects on behaviour and to distort actual conduct in a manner that no-one would actually chose. This is a critical manifestation of the essential irrationality of partial rationality.

Advocates of the "new public management" like to think of themselves as business-like. They approach government decision-making with a single market driven private sector model which will, by the application of some natural law, lead to the most desirable outcome. A different perspective is available. An emphasis on strategic plans, business plans and performance indicators characterises the long tradition of socialist planning. The one thing of which there was no shortage in the former Soviet Union was performance indicators. They called it a five year plan. The Soviet experience indicates dramatically the distortions that can arise by reason of an emphasis on quantification.

Nikita Khrushchev, in one of his speeches attacking what he called the "steel eaters" of heavy industry revealed that when the five year plan for nail manufacturers identified output in terms of tonnes, every manufacturing plant in the country made large nails and there was a shortage of small nails. Accordingly, in the next five year plan output was stated in terms of numbers of nails. The inevitable happened. Everyone made small nails and there was a shortage of big nails.

There are numerous such examples of the pathology of measurement which I have collected in my two recent addresses. They include examples from the university sector. What is merely a threat with respect to the administration of justice is, regrettably, a reality in university decision-making. The distortions created by the application of rigid funding formulae which allocate resources, and by indicators that determine employment, are palpable in the university context. The irrationality of this partial rationality threatens a considerable body of our intellectual capital in a way which I am convinced, we will eventually come to regret. The linkage of long term investment decisions to short term fluctuations of demand, which appears to be inherent in funding formulae for tertiary education, would not, I venture to suggest, be acceptable for any private corporation that has an attention span longer than that of a gnat.

The difficulties are well stated in a recent assessment of the impact on American universities of the emphasis given to publication in the grant of tenure to American academics. It is worth quoting at some length.

"As long as the candidate proves an inoffensive teacher and a reasonable department member, only one question sits on the meeting room table: Is the research project finished? If the junior colleague has a book in hand or an acceptance letter from the director of the university press, tenure is a fait accompli. If the work remains in manuscript, promising but incomplete, no promotion. That is the employment equation. Tenure has boiled down to a six-year composition scheme. Junior faculty now face a demystified production schedule, and senior faculty enter the tenure meeting with a one-checkbox form in their heads. No more messy discussions about quality. No more anxiety about whether the department has enough discernment, or too much. Administrators have an objective criterion to point to should any outsiders challenge the proceedings. Judgment has been externalised, handed over to the university editorial board. The assistant professor has inherited a job task that takes priority over teaching students, that is, marketing his revised dissertation to academic press



editors.

While the book criterion has clarified the tenure process, it has fundamentally altered the nature of scholarship in the humanities. The system discourages research that is time-consuming, that involves tracking down information secreted in libraries and archives, that may yield numerous dead ends before a discovery occurs. Junior faculty must envision book-length projects that can be executed well in advance of the crucial tenure meeting, which takes place in the middle of the candidate's sixth year of employment. ... Books that require lengthy inquiries do not get written. ... Clear-sighted professors will avoid empirical methods, aware that it takes too much time to verify propositions about culture, to corroborate facts with multiple sources, to consult primary documents, and to compile evidence adequate to inductive conclusions. They will seek out research models whose premises are already in place, not in need of proof, and whose exercise proceeds without too much deliberation over inquiry guidelines. Speculation will prevail over fact-finding, theory and politics over erudition. Inquirers will limit their sources to a handful of primary texts and broach them with a popular academic theory or through a socio-political theme. In sum, facing a process that issues in either lifetime security or joblessness, junior faculty will relax their scruples and select a critical practice that fosters their own professional survival, a practice that offers timely shortcuts to publication and still enjoys institutional sanction."<sup>2</sup>

As can be seen from this experience, the attempt to abolish judgment and replace it by an allegedly "objective" criterion does have significant distorting effects. There is every reason to believe that in Australia an egalitarian instinct may exacerbate these kinds of distortions. The exercise of judgment may appear to be elitist. The substitution of an allegedly objective, measurable indicator can be appealing.

That such considerations are having an impact on the Australian university is suggested in a recent address by Professor Stuart Macintyre, Dean of the Faculty of Arts at the University of Melbourne. He identified the effects of funding formulae developed over the decades for the allocation of resources to, and accordingly within, universities. He noted the significance of external research funding support in determining public funding for research. Professor McIntyre concluded:

"The new regimen has brought considerable change on the ways that universities manage their affairs and on the way that academics conduct their teaching and research. There is both an institutional and individual pre-occupation with measurement of performance. The aggregate of research funding has become a measure of the research performance of the university; its newsletter and glossy promotional literature will feature the research project that attracts the largest grant as the paradigm of excellence. Academics, who are usually so resistant to external direction of their activity, show a surprising responsiveness to these market signals. A lawyer will write a journal article rather than a case note because the former is included in the publication index and the latter is not. It becomes more difficult to find a book reviewer or a journal editor, because these activities, so necessary to the scholarly infrastructure, are not recognised as research activities for funding purposes.

[I interpolate: You see why students have to run the law journals]

The core disciplines of the sciences, social sciences and humanities are especially disadvantaged by the emphasis on research income as a determinant of funding. They find it harder to attract industry funding, which is concentrated in the biological and technological sciences. Some of the disciplines are especially disadvantaged by the new conditions on post graduate research: in linguistics or anthropology, where substantial fieldwork is required, a candidate will have great difficulty in completing his or her thesis in the time that is required for funding purposes. More generally, the application of simple aggregate measures across the range of research fields plays little heed to issues of quality. The British system where discipline panels evaluate research performance on a qualitative basis is far more conducive to breadth and excellence."<sup>3</sup>

As I have indicated, there are pressures of this same general character with respect to the administration of justice. The grotesqueries that have been perpetrated in the name of so-called "rational" decision making in education and health, both in Australia and elsewhere, contain important lessons for those of us who have to deal with these pressures in the context of court administration. Nor, I should emphasise, is there any occasion to accept that the present position in universities is irreversible.

There is at the heart of this development a discernible power struggle between different disciplines. In these spheres of public decision-making there are professionals such as teachers, doctors, lawyers and academics, who tend to emphasise the significance of qualitative considerations. Those who

believe in the universal applicability to all organised life of principles of management - including executive officers, treasury officials, finance officers and the like - tend to emphasise measurable indicators.

The managers often resent the high degree of autonomy of professionals and categorise their pre-occupation with matters of quality as either rent seeking activity or an invitation to inefficiency. They are suspicious of professionals as liable to engage in self-serving conduct and believe that they have no capacity to prioritise or to regard professional standards as anything but absolutes.

To the extent to which qualitative considerations are given weight, the professionals will have the greater say. Unless matters can be reduced to measurable plans, standards and indicators, the managers will not be able to exert significant influence. The managers simply do not have the capacity to make qualitative judgments and have an inbuilt institutional bias to downgrade the significance of quality considerations. Hence the power struggle. As a regrettably anonymous pundit once put it: "Where you stand, depends on where you sit".

This kind of conflict operates within institutions and between institutions and those who are responsible for allocating funds to them. This palpable tension in many areas of discourse is beginning to emerge within the law as a significant consideration. The judiciary, by reason of its constitutional position and a long history of independence, does have a greater capacity to resist these pressures than many other spheres of conduct. However, nothing that has happened in the funding of health and education over the last two decades, gives any cause for complacency in this regard.

\* \* \* \* \*

In conclusion, I must formally launch the two publications, as I have been requested to do. For other such occasions there is a traditional format containing a symbolic gesture of commencement. A ship is launched by smashing a bottle of champagne on the bow. A bridge is opened by cutting a ribbon. I regret that no such tradition has developed with respect to the launch of a publication. There ought to be a symbolic gesture of some universally accepted character. I have one proposal for the future in this regard.

Publications contain words. However, what is launched is not the words, but the ideas and thoughts which the words transmit. Those ideas take flight in the discourse of our society and come to influence many who have not themselves seen the print.

Aristophanes, in his work "The Birds", said: "Words can give everybody wings". Like birds, ideas follow certain long established migratory patterns. However, where and in what intensity they come to roost or propagate cannot be predicted at the time of their launch.

It would be a nice tradition to adopt for the purposes of the launch of a publication to let a bird free, as the symbol of the liberation of the ideas contained in the publication. However, as this launch is occurring in Renzo Piano's Aurora Place tower in Sydney, I could not institute this idea today. Like all other contemporary office buildings it is not possible to open the windows. That may say something about the words produced in such buildings. Be that as it may all I can do is to say that I hereby launch both the Journal and Forum.

1 See "Judicial Accountability and Performance Indicators" address to The 1701 Conference: The 300th Anniversary of the Act of Settlement, Vancouver, Canada, 10 May 2001, to be published in the Civil Justice Quarterly and "The 'New Public Management' and the Courts" address to the Family Courts of Australia 25th Anniversary Conference, Sydney, 27 July 2001, to be published in the Australian Law Journal: both papers are accessible at [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc).

2 Mark Bauerlein "Social Constructionism: Philosophy for the Academic Workplace" (2001) Vol LXVIII (2) Partisan Review accessible at [www.bu.edu/partisanreview](http://www.bu.edu/partisanreview).

3 Stuart Macintyre " 'Funny You Should Ask for That': Higher Education as a Market" paper to "The Idea of a University: Enterprise or Academy?" Conference organised by The Australian Institute and Manning Clark House, ANU, 26 July 2001.



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## Becket and Henry II: The Conflict

### THE THIRD ADDRESS IN THE BECKET LECTURE SERIES THE ST THOMAS MORE SOCIETY, SYDNEY 20 AUGUST 2001

In contrast to the matters of high principle to come, the first public confrontation between Becket and Henry II was about the tawdry subject of money. It happened on 1 July 1163 at the King's favourite hunting lodge of Woodstock, 12 kilometres north of Oxford and now within the grounds of Blenheim Palace, during the construction of which the Duchess of Marlborough peremptorily rejected her architect's plea not to destroy the remains of the medieval lodge.

Henry proposed that the charge of two shillings on every hide of land that had traditionally been paid by landowners to the local sheriff, should henceforth be paid directly to the royal treasury. The archbishop, speaking on behalf of the assembled landowning nobles and bishops, protested that the sheriff's aid was a fee for service, not a tax. No doubt the landowners thought they could withhold all or part of it, if the sheriff was not performing his duties as the local policeman and protector of property.

Flashing into his usual temper tantrum, Henry exclaimed:

"By the eyes of God, it shall be given as revenue and in the King's scroll shall it be writ. Nor is it fit that thou shouldst gainsay me, when no man would oppose your men against your will."

Such blasphemies from the king were commonplace. However, in an extraordinary gesture of defiance, the archbishop turned the blasphemy into a personal oath, escalating the purely secular dispute. Becket said:

"By the reverence of the eyes by which you have sworn, my Lord King, there shall be given from all my land, or from the right of the Church, not a penny."

The measure of Henry's fury was displayed in an uncharacteristic silence. This was open calculated insolence – the triviality of the issue exacerbating the impertinence. The chronicles are unanimous that this was the first open breach between the king and the archbishop.

Becket had made it impossible for Henry to treat him with respect, let alone as a friend, without loss of face. He had trumpeted his independence, as if daring the king to challenge it.

A few days after this confrontation, when the court had moved from Woodstock to Westminster, Henry launched an attack on the church's most vulnerable privilege: the immunity of the clergy from punishment for crimes in the normal courts. Simon Fitzpeter – who had served Henry as justice, sheriff and as a commissioner of inquiry into losses of Crown land, and would do nothing without his authorisation – asserted that in his capacity as a Royal justice, he had been personally abused by a clerk called Phillip de Broi, in effect a contempt of court.

The incident must have preceded Woodstock, where Fitzpeter was in attendance. Fitzpeter said that, sitting as a judge on circuit in Bedfordshire, he had raised the issue of a homicide with which de Broi had been accused and of which he had been acquitted in the bishop's court. In response, de Broi had abused him.

At Westminster the king demanded that the matter be investigated, both the alleged murder and the contempt of his court. According to Becket's most fervent biographers, Edward Grim – who eight years later would be injured when trying to protect the archbishop from his assassins – said that the king "delighted at the opportunity of venting his spleen on a clerk, brought forth upon Philip the vials of his wrath".

Subsequently, when appearing before an ecclesiastical court convened for this purpose in Canterbury, de Broi, while continuing to deny the homicide charge, pleaded that he should not be tried twice for the same offence. "I confess" he added "that overcome by my bitterness I have abused the king's officer,

but I promise full reparation for my outrage". No doubt having heard the king's views that death was the appropriate penalty, de Broi added, "Let not the penalty exceed the bounds of reason". The ecclesiastical court upheld his plea against double jeopardy on the homicide charge. For the contempt, they ordered that he forfeit two year's income to charitable purposes nominated by the king.

Henry ranted that this was insufficient penalty for an insult to himself. "By the eyes of God" – Becket's hagiographers dutifully record the blasphemy – "you shall swear to me that you judged a just judgment and did not spare the man because he was a clerk". As soon as the bishops made that oath the king broke into what was described as "a storm of rage". This was his usual intemperate conduct whenever his will was thwarted or, indeed, even questioned. As he told one of his courtiers on another occasion:

"Am I not allowed to be angry when passion is part of man's character and a natural attribute? I am by nature a child of anger; how therefore should I not be moved to anger? God himself was moved to anger."

Indeed, when it came to dealing with clergy who committed crimes, Henry preferred the punishing God of the Old Testament.

The caste of tonsured clerks represented a substantial proportion of the population of medieval England – up to one-sixth of the total according to one estimate. The group of persons who claimed an entitlement to what came to be called "benefit of clergy", was not limited to priests, monks and deacons directly involved in matters spiritual. It extended to include acephalous, vagabond clerks, ordained in minor orders, who were quite indistinguishable from their social peers and equally prone to fits of jealousy, anger, greed and sexual craving. Henry had been told that clerks had committed about 100 murders.

The church claimed the right to deal with clergy in all respects, including the right to put them on trial for criminal offences like homicide, rape and theft. This exemption from civil jurisdiction was, potentially, a significant factor in the maintenance of public order. It also affected the performance of other functions of the criminal process of particular significance at the time, such as compensation for victims and their families.

In a case in which a priest from the diocese of Salisbury had been found guilty of murder in the bishop's court, Becket had formally ruled that the maximum penalty permissible anywhere in England was life imprisonment in a bishop's gaol or life in a monastery. Becket proclaimed a general rule that no convicted clerk could be sentenced to death or mutilation.

The civil courts had no compunction about the shedding of blood. Death was a frequently imposed punishment, as were various kinds of gruesome mutilation, including amputation of limbs, flaying of skin, and gouging of eyes. At the time, even in the case of heretics – though the precedent had been set by this stage – public execution by burning was still not generally accepted in the church as an appropriate form of punishment. Henry, in this respect representing the brutish simplicities of the warrior caste of nobles, regarded sentences such as imprisonment, fines and deprivation of status, handed out to clerical criminals, as unacceptable in terms of revenge, unsatisfactory as a deterrent and, perhaps, unfair as discrimination against other offenders.

Henry spoke as if England was enveloped by a crime wave. Even in those comparatively simple times, before the emergence of the electronic lynch mobs of talkback radio, being tough on crime was seen to be a requirement of executive government.

There is no reason to believe that, in the mid 1160's, the problem of clergy committing crimes had become worse. Indeed, it is almost certain that it had improved from the lawlessness prevalent throughout the reign of Stephen. Nevertheless, there is little doubt that there was a 'law and order' issue of substantial scale. A few years later, by the Assize of Clarendon of 1166, a nationwide inquest was conducted in which twelve men from every hundred and four men from every vill had to come forward and identify criminals believed to have committed robbery and murder. This sworn inquest before itinerant royal justices, would institutionalise a practice used, sporadically, by Henry I.

A feature of Henry's reign was the expansion – by the creation for the first time of a permanent judiciary – of royal jurisdiction, at the expense of local jurisdiction in the courts of the hundreds and shires and in the manorial and honour courts of local lords. By firm and patient insistence on the maintenance of all royal jurisdictional rights, and by the progressive refinement of royal procedure, a gradual, at first imperceptible, shift of jurisdiction occurred. What had once been an extraordinary intervention to do justice, became more and more frequent. There was never a full-scale confrontation

in this respect. A concurrent jurisdiction expanded gradually.

It proved otherwise in the case of ecclesiastical jurisdiction. There is no suggestion that Henry was concerned with the jurisdiction of ecclesiastical courts in matrimonial or testamentary disputes or even in criminal cases involving heresy, sacrilege, sorcery, usury, defamation, fornication, homosexuality, adultery and injury to religious places. Nor did he appear to be concerned with civil jurisdiction over cases involving contract, property and other disputes in which there was a breach of an oath. It was otherwise with respect to breaches of peace and the law relating to the transmission of, and incidents of, real property. The latter was the very foundation of political, social and, indeed, military power in an age, unlike our own, when the social hierarchies of status, wealth and power almost completely overlapped.

The canon law had a broadly based theory of legal liability, derived in large measure from a concept of sin. Secular jurisdiction made more specific claims derived from practical concerns. Overlap, tension and conflict was inevitable because of the ubiquity of sin and because of the institutional interests of the Church in matters secular, particularly with respect to church property.

In the first year after his appointment as archbishop, Becket had taken steps to recover virtually every piece of property that had ever been owned by the see of Canterbury and which had been alienated, whether consensually by, or non-consensually from, any of his predecessors. William Fitzstephen, the most reliable of his biographers, suggests that Henry had promised to stay out of Becket's way in this regard, save in the case of one claim that affected Henry personally, Becket's claim to recover custody of the castle at Rochester. At first, Henry had ignored the rhetoric of Becket's program of restoration, which sometimes invoked the potentially socially disruptive doctrine of the canon law that no occupant of ecclesiastical office had the right to alienate church property.

On 22 July, immediately after the confrontation at Woodstock, the king formally rejected Becket's claim about the tenure of Roger, earl of Clare, over the town and castle at Tunbridge. The depredation of church property by the earl, notably in the see of Ely – which Pope Adrian had ordered Bishop Nigel of Ely to pursue, under threat of his own suspension from episcopal office – was notorious and had been raised at the recent Council of Tours. The powerful, well-connected noble, had acted for some time as if the land were held directly from the king. Becket asserted that, as one of his predecessors was the original tenant-in-chief of the king, the earl owed him homage for the land, with all the opportunities for exercising authority and exacting revenue – at the king's expense – which such a relationship entailed. Henry, for the first time – no doubt as an intended punishment for, or a warning about, Becket's recent display of independence – acted to stop one of Becket's claims of this character.

Henry had been prepared to accept Becket's attempt to unravel the depredations that had occurred during the years of anarchy under King Stephen. However in one case Becket went beyond any permission that Henry may have ever given him.

The archbishop claimed a traditional right to appoint a clergyman to the occupation of a church at Eynsford in Kent. The lord of the town, William de Ros, claimed the same right of advowson. As Becket had himself done to his own tenants, de Ros took the law into his own hands and forced Becket's nominee to leave. The right to appoint a clergyman to the occupation of a church, as with all such feudal rights, entitled the appointor to a fee – usually one year's revenue of the church.

Rather than have the matter resolved in the king's court, Becket displayed his independent authority by excommunicating William de Ros. He knew perfectly well that this would provoke the king. Henry, like his predecessors, would not allow himself to be put in a position where he could not communicate with one of his own tenants-in-chief. They owed him direct personal obligations of service, attendance and advice. The customs of England, Henry correctly asserted, prohibited any such excommunication without the king's assent. Indeed, whilst Becket had been chancellor, Theobald had refused to obey a papal order to excommunicate an earl who had appropriated church property, precisely for that reason.

Becket first asserted that the king had no right to order him to either absolve or excommunicate anyone – even if he had wielded his clerical sword for secular reasons. This was perhaps the first indication that Becket intended to apply the most rigorous Gregorian ideology of the complete independence of, indeed the superiority of, the Church. Henry, described by William Fitzstephen as “hotly enraged”, cut Becket off and would not see him. Becket backed down at this point. He lifted the order against de Ros. “For this I owe him no thanks”, Henry bitterly remarked.

The issue of criminous clerks became the focus of the conflict between archbishop and king. Three years before, John of Salisbury, Theobald's former private secretary who had remained on the

archbishop's staff, had dedicated to Becket, then chancellor, a long treatise, entitled "*Policraticus*" – one of the highlights of 12th century political thought. He had concluded on this issue:

"That the material sword may not be wielded against a priest, even if he should tyrannise, for reverence to the sacrament of his holy orders, unless perhaps after being unfrocked, he should lay his bloodstained hands upon the Church of God. Even so, the rule must be observed that he does not suffer double punishment for the same offence."

For reasons that cannot be now determined Henry decided to bring the issue of clerical criminality to a head.

In October 1163, Henry called a Council meeting at Westminster Palace – restored at great expense and at forced pace by Becket, when he was chancellor.

Probably immediately before the Council meeting, fourteen bishops and five abbots were present at a ceremony in Westminster Abbey, for the translation of the remains of the recently canonised King Edward the Confessor to a new tomb in the abbey. Becket made pointed use of his feudal right to impose a fee for performing a duty. He took as his trophy for presiding over the translation of the bones of Saint Edward, a gravestone of great significance. Wulfstan, bishop of Worcester, saintly but not then canonised, had been threatened with deposition by William the Conqueror himself at a Council meeting held at Westminster Palace. According to one version, this was because Wulfstan, a patron and preserver of the English language, could not speak French.

Declaring that he would only surrender his staff of office to Edward the Confessor, who had conferred it on him, Wulfstan had gone to Edward's tomb and, according to the legend, as he struck his staff on it had declared – in his, and Edward's mother tongue:

"Take it my lord King and give it to whomsoever thou will."

Miraculously the marble melted and held the staff fast until a decision had been made in Wulfstan's favour. He survived the purge of Anglo Saxon bishops by King William.

God had, by a miracle, prevented Henry's great grandfather from perpetrating a gross injustice on the Church at a Council meeting in the palace of Westminster. The symbolism of Becket's choice of emolument would have been obvious to all.

Henry surprised the Council with a new, carefully crafted proposal for compromise on the issue of criminous clerks. He suggested a new rule that permitted ecclesiastical courts to try clerics for crimes which were breaches of the peace, with the proviso that anyone found guilty would be handed over to the civil authorities for punishment.

According to one source, Henry told the assembly:

"I am bent on having peace and tranquillity through all my dominions and I am much annoyed at the disturbances which the crimes of the clergy have occasioned. They do not hesitate to commit robbery of all kinds, and very often murder also. I therefore demand your consent, my lord of Canterbury, and the consent of all the other bishops also, that when clerks are detected in crimes and convicted either by the judgment of the court or by their own confession, they shall be stripped of their orders and given over to the officers of my court to receive corporal punishment without protection from the church."

Henry carefully prepared the ground, no doubt assisted by those of his justices who had received extensive training in canon law. The argument focused on the frequent use in the canons of the phrase "tradatur curia" – i.e. "handed over to the court". Herbert of Bosham, one of Becket's devoted biographers, recalled the events at the Council:

"Those who were apparently prepared to put their learning at the King's service in order to curry favour with him, argued from this that such clerks should in no wise be exiled or sent into a monastery, but rather, as the canons ordained they ought 'to be handed over to the court' and this they interpreted to mean, to be delivered to the secular arm for punishment."

No doubt Henry's advocates would have gained comfort from the fact that the then pope, Alexander III, a skilled canon lawyer, had some years before written a treatise in which he accepted the possibility of double punishment. It seems probable that this reasoning would have been used by Henry's advocates, although none of Becket's biographers refer to it.

There was a period of intense negotiations, including in the King's private apartments. Threats were made to the bishops about the consequences, if the Royal will were thwarted. Becket overruled the waverers. He said:

“The liberties of the church are in our keeping and it is incumbent on us to guard them or they will be subverted.”

The bishops agreed to reject Henry's proposal and to adopt a united front. What followed, however, probably went further than any of them expected.

Returning to the Great Hall at Westminster, Becket – speaking in the name of the Holy Church – gave Henry a lecture, which travelled so far beyond the issue which Henry had raised as to constitute a challenge to his authority. The archbishop opened up with a reiteration of the most extreme position on the total independence of the church. He drew on the theology of the “two swords” saying there were two Kings – Christ in heaven and earthly Kings. That there were two laws – divine and human. That there were two means of enforcement – spiritual and corporal. Drawing on theology, rather than on canon law, Becket escalated his rhetoric:

“The clergy by reason of their orders and distinct office, have Christ alone as King ... and since they are not under secular Kings, but under their own King, and under the King of Heaven, they should be ruled by their own law and if they are transgressors they should be punished by their own law, which has its own means of coercion.”

As Becket must have known, this proclamation was an anathema to Henry. The king carefully nurtured the overlapping jurisdictions between his courts and those of the barons and of the church. He never attempted to resolve every ambiguity by the application of fixed rules. He never attempted to reconcile every inconsistent jurisdictional precedent. The proposal he had put forward was designed to solve a particular problem, by a pragmatic adjustment of past practices. What Becket flung in his face – with according to Herbert of Bosham the repetition, again and again, in an insolent peroration of the phrase “This I neither ought nor will suffer” – was a public challenge to his honour and prestige as a king.

Becket proclaimed that the step of stripping a person of his clerical status was a punishment and church doctrine forbade double jeopardy. The phrase in the canons on which Henry's advocates had relied – “handed over to the court” – meant for future offences, not further punishment for the one that had just been decided with the result of deprivation of clerical status. Something of this character became the actual position in England with the doctrine of benefit of clergy that was established after the martyrdom of Becket. A practice developed that the benefit could be used only once, irrespective of whether the offender had been deprived of clerical status on the first occasion. To enforce this practice, eventually, a convicted clerk was branded on the thumb. This is said to be the origin of the phrase “rule of thumb”.

At Westminster, in response to Becket's rhetoric, Henry reacted with a retaliatory escalation that went beyond rhetoric. He demanded that all the bishops present affirm whether or not they acknowledged the king's customary constitutional rights and prerogatives. There is no doubt that some of Becket's rhetoric, taken to its logical conclusion – which was not the intention of the body of bishops – did challenge some of the customary prerogatives.

Led by Becket, one by one, to Henry's growing fury, the bishops stepped forward and proclaimed that they would observe the customs of the realm “saving my order” – a phrase that would ring down through the subsequent controversy between Henry and Becket. Society was then universally regarded as trifurcated into orders: those who fight; those who work; those who pray. The qualification – “saving my order” – appears, on this occasion, to have been employed at this level of generality. It asserted that each bishop owed his primary loyalty to the church, and that in the case of any conflict between the royal prerogative and the canon law, the latter must prevail.

The position taken by Becket and the bishops was not intended to be provocative. As Becket pointed out, and Henry must have known, the same phrase - “saving my order” – was part of the formal homage that each bishop made to the king, when being invested with the temporalities of his see, before consecration as a bishop. The quick-witted Becket added that when each of them had sworn



fealty “in life and limb and earthly honour saving their order”, the reference to “earthly honour” encompassed the royal customs.

Henry would have none of this. On all accounts he was indulging in a fit of royal pique, which could only be aggravated by the upstart ingrate making a good point. Henry of Bosham reported the king’s response:

“He declared that they had formed a firm and united front against him, that poison lurked in the phrase *saving their order* and that it was a mere sophistry. He therefore demanded that they should absolutely and without qualification promise to obey the Royal customs.”

In his play *Curtmantle*, Christopher Fry captures the moment:

“Henry: I need your word that you’ll obey these customs.  
Becket: God said ‘I am Truth’, not ‘I am Custom’.

I interpolate that this excellent line, which Fry has lifted from the Becket material, was originally deployed by Pope Gregory VII against the Holy Roman Emperor, Henry IV, a century before.

Henry: Whose truth are you acrobat? These Customs are the truth of the men whose lives shaped them.

Becket: What you see as the freedom of the State within the law, I fear as the enslavement of that other state of man, in which and in which only he can know his perfect freedom. So this is how I must answer you: We obey you in everything unless it should threaten the will of God and the laws and dignity of the church.

Henry: ‘Unless’ is nothing. No answer and no vow! Who is to set limits on your laws and dignity? Who apart from your own reading of God, is going to control your ambition? Very astute isn’t it to attach yourself to a power which proceeds and communicates only through you.

Becket: If by me, you mean the Church, tell me who controls the ambitions of the State?  
Henry: The well-being of the whole community.”

The reference to the “State” is, of course, anachronistic. In any event, Henry could never himself have adopted an ideology of royal absolutism. His interests as a duke and count under the king of France would have prevented that.

Henry’s formula would, of course, incorporate any rights of the church, including limits on royal jurisdiction, that had been adopted as a matter of custom. In that respect the qualifying phrase “saving my order” had no work to do. The problem was who would ultimately decide where such limits lay. It is by no means clear that Henry assumed that the king would always do so. It is quite likely that he accepted that some form of collaboration was required. However the formula on which he now insisted did not make provision for any give and take.

The principal theme of Henry’s reign in the early years, was a rhetoric of restoration of the rights of the monarchy to what they had been in the time of his grandfather, Henry I. No one could have been unaware of the frequent repetition of this formula in writ after writ, charter after charter, letter after letter. Becket himself would have fully understood the significance that Henry attached to this position.

The difficulty, of which Becket would have been very much aware, was that since the death of Henry I in 1135, the canon law had considerably expanded and, indeed, had changed the claims it made about the jurisdiction of the Church and of its courts. There was ample scope for conflict. In the case of England, unlike the position in Henry’s other domains on the continent, that conflict was exacerbated by a contest between two exceptionally stubborn men, whose former personal intimacy had borne a poisonous fruit.

Henry stormed out of the Westminster Council meeting and, the next morning, without notice and without the required formalities, rudely abandoned the Council and left Westminster.

The intensity of Henry’s past affection for Becket was manifest in the torrent of hostility which he directed at his former protégé.

Within twenty-four hours after the Westminster Council, he stripped Becket of his remaining royal honours – custody of the castles of Eye and Berkhamsted. He also removed his son and heir, the

young Prince Henry, from Becket's household. Like other noble youths the young Prince had been entrusted to another for training as a knight, away from the perceived biases of parental affection – a toughening up process which echoes in the British boarding school tradition. The prince's committal had been a mark of trust and confidence in his then chancellor. His removal indicated that all such feelings had disappeared.

Henry took steps to divide the bishops. He swung his support behind the Archbishop of York in the perennial dispute over the primacy of the English church. Roger of Pont L'Eveque was, predictably, the first to come over and agree to an unqualified submission to the customs. Henry, who had already obtained papal authority to have his son crowned by the archbishop of York – in defiance of Canterbury's most cherished privilege – now sought the appointment of Roger of York as papal legate, a position which Becket had not acquired with the archbishopric. Such an appointment could, in one deft act, effectively remove Becket as head of the English church.

In defiance of tradition, Roger of York began to parade in the south of England behind his cross. "He has raised cross against cross, and opposed cross to cross", Becket complained to Pope Alexander, "taking advantage of a particular opportunity, thereby symbolising that Christ is divided". Roger of York, Becket asserted was "attempting to deprive the church of Canterbury of her ancient honour".

Henry, seeking to undermine Becket's authority in every conceivable way, lent his support to the abbot of St Augustine's in Canterbury, a tough minded Norman called Clarembald, universally regarded as a worthless monk, who was in a state of continual conflict with his monks and who exploited the monastery's wealth for his personal profit and pleasure – according to one account fathering no less than seventeen bastards on one of the monastery's manors. Eventually he would be deposed for scandalous and licentious conduct. Clarembald had revived the claim over which Theobald had fought for so long: the exemption of his abbey from the archbishop's jurisdiction.

The new bishop of London, Gilbert Foliot, raised a third challenge to Becket's authority as primate of England.

Foliot was highly educated, an accomplished administrator, a skilled canon lawyer, an ascetic monk of unblemished personal piety. Pope Alexander wrote to him about his total abstinence from alcohol and his strict vegetarianism: "We are afraid if a pack horse is deprived of what it needs, it will fail from excessive weakness". Foliot had attended the great Burgundian monastery of Cluny where he rose to be a prior. He was appointed in his thirties as Abbot of Glastonbury and a decade later, in 1148, as bishop of Hereford, before being translated to London, a virtually unprecedented lateral shift which required a specific papal license. Foliot was regarded by many as unlucky not to have succeeded Theobald at Canterbury.

Alfred Lord Tennyson in his Play "*Becket*" had Henry describe Foliot to Becket in terms of Shakespeare's Cassius:

“... He! To thin, too thin.  
Thou art the man to fill out the Church robe:  
Your Foliot fasts and fawns too much for me?”

At the time of Becket's fall from favour, Foliot was resisting Becket's insistence that he make a further formal profession of obedience to the archbishop of Canterbury, in his new position as bishop of London. Foliot wanted to turn the see in the capital into an archbishopric, an institutional inspiration first proclaimed by the noble-born Foliot's relative, who had become bishop of London fifty years before, a claim which then caused great consternation to Anselm of Canterbury. Foliot took family seriously. Over a period of four decades as bishop he appointed five archdeacons, every one of them a relative. Foliot, who was Henry II's personal confessor, would have been aware that, in the absence of the then exiled Anselm, his relative forebear as bishop of London had officiated at the coronation of Henry I, his grandson's abiding role model and point of reference.

In the wake of the Westminster Council, Foliot advanced a new claim, based on some transparently self serving mythology that London was not subject to Canterbury at all.

Pope Alexander, exiled from Rome by his conflict with the Emperor and the factious Roman families, was close at hand in Sens. A stream of letters and envoys from Henry crossed the Channel seeking decisions by the pope on all these matters.

The Pope was in no position to assist. In exile he relied on the support of Henry in his conflict with the

Emperor. He urged compromise. A meeting between Henry and Becket was arranged at Northampton.

Henry, pointedly refusing to have Becket inside his castle, insisted that the meeting be held in an open field outside the town. With the conversation disrupted by the neighing and rearing of their horses, no doubt sensing the restless tension of their masters, the two antagonists met alone. One contemporary, Roger of Pontigny, who would have heard Becket's version, left a verbatim record – the interplay of stubborn defiance and the mixture of promise and threat comes down clearly through the flowery terminology of the hagiographer:

“Have I not raised you from a poor and lowly station to the pinnacle of honour and rank. How comes it then that so many benefits so many proofs of my love for you, well known to all, have so soon been obliterated from your mind, that you are not only ungrateful, but oppose me in everything?”

“I am not unmindful of the favours which, not you alone, but God who dispenses of all things has condescended to confer on me through you. Wherefore, far be it for me to show myself ungrateful or to act contrary to your will in anything, so long as it accorded with the will of God ... you are indeed my liege Lord, but he is both your Lord and mine, to ignore whose will in order to obey yours would be expedient neither for you nor for me ... for temporal lords are to be obeyed, not against God as saith St Peter, ‘We ought to obey God rather than men’.”

“I don't want a sermon from you. Are you not sprung from one of my villeins.”

“In truth I am not sprung from royal ancestors; neither was St Peter, prince of the Apostles on whom the Lord deigned to confer the keys of the Kingdom of Heaven and the primacy of the whole Church.”

“True, but he died for his Lord.”

“And, I will die for my Lord when the time comes.”

“You trust to much to the ladder you have mounted by.”

“I trust and rely on God for cursed is the man who putteth his hope in man. Nevertheless whatever you may say and I answer, as of old so now, I am ready for your honour and pleasure, *saving my order*.”

Henry promised the pope and the English bishops that he had no intention of taking any steps against the clerical order. The omission of the phrase “saving my order”, his envoys said, was not a step in a covert attack on the rights of the church. It was a matter of honour for him. Others were tempted by this blandishment. Not so Becket. He told Hillary of Chichester:

“The King has promised you that he will make no demands on you that may be against your order. If he wants to he will keep his word; if not, nobody is going to oppose him. But you, you will be compelled to keep what you have promised, for you are his man and he will make you keep it.”

Pope Alexander increased his efforts to have Becket compromise. He chose as his emissary Phillip, abbot of L'Aumone, a universally respected Cistercian, who had been Bernard of Clairvaux's prior and acquired some of the late saint's moral power. His mission called on Becket at his Harrow manor. He said that he accepted Henry's assurances that the omission of the reference “saving my order” was simply a matter of face and that there was no threat to the church in its omission.

Becket finally agreed. He called on the king at Oxford Castle and promised to accept the customs without qualification. To Becket's surprise – because of the assurances that only a formal submission was required – Henry demanded that the surrender should, like the earlier defiance, be delivered at a full Council meeting. Henry required a public humiliation.

The meeting was convened for January at Henry's hunting lodge at Clarendon a few miles east of Salisbury. With his customary impish swagger in victory, Henry could not refrain from rubbing salt into Becket's wounds. He chose to spend Christmas at the castle of Berkhamsted, which he had just expropriated from Becket – publicly parading the consequences of impudence past.

Henry called together as complete a Council of tenants-in-chief as could reasonably be expected to be available at any one time, to bear witness to Becket's humiliation. Ten earls, two archbishops, twelve

bishops and numerous royal officials and barons, assembled at Clarendon in January.

The precise sequence of events at Clarendon cannot be reconstructed with any assurance. There are too many gaps and inconsistencies in the documents that have survived. One thing is quite clear, however. Becket prevaricated. Contrary to what he had told the king, he was reluctant to give an unqualified promise. Days of threats and blandishments followed.

The four tempters, which T S Eliot locates in the days before the martyrdom – sensuous pleasure, political power, revenge and the glory of martyrdom – would all have been present in Becket's mind at Clarendon.

The First Tempter said to him, as he spurned it:

“You were not used to be so hard on sinners  
When they were your friends ...”

and left him with a cynical aside:

“I leave you to the pleasures of your higher vices,  
which will have to be paid for at higher prices.”

The first such arrived in the form of the Second Tempter, who said:

“Real power is purchased at the price of a certain submission. Your spiritual power is  
earthly perdition. Power is present for him who will wield.”

When asked what was required in exchange, the Tempter replied:

“Pretence of priestly power.”

Eliot cast Becket's reaction as dismissive:

“Those who put their faith in worldly order  
Not controlled by the order of God  
...  
Degrade what they exalt.”

The Third Tempter, revenge, explained that there was no hope of reconciliation and Becket should align himself with the barons, some of whom wished to rid themselves of royal authority. Becket responded:

“To make then break, this thought has come before  
The desperate exercise of failing power  
Sampson in Gaza did no more.  
But if I break, I must break myself alone.”

Finally, the Fourth unexpected, Tempter: the glory of martyrdom. Becket refused, in perhaps the most famous lines of the play:

“The last temptation is the greatest treason:  
To do the right deed for the wrong reason.”

Numerous pros and cons, such as these, must have gone through Becket's mind at Clarendon about the correct position to adopt. No doubt the interests of the Church would have received determinative weight. Surrender may have become the best means of promoting those interests, even at the temporary expense of some aspects of independence.

As Becket delayed, the enraged king unleashed his bovine barons. According to Foliot, writing two years later, by which time he was in the king's camp:

“We were all shut up in one chamber, and on the third day the princes and nobles of the realm, waxing hot in their wrath, burst into the chamber where we sat, threw off their cloaks and shook their fists at us exclaiming ‘Attend, all ye who set at nought the statutes of the realm and heed not the king’s commands. These hands, these arms, yea even our bodies are not our own but belong to our lord the king and they are ready at his nod to avenge every wrong done to him and to work his will, whatever it may be ... Take fresh counsel then and bend your minds to his command, that you may avert the danger while yet there is time’.”

Suddenly Becket capitulated. On one version he returned to the Great Hall at Clarendon leading his flock of bishops and said:

My Lord King, if the dispute between us had resolved around my personal rights, I would have yielded to your will at once without the slightest opposition. But since it concerned the affairs of the Church, and since grave and dangerous matters have been brought forward on both sides, you should not regard it as strange or offensive that I have been so scrupulous in God’s cause. I know that I must account to God for my stewardship and He does not spare the wicked. Now trusting in your prudence and your clemency, I consent to your demand and I declare that I will observe the customs of the kingdom in good faith.”

The invocation of “prudence and clemency” was an oblique reference to the various promises Henry had made that only a formal submission was required and that he had no intention of forcing the archbishop to act in any way which would have been protected by the phrase “saving my order”. In the days immediately before the capitulation, two earls and two Templars had called on Becket – good cop, alternating with bad cop – making threats and offering assurances. The Templars reiterated the undertaking that Henry only wanted a victory to save face. This promise had already been made to the cardinals and the curia and to the saintly Phillip of L’Aumone.

The public capitulation was a dramatic moment and, it appears, a surprise to the bishops. On Becket’s express instructions each bishop made the same promise on oath.

Gilbert Foliot, the Bishop of London would later fling Becket’s inconstancy in his face:

“It was the leader of our chivalry who turned his back, the captain of our camp who fled; our Lord of Canterbury abandoned the society of his brethren and forsook our common counsel. He made his own decision, and when he returned to us after a space uttered these words, ‘It is the Lord’s will that I should forswear myself; for the present I submit and incur perjury, to do penance for it later as best I may.’ Hearing such words, we stood thunderstruck, clinging to each other with mutual astonishment ... our archbishop himself acquiesced in the king’s prerogatives and the ancient customs of the realm and agreed to their being recorded.”

Becket’s inclination not to believe that the king would be satisfied with merely a formal submission, was affirmed by a letter he received after the Council at Clarendon from John of Canterbury, the third member of a clique on Theobald’s staff before the other two, Becket and Roger of Pont L’Eveque, had fallen out. John had recently been elevated by Henry to the position of Bishop of Poitiers the most important see of Aquitaine. John had adopted the same position as Becket on the issue of criminal clerks.

Indeed, a few years before John had infuriated the royal court in a case brought against a dean who had extracted twenty two shillings – twenty for the archdeacon and two for himself – to drop a charge of adultery against a burgess’ wife. The case was brought at the instigation of Henry who proclaimed that throughout the nation rapacious archdeacons extracted annually more than the royal revenue. The judgment of the clerical court, presided over by John of Canterbury, then Treasurer of York, ordered a full refund and imposed a fine payable to the archbishop. “What then” said Richard de Lucy, the king’s justiciar, “will you say to the king whose law has been broken”. Richard expected a moiety of the fine. “Nothing”, John had replied. “The man is a clerk”. Henry was furious but there was no permanent breach, as shown by John’s elevation to Poitiers.

Upon his appointment to Poitiers, Henry had told the bishop that he expected him to act in accordance with, the slightly different, customs dividing the clerical and lay jurisdictions in the region of Aquitaine. As John explained in his letter to Becket:

“They began with forbidding me in general terms and under severe denunciations to interfere with such things as concerned the King’s royal dignity; and when I readily promised to do so, they came to more specific points, forbidding me 1. to summon before me any inhabitant of my diocese at the suit either a widow, orphan or cleric, till the King’s law officer or the lord of the manor had failed to award justice. 2. to hear any complaint in cases of usury. 3. to pronounce sentence of excommunication against any baron, without first either consulting themselves or obtaining his consent to my judgment. These were the principal points in which I was said to interfere with the King’s prerogative and this especially in the case of clerics.”

A similar process occurred after the formal submission of the English bishops at Clarendon. The precise way in which the document, known as the “The Constitutions of Clarendon”, was compiled cannot be reconstructed from the surviving material. There are, however, marks of compromise and negotiation on the face of the document – sixteen numbered paragraphs dealing with a range of jurisdictional issues - which suggests a long and complicated process, involving the lawyers on the royal staff and also, probably, the bishops who had abandoned the common stand after Westminster.

It is quite unlikely that Herbert of Bosham is correct when he suggests that Henry’s demand that the customs should be written down, came as a complete surprise. The unprecedented step of a formal written statement of customs was ironically a step not itself sanctioned by custom. It was unprecedented in England.

However, a year before, in his capacity as duke of Normandy, Henry had reissued the statement of William I, pronounced at Lillebonne in 1080, and once before formally reissued by Henry I, which defined the jurisdictional privileges of bishops in Normandy and proclaimed that no new rights could be established without express approval of the duke. Henry’s position was a consistent one.

The relationship between the medieval Church and secular rulers is best understood in terms of federalism. There were two interconnected and overlapping jurisdictions.

At the federal level there was the European Union of Christendom, with baptism as a form of citizenship, a European Parliament in the form of Church Councils and territorial units of bishoprics exercising both executive and judicial authority, under the centralised control of the pope and the curia. There was a clear hierarchy of judicial authority, culminating in appeals to the pope.

The local unit of government was constituted by a variety of secular territories with their own interrelationships - monarchs, dukes, earls, lords and the like – also exercising both executive and judicial authority.

A critical issue was to identify the constitutional principle by which jurisdictional conflicts were to be resolved. All federations require a rule as to which jurisdiction prevails in the case of inconsistency. In Australia, s109 of the Commonwealth Constitution states that the rule of the centre shall prevail. The medieval canon law of the Church had a similar rule: an issue was subject to canon law, if canon law said it was. The Church proclaimed its constitutional authority to be superior. The scope of its jurisdiction was to be determined in accordance with its own interpretation of its jurisdiction.

Henry’s success in obtaining the concession of the bishops to the customs at Clarendon was inconsistent with such a principle. The very means by which he had obtained the bishops’ submission, supported the opposite approach, i.e. in the case of any conflict between customs and the canon law, the former would prevail.

Moreover, the freezing of those customs at an earlier date, rolled back the Church’s success in extending its authority over the last few decades. The canon law – consisting of papal decrees, the legislative canons of Church councils and the determinations of ecclesiastical courts – had been a disparate mass of undigested material during the reign of Henry I. Its first systematic compilation – the *Decretum* of the Bologna academic Gratian – which was quickly adopted as an authoritative statement – was not published until five years after the death of Henry I. In the years since the “customs of England” were now to be accepted as frozen in time, the canon law had developed dramatically.

The boundaries between clerical and secular authority were uncertain precisely because, in the federal structure of European governance, neither pope nor king asserted, or could command, total allegiance. The pluralism that continues to exist in the institutional structure of Western nations, finds its origins in this medieval conflict.

The preamble to the Constitutions of Clarendon sets the institutional tone: this was a proclamation of the “customs, liberties and rights” of the monarchy *as such*. The concluding words, however, were equally significant. They accepted that the Church and the barons also had rights:

“There are moreover rights and customs, both many and great, of the Holy Mother Church of the Lord King and of the barons of the realm, which are not contained in this writing; they are to be saved to the Holy Church, to the Lord King and to his heirs, and to the barons of the realm and are inviolably to be observed forever.”

The written specifications of some of these rights, would have to wait until the Church and the barons, together, forced Henry's son John to issue the Magna Carta in 1215.

The Constitutions of Clarendon resolved a number of disputes of an institutional kind. There is nothing in the document which bears directly on the church's religious functions. It reads like a political arrangement between two levels of governance in a federal system.

Article 12 repeats the formula for appointment of bishops and abbots which had resolved the dispute between Henry I and Archbishop Anselm – recognised at the time to be a compromise between the claims of the Crown and the dictates of strict canon law, by requiring a bishop or abbot to formally do homage to the king before his consecration, using the customary formula – an ironic echo of the trigger for the recent dispute - “homage and fealty to the Lord King as to his liege lord, the life limb and earthly honour, *saving the rights of his order*”.

Perhaps the most controversial Article was 3, with respect to criminous clerks. This was the provision which Henry had suggested at Westminster: clerics would be tried in an ecclesiastical court and, if found guilty, would be deprived of its protection. However, the most important aspect of clause 3 – which appears to be a development on the proposal at Westminster – is the assertion that it was for the king's court to decide whether or not the ecclesiastical court had any jurisdiction. The clause provided:

“A clerk cited and accused of any matter shall, when summoned by the king's justice come before the king's court to answer there concerning matters *which shall seem to the king's court* to be answerable there and before the ecclesiastical court *for what shall seem* to be answerable there.”

To whom, in the latter respect, was left to implication.

This was a fundamental challenge to the separate role of Church courts and the Church's understandable desire to protect the clergy from the irrational modes of proof still extant in lay courts – trial by ordeal would not be banned by the Church until the Lateran Council of 1215 - and from the barbaric punishments of maiming and mutilation to which clerics would become subject.

The Constitutions also contained a number of express assertions of royal control over the internal deliberations of the church. No tenant in chief could be excommunicated without the King's consent and no person under the king's control could be excommunicated until the king's representatives had been asked to bring him to justice and failed to do so. Furthermore, no appeal could be made to the pope without the King's consent and no senior cleric was permitted to leave England without such consent. At least nine of the sixteen Articles were in conflict with the canon law.

Becket resisted Henry's demand to affix his seal to the document. He nevertheless acknowledged the written version, which had been executed in triplicate, by publicly accepting one of the three copies. Another copy was retained in the Royal archives. The final copy was handed to the archbishop of York, pointedly treated by the king – who could not resist imposing this final humiliation – as Becket's equal. There can be no doubt that by his oral promise, and by accepting delivery of the document, Becket and the English church were bound by the customs so declared. Henry's triumph was complete.

Writing after the martyrdom, many of Becket's biographers assert an immediate repentance after Clarendon. They speak of “groans”, “remorse”, “transgression” and the like. There is, however, no credible evidence that Becket did anything other than accept the binding force of what he had agreed at Clarendon. Assertions of some kind of resistance are not supported with any actual example of conduct. Nevertheless, Becket must have been depressed by the magnitude of his defeat. This was not just a personal humiliation, although it was that. It was also a failure in the performance of his overriding duty to the institution he now served.

Herbert of Bosham's version has the stamp of truth:

"Now I begin to see that it is through me and because of my sins, that the English church is reduced to bondage ... she who before reigned as sovereign lady is now through me, wretch that I am, visibly reduced to servitude ... It is all my fault that the church is destined to suffer these things in my time. For I was promoted to this office, not like my predecessors from the service of the church but from the court; not from the cloister of some religious house nor from the school of the Saviour, but from Caesar's household ... In truth my past life has been far from conducive to the safety of the Church and now she has been undone through me."

Henry's emissaries, seeking the approval of Pope Alexander to the Constitutions, carried with them letters of support from both Becket and Roger of York. Henry's agenda to continue the punishment of Becket and to marginalise him was maintained by the reiteration, on the part of the same envoys, that Roger should be appointed papal legate for the whole of England.

Alexander explained his position in a letter to Becket of 27 February:

"In the matter of the ancient constitutions and dignities, though you and others had given your consent to them, yet we would not grant his request. But that we might not altogether exasperate him against us, and also for your own sake, and considering the evil nature of the times, we have granted the legation to the above named archbishop. And, for as much as condescension must be shown to the will of princes, we advise, and in every way exhort your prudence, to consider well the necessities of the times and the perils which may befall the Church, and so endeavour to please the King, saving the credit of the ecclesiastical order, that you may not by doing otherwise, set him against both you and us, and cause those who are of a different spirit to mock and deride us. We will not fail, when an opportunity offers, to speak to the King in every way that may tend to maintain and to increase your honour, and any rights and privileges of your church."

In a separate letter, apparently for Becket's eyes only, which was also probably sent on 27 February, Alexander tried to reinforce the reassurance of the last sentence by suggesting that the legation – like the authority for Roger of York to perform a coronation ceremony - was simply a matter of posturing, without practical consequence:

"Let not your heart fail you, my brother, because the legation has been granted; for the ambassador who gave us beforehand an assurance from the King, and offered themselves to confirm it on oath, that the letter should not be delivered to the archbishop without your knowledge and consent. You cannot believe it is our wish to humble you or your church by subjecting it to any other than the Roman pontiff. Wherefore we advise your prudence, as soon as ever the king shall be known to have delivered the letters, which we cannot easily believe he will do without your knowledge, to inform us at once of it by letter, that we may, without delay, declare you and your church and city to be exempt from all legatine jurisdiction."

Becket could hardly have been reassured by Alexander's private fallback position, which would have reduced Becket to no more than the bishop of Kent. In any event, Henry rejected the condition and sent another delegation to Alexander requesting an unqualified legation for Roger.

The ambassador arrived at the papal court on the very day that news arrived of the death of the anti-pope, Octavian. Temporarily - for Frederick Barbarossa would soon appoint a successor - Alexander believed that his position was sufficiently strengthened for him to reject Henry's request. Nevertheless, perhaps as a gesture to Henry, he now agreed to the king's other campaign to humiliate Becket. He directed Becket to consecrate Clarimbald as abbot of St Augustine's, without making a formal profession of obedience to the archbishop. Perhaps Alexander hoped that Henry would be satisfied with such a small measure of vengeance. That was not likely.

On 1 April 1164, Becket officiated at the dedication of a church at Reading Abbey, in the presence of ten of his suffragan bishops. The abbey, founded by Henry I, was the king's family shrine. The first Henry was buried there and, in 1156, the second Henry had buried his first son, William, there. The abbey had a relic of the first importance – the hand of St James – brought back from Germany by Henry II's mother, the Empress Matilda. As Becket publicly proclaimed an indulgence of forty days for



anyone visiting the shrine, his mind could well have gone back to the royal Council of 17 July 1157 when he, as chancellor, had participated in the decision to refuse the request of the Emperor Frederick Barbarossa, for the return of the sacred relic to the emperor. It was at that very Council meeting that his predecessor, Theobald, had finally exacted a public profession of obedience from Sylvester, abbot of St Augustine's – the very step which the pope, at the urging of the king, had just denied him.

Henry II's mind, however, probably focussed on a more directly pertinent precedent, probably standing before him in the choir. One of the nondescript monks at Reading was Henry of Essex, banished to the monastery only a year before. Henry of Essex had been one of the king's closest associates. He served as a constable, as a sheriff, as an itinerant justice and, indeed, had served as joint commander with Becket himself of the troops in Toulouse.

In 1157, two years before that campaign, Henry of Essex, the hereditary bearer of the royal standard, had, during the king's invasion of northern Wales, prematurely panicked and fled the battlefield. Despite this he had retained a relationship with the king for six years. Then, for reasons which are not apparent, the king turned on him, accused him of cowardice and treason in the Welsh campaign. The issue was settled in Becket's presence at Oxford on 6 April 1163, by the Norman method of proof, trial by battle. Essex lost. He promptly forfeited all of his estates to the king and - probably as a gesture of mercy – was tonsured a clerk at nearby Reading Abbey. He remained there as a monk.

This was the kind of future that Henry now had in mind for Becket.

The next instrument chosen by Henry for his campaign of harassment against the archbishop was John Fitzgilbert, a loyal soldier who had served Henry I and had lost an eye in the service of Henry's mother. Known as John the Marshall, after the office he occupied in the Exchequer, in which office he had succeeded his father by 1130. His own son, William, would become the earl of Pembroke. John, who had been present at Clarendon as a member of the royal household, now made a claim for the occupation of some land within the archbishop's manor of Pagham in Sussex. The land was one of those which had been forcibly reoccupied by Becket who, like any other magnate, had many men at arms in his service. John's claim to possession had been overruled in the archbishop's court.

John appealed to the king by means of one of the king's writs. The returnable royal writ was one of the great inheritances that the Norman kings had acquired from the Anglo Saxon monarchy. Flexible in its application and issued in various peremptory forms - forbidding, commanding or informing and, increasingly, requiring attendance before an impartial tribunal to answer a complaint - the procedure was being used more and more frequently. Certain standardised forms had begun to emerge. They were to be gradually transformed from executive commands into judicial processes. This would prove to be the foundation of the common law.

The origins of the returnable writ lay in the fiction that access to the royal courts was exceptional, indeed that it was a privilege. The invention in the king's chancery of new kinds of writs and their progressive standardisation by royal justices, concealed in the forms of a judicial process what was, in essence, legislation.

The writ in the case of John the Marshall, ad hoc though it probably was, is referred to by historians as the earliest example of what would become standardised as the writ of *novel disseisin*. This proved to be one of the most significant developments in English legal history. Pursuant to this procedure the king's courts offered a new form of remedy for any landholder who claimed to have been unjustly dispossessed by a more powerful baron. This became one of the most important areas of jurisdiction exercised by the king's courts. It maintained the peace by restraining self help in claims for restoration of land. After the anarchy of Stephen's reign, there were many claims of dispossession to be resolved. The concept of seisin helped keep the peace. The more difficult issues involved in establishing ownership, took too long.

It was a necessary pre-condition for the invocation of the superior jurisdiction of the king in this, as in other respects, that the person seeking the writ solemnly swear that justice had been refused in the lower court – that he had been disseised "unjustly and without judgment", as the ultimate form of the writ required. False oaths were not unknown. John the Marshall had sworn his oath on a service book called a troper, rather than on the gospels or on a sacred relic. The suggestion was that this would enable him to avoid a charge of perjury.

By the writ, Becket was summoned to appear before the king on 14 September. Ignoring the precise terms of the king's order – which required his personal attendance – Becket sent representatives with letters from himself and from the king's own officer, the sheriff of Kent, which outlined the weaknesses

of John's claim, his failure of proof and, most significantly, John's failure to properly invoke the king's appellate jurisdiction by making a proper oath.

This may have appeared to be a provocative act – not that Henry required any provocation. It suggested that, notwithstanding his defeat at Clarendon, Becket would not be cowered. If so, this was a re-emergence of the personal posturing that had already created friction. Becket's pride – both personal and institutional – would still not allow him to display the formal servility which Henry demanded, indeed which he appeared to crave with a pathological intensity.

The king ranted at the messengers, as was his usual way, whenever his will was questioned. Eventually, he accepted the formal security each gave and which they would forfeit if the archbishop did not appear personally on the next occasion. He issued summonses to his tenants-in-chief – the barons, bishops and senior abbots – to attend a Council at Northampton on 6 October. All of the summonses were issued in the customary form, except that directed to Becket. Refusing to address him personally – in part perhaps to avoid the formal salutation of greetings and well-wishes – Henry ordered the sheriff of Kent to summon the primate. This was not a meeting of the Council to which Becket was invited as a royal councillor. This was to be a trial.

The issue before the court was not to be the formal appeal by John the Marshall. Indeed, Henry's barons may not have entirely approved of the king's court dealing with a dispute that would traditionally be dealt with in a baron's court – in this case, that of the archbishop. They would have been sensitive to the principle that a lord should not lose his court, unless he failed to do justice in that court. On the other hand many would have acquired land which once belonged to the church. The suggestion that Becket's claim against John was based on the canon law principle of the inalienability of church property, would have been a threat to many. The balance of interests may well have been in favour of accepting the protection of the royal courts against the broad claim of the canon law.

Choosing his ground carefully, Henry accused Becket of contempt of court. No matter how good his defence to John's claim was, he should have appeared on 14 September to deliver it in person.

The Council summoned at Northampton for 6 October commenced with a series of petty but calculated insults. The king arrived a day late – he was hawking. Becket found that one of the king's knights had taken up part of his lodging and he had to ask the king to remove him. John the Marshall was still in London on Exchequer business and the matter was deferred until the next day, Thursday 8 October.

William Fitzstephens who was one of Becket's large entourage at Northampton, reported that day's events:

“When the bishops, earls and all the barons of England as well as many from Normandy, had taken their seats ... the archbishop was accused of contempt of the Crown because, although summoned by the King at the suit of John he had neither come nor given a valid excuse. The archbishop's defence was not accepted when he declared the wrongs committed by John and maintained the validity and integrity of the jurisdiction of his own court in this matter. The king demanded judgment and the archbishop's defence was wholly rejected.”

The judgment was that of the king in council, with the involvement of all the bishops. The usual punishment was imposed: the archbishop was condemned to forfeit all his goods and moveables to the King's mercy. It was customary that such a penalty – traditional in form – would be commuted into a reasonable fine commensurate with the particular offence. However this was not a usual trial. The fine was set at the amount of five hundred pounds. The bishops agreed to stand surety. What followed was as grotesque an abuse of power that the long history of royal pique has recorded.

Without notice, Henry demanded that Becket account, on the spot, for the sum of three hundred pounds which had gone through his hands as custodian of the two royal castles of Eye and Berkhamsted. Becket, rejecting the preposterous demand that he could answer such a charge immediately, asserted that the whole of the amount had been spent on improvements at those castles and at the Tower of London. Nevertheless, expressing a reluctance that a question of mere money should be the source of a quarrel, Becket agreed to pay the sum.

The next day Henry made fresh demands – the overnight delay suggesting that not even he had come fully prepared to proceed in this way, but that this was an unpremeditated rolling royal fury.

First, he demanded repayment of a loan of five hundred pounds which he had made to his former

chancellor for the military campaign in Toulouse, five years before. Becket again pointed out that he had no notice that such a claim would be made and asserted that the amount was a grant and not a loan. Becket was required to find sureties for the amount. His indignant assertion that his property was obviously greater than this sum could only have aggravated the king's mood. Henry probably regarded the statement as defiance, rather than the meek submission before the entire English political elite, which he was seeking.

Henry also demanded a formal account of all the vacant bishoprics and abbeys which Becket had administered in the king's name during his chancellorship, said to be in the order of twenty thousand pounds. This had become a vendetta. It had become clear that the king wanted Becket removed from office.

As Henry ordered the gates of the castle closed – forbidding anyone to leave without his consent – Becket consulted his bishops about the claim for a formal account of Becket's superintendence of finances whilst Chancellor.

Hilary of Chichester made the king's wishes plain:

“The king is reported to have said, that either he or you must resign ... It is better, therefore, to throw yourself entirely on his mercy.”

Gilbert Foliot knew better than anyone that the church's spiritual authority could not tolerate a king being able to, in effect, dismiss a bishop, let alone the archbishop of Canterbury. This principle, however, did not necessarily apply to a person who should never have been made an archbishop, his frequently proclaimed opinion of Becket. Foliot revealed a keen appreciation of the king's near pathological need to appear to be dominant in all matters at all times:

“If you could only remember, my father, the condition from which his majesty raised you and what benefits he has conferred on you, also the ruin which hangs over the church and all of us if you persist in your opposition to the king, you would not only give up your see, but ten times as much if it were in your power; and perhaps the king would recompense your humility by giving it back again.”

Becket bitterly dismissed this advice with – according to one of his biographers – a curt reference to Foliot's thwarted ambition to succeed Theobald and, perhaps even now, Becket himself:

“It is enough. Your opinion is evident; so are your motives.”

It was left to the elder statesman of the church, Henry of Winchester, to remind the assembled bishops that when he performed the consecration ceremony of Becket, he had extracted a release from all royal claims. This had been given in the king's name by his son. The debts were remitted on the promotion - “like sins in baptism”, Foliot would later scoff.

Henry of Winchester made a more telling point:

“This discussion is most pernicious to the Church of Canterbury and ought to make us blush for shame. If our archbishop, the primate of all England, shall set us the example of resigning the cure of souls committed to his charge at the beck and nod of a temporal sovereign what will become of the whole Church: there will be no more regard paid to rights and privileges, but anarchy will ensue and the priest will be no better than the people.”

The Council was not scheduled to sit the next day, a Sunday. Frantic consultations, and no doubt preparations for the final act, proceeded apace. On Monday – to Henry's openly expressed scepticism and indignation – Becket was ill with, what the symptoms suggest, was a renal colic, to which he was prone and which could well have been brought on by the most acute stress to which he had ever been subject. For Becket had resolved that the abject surrender which Henry craved, was impossible.

Putting aside questions of personal pride – which could not have been absent – Becket's most abiding characteristic was his sense of honour. That was expressed, in accordance with the mores of the time, in the form of complete loyalty to the institution he served. Compromise was possible, within limits.

Dissembling was sometimes advisable, within limits. What Henry now demanded was beyond all limits.

To resign at the king's behest would be to acknowledge the Church's subjection to secular power. Perversely, by his resignation – rather than as originally feared, by his appointment – Becket would be remembered as the instrument of such subjection.

Early the next morning, Tuesday 13 October 1164, Becket rode past the hushed crowds that had gathered in the streets of Northampton. His expression was one of stern resolution – “the face of a man and at once the face of a lion”, Herbert of Bosham would later recall. Becket dismounted in the castle courtyard and, as the gates clanged shut behind him, he took the primatial cross from his cross bearer and proceeded across the yard, brandishing it before him defiantly.

One of the bishops stepped forward and said: “Suffer me my Lord to carry the cross, which is much better than that you should carry it yourself.”

“No my son”, he replied “suffer me to retain it as the banner under which I fight.”

Foliot tried to wrest the provocative symbol from his hands: “Look now, my lord archbishop, such conduct as this tends only to disturb the peace, for the king will arm himself with his sword and then we will have a king and an archbishop well matched against each other.”

“Be it so”, Becket replied. “My cross is the sign of peace and I will not let it go. The king's sword is an instrument of war”.

Foliot reacted with exasperation: “He was always a fool and he will always be one”.

This very primatial cross – a wooden staff surmounted by a bronze cross, most likely gilded, with a figure of the Saviour superimposed – would feature once again during the martyrdom.

Addressing the assembled bishops, Becket gave them an order which manifested his open defiance:

“I now enjoin you all, in virtue of your obedience and in peril of your orders, not to be present in any cause which may be moved against my person: and to prevent you from doing so I appeal to that refuge of the distressed, the Holy Roman See.”

As Becket retired to a small antechamber off the main hall on the ground floor, the bishops were summoned to the full Council meeting on the floor above. Just then Roger, Archbishop of York, plainly advised of the imminent climax, swept past, preceded by his own cross bearer, in open defiance of tradition that proscribed this assertion of symbolic equality when the archbishop of York was in the province of the archbishop of Canterbury. Roger had carefully absented himself from all of the deliberations of the bishops, although obviously close at hand, according to William Fitzstephen “in order to avoid the appearance of being of the king's party”. Roger had come in for the kill.

In the Council meeting upstairs the bishops reported Becket's defiance. He had breached two clauses of the Constitutions of Clarendon. He had purported to prohibit the bishops from participating as councillors of the King and he had defied the proscription on appeals to Rome without the king's consent.

The king – who it is by now unnecessary to state did not react with equanimity – dispatched a number of barons to ask the archbishop whether he intended to honour his promise to uphold the Constitutions and also to submit to the court in the matter of the account of his financial administration as chancellor. However, the breach was now complete. Becket said:

“My lords, I acknowledge myself bound by oath and fealty to his Majesty as his liege man, and it is my duty to show him all earthly honour and fidelity saving my obedience to God, the dignity of the church and my own episcopal character.”

The reference to “saving my order” had become a more elaborate list of exemptions. Becket continued:

“I am summoned here to answer in the matter of John Marshall, but am bound to nothing

else whatever, neither to answer to any other charge, nor to render any pecuniary accounts ... When I was archbishop elect, before my consecration, the king gave me indemnity for all previous transactions. Most of you are aware of the fact and all the ecclesiastics of the kingdom know it well. I pray you to make this evident to the king, for it would be unsafe to produce witnesses of the fact, nor am I willing to do so, for I will not litigate this matter ... As regards the bishops, I blamed them for passing so severe a sentence on a single instance of neglect of court, which did not amount to contumacy. I also appeal from their judgment; I forbid their proceeding any further to judge me; I appeal from the sentence and place myself and my church, under the protection of God and the sovereign Pontiff."

This was a declaration of war or, rather, a resumption of hostilities.

The bishops were left in a dilemma. They were obliged to sit in the king's court and give him their advice. However, they were also obliged to obey their ecclesiastical superior. It was probably Gilbert Foliot who proposed the ingenious compromise. The bishops were excused from sitting in judgment, on the condition that they should unanimously appeal to the pope on the grounds of Becket's breach of his own oath to uphold the Constitutions and his order to the bishops to take the same oath, which he now required them to break.

As Becket stepped through the chamber – again raising his own cross like a battle standard – to howls of abuse like "traitor" and "perjurer" from the sycophantic barons, he traded insults like the Norman he was. He reminded one baron of his relative who was hung as a criminal and a second of his parents' failure to marry. "Were I a knight", he told another, "my sword should answer that foul speech". This was not the exit of a man preoccupied with matters spiritual.

Henry – mastering his temper – immediately understood the dangers inherent in this new situation. He dispatched a herald to proclaim safe conduct for the archbishop. At midnight, the suspicious archbishop escaped by the unguarded north gate of the city, through the torrential rain of an autumn gale. First he travelled north, deceptively away from the Channel ports. Disguised as a Gilbertine lay brother, he slowly made his way back down the coast and, three weeks after his escape from Northampton, crossed the Channel in a small boat – first to Flanders and then France. The battleground shifted to the papal curia, also in exile at Sens.

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## The Poet's Rich Resource: Issues in Statutory Interpretation

ADDRESS BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

TO THE GOVERNMENT LAWYERS' CONVENTION

PARLIAMENT HOUSE, SYDNEY

TUESDAY 7 AUGUST 2001

### THE POET'S RICH RESOURCE: ISSUES IN STATUTORY INTERPRETATION

The law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of the law are determined entirely by statute. No area of the law has escaped statutory modification. Statutory interpretation is not merely a collection of maxims. It is a distinct body of law. No group of lawyers are more concerned with questions of statutory interpretation than government lawyers.

I have taken my title for this address - "The Poet's Rich Resource" - from Lord Simon of Glaisdale who once said:

"Words and phrases of the English language have an extraordinary range of meanings. This has been a rich resource in English poetry (which makes fruitful use of the resonances, overtones and ambiguities), but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know, as exactly as possible, where he stands under the law)."[1]

The origin of most problems of statutory interpretation is in the wonderful flexibility of our language. As the late poet laureate, Ted Hughes, once observed:

"A word is its own little solar system of meaning."

Lord Simon of Glaisdale has referred to the need for an interpreter to tune in to the linguistic register of the drafter. His Lordship said:

"Statutory language like all language is capable of an almost infinite gradation of 'register' - i.e. will be used at the semantic level appropriate to the subject matter and to the audience addressed (the man in the street, lawyers, merchants, etc). It is the duty of a court of construction to tune in to such register and so to interpret the statutory language as to give to it the primary meaning which is appropriate in that register (unless it is clear that some other meaning must be given in order to carry out the statutory purpose or to avoid injustice, anomaly, absurdity or contradiction). In other words, statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances."[2]

#### Intention

The task of the courts is to interpret the words used by the parliament. It is not to divine the intent of the parliament[3]. In an era where a purposive approach to interpretation is emphasised, and indeed required by statute[4], the distinction between interpretation and divination is not always observed. The courts must determine what parliament meant by the words it used. The courts do not determine what parliament intended to say[5].

The statutory enactment of the "purposive" approach, directs a court to prefer a construction that promotes the purpose or object of an Act, over a construction that does not promote that purpose or object. The choice is rarely of that kind. Usually the issue is whether to adopt a construction that more completely or to a greater degree "promotes" the "purpose or object". That choice calls for a finer

judgment than the "purposive" approach required by statute.

In reasoning adopted in a number of Australian decisions[6] the Supreme Court of the United States said:

"... no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice - and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law"[7].

The protection which the common law affords to the preservation of fundamental rights and liberties is secreted within the law of statutory interpretation. Parliament is presumed not to intend to infringe such rights and liberties and general words are often read down to achieve that presumed intention[8].

The concept of attributing an intention to a legislature poses a number of problems[9]. Indeed, there may not have been any actual intention at all. The words of a statute may represent a compromise between contending positions, where the actual working out of the application of the statute is, in practice, left to courts precisely because those responsible for the legislation are not able to agree on what the position should be. In a sense, each group is prepared to take its chances in court[10].

Even an explicit statement of intention by a Minister cannot prevail over the words actually used in the statutory text. The clearest example of this is the High Court decision in *Re Bolton; Ex parte Beane*. The issue in that case was whether a statutory provision concerned with "visiting forces" applied to deserters from the Armed Forces of the United States. The majority judgment said[11]:

"[The Second Reading Speech by the Minister] quite unambiguously asserts that Part III relates to deserters and absentees whether or not they are from a visiting force. But this of itself, while deserving serious consideration, cannot be determinative; it is available as an aid to interpretation. The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law."

The same result has been reached in other cases of apparent mistakes on the part of a drafter in failing to state the obvious purpose of the law, with the result that the object of the law was subverted in some indirect manner[12]. It is not the task of the courts to supply an omission by the drafter, when the intended result cannot be deduced from the words actually used by any recognised technique of interpretation.

#### Extrinsic Materials

The use of extrinsic materials raises a number of issues. Many of you will have occasion, in the various departments in which you work, to draft such materials, particularly in the form of explanatory memoranda and, no doubt, parts of second reading speeches. I do not propose to canvas the wide range of issues that may arise. One central proposition must always be borne in mind. The content of such documents cannot be used to rewrite the enacted language. Any intended application must be reasonably open from the language actually used.

As a four judge joint judgment of the High Court said:

"... inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which ... is reasonably open and more closely conforms to the legislative intent."[13]

McHugh J has referred to this authority in the context of saying:

"Extrinsic material cannot be used to construe a legislative provision unless the construction of the provision suggested by that material is one that is 'reasonably open'. Even if extrinsic material convincingly indicates the evil at which a section was aimed, it does not follow that the language of the section will always permit a construction that will remedy that evil. If the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in

a tortured and unrealistic manner to cover another set of circumstances." [14]

#### The Kisch Case

A great cause case of the mid 1930s was the attempt by the Commonwealth Government to prevent Egon Kisch, a Czech journalist, from attending a Communist front peace congress. Kisch's celebrity has received a recent, moderate revival at the hands of Justice Hasluck of the Supreme Court of Western Australia [15]. The case affords good illustration of some issues of statutory interpretation

Kisch had acquired a degree of intellectual notoriety for his prolific, investigative, declamatory journalism. The attempt to prevent the Australian public hearing his subversive opinions caused outrage, particularly on the left. A theme of broader appeal was the prospect that such conduct could cause right thinking people overseas to think less of Australian intellectual life. Australians never seem so parochial as when we act in fear of being regarded as parochial. Perhaps it was inevitable that Australia's patron saint of the second rate, Norman Lindsay, proclaimed that he and Kisch were both victims of Australian "suburban complacency" [16].

Kisch, famously, in an obviously futile attempt to evade those who sought to ban his arrival, first landed in Australia by jumping from his ship in Melbourne - he entitled his subsequent memoir "Australian Landfall". The leap broke his leg. This, of course, gave him immediate celebrity status. It also enabled him to energise his audiences, as he pursued the Soviet policy of "peace" in the years immediately preceding the Hitler-Stalin pact, with the rallying cry:

"My leg is broken. My English is broken. But my heart is not broken." [17]

The Immigration Restriction Act 1901 made provision for a dictation test in a European language of the examiner's choice. The phrase was "a European language". Another delegate who sought to address the peace congress came from New Zealand. He was given a dictation test in Dutch, failed it and was excluded [18]. Kisch had a reputation as a linguist. Dutch would not do for him. He was given the test in Scottish Gaelic. The issue for determination in the High Court was whether or not Scottish Gaelic was a "European language". By majority the High Court held that it was not and, accordingly, the dictation test administered to Kisch was invalid.

Starke J had no doubt about the position. He applied the "golden rule": give words their grammatical and ordinary meaning, unless the context indicates otherwise. He found no reason to read the words down. Scottish Gaelic was a language used by a large number of people in Scotland. It was a "European" language. All other members of the Court concluded otherwise.

Rich J noted:

"... the provision ... is dealing with the practical subject of immigration from abroad, particularly from other nations. It ostensibly provides a test against illiteracy and against ignorance of European speech. I think it would be unreasonable to hold that every distinguishable form of speech which has a home in Europe can be resorted to for the purpose of asking the immigrant to write at dictation a passage of fifty words in length in a European language. The expression 'an European language' means a standard form of speech recognized as the received and ordinary means of communication among the inhabitants in an European community for all the purposes of the social body. Scottish Gaelic is not such a language. Census figures show that it is the speech of a rapidly diminishing number of people dwelling in the remote highlands of Scotland, and the western islands. It is not the recognised speech of a community organized politically, socially or on any other basis." [19]

Dixon J said:

"... the substance of the enactment and its subject matter ... show that the language resorted to is to be taken, ostensibly at least, as a test of fitness of the person to whom the dictation test is administered to take his place in an organized British community." [20]

Dixon J concluded:

"I am very much alive to the difficulty of attaching a definite meaning to these words which will be satisfactory and which will accord with the probable intention of the Legislature. No doubt the Legislature did not itself sufficiently advert to the many uncertainties involved in the expression it used.

...

The rules of interpretation require us to take expressions in their context, and to construe them with



proper regard to the subject matter with which the instrument deals and the objects it seeks to achieve, so as to arrive at the meaning attached to them by those who use them. To ascertain this meaning the compound expression must be taken and not its disintegrated parts. I am disposed to think that it means here to convey that a test is provided for immigrants depending upon a proper familiarity with some form of speech which in some politically organized European community is regarded as the common means of communication for all purposes ... "[21]

Evatt J adopted a more international perspective when he concluded:

"It cannot be denied that, in the Immigration Act dictation test, the Australian Parliament represented to the Governments and nationals of all other countries that exclusion from Australia would be the result of an elementary dictation test limited to those languages which the Governments of the world would immediately recognize as an accepted or standard language of modern Europe. Scottish Gaelic is not such a language." [22]

The case of Kisch occurred before the courts decided to have recourse to a wide range of extrinsic materials, including parliamentary debates. Nevertheless it is difficult to believe that the High Court was unaware of the true origins of the dictation tests. The intention of parliament when enacting the original Immigration Restriction Act 1901 was that the dictation test should be applied for the purpose of excluding coloured migrants. It was the core provision of what became known as The White Australia Policy.

The use of a dictation test as a camouflage for a policy of racial exclusion was first introduced in Natal and, at the express suggestion of the British Colonial Secretary, Joseph Chamberlain, was adopted by a number of the Australian colonies [23]. The purpose of this camouflage was to preserve the illusion of an absence of racial discrimination within the British Empire. The sensitivity of the imperial centre to any of the white colonies behaving in this manner, was exacerbated by the fact that Great Britain was at that time cultivating the newly emerging power in the Far East, Japan, which had shown itself to be particularly sensitive to expressions of racial discrimination, including by the Australian colonies.

When Edmund Barton introduced the Immigration Restriction Bill into the first Commonwealth Parliament he implemented this imperial policy [24]. Amendments were unsuccessfully moved by the Labour Party to expressly exclude non-European migrants. The Parliament did not intend to exclude all coloured immigrants. Indeed a handful of non-European applicants were allowed into Australia by means of the selection of a language under the dictation test in which they proved proficient. The degree of administrative discretion conferred by permitting the examiner to select the language invited abuse, which no doubt occurred.

A B Piddington KC, who appeared for Kisch in the High Court, handed up in Court the Australian Encyclopedia (1926) Vol 1, drawing their Honours' attention to pp653 et seq [25]. That text made the racist origins of the Act quite clear. It said:

"The first federal parliament ... set itself to give effect to the popular demand for the exclusion of Asiatics, and after much controversy the language test was agreed upon ... It was understood from the first that European immigrants would not be required to pass the test." [26] (Emphasis added)

This little bit of extrinsic material was handed up, without comment, it appears, from either the bar or the bench. Nonetheless, it was powerful as a guide to the eventual result in Kisch. It is a technique of advocacy that the late Sir Maurice Byers QC, a barristers' barrister, used to describe as: "Putting the ball in the scrum".

Piddington made no submission to the High Court that the Parliament intended the dictation test to be administered only to coloured applicants: He made no submission that the Act was never intended to apply to a white Czech, even if he was a Bolshevik. Piddington, did not submit that, rather than reading down the words "European language", it would better accord with the parliamentary intention to read down the word "person", in the relevant section, to mean "non-white" person. Perhaps, particularly with an aggressive Japan, it was still too hard to be frank.

The first use of the dictation test for a white person, of which I am aware, was in 1914. Miss Ellen Fitzgibbon, a young Irish girl, described as "of rather attractive appearance" was deported after failing a test in Swedish. The only clue we have is that on her voyage the captain of the ship had occasion to have Miss Fitzgibbon examined by a medical officer [27]. Preserving the public morals was still a factor in the mid 30s. A year after the Kisch affair, in 1936, the dictation test was used to exclude an English

woman, Mrs M Freer, on the ground that her entry might lead to the dissolution of a "perfectly good Australian marriage"[28]. The power was also frequently used for political purposes.

The history of the abuse of this unreviewable discretion, well beyond its original purpose, is a warning to drafters. It also lends support to the contemporary approach to statutory construction which emphasises purpose.

#### Context

In the Kisch case reference was made to the importance of context. It was context that proved determinative. The context on which reliance was placed extended beyond the Act itself to encompass the scope and purpose of the legislation. Emphasis was placed on the significance of language, in contrast to dialects, in a world-wide system of polities and societies. This was the context adopted by the Court as pertinent to the interpretation of legislation regulating the migration of persons from one polity/society to another polity/society. That is why the word "language" was identified as having been used with reference to a broader grouping than a distinct minority language or a dialect.

This reflects the contemporary approach to construction, which is well described as "literal in total context"[29].

As Sir Anthony Mason once put it:

"Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."[30]

This approach was confirmed in a four judge joint judgment of the High Court:

"... the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means ... one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous."[31]

Context is always important. Let me give you one example of the flexibility of our language. How should one construe the sentence "The chicken is ready to eat?". This can refer either to a cooked chicken, or to a hungry chicken. Only the context will identify the meaning. I accept that when Lord Simon of Glaisdale spoke of the richness of the English language as a resource for poets, he may not have had this example in mind.

I give another example of the significance of context. Parents leave their children in the care of a childminder. They suggest that to keep the children amused the childminder should teach them a game of cards. After the parents leave, the childminder teaches the children to play strip poker. The natural and ordinary meaning of the words "game of cards" encompasses strip poker. It is the context which requires those words to be read down[32].

Sometimes identifying the level of generality at which a drafter has used words is described as resolving an "ambiguity". The irony with the word "ambiguity" is that it itself may be used in different senses. The word "ambiguity" is not restricted to lexical or verbal ambiguity and syntactic or grammatical ambiguity. It extends to circumstances in which the intention of the legislature is for whatever reason doubtful[33].

The issue for an interpreter, faced with broad and general words, of determining at what level of generality the drafter employed those words is an issue which I prefer to describe as one of "inexplicitness", rather than of "ambiguity"[34].

I prefer this distinction to another, once proposed but happily not taken up, between "ambiguity" and "obscurity". In *Ellerman Lines Ltd v Murray*[35] the House of Lords was unanimous that s1 of the Merchant Shipping (International Labour Conventions) Act 1925 was completely unambiguous. It was just that three Lords said the meaning was X and two said the meaning was Y.[36] One of their Lordships put it this way:

"... I do not suggest this Act of 1925 is clear. I do not suggest that s1 bears its meaning, as I have interpreted it, upon its sleeve. It yields up its secret only to the patient inquirer; its truth lies at the bottom of the well. It is obscure, it remains oblique, but it is not in the result ambiguous. The truth from the well is found, at the end of the search for it, to have been leaking from the section itself all the time just as the truth, in the words of a learned judge we all have in remembrance, may leak out sometimes even from an affidavit."[37]

#### Reading Down General Words

The Kisch case turned on the reading down of the words "European language". This process of reading down general words is one of the most frequently recurring tasks in statutory interpretation. This has always been so. As long ago as 1560, the Barons of the Court of the Exchequer said:

"And the Judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular where the intent was particular."[38]

A fuller quotation from this judgment of 1560 has a decidedly contemporary ring:

"... the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."[39]

This is a well recognised technique of construction. General words are frequently read down. However, I know of no example in which a court has done the opposite, i.e. "read up" words. That is to say it is possible by a recognised technique of construction to reduce the scope and ambit of a statutory provision. I do not believe it is possible by any recognised technique of statutory construction to expand the sphere of operation of a statutory provision to circumstances not reasonably covered by the words actually used by the parliament[40].

#### Reading Words into an Act

Some authorities and texts refer to a process of "reading words into an Act of Parliament". This terminology appears to me to offend a fundamental principle of our constitutional law. It is not the function of the judiciary to do anything like this[41].

The most frequently cited passage of this kind is from Lord Diplock, who sets out a number of restrictive conditions before anything of this character can occur. His Lordship said:

"My lords, I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it."[42]

It is important to reconcile the two, apparently contradictory, elements in this passage. How is it possible to "read words into" an Act, whilst engaging in a task of "construction"? From my reading of the authorities, and I acknowledge this is not the only possible reading of those authorities, the court may not supply words omitted by the legislature, per se. Rather, what a court may do, is to construe the words actually used by the legislature as if certain words appeared in the statute. The words are "included" to reflect in express, and therefore more readily observable form, the true construction of the words actually used.

Putting aside the question of typographical errors, the task as I have said is to interpret the words of the legislature, not to divine the intent of the legislature.

I re-emphasise the words from Lord Diplock that I have quoted: the task of the Court "remains one of construction". In order to be able to characterise the process as one of construction, which remains a constitutional restriction on the role of the judiciary, it is best to avoid describing the process as one of

"introducing words into the Act". It remains a process of construction if what the Court is doing is to interpret the words actually used by the Parliament, by giving them an effect as if they contained additional words or as if some words were deleted for a specific application. That is not however to introduce words into the Act. It involves the interpretation of the words actually used.

Interpretation must always be text based. The issue of "text" versus "purpose" has been traced back to Aristotle.<sup>43</sup> The reformulation of a statutory provision with additional or fewer words should be understood as a means of expressing the Court's conclusion with clarity, rather than as a description of the actual reasoning process which the Court has conducted.

In Australia, the basic authority on legislative inadvertence is *Cooper Brookes v Commissioner of Taxation*<sup>44</sup>. This case has been described by the text writers as, in effect, reading words into the statute<sup>45</sup>. As I have indicated, I would not so describe it. What the Court concluded was that in a particular paragraph, the word "company" should not be given the extended meaning, which one sub-section said that all such references should be given. In the full context of all of the relevant provisions, and of the legislative history, the sub-section which made provision for the extended meaning was read down so as not to apply to the specific reference in one paragraph<sup>[46]</sup>.

To similar effect is a recent judgment of the House of Lords which, notwithstanding references to reading words into the Act, took words of general application, namely "any decision of the court under that Part" and concluded that that particular composite phrase had to be read down, so that the phrase "under that Part" applied only to some sections in that Part of the Act.<sup>[47]</sup>

There are a number of permissible techniques of construction which can sometimes be exemplified by reformulating the actual statutory words, with the addition or deletion of words. The reading down of general words is a frequently occurring example. Similarly, the process of giving a word an ambulatory construction may often be more clearly stated in this manner. However, it is of great significance to emphasise the central proposition that what is involved is interpretation, and abjure the phrase that is sometimes used: "reading words into the Act".

#### Conclusion

You will permit a touch of nostalgia in conclusion. In the 1930's when the *Kisch* case was decided, respect for the courts was unalloyed. No Commonwealth Minister denounced the High Court for letting this rabble rouser pollute the minds of Australian youth or lead Australian women from the path of virtue. There was no electronic lynch mob on talk-back radio.

The Attorney General, Robert Menzies, of Scottish heritage himself and no doubt sensitive to the status of Scottish Gaelic, quietly paid *Kisch's* costs and let him go home. When the *Sydney Morning Herald* published articles and letters denouncing the judgment for its failure to recognise Scottish Gaelic as the glorious language it was, the newspaper was prosecuted for contempt.

Perhaps Egon *Kisch* left Australia ruminating about the application to his recent experience of the insights into bureaucratic conduct recently published by his old classmate at the *Altstadter Gymnasium* in Prague - Franz *Kafka*. We will never know.

1 *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 236.

2 *Maunsell v Olins* [1975] AC 373 at 391. See also *Farrell v Alexander* [1977] AC 59 at 84; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 645; *Spigelman "Statutory Interpretation: Identifying the Linguistic Register"* (1999) 4 *The Newcastle Law Review* 1 also accessible at [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc).

3 *State v Zuma* (1995) 4 BCLR 401 at 402; *Matadeen v Pointu* [1999] 1 AC 98 at 108.

4 *Interpretation Act 1987 (NSW) s33; Acts Interpretation Act 1901 (Cth) s15AA.*

5 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459; *Stock v Frank Jones supra* at 236G; *Black-Clawson International supra* at 613G and 645C-D.

6 *Brennan v Comcare* (1994) 50 FCR 555 at 574; *Byrne v Australian Airlines supra* at 459; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 248; *Morrison v Peacock* (2000) 50 NSWLR 178 at [33].

7 Rodriguez v United States 480 US 522 (1987) at 525-526 original emphasis.

8 See Bropho v Western Australia (1991) 171 CLR 1 at 17-18; Spigelman "Statutory Interpretation: Identifying the Linguistic Register" supra at 11-17.

9 See for example Bennion Statutory Interpretation (3rd ed) London, 1997 at Ch VIII.

10 See e.g. Brennan v Comcare supra at 573 per Gummow J.

11 Re Bolton; Ex parte Beane supra at 518.

12 See e.g. R v Young (1999) 46 NSWLR 681 esp at [33]-[37].

13 CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 at 408.

14 Newcastle City Council v GIO General Ltd (1997) 191 CLR 85 at 113.

15 See Nicholas Hasluck Our Man K Penguin, Melbourne, 1999; Hasluck "Waiting for Ulrich; The Kisch and Clinton Cases" 33 Quadrant (April 1999) 28; Hasluck "Reinventing the Kisch Case" (2000) 2 UNDALR 67.

16 C M H Clarke "A History of Australian VI: The Old Dead Tree and the Young Tree Green (1916-1935)" Melbourne, 1987 at 474.

17 Id at 471.

18 Id at 463.

19 R v Wilson; Ex parte Kisch (1934) 52 CLR 234 at 241.

20 Id at 243.

21 Id at 244.

22 Id at 247.

23 See Quick and Garran The Annotated Constitution of the Australian Commonwealth 1901 at 626-627.

24 See G Bolton Edmund Barton: The One Man for the Job Sydney, 2000 at 243-245.

25 52 CLR at 237.

26 The Illustrated Australian Encyclopedia Vol 1, Sydney, 1925 at 653-654.

27 See Gavin Souter Lion & Kangaroo Australia: 1901-1919 The Rise of the Nation 1976 at 90.

28 F K Crowley (ed) A New History of Australia Melbourne 1974 at 448.

29 See E Driedger Construction of Statutes (2nd ed) at 2; The author of the 3rd edition Driedger on the Construction of Statutes (3rd ed) 1994 substitutes a more convoluted phrase at 3: "Today in every case, the meaning that emerges from reading the words in their immediate context must be considered in light of a larger context and tested against other sources of legislative meaning".

30 K & S Lakes City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309 at 315. His Honour was in dissent but not with respect to this issue. Indeed his Honour's judgment has frequently been referred to.

31 CIC Insurance Ltd v Bankstown Football Club Ltd supra at 408. See also Project Blue Sky Inc v

Australian Broadcasting Authority (1998) 194 CLR 355 at [69].

32 See Zander *The Lawmaking Process* London, 1980 at 57.

33 See *Bowtell v Goldsbrough Mort & Co Ltd* (1905) 3 CLR 444 at 456-477; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-288; R Cross *Statutory Interpretation* (3rd ed) 1995 at 83-84; Spigelman "Statutory Interpretation: Identifying the Linguistic Register" *supra* at 2-3.

34 *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc* (2000) 48 NSWLR 548 at 116.

35 [1931] AC 126.

36 This is not classified as an "ambiguity" by Megarry. See *A Second Miscellany-at-Law* 1973 at 179-180.

37 [1931] AC at 144 per Lord Blanesburgh.

38 *Stradling v Morgan* (1560) 75 ER 305 at 312.

39 *Ibid* at 315. See also *Bowtell v Goldsbrough Mort supra* at 457-458 *Ex parte Walsh*; *In re Yates* (1925) 37 CLR 36 at 91-93; *Ex parte Kisch supra* at 244; *Commercial Union Insurance Co Limited v Colonial Carrying Co of New Zealand Limited* [1937] NZLR 1041 at 1047-1049; *Church of the Holy Trinity v United States* 143 US 457 (1892) at 459; *Tokyo Mart Pty Limited v Campbell* (1988) 15 NSWLR 275 at 203; *Smith v East Elloe Rural District Council* [1956] AC 736 at 764-765; *Bropho v Western Australia supra* at 17-18.

40 This was the issue in *R v Young supra*. See also *R v PLV* [2001] NSWCCA 282 esp at [88]-[89].

41 See the discussion in *R v Young supra* esp at [5]-[32].

42 *Wentworth Securities v Jones* [1980] AC 74 at 105. This passage has been adopted and applied in a number of authorities, see *Young supra* at [10].

43 Manning "Textualism and the Equity of the Statute" (2001) 101 *Columbia Law Review* 1 at 4.

44 *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297.

45 Pearce and Geddes, *Statutory Interpretation in Australia*, (4th ed) Sydney, 1996 at par 2.16.

46 *R v Young supra* at [17]-[22].

47 See *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 esp at 592 noting the references to how a provision should be "read" in the context of "adding or omitting words" as part of an "interpretative function".

## The 'New Public Management' and the Courts - Address to the Family Courts of Australia 25th Anniversary Conference

ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
TO THE FAMILY COURTS OF AUSTRALIA  
25TH ANNIVERSARY CONFERENCE  
SYDNEY, 27 JULY 2001

### THE 'NEW PUBLIC MANAGEMENT' AND THE COURTS

Over the course of the last two decades the organisation of governmental activity has undergone a radical transformation. In Australia, New Zealand and England and some European countries the change has been called the "new public management". In the United States, the terminology of the previous administration was "reinventing government". The transformation has been proclaimed to be a "global public management revolution" Donald F Kettl *The Global Public Management Revolution: A Report on the Transformation of Governance* Brookings Institution, Washington DC 2000 see esp Ch 2.

The courts are an arm of government. They have not been, and cannot be, insulated from changes in attitude about the proper role of government and the appropriate means to conduct governmental activity. The courts have responded and must continue to do so.

The terminology of "public management" is comparatively new. For over a century the conduct of governmental activities has been generally referred to as "public administration". This was, for example, the title of the primary journals for persons concerned with these issues in each of the United States, the United Kingdom and Australia. Now the word "administration" seems old fashioned and exceedingly passive.

Perhaps the most definitive characteristic of the "new public management" is the greater salience that is given to what has been called the three "e's" - economy, efficiency and effectiveness - in competition with other values of government activity such as accessibility, openness, fairness, impartiality, legitimacy, participation, honesty and rationality. I accept, as I have said, that this change of emphasis in government activity must affect court administration. In this lecture I wish to explore some of the limits which the role of the courts as an independent arm of government impose on the applicability of "the new public management" to the activities of the judiciary I have explored a number of these issues in my address on Judicial Accountability and Performance Indicators at the *1701 Conference: The 300th Anniversary of the Act of Settlement* Vancouver, Canada, 10 May 2001, accessible at [www.lawlink.nsw.gov/sc](http://www.lawlink.nsw.gov/sc). Similar issues have also been considered by the Honourable Justice Douglas Drummond "Towards a More Compliant Judiciary" (2001) 75 ALJ304, 356.

#### Case Management and Caseload Management

The primary judicial response to the change of attitudes to which I have referred has been the acceptance by the judiciary of a greater role in case management. Judges are now concerned to ensure the efficiency and effectiveness of court procedures. They intervene in proceedings to a degree which was unheard of two decades ago. Courts are no longer passive recipients of a caseload over which they exercise no control. All courts now engage in case management and caseload management.

There is no necessary conflict between economy, efficiency and effectiveness and the requirements of justice in the sense of fair outcomes arrived at by fair procedures. Indeed, to a very substantial extent they reinforce each other. The traditional cliché - "justice delayed is justice denied" - was not derived from efficiency considerations. The exercise of legal rights is always devalued if delayed. Sometimes delay makes the exercise of rights impossible. All members of the judiciary will readily accept the importance of expedition from the perspective of justice. For that reason the managerialist objective to

minimise delay will find no resistance from the judiciary. There is no conflict between the two sets of values here.

The same is true with respect to the minimisation of the costs of access to justice. This is related to delay. However, court processes impose costs, both directly and indirectly, on participants in ways not reflected in delay. Such matters have not received the degree of attention that delay reduction has received in the process of case management. It is a comparatively unexplored area which deserves greater attention. Once again the proponents of new public management will find little resistance from the judiciary in the pursuit of measures designed to minimise the costs to litigants.

A third area is the minimisation of the costs to government. In principle the judiciary accepts that taxpayer's money should not be wasted. This is not, however, an objective which judges would regard as a priority of their own. To a substantial degree economy in this respect may be seen to be in conflict with the commitment to justice. The scope for disagreement between judiciary and managers with respect to this matter is, accordingly, greater.

### **Structural Change**

The emphasis now given to the values of economy, efficiency and effectiveness have required the judiciary to accept changes in traditional procedures and institutional structures. I am not sufficiently familiar with the needs of your jurisdiction to comment on the debate that has occurred about the operations of the Family Court, particularly in the context of the report on "*Managing Justice*" of the Australian Law Reform Commission "*Managing Justice: A Review of the Federal Civil Justice System*" Australian Law Reform Commission Report No. 89, 2000.

. I offer some observations that may be pertinent to the issues that have arisen in this regard.

Perhaps the greatest challenge facing the administration of justice and the legal profession is the establishment of a rational relationship between the resources consumed in litigation and the value of what is at stake. I know that this is a matter of great concern to all practitioners and judges involved in family law. It is an issue which affects the whole legal system. The remedy will necessarily be multifaceted.

The task of establishing a rational, let alone reasonable, proportionality between what is at stake in proceedings and the resources of the parties and of the community that it is appropriate to devote to the resolution of a particular dispute, is a difficult one. It is a matter which is complicated by appeals, sometimes multiple appeals, as of right or by leave. The judicial system is organised in layers, like Dante's Hell, and for much the same reasons.

In an English dispute involving distribution of property after divorce where the total value of the property was £127,400, but the legal costs expended in deciding how they should be divided exceeded £128,000, Lord Hoffmann said:

"To allow successive appeals in the hope of producing an answer which accords with perfect justice is to kill the parties with kindness." *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1373.

The highest priority task for the courts, a task which requires the collaboration of the profession, is for the legal system to stop killing parties with "kindness". From the perspective of the profession, this may be more accurately described as a process of "killing the goose".

The management by a court of its caseload has a critical role to play in this endeavour. Such management is not always welcome by the profession. It is not always welcome by judges. Nevertheless the courts must continue down this path in the interests of justice.

There is clearly a trade-off between efficiency and expedition on the one hand, and fair procedures on the other hand. How these conflicting imperatives can be balanced calls for an exercise of judgment. In my address today, I wish to emphasise the overriding imperative of judgment in these matters, being a judgment that cannot, by its nature, be reduced to a measurable form. It is this inability which gives rise to the prospect of conflict between the judiciary and the "new public management".

A distinctive feature of our adversary system of litigation is that, to a substantial degree, the parties have a real sense of active participation in decisions which affect their lives. This is of great



significance to the perception of fairness of the processes and, accordingly, to the degree to which unfavourable outcomes are regarded as acceptable.

It may very well be the case that society is not prepared to meet the considerable expenditure involved in traditional judicial decision making processes in as wide a range of matters as in the past. The diminution in the role of the civil jury and the considerable expansion in criminal summary jurisdiction, is one manifestation of this development. The pressure to accelerate all aspects of the judicial process represents a similar phenomenon. Within bounds, improvements in the efficiency of the judicial process are feasible. However, pressures upon the courts show no signs of respecting those bounds.

The trade-off between efficiency and expedition, on the one hand, and fair procedures, on the other hand, raises issues on which the values of the legal profession, including the judiciary, are likely to differ from proponents of the new public management with whom the judiciary must deal in many different ways. There is room for difference of opinion and also for reasonable accommodation. The requirements of a fair trial are not reflected in a fixed body of rules, nor do they manifest themselves in a set of immutable procedures.

However, there seems to be a determination on the part of some advocates of managerialism to put judges in their place. It is understandable that the significance of judicial independence is not fully accepted by those of whom the judiciary is independent. The comparative freedom of the judiciary from external constraints, and the fact that the judiciary has in large measure escaped the gales of destruction that have swept through the traditional public service is, understandably, reflected in an underlying, albeit unexpressed, sense of resentment.

There is, in my opinion, a very real danger of creeping bureaucratization of judicial processes from these developments. This requires a heightened sense of vigilance on the part of the judiciary.

#### **'One Size Fits All'**

The 'new public management' adopts a 'one size fits all' approach that requires a hierarchy of documentation. At the highest level of generality and abstraction are documents described variously as strategic plans, corporate plans, charters or mission statements. The level below concerns annual implementation, variously called business plans or performance plans and the like. These plans are required to contain goals, objectives, targets or standards at a level of generality that is implementable and, preferably, capable of measurement and stated in quantitative form. Further down the hierarchy is what is frequently called performance indicators which are required to be measurable, concrete, collectable at reasonable cost and comparable, either between institutions or over time for the one institution. Finally, the process must be capable of independent evaluation, both within the unit of public administration and by investigatory and regulatory bodies, such as finance departments, auditors general and parliamentary committees. Although the nomenclature varies from one country to another and from one area of public administration to another, the broad lines of these requirements appear to be similar in many countries and spheres of discourse.

At the level of strategic plans, mission statements, charters and the like, one generally finds the broadest of platitudes unlikely, by their nature, to have any effect on actual behaviour. No doubt there are some areas of public administration in which clarification of objectives at this level of generality performs some useful function. I do not myself believe that the administration of courts is one of those areas. Some courts take a different view. In a media dominated age where the public attention span is not much longer than that of a gnat, strategic plans and the like pander to the dominant imperative of day to day public debate: *To be seen to be doing something.*

At the Commonwealth government level the 'one size fits all' management and budgeting structure is described as the "Outcomes and Outputs Framework". This identifies three levels:

- “(i) What does government want to achieve? (outcomes).
- (ii) How does it achieve this? (outputs and administered items).
- (iii) How does it know if it is succeeding (performance reporting)” See the Department of Finance and Administration “The Outcomes and Outputs Framework” accessible at [www.dofa.gov.../the\\_outcomes\\_\\_outputs\\_frameworko](http://www.dofa.gov.../the_outcomes__outputs_frameworko).

Issues of effectiveness, rather than of economy and efficiency, arise at the level of outcomes. However, in many areas of government, outcomes have to be stated at such a high level of generality that they become of dubious utility for any purpose. This can be illustrated by the compliance with the new Commonwealth regime by the Productivity Commission, the organisation which compiles and publishes league tables which provides information that purports to be comparable, a proposition which I contest, for purposes of benchmarking between different courts.

In the Commonwealth Budget for 2000/2001, the Productivity Commission published "outcomes and outputs" information Accessible at [www.dofa.gov.au/budget/2000%2D2001/pc%2001.ht](http://www.dofa.gov.au/budget/2000%2D2001/pc%2001.ht).

. The "outcome" for the Commission was said to be:

"Well informed policy decision making and public understanding on matters relating to Australia's productivity and living standards, based on independent and transparent analysis from a community wide perspective."

Hardly an objective with which anyone would argue. In order to achieve this objective, the Productivity Commission says that it provides a range of outputs including reports and reviews of various kinds. Each of the reports and research projects in which the Productivity Commission engages can be counted. No doubt the pages can also be counted or the reports weighed. I doubt that the Productivity Commission would regard such measurable indicators as reflecting adequately any aspect of its contribution.

So it proves to be when, in accordance with the 'one size fits all' approach, the Commission states what contribution its "outputs" make to the achievement of the "outcome" I have quoted above. This is what they say:

"The effectiveness with which the Commission's outputs contribute to achievement of the outcome is difficult to assess and is often subjective. The Commission is but one source of policy advice on matters relating to Australia's productivity and living standards and many issues are complex and long term. The Commission aims to demonstrate its effectiveness by reporting annually on the relevance, quality, tardiness and cost effectiveness of its outputs."

Such reporting is necessarily qualitative. For the Productivity Commission, as for many areas of government activity, the effectiveness of what it does can only be judged. It cannot be measured.

### **Measurement**

Perhaps the most distinctive characteristic of the 'new public management' is the centrality of quantitative measurement. The issue comes up in many different fields. Should the Australian Broadcasting Corporation be judged by ratings? Should art galleries be judged by attendances? Should university lecturers be judged by number of publications? It also arises in the administration of justice in many different contexts See for example Nicola Lacey "Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991" (1994) 57 *Mod L Rev* 534; Sally Wheeler "Contracting Out in the UK Insolvency Service: The Tale of Performance Indicators and the "Last Cowboy" (1997) 7 *Australian J. of Corp. Law* 227.

Quantitative measurement sometimes provides an entirely fake sense of precision. Quantitative measurement appears to be objective and value free. Qualitative assessment appears to be subjective and value laden. In fact quantitative measures contain and conceal important value judgments.

Not everything that counts can be counted. Some results or outcomes are incapable of measurement. They can only be judged in a qualitative way. Nevertheless, quantitative measurement, by reason of its concreteness, acquires a disproportionate and inappropriate influence over amorphous and judgmental matters of quality.

It is important to recognise that measurement is not neutral in its effects. Measurement has

consequences. See generally Arie Halachmi and Geert Bouckaert (eds) *Organisational Performance and Measurement in the Public Sector* (Westport, Connecticut 1996)

The 'one size fits all' approach to public management does not acknowledge that different areas of public activity vary in the significance that ought be attributed to the matters that can be measured. Some areas of public activity are such that their most important outcomes are measurable, eg government trading enterprises. Other aspects of public activity have outcomes that are measurable, but they are not of the same central significance. Many important aspects of health can be measured. Some aspects of education, though I suspect fewer than health, can be measured. With respect to the legal system, most of what matters cannot be measured at all. There is no measurable performance indicator for quality of judicial decision making. The fairness of outcomes and the fairness of procedures can be assessed but not measured. The suggestion that is sometimes made that surveys of some identified group may provide a relevant quantified indicator receives no support in the literature I have consulted. To review the inadequacies of such proposals would require another lecture. See Drummond "Towards a More Compliant Judiciary" supra 315-316.

Delays in the courts are capable of measurement See L Glanfield and E Wright "*Model Key Performance Indicators for NSW Courts*" Justice Research Centre, February 2000. . Even with respect to delay, a number of issues arise as to what constitutes a case, what constitutes a commencement and what constitutes a completion I have referred to some of these matters in my address "Judicial Accountability and Performance Indicators" supra. . In the area of court administration the focus of attention with respect to measurement, including with respect to delays, has been on the case i.e. each legal proceeding, as the relevant unit of consideration. The most recent thinking of the 'new public management' would regard this as an entirely inadequate focus.

I have referred above to the distinction between outputs and outcomes. For example, in the case of an occupational health and safety inspectorate an 'output' would be the number of inspections. The 'outcome' however, is the ultimate objective, such as a decline in rates of injury in the workplace.

In the three e's: 'Economy', focuses on minimisation of inputs; 'efficiency', focuses on the ratio between inputs and outputs; 'effectiveness' seeks to identify the match between outcomes and objectives. When one is concerned with effectiveness it is outcomes rather than outputs that matter. There is conflict between the three different considerations. For example one can 'economise' by reducing the resources available to a certain area of activity, but that does not necessarily enhance efficiency and is most likely to decrease effectiveness. The history of the 'new public management' suggests that considerations of efficiency and economy receive priority over effectiveness, simply because they are easier to do.

A feature of all areas of the new public management in practice is a tendency is to rely on outputs, rather than outcomes. There is a simple explanation: the former are readily measurable, the latter generally involve matters of judgment. All too often the persons conducting the measurement exercise are incapable of making the relevant judgments. Accordingly, the overwhelming tendency is to set them aside or to list them in some sort of catalogue of benefits and costs of a qualitative nature and conclude that, in some vague and non-rational way, the two lists balance each other out.

In these matters, one can detect what can only be called a power struggle between different groups. See Stan Brignall and Sven Model "An Institutional Perspective on Performance Measurement and Management in the 'new public sector'" (2000) *Management Accounting Research* 281 esp at 288-295.

Professionals, like teachers, doctors or lawyers involved in public decision making processes, tend to emphasise the significance of qualitative considerations. Proponents of the 'new public management' like treasury officials, departmental finance officers and auditors (to whom it is convenient to refer as "the managers") tend to emphasise measurable indicators. The managers often resent the high degree of autonomy of professionals and categorise their preoccupation with matters of quality as either rent-seeking activity or an invitation to inefficiency. The managers have a self-image of themselves as the true custodians of the objectives of an organisation and, often, as the representatives of the taxpayer in the interests of minimising expenditure and maximising efficiency.

They regard professionals as liable to engage in self serving conduct and of having no capacity to prioritise or to regard their professional standards as anything but absolutes.

One should not underestimate the significance of the power struggle to which I have referred. To the extent to which qualitative considerations are given weight, the professionals will have the greater say. Unless matters can be reduced to measurable standards and indicators, the managers will not be able to exert significant influence. The managers simply do not have the capacity to make qualitative judgments. They have an inbuilt institutional bias - perhaps that of a rival profession with all encompassing ambitions - to downgrade the significance of quality or to assume it away, in such manner that measurable factors actually determine the decision making process. As a regrettably anonymous pundit put it: "Where you stand depends on where you sit".

This conflict between managers and professionals has been reflected in numerous battles over budgets and programmes in virtually every area of public sector activity in every English speaking nation and some European nations over the last two decades. The use of measurement for internal management, benchmarking for best practice and accountability was applied many years ago to areas like health and education, in much the same way as is presently proposed for the courts. It has not, however, stopped there. Measurable performance standards and indicators are now deployed in health and education to determine budgets, set remuneration or decide tenure, often in a rigid and mechanical way. Decisions that plainly call for judgment are now often made on the basis of partial, purportedly 'objective' considerations, with dramatic consequences which no-one would have chosen in a properly based decision making process.

### **Measurement for Courts**

Performance indicators for the courts focus on disposition of *cases*. Cases are a measure of *output*. They are not a measure of *outcome*. The outcome of a judicial decision making process can be variously stated. The administration of justice in accordance with law is one. Another is the attainment of a fair result arrived at by fair procedures. Such 'outcomes' are not measurable. They can only be judged.

The 'newest' theme in the 'new public management' is a recognition that the focus on outputs is inadequate. Too many important matters fall between the cracks of the measured outputs. What is measured is necessarily incomplete. The disposition of cases, even in accordance with time standards, does not measure all that a court does, nor even the most important things that a court does.

In New Zealand, a pioneer in the use of performance indicators in the public sector, senior figures associated with the 'new public management' have come to criticise what they call an "output fixation". Concentration on outputs, which are readily measurable and less costly to monitor, gives an inappropriate significance to considerations of efficiency over those of effectiveness. See Christopher Pollitt & Geert Bouckaert *Public Management Perform: A Comparative Analysis* Oxford University Press 2000 at 167.

The identification of case disposals as outputs rather than outcomes may be of differing significance between courts. Just as the 'one size fits all' approach is inappropriate, so it may be some aspects of output measurement are more significant for some courts than others.

I have on a number of occasions emphasised that the courts are not simply a publicly funded dispute resolution process. I have emphasised that courts do not supply a consumer service to litigants. Litigants are and ought to be treated as citizens with rights, not as consumers with needs. See Spigelman "Seen to be Done: The Principal of Open Justice" 74 *ALJ* 290 378 esp 380-381; also my address "Citizens, Consumers and Courts" to the *International Conference on Regulation Reform Management and Scrutiny of Legislation*, Sydney, Australia, 9 July 2001 accessible at [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc).

In some courts the dispute resolution function per se may be more significant than in other courts. In terms of this balance, the Family Court may be almost unique in Australia in the significance of the dispute resolution function. In this Court the resolution of disputes in and of itself has more of the flavour of an 'outcome' than it does in other courts, where the resolution of the case is more

appropriately seen to be an *'output'*.

There are limits on what any court can properly do to ensure efficient and expeditious disposal of cases. There is, of course, a wide divergence of attitude amongst judges as to the extent to which a court should override the wishes of litigants in the interests of efficiency or expedition. Nevertheless, I think all judicial officers would accept that there are real limits to the extent to which the wishes of the parties may be ignored. There is no process that we would regard as just that permits a court to assume complete control of litigation. Indeed, there are constitutional limitations on such conduct. The system of open justice, like the system of parliamentary democracy, is in certain respects, deliberately inefficient.

The position is different for other spheres of government activity, which deliver a service or benefit to an essentially passive recipient. A court participates in a collaborative process.

Court delays and performance against time standards, are *not* a measure of the performance of judges. They measure the performance of a system in which judges have an important, but not determinative, role.

The first thing measured by time performance figures is the adequacy of the resources provided to the court in relation to the caseload of that court. Furthermore, because backlogs build up over a period of time, such performance figures measure this relationship over a period of time, something like three to five years.

The second thing that is measured is the resources available to the numerous other public elements in the system, also over a period of three to five years. The ability of the courts to perform depends on the resources available to prosecutors, to legal aid, to court reporting, etc.

Finally, these performance figures reflect the culture of legal practitioners, a culture which varies considerably from one area of specialisation to another and from one state to another. To give only one example from my own experience, the conduct of appeals in the New South Wales Court of Criminal Appeal is a model of efficiency that does not always appear to be followed by practitioners in criminal trials.

There are many aspects of the culture of the legal profession which make the just, quick and cheap resolution of disputes difficult. Judicial attitudes and conduct may have an effect on that culture, as indeed they have had. Not all aspects of that culture need to be accepted. Nevertheless it is not the role of the courts to unilaterally change that culture.

These are complications which the usually naïve use of performance figures does not take into account.

Quantitative measurement has been used or proposed for the purpose of determining the allocation of resources. It has also been used or proposed for the purposes of determining job security and remuneration. Over recent years, proposals to use quantification for such purposes in the administration of justice have become much more frequent. Indeed, one detects a sense of resentment that the judges have not had to adjust in this respect to the same degree as have other areas of government.

The tendency to treat judges as public servants has profound constitutional implications and is wrong. The relevant analogy for the purposes with which I am now concerned is between judges and parliamentarians, exercising their distinctive constitutional functions.

### **The Pathology of Measurement**

There is a tendency to regard questions of measurement as benign, that no harm can be done from quantification, even if it does not prove useful. Nothing can be further from the truth. The process of deciding what and how, to measure 'performance' is capable of having very real effects on the behaviour of persons and thereby distort actual conduct. Such can occur even from publication in a manner which may have an effect only on reputation. The possibility of distortion escalates as the use of the figures becomes more significant.

I have on a number of occasions referred to the distortions associated with economic plans. The one thing of which there was no shortage in the former Soviet Union was performance standards and performance indicators. They called it a five year plan. A good example of the pathology is the case of

nail manufacturing. When the five year plan identified the outputs in terms of tonnes, every nail manufacturing plant in the country made large nails and there was a shortage of small nails. In the next five year plan the output was stated in terms of numbers of nails. The inevitable happened everyone made small nails and there was a shortage of big nails.

Targeting of the indicators instead of the ultimate objective, is not a pathology associated only with socialist planning. It is endemic in any system in which resources, remuneration and other rewards depend on the achievement of intermediate outputs, rather than final outcomes. In most areas of public activity there is no measurable final outcome, the way profitability is the final outcome in the private sector. There are issues in the private sector as to balancing short and long term profits, but these issues do not undermine the proposition that what really matters in that sector is intrinsically capable of measurement. That is not the case in many areas of government activity. Specifically it is not the case in the law. Accordingly, the pathology associated with giving emphasis to quantification is likely to be more acute.

Let me give an example from the universities, where measurable performance indicators, particularly as embedded in rigid bureaucratically determined funding formulae, have caused enormous disruption throughout the world. Employment prospects for academics are, to a significant degree, determined by publication. Quantity sometimes counts more than quality.

In the United States the major decision is the grant of tenure to young academics. As one observer put it:

“As long as the candidate proves an inoffensive teacher and a reasonable department member, only one question sits on the meeting room table: Is the research project finished? If the junior colleague has a book in hand or an acceptance letter from the director of the university press, tenure is a fait accompli. If the work remains in manuscript, promising but incomplete, no promotion. That is the employment equation. Tenure has boiled down to a six year composition scheme. Junior faculty now face a demystified production schedule, and senior faculty enter the tenure meeting with a one checkbox form in their heads. No more messy discussions about quality. No more anxiety about whether the department has enough discernment or too much. Administrators have an objective criterion to point to should any outsiders challenge the proceedings. Judgment has been externalised, handed over to the university editorial board. The assistant professor has inherited a job task that takes priority over teaching students, that is, marketing his revised dissertation to academic press editors.

While the book criterion has clarified the tenure process, it has fundamentally altered the nature of scholarship in the humanities. The system discourages research that is time consuming, that involves tracking down information secreted in libraries and archives, that may yield numerous dead ends before a discovery occurs. Junior faculty must envision book length projects that can be executed well in advance of the crucial tenure meeting that takes place in the middle of the candidate's sixth year of employment ... Books that require lengthy inquiries do not get written ... Clear sighted professors will avoid empirical methods, aware that it takes too much time to verify propositions about culture, to corroborate facts with multiple sources, to consult primary documents, and to compile evidence adequate to inductive conclusions. They will seek out research models whose premises are already in place, not in need of proof, and whose exercise proceeds without too much deliberation over inquiry guidelines. Speculation will prevail over fact finding, theory and politics over erudition. Inquirers will limit their sources to a handful of primary texts and broach them with a popular academic theory or through a socio-political theme. In sum, facing a process that issues in either lifetime security or joblessness, junior faculty will relax their scruples and select a critical practice that fosters their own professional survival, a practice that offers timely shortcuts to publication and still enjoys institutional sanction.” Bauerlein “Social Constructionism: Philosophy for the Academic Workplace” 2001 Vol 48 *Partisan Review* (No 2) accessible at [www.bu.edu/partisanreview](http://www.bu.edu/partisanreview).

The objectivity of publication as a measurable indicator of performance has significant distorting effects. This is determined by the significance of the decision which has come to be dependent on this performance indicator. As I have said; measurement is not always benign, it has consequences.

This example can be multiplied manifold. I give a recent one. The Royal Commission into the

Metropolitan Ambulance Service in Victoria considered the outsourcing of its telephone call functions to a private contractor. The contract established levels of performance: the contractor was required to answer 90% of incoming non-emergency calls within 30 seconds. There were adverse financial consequences for the company if it failed to meet the standard.

The Royal Commissioner discovered the existence of a system of "test calls". Employees of the contractor undertook a systematic programme of calling the ambulance number at certain fixed times. The larger the number of these calls that were answered quickly, the more easily the company would be able to reach the target of 90% of calls within 30 seconds. The Royal Commissioner concluded that the objective of the test call programme was to artificially increase the company's reported performance and, accordingly, ensure that it received full payment on the contract *Report of the Metropolitan Ambulance Service Royal Commission Vol 1 Parliament of Victoria, May 2001 at par [5.5.2]*.

The pathology of performance indicators is referred to in the literature in different ways - 'goal displacement', 'gaming the system', 'moral hazard'. This is an unavoidable difficulty in the measurement of performance. The persons responsible for the administration of the measurement system, always have superior private information, about how their own actions influence the measured results, than the persons to whom the results are reported. To the degree that self-interest motivates them to target the indicators, even at the expense of the ultimate objectives, they may do so.

In the United States one of the pioneer projects for the application of managerial techniques to the public sector was the *Job Training Partnership Act* of 1982 (the "JTPA"). Job training was decentralised to hundreds of semi-autonomous training centres. Their budgetary allocations depended upon their measured performance. This performance incentive system was designed to achieve outcomes in terms of getting the trainees into jobs. This appeared to be a simple enough indicator of success capable, it could be thought, of objective measurement. That did not prove to be the case.

The first response of many training centres was to maximise their chances of success by refusing to accept for training people who were unlikely to get jobs. That is to say, the people who needed the assistance most, were refused entry into the scheme in the first place. This was called 'cream skimming' and various bureaucratic rules by the central administrative agency were established to try and correct the distortion. Nevertheless, many studies identified 'cream skimming' to have occurred See e.g. Cragg "Performance Incentives in the Public Sector: Evidence from the Job Training Partnership Act" 1997 13 *The Journal of Law, Economics and Organisation* 147.

. One study, that did not identify such an effect, attributed it, not to the success of the performance indicator system, but to the high professional standards of the public servants employed in the particular area of the study, who avoided these effects See James J Heckaman, Geoffrey A Smith and Christopher Taber "What Do Bureaucrats Do? The Effects of Performance Standards and Bureaucratic Preferences on Acceptance into the JTPA Program" *National Bureau of Economic Research Working Paper* 5535, April 1996.

The problems did not stop there. At first, the training centre did not have a clear rule about when to report. There were complaints that some postponed reporting on trainees who failed to find jobs quickly. A requirement was introduced for each centre to report if a trainee had a job at any time between the last day of training and 90 days after. A number of bureaucratic strategies were adopted to enhance apparent performance.

If a person was employed at the time that training finished then he or she was counted immediately and it did not matter if subsequently the job was lost. If, however, a trainee was not employed at that time, reporting centres waited to the last possible moment, in the hope that the trainee would acquire a job for whatever length of time during that period. Further, studies showed that training centres instituted "quick fixes" such as a blitz of job placement services that acquired jobs in the short term but did not have any long term impact on the trainees' employability.

The central agency responsible for the programme discovered these responses and formulated follow-up tests at three months after an original placement. The training centres responded by instituting systems for tracking their former trainees until this follow-up period expired. Some offered special services in the interim between job placement and the three month follow-up point, including child

care, transportation and even clothing allowances. If a job was lost special job counselling appointments and placement services were offered. At the end of the further three month follow-up period all this special treatment just ceased.

As the authors of this study concluded:

“... Bureaucrats maximise what they are told to maximise especially when this constitutes the only precisely defined and quantifiable objective.” Pascal Courty and Gerald Marschke “Measuring Government Performance, Lessons from the Federal Job Training Program” 1997 Vol 87 *The American Economic Review, Papers and Proceedings of the 109th Annual Meeting* 383 at 388.

In another paper these authors concluded:

“... Once an incentive system is put in place in an organisation, the behaviour in that organisation does not depend so much on the motivation which led to the system but depends to a large extent on the incentives alone.” Pascal Courty and Gerald Marschke “An Empirical Investigation of Gaining Responses to Performance Incentives” unpublished paper December 1997 accessible at [www.papers.ssrn.com](http://www.papers.ssrn.com).

Such perverse effects of performance indicators frequently occur in private corporations, especially when remuneration is determined on the basis of performance. One Harvard Business School professor calls the process “Paying People to Lie” Michael C Jensen “Paying People to Lie: The Truth About the Budgeting Process” *Harvard Business School Working Paper No 01-072* April 2001 accessible at [www.papers.ssrn.com](http://www.papers.ssrn.com).

He reports an example of bonuses being paid on the basis of sales revenues within a certain period. At great cost and inconvenience, unfinished industrial products were shipped from the plant in England to the Netherlands, where they could be assembled close to the customer and the sales revenue could be booked before the end of the quarter. The managers made their bonuses but the company's profit was substantially reduced. In another case, management announced that prices would increase by 10% in four months time, which had the effect of bringing forward sales and meeting targets to which bonuses were tied.

Sometimes the response is fraudulent. He reports a case where the United States Securities and Exchange Commission brought charges against a company for falsely increasing earnings by several hundred millions of dollars over a certain period. This had occurred because of the internal incentives and bonuses paid to managers. They brought forward revenues by backdating sales agreements, entered into secret side agreements granting rights to refunds after the relevant period, recognised revenue on disputed claims, etc. In another case fraudulent reporting of completely fictitious sales ensured that managers acquired bonuses tied to sales targets.

As the author concludes:

“Tell a manager that he or she will get a bonus when targets are realised then two things are sure to happen. First, managers will attempt to set targets that are easily reachable, and once the targets are set, they will do their best to see that the targets are met even if it damages the company to do so.”

On the issue of target setting he agrees with the observation that:

“The more people lie about how much they cannot do, the more they are rewarded.”

All of this behaviour he says has become an accepted part of business life, although it is “undiscussable”. He concludes:



“To stop the gaming of budgets and targets and restore integrity to the planning and management process we must begin not by telling managers to stop lying, nor by eliminating the use of budgets, but by eliminating the use of budgets and targets in compensation formulas and promotion systems.”

Let us not assume that the kinds of distortions that appear in other organisations will not affect the courts. I am aware of one common law jurisdiction, not in Australia or the United States, in which the court administrator had a performance package related to the quantum of cases processed. Counsel contacting the court to say that a case was settled were discouraged from having the matter removed from the list by consent. Rather, settlement was done by an appearance in court. When the matter was so listed it counted for purposes of the administrator's remuneration. Measurement, I repeat, is not neutral. It has consequences. The greater the incentives given, whether by means of performance bonuses to individuals or enhanced funds and budget allocations, the greater the likely consequences.

The internal use of organised information for purposes of managing the organisation does not, of itself, create any prospects of distortion. It is the external use of this information which creates the possibility of such distortion. Distortion arises because the things that can be measured are not the only things that matter. Insofar as external judgments are made on an information base which is too narrow, then the incentives created by performance indicators operate perversely.

Performance indicators are always partial and are always manipulable. Furthermore, an organisation can always improve performance as measured, by reducing quality in ways which are not necessarily detectable. Strategies of targeting the indicator, rather than doing the job properly, are always capable of being adopted. These rarely have adverse consequences on those responsible because of the difficulty of auditing the distortions which occur. The objectives distorted are often either not measurable or not measured.

In the case of a slow degradation of the quality of justice nothing particularly dramatic would occur. More corners are cut, as more pressures for expedition are exerted. The wishes of litigants are overridden more often. The quality of justice may be progressively compromised in small, incremental and barely perceptible steps but with an ultimate consequence that is unacceptable. By then it is too late.

### **Performance Pay**

Advocates of the 'new public management' tend to have a one dimensional view of human behaviour, which lies at the foundation of virtually all of their policy prescriptions. Individuals are assumed, in accordance with the oversimplified model used by economists, to be self-interested maximisers. Some take these assumptions to the logical conclusion that anyone who does not behave in accordance with the assumed model of all human behaviour, should be encouraged, or even required, to do so. In some respects we are witnessing a form of utopian social engineering that we have not seen since the demise of socialism. That is a subject for another lecture.

This model of human behaviour has been applied to create a system of performance based pay in many public positions. The assumption is that performance will be improved by such incentives. Because public pay scales must be objectively determined, measurement is generally required to determine whether the requisite performance has occurred. Such an approach is, of course, inapplicable in any field - like the courts - where 'outcomes' as distinct from 'output' cannot be measured at all.

Nevertheless, in their most recent reports, two of the statutory tribunals responsible for the determination of judicial salaries in Australia (the Commonwealth and the Queensland tribunals) have indicated the possibility of pursuing inquiries into "court productivity" for the purpose of "linking" judicial salaries to aspects of performance See Commonwealth Remuneration Tribunal Statement on "2000 Review of Judicial and Related Officers Remuneration" at p4; *Judges (Salaries and Allowances) Act 1967*; Report by the Queensland Salaries and Allowances Tribunal, 15 March 2001 pars [56]-[57].

Let me leave you with no doubt that I believe that this suggestion constitutes a direct attack on judicial independence. Judges are not public servants and cannot be treated as such. By reason of the

constitutional requirements for the exercise of the judicial power of the Commonwealth, federal judges and, arguably state judges, cannot be treated in this way.

As advocates of performance pay - some of whom may have their own performance bonuses to justify - are unlikely to highly value these considerations, it is material to point out that the evidence indicates that such performance linked remuneration in the public sector does not work. There is a basis for believing that, to a significant degree, it has not worked well in the private sector either. There is large literature. Some of the issues are considered in George P Baker, Michael C Jensen and Kevin J Murphy *Compensation and Incentives: Practice vs Theory* reprinted in Michael C Jensen *Foundations of Organisational Strategy* Harvard University Press 1998

In 1997, the Organisation for Economic Co-operation and Development conducted a public sector survey in five nations and found that performance based pay was a weak motivator of work: indeed it ranked last of fourteen factors in the survey See *OECD Performance Pay Schemes for Public Sector Management*, Paris 1997. The five countries were Australia, Denmark, Ireland, the United Kingdom and the United States.

. Other studies have reached the same conclusion. One of the most enthusiastic promoters of the "global public management revolution" has concluded, rather wistfully, that public managers have been motivated by their jobs, rather than by performance based pay, which has been a failure See Donald F Kettl supra at 14 and 37-38.

The reason for this response in the case of the public sector is not hard to find. People who are likely to be motivated by marginal financial incentives will be attracted to the private sector where this is the dominant culture. People who are motivated by other considerations, including social contribution will, without prejudice to their claim to be properly remunerated, tend to be attracted to the public sector.

This is particularly the case for persons who are prepared to accept judicial appointment. The overwhelming majority of judges take a significant reduction in their periodic remuneration when they assume office. In the case of persons with substantial commercial practices that reduction is often in the order of 70% or 80%. Such persons are unlikely to be motivated to change their behaviour as judges by reason of some marginal performance-related payment. Assumptions to the contrary are risible.

### **The Performance of 'The New Public Management'**

I know of no performance indicator for performance indicators. They can, and do, have perverse distortive effects. Nevertheless, they have become ubiquitous in many areas of government activity throughout the western world, particularly in the United Kingdom, New Zealand and the United States and, only to a marginally lesser degree, in Australia. The proposition that their implementation and widespread use has been positive, is a proposition that has been based on faith.

Two authors who have published widely in this field conclude after a wide-ranging comparative analysis of the implementation of the "new public management" in ten nations that:

"At the level of broad programmes of management reform we know of not a single study from our ten countries that convincingly links the actions taken with a set of positive and safely attributable final outcomes. This kind of rationality may occasionally be possible for very specific programmes in particular, well understood, contexts (e.g. an evaluation of traffic management measures ...), but it is seldom, if ever, possible for broad strategies of reform ... Recent academic attempts to develop a 'theory of effective government' show what a wide range of information would be required - much wider than anything that is normally available, even in these electronically lubricated, data rich times." Christopher Pollitt and Geert Bouckaert supra at 111-112.

This impossibility holds true of any area in which the quality of what is done is more significant than the matters capable of measurement. It is true of the legal system. Some aspects of the system are capable of measurement, particularly issues of delay. However, that is not the only standard by which performance of the legal system should be judged. Insofar as emphasis is given to the matters which

can be measured, whether by means of budgets, invidious comparisons or performance bonuses, distortions will inevitably creep into the system.

“What is Performance?” is a question worthy of Pontius Pilate.

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## Citizens, Consumers and Courts - International Conference on Regulation Reform Management and Scrutiny of Legislation

**ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
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INTERNATIONAL CONFERENCE ON REGULATION REFORM MANAGEMENT AND SCRUTINY  
OF LEGISLATION  
NEW SOUTH WALES STATE PARLIAMENT HOUSE  
SYDNEY AUSTRALIA  
9 JULY 2001  
CITIZENS, CONSUMERS AND COURTS**

The perennial discourse over the proper role of government can be characterised as a debate between those who emphasise government failure and those who emphasise market failure. Over the last two decades those who emphasise government failure have been in the ascendancy. This ascendancy has been reflected in a variety of changes such as privatization, contracting out, deregulation, reinventing government, value for money, re-engineering, market based solutions, downsizing, cost benefit analysis, performance indicators, program budgeting, benchmarking, performance audits, strategic plans, citizen charters, etc. etc.

These changes have usually been called "reforms". I am reminded of the blistering attack on reformers by Senator Roscoe Conkling, the Republican machine party boss of New York City, who said in 1880:

"Some of these worthies masquerade as reformers. Their vocation and ministry is to lament the sins of other people. Their stock in trade is rancid, canting self righteousness .... Their real object is office and plunder. When Dr Johnson defined patriotism as the last refuge of the scoundrel, he was unconscious of the then undeveloped possibilities of the word 'reform'." Dorothy S Truesdale "Rochester Views the Third Term 1880" 1940 2 *Rochester History* 1 at 5.

In a media dominated age with a public attention span not much longer than that of a gnat, the one dominant imperative of day to day public debate is: to be seen to be doing something. The various changes and reforms to which I have referred pander to this requirement rather well.

The courts have not been and cannot be insulated from changes in attitudes about the proper role of government. The courts are an arm of government and have been subject, as other arms of government have been subject, to the greater salience of what has been called the three "e's" - economy, efficiency and effectiveness - in competition with other values of government, activity such as accessibility, openness, fairness, impartiality, legitimacy, participation, honesty and rationality. The judiciary cannot and should not attempt to insulate itself from such changes. Courts have responded and must continue to do so.

The primary judicial response to the change of attitudes to which I have referred has been the acceptance by the judiciary of a greater role in case management. Judges are now concerned to ensure the efficiency and effectiveness of court procedures. They intervene in proceedings to a degree which was unheard of a few decades ago outside specialist commercial lists. Courts are no longer passive recipients of a case load over which they exercise no control.

Advocates of a managerialist approach, who sometimes refer to their project as the "new public management" - the word "management" replacing the more staid and, seemingly more passive, traditional terminology of "public administration" - continue to advocate further significant changes to the operation of the courts including the full gamut of strategic plans, business plans, performance indicators and evaluation mechanisms.

The issues that arise in this regard are not dissimilar to the issues that arise in the context of

assessing the role of government as a regulator, which, I understand to be the concern of this conference, such as the assessment of regulatory impact and the role of cost benefit analysis.

Many of the developments to which I have referred have been driven by a belief that a self-regulating market, such as is prevalent in the private sector, is the preferable mode of ordering human relationships. There is danger in an indiscriminate application of this role model. It tends to reduce citizens to consumers.

There is nothing wrong with being a consumer or in ensuring that organisations take into account how well the functions they perform meet the requirements of people as consumers or clients. Nevertheless, it is important to recognise that a person's interest as a "consumer" is only one part of a person's status as a citizen. The consumer analogy has become, in many respects, a feral metaphor that has acquired a disproportionate degree of prominence.

Consumers have desires or needs. Citizens have rights and duties. The perspective of citizenship is of greater significance for many areas of public activity than the perspective of consumerism. This is true for the courts.

In the context of court administration, the consumer perspective treats courts merely as a provider of dispute resolution services. Indeed, the most recent court created in Australia, the Federal Magistrates Court is, by specific statutory provision, permitted to be called the "Federal Magistrates Service". It is the policy of the government to prefer that denotation.

The identification of the courts as merely a publicly funded dispute resolution service is too narrow. Indeed, in my opinion, it is potentially subversive of the rule of law.

Human life cannot be characterised simply as a series of consumer choices. Litigants are not consumers. Litigants have rights. They come to court to assert their rights, not to exercise some form of consumer choice. This is clearest in the criminal justice system where, in substance, the community asserts rights by way of protecting itself. In all cases, litigants are, and should be, treated in the courts as, citizens not consumers.

The courts do not deliver a "service". The courts administer justice in accordance with law. They do not deliver a "service" in the form of judgments and decisions, than a Parliament delivers a "service" in the form of debates and statutes. I do not doubt that courts serve the people. But they do not provide services to the people. This distinction is not merely semantic, it is fundamental.

Courts perform functions that go well beyond resolving disputes. The enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by a public affirmation of who is right and who is wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of conduct by a public process with public outcomes - these are all public purposes served by the courts, even in the resolution of private disputes.

The judgments of courts are part of a broader public discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances. This is a governmental function of a broadly similar character to one of the functions performed by legislatures. This has no relevant parallel in most other spheres of public activity, let alone private activity.

I have no doubt that there are important areas of government in which the emphasis on a consumer perspective and the analogy with the free market have been adopted with substantial benefits. However not all areas of government are capable of being moulded by analogy with the operation of a free market. The administration of justice is an area in which this analogy has little useful to contribute.

No-one advocates that commercial corporations should conduct their affairs in public, nor that they should publish reasons for their decisions, or observe any of the other principles of open justice. Nor should the operations of commercial corporations be seen as having a determinative relevance to the administration of justice.

One characteristic of the administration of justice is its inefficiency when compared with some other systems of decision making. This is not an accident.

There is no doubt that a much greater volume of cases could be handled by a specific number of judges if they could sit in camera, dispense with the presumption of innocence, not be constrained by obligations of procedural fairness or the need to provide a manifestly fair trial, could act on the basis that no-one has any rights and not to have to publish reasons for their decisions. Even greater "efficiency" would be apparent if judges had made up their minds before a case began. There are places where such a mode of decision making has been, and indeed is being, followed. We do not regard them as role models.

Our system of justice is not the most efficient mode of dispute resolution. Nor is democracy the most efficient mode of government. We have deliberately chosen inefficient ways of decision making in the law in order to protect rights and freedoms. We have deliberately chosen inefficient ways of governmental decision making in order to ensure that governments act with the consent of the government.

The values that are served by our system of justice and our parliamentary institutions should not be regarded as subordinate to, let alone some kind of manifestation of, the allegedly superior values of the market system.

The courts have preserved - more successfully than some other areas of government - a distinctive public service ethos. This has been possible, in significant measure, by reason of the constitutionally guaranteed independence of the judiciary. That distinctive ethos is not likely to change in the case of the courts.

The global triumph of market ideology and a consumer perspective may be the market economy's own worst enemy. A balancing perspective is suggested by Rabbi Jonathan Sacks, the Chief Rabbi of the British Commonwealth which you will bear with me if I quote at length. The Rabbi said:

"When everything that matters can be bought and sold, when commitments can be broken because they are no longer to our advantage, when shopping becomes salvation and advertising slogans become our litany, when our work is measured by how much we earn and spend, then the market is destroying the very virtues on which in the long run it depends.

That, not the return of socialism is the danger that advanced economies now face. And in these times, when markets seem to hold out the promise of uninterrupted growth in our satisfaction of desires, the voice of our great religious traditions needs to be heard, warning us of the Gods that devour their own children, and of the temples that stand today as relics of civilisations which once seemed invincible ...

The market, in my view, has already gone too far: not indeed as an economic system, but as a cast of thought governing relationships and the image we have of ourselves ... The idea that human happiness can be exhaustively accounted for in terms of things we can buy, exchange and replace is one of the great corrosive acids that eat away the foundations on which society rests; and by the time we have discovered this it is already too late." Jonathan Sacks "Markets and Moral" *First Things* August/September 2000 at 23-28 accessible at [www.firstthings.com](http://www.firstthings.com).

The managerialist focus in public administration, increasingly influential in courts administration, has sought to replicate a results driven model, said to be characteristic of the private sector, where the free operation of market forces ensures efficient use of resources. One of the principal manifestations of this approach is the identification and targeting of performance standards or performance indicators in all areas of government activity, including courts. The problems of measurement which arise in this context are similar to the problems of measurement that arise in the context of cost benefit analysis, the subject of one of the sessions at this conference.

The basic proposition is a simple one: not everything that counts can be counted. Some results or outcomes are incapable of measurement. They can only be judged in a qualitative manner. Justice, in the sense of fair outcomes arrived at by fair procedures, is, in its essential nature incapable of measurement.

The same is true of benefits and costs of government regulation in many different contexts. All practitioners of cost benefit analysis will accept that proposition. The problem is to determine how to treat the matters that *can* be measured, in a context in which it is acknowledged that other matters are also relevant to the decision making process.

All of the experience that I am aware of with respect to these matters, suggests that the matters capable of measurement acquire an entirely inappropriate significance by reason of their concreteness. It is all too easy to simply list the other matters as qualitative considerations on both sides of the relevant equation. In the case of cost benefit analysis, costs of a qualitative nature are set out in one list and benefits of a qualitative nature in another list. The temptation is to conclude that in some vague and non-rational way the two lists balance each other. The result is that the measurable factors actually determine the outcome of the decision making process. All too often the qualitative factors are given only lip service. The weight to be given to them is too contested to be determinative. The same effect is apparent in the context of decision making processes based on performance indicators.

In these matters one can detect what can only be called a power struggle between different groups. Professionals like teachers, doctors or lawyers involved in public decision making processes tend to emphasise the significance of qualitative considerations. Treasury officials, departmental finance officers and auditors tend to emphasise measurable indicators. The latter group often resents the high degree of autonomy of professionals and categorises their pre-occupation with matters of quality as either rent seeking activity or an invitation to inefficiency. They have a self image as the true custodians of the objectives of an organisation and, often, as representatives of the taxpayer, in the interest of minimising expenditure. There is a power struggle involved in this interrelationship. To the extent to which qualitative considerations are given weight, the professionals will have the greatest say. Unless matters can be reduced to measurable standards or indicators, finance officers and auditors will not be able to exert influence.

It is noticeable that in all areas in which the use of performance indicators has developed, the tendency has been to measure outputs rather than outcomes. The former are readily measurable, the latter involve matters of judgment. The better practitioners of the new managerialism understand that an "output fixation", as it has been described Christopher Pollitt and Geert Bouckaert *Public Management Reform: A Comparative Analysis* Oxford Uni P. 2000 p167., is counterproductive, because too many important matters fall between the cracks of the performance indicators, which are necessarily incomplete.

In cost benefit analysis, also, it is important to recognise the limitations of quantitative measurement, so that the results of such analysis do not acquire a disproportionate and inappropriate influence over the amorphous and judgmental matters of quality. Quantitative measurement appears to be objective and value free. Qualitative assessment appears to be subjective and value laden. In fact, measurement, by reason of the inevitable selectivity of what can be measured, contains and conceals important value judgments.

It is important to appreciate that the significance of what can be measured varies from one area of discourse to another. There is a tendency in the literature of cost benefit analysis and performance indicators to act on the assumption that the methodology is equally appropriate to any area of discourse. That is not the case. There are some areas of government regulation or public administration in which the things that can be measured are the important things. There are other areas, and the law is one of those areas, in which the things that can be measured are not central to the objectives and functions performed by the organisations involved. Computation can be of great utility. However, in significant matters, there is no escaping the centrality of judgment of a qualitative character.

## Address on the Occasion of the Re-Opening of No 2 Court Francis Greenway Wing of the King Street Supreme Court Complex

The location, plan and construction of the courthouse of which No. 2 court was part resulted more from chance than design. On 7 October 1819 Macquarie laid the foundation stone for the court but St James' Church was built over it. On 20 March 1820 on this site Macquarie laid the foundation stone for the Georgian public school which was then built on the other side of Elizabeth Street.

Greenway planned this court building with an entrance front to face the park, the dimensions of which were intended to be 70 by 46 feet, a room large enough for over 500 auditors. Under a recessed colonnade of the Doric order was to be a grand flight of steps extending from one wing to the other, the two wings projecting for offices. At the western end there was to be a portico entrance to the criminal court.

Above was to be the second court. Macquarie left in December 1821. Greenway was dismissed from government service in November 1822. The experience of Joern Utzon and the Sydney Opera House was not unprecedented. The construction of the courthouse was finished under contract. The result was said to be only fit for an old barn and not at all in character with the building. No part of it was ready until August 1827. In the meanwhile, on 17 May 1824 the Supreme Court of New South Wales had come into being and had been formally opened by Forbes CJ in the Georgian school on the other side of Elizabeth Street.

On this side of the street the contract work caused constant trouble. Standish Lawrence Harris for a short and quarrelsome term took over as colonial architect and tried his hand at a plan, specification and estimate to complete the building. But by the end of 1824 Harris was no longer colonial architect and publicly disclaimed all participation in the courthouse. In 1834, in this court, Harris recovered a verdict of £1,420.4.6d for money owing to him by the government for his work as civil architect.

By 1827 the western wing (now No. 3 court) was ready and in August 1827 was conveyed and delivered to the judges of the Supreme Court for the purpose of holding the court and the administration of justice. For some years that western courtroom was the one chiefly used. This room, when completed, was used by the Court of Requests and of Quarter Sessions. The upper floor was used by ministerial officers of the court and the law officers of the Crown. The judges used a very small cold comfortless room scarcely 7 feet square without a fireplace and with a window and frame wholly out of repair and the walls and ceiling in a highly dangerous and unsafe state for matters heard in Chambers.

The ground floor accommodation when complete consisted of Greenway's two wings on the southern side, one used as robing and consultation room by the judges and the other used as a retiring room for juries, a robing room for lawyers and the court keeper residence. The Greenway recessed colonnade of the Doric order had not been built so the circular geometrical staircase stood isolated in an open paved terrace exposed to the violence of the winds at all seasons of the year but especially during the winter. The site was occupied by privies of the worst possible construction in a most exposed situation and kept in a most filthy condition. From 1830 there was a commodious though uncovered shed to shelter the judge's horses and carriages.

The spaciousness of the courthouse made it an attractive venue for public functions. In January 1827, 125 colonists sat down here for the anniversary day dinner celebrating the settlement's 39th year. But quite quickly the defects in the building drew attention to themselves. At the "free inhabitants" meeting in February 1830 the roof was in such a deplorably bad state of repair that it threatened to come down "about the peoples' ears and many folks walked off fearful of mischief happening". It was necessary to brace the courtroom with poles and to support the roof with additional columns adding strength and elegance.

Much of the external appearance of the court fitted Greenway's design facing Hyde Park with projecting wings extending on either side and an entrance on Elizabeth Street to the criminal court. The circular stair and at least three columns of a portico, possible on the south side of the building, had been built before Harris took over. The facade of Doric columns had begun. By 1827 what was missing were the major decorative elements which were too have given the building dignity, presence and shelter on the Hyde Park side, namely the grand flight of steps extending from wing to wing and



the facade of Doric columns. Only a bald shell faced the park. The interior arrangement was entirely altered from Greenway's design which had consisted of a large courtroom on both floors borne out by the fenestration and the circular stair positioned externally and not intruding into the large rooms.

By 1832 the Chief Justice was complaining of serious cracks in the court's partition walls and expressed the fear they would collapse. There was constant danger from the threatened falling in of ceilings and plaster.

By 1833 the judges wanted Greenway's terrace on the south side enclosed and converted into rooms and the eastern and western entrances to the courts stopped up and replaced by a single doorway in the centre of the building on the north side in King Street. Another complaint was the noise about the courthouse at the corner of Elizabeth and King Streets. In 1839 the second Chief Justice, Sir James Darling, protested about the extreme embarrassment occasioned in court cases because of passing carriages and requested that "bars may be put across the street while the court is sitting".

By 1838 the state of the building was "very perilous" due to some neglect of architect or builders or both and to the weakness of the lime mortar which, having been made from sea shells in the early days, was frail and too sparingly used. But nothing it seems was done. Stephen J shortly to become the third Chief Justice reported that all the woodwork was decaying for want of paint, that the plastering on most ceilings had receded, that the drapery, curtains, blinds and sashes were partially in rags and many of the court chairs reduced too skeletons. The rain came down in some places in an uninterrupted stream.

Joseph Fowles' detailed elevation of the courthouse drawn in 1848 showed the newly made entrance into King Street. The associations with Macquarie's era were beginning to fade. The facade opposite Hyde Park had become so circumvolved against winds that it would never again be thought of as the front entrance. Fowles adjudged the structure "a very plain brick building, having no pretensions to architectural beauty neither designed after any particular style except it be that already adopted in the Hyde Park barracks". Thereafter patchwork additions were undertaken and so proliferated that they are difficult if not impossible to chronicle.

It is rare for a building of heritage significance to be recycled for its original use. This is the objective, already partly achieved, of this significant project of restoration of the original Supreme Court complex. On behalf of all the judges of the Court, I wish to express the Court's appreciation for the magnificent work undertaken by the dedicated team of skilled professionals led by Barry Johnson.

I invite the Attorney General of New South Wales, the Honourable Bob Debus MP to open the refurbished Court 2.

## Judicial Accountability and Performance Indicators

**PAPER BY THE HONOURABLE J J SPIGELMAN AC  
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1701 CONFERENCE: THE 300TH ANNIVERSARY OF THE  
ACT OF SETTLEMENT  
VANCOUVER, BRITISH COLUMBIA, CANADA  
10 MAY 2001**

Perhaps the foremost challenge for judicial administration today is to ensure that contemporary expectations of accountability and efficiency remain consistent with the imperatives of judicial independence and the maintenance of the quality of justice. Accountability is something that everyone is "for" - like democracy or freedom. As always it is the detail that matters: accountability to whom and for what.

Accountability for adjudicative functions occurs in the form of open justice, the obligation to publish reasons and appellate review. Accountability for the administrative functions of courts is, in principle, distinct. Some activities fall clearly into one or another category but there is a significant area of overlap between the two See The Honourable Murray Gleeson AC "Judicial Accountability" (1995) 2 *The Judicial Review* 117.

The courts have not been and cannot be insulated from changes in attitudes about the proper role of government. The courts are an arm of government. Over recent decades the balance of influence between the political ideology that emphasises market failure and that which emphasises government failure has, in relevant respects, shifted in favour of the latter. The response to this shift within the public sector has been a rise to prominence of managerialism.

The value of efficiency - of getting "value for money" - has received a greater, and often dominant, salience in competition with other values of government activity such as accessibility, openness, fairness, impartiality, legitimacy, participation, honesty and rationality. This change has affected all aspects of government including, inevitably, the courts. The judiciary cannot, and should not, attempt to insulate itself from such changes. Courts have responded and must continue to do so.

The primary judicial response to the change of attitudes to which I have referred has been the general acceptance of a greater role for the judiciary in case management. Judges are now concerned to ensure the efficiency and effectiveness of court procedures and intervene in proceedings to a degree which was unheard of a few decades ago, outside specialist commercial lists.

In medieval times trial procedure included *peine forte et dure* designed to coerce a plea of some character - so that a verdict could expose the accused's property to forfeiture - by placing heavier and heavier stones on his body until he pleaded or died. This was an early form of case management and an abiding model.

Case management requires information to ensure its effectiveness for the purposes of managing the court's resources in the most efficient manner and minimising delays to the parties. In such respects, the measurement of what a court does is a perfectly legitimate and, indeed, desirable activity.

It is also entirely appropriate that information of this character, but not necessarily of the same degree of detail, should be available to the public. Citizens are entitled to know whether the arms of government which they fund through their taxes are spending that money efficiently and effectively. There is no threat to judicial independence if that is done, although some ways of gathering and reporting such information could constitute such a threat.

Furthermore, judicial accountability by publication of pertinent information, both about the reporting court and by comparison with other courts may assist courts to improve the efficiency of their own management and their internal planning. Courts are no longer passive recipients of a caseload over which they exercise no influence. They are now expected to plan for the future and do so. In the

immortal words of an English footballer: "If you have the courage to look far enough ahead, you too can see the carrot at the end of the tunnel".

The dominant characteristic of the new managerialist focus has been a wish to replicate a results-driven model, said to be characteristic of the private sector where the free operation of market forces ensures efficient use of resources. This approach is said to require the explicit identification of goals, which must be measurable so that performance can be assessed in what is regarded as a "objective" manner. This new approach commenced with government trading enterprises, often as a step along the road to privatisation, and thereafter extended to other spheres of government activity.

The approach involves a hierarchy of required documentation. At the top, at the highest level of generality and abstraction, are documents described variously as strategic plans, corporate plans, charters or mission statements. The level below concerns annual implementation, variously called business plans or performance plans and the like. These plans are required to contain goals, objectives, targets or standards at a level of generality that is implementable, and, preferably, capable of measurement. At the lowest level of the hierarchy is what are frequently called performance indicators which must be measurable, concrete, collectable at reasonable cost and comparable, either between institutions or over time for the one institution. This process must also be capable of evaluation either by the unit of public administration concerned or by third parties, such as an auditor general conducting a performance audit.

Although the nomenclature varies from country to country and from one area of public administration to another, the broad lines of this development appear to be similar in many countries and spheres of discourse.

The position is not a static one. The enthusiasm for strategic plans or charters or mission statements appears to have waned somewhat. The presumed benefits from clarification of objectives, do not seem to be attainable when the objectives are stated at a high level of abstraction. Management is, after all, a fashion industry.

Although at any point of time the requirements of good management are stated with certitude, those requirements change over time. The recent focus on measurement in a structure of decision making perceived to be rational - overriding and often replacing an approach which emphasises the significance of judgment - is not new. In the United States there has been a succession of fashionable schemes: in the 1950's there was "performance budgeting". In the 1960's there was "program budgeting"; in the 1970's there was "management by objectives" and in the 1980's the current approach developed culminating in the hierarchy of documentation required by the *Government Performance and Results Act* 1993. Each of the previous approaches was accepted to be a failure. See Christopher Pollitt "How Do We Know How Good Public Services Are?" in B Guy Peters and Donald J Savoie (eds) *Governance in the Twenty-First Century: Revitalising the Public Service* 2000 esp at 123. In a fit of youthful enthusiasm I was myself quite taken with the rationality and certitude of one of these phases. See J Spigelman "Program Budgeting for New South Wales" (1967) 26 *Public Administration* 348.

Notwithstanding many divergent proposals for performance indicators for courts, what appears to have been most useful for purposes of both accountability and internal management have been indicators relating to the question of delay. Indicators relating to questions of cost - both court costs and costs imposed on third parties - have been suggested and some implemented, but, so far as I have been able to determine, have proven to be of lesser practical utility.

The internal use and publication of indicators relating to delay and cost is plainly appropriate. The promotion of efficiency is not just about saving money for government, although that is a perfectly legitimate consideration. It also involves substantive issues; the quality of justice being degraded by delay, access to justice, fairness and, ultimately, public confidence in the administration of justice. These are proper matters for measurement and publication.

The compilation of statistics is not as straight-forward as it may first appear. This is true even of indicators directed to the issue of delay. Measurement of such matters turns on three essential factors, each of which is problematic:

· The idea of a “case” is the basic unit of measurement. This is constituted by a single proceeding, irrespective of how many parties are joined in the one proceeding, how many cross claims are involved and whether or not a number of such proceedings are sufficiently identical in substance to be treated as one. Comparisons between courts is particularly difficult because even courts of similar status will have major divergences in terms of the mixture of cases. In Australia information on a number of government activities including the courts is published in an Annual “*Report on Government Services*”. The publication contains tables which purport to compare courts at the various levels of the judicial hierarchy with respect to broad categories of jurisdiction such as civil, criminal and appellate. Footnotes and text to these tables outline some, but not all, of the substantial differences in case load of the similar courts e.g. the Supreme Courts of the different States. These qualifications make the raw figures of the published tables almost completely useless. As further testimony to the power of simple numbers, the qualifications are, predictably, completely ignored in media reporting and probably ignored in other uses, if any, to which the raw data is put.

· The idea of “commencement” is in theory identifiable with clarity as a formal filing in the court. However, that date may not constitute a true commencement for a range of reasons: Limitation Acts lead to the institution of proceedings to “stop the clock”; divergent rules as to when a proceeding must be served; holding actions where court rules require filing within a certain time after an event. These matters differ between courts and vary from time to time.

· The idea of a “disposal” may be determined in a variety of ways. It may differ from one subject matter of jurisdiction to another and from one court to another. A formal act such as the closing of a bureaucratic file or the making of a final order may not reflect what is in substance the true disposal from the point of view of the litigants. The formal act may be mechanical and in no way time critical. In order to ensure that the idea of “finalisation” is both uniform across jurisdictions and does not involve any subjective assessment, the compilers of the *Report on Government Services*, require courts to file their returns on the basis that a “finalisation” occurs when the bureaucratic act of closing the file is undertaken. Many cases are, of course, disposed of long before that step occurs. The Supreme Court of New South Wales did not in the past bother to devote resources to the task of deciding whether or not long dormant cases have, in fact, settled. Eventually it did so, primarily in one year. In that year just under a third of the total cases “finalised” were such old and dead files. The appearance was given that the efficiency of the court in terms of delay had dramatically fallen. This year the position is likely to suggest a further deterioration. Some 3,500 files in a major class action, in fact dormant for many years after a settlement and progressive allocation of settlement funds, were finally closed. This will constitute in excess of one third of the “finalisations” for the year. The Report will give the misleading impression that the New South Wales Supreme Court has become slower in disposing of its cases when the opposite is in fact true.

· Policy issues may arise when defining a ‘disposal’. For example, in the context of criminal trials a case can be made for measuring the end point as the first day of the trial, so as not to suggest any pressure on a court to compromise the requirements of a fair trial. In different areas of jurisdiction a point often arises from which it can safely be said that further proceedings are not in any way time critical. For example in the case of the Supreme Court of New South Wales, which has a criminal jurisdiction almost exclusively concerned with murder trials, the period after a verdict or plea is not time critical. Any sentence is almost invariably going to be a long one and the time between verdict or plea and sentence does not need to be targeted.

The legitimate purposes served by performance indicators for the courts are purposes which are also served in other areas of governmental expenditure such as hospitals, schools, universities, etc. In many nations the use of performance indicators started off in such areas broadly in the same manner as presently exists with respect to courts. It has not however stopped there. The use has expanded to

involve more dramatic intervention with the functions of hospitals, schools and universities.

Performance indicators have been used to determine funding, often in a quite rigid and mechanical way, with the effect of diverting funds from one hospital to another and from one university to another. They have been used to determine salaries and to decide whether or not to terminate employment of those responsible for the administration of such institutions. They have also been used to provide public information purportedly for the purposes of consumer choice, e.g. school or university league tables.

The application of performance indicators in these ways has frequently been controversial. Throughout the advanced industrial world, schools, universities and hospitals are reaping a whirlwind of the new managerialism which determines budgets, remuneration and tenure solely, primarily or significantly with regard to measurable performance indicators. To give only one example, the wholesale downgrading of humanities faculties, such as classics and history departments in universities, is in large measure attributable to the mechanical application of funding formulae based on performance indicators.

Public servants associated with the development of the Australian system of publishing indicators expressly contemplated their use, at some future time, for the purpose of annual governmental budget decision making See e.g. Lawrence McDonald "Measuring Administrative Justice - Lessons from the Report on Government Services" in Robin Creyke and John MacMillan editors *Administrative Justice: the Core and the Fringe*, Australian Institute of Administrative Law (2000) at p139.

. Furthermore one of the express purposes of publishing such information was said to be the encouragement of competition between courts in mimicry of competition in private markets against the achievement of identified "benchmarks", referred to as "yardstick competition" See *ibid*. See also Bill Scales "Performance Monitoring Public Services in Australia" (1997) 56 *Australian Journal of Public Administration* 100 at 101-102.

Two of the statutory tribunals responsible for the determination of judicial salaries in Australia have, on the basis of practice in other spheres of government, referred expressly to the possibility of pursuing inquiries into court "productivity" for the purpose of "linking" aspects of performance to judicial salaries See Commonwealth Remuneration Tribunal "*Statement on 2000 Review of Judicial and Related Officers Remuneration*" at p4; *Judges (Salaries and Allowances) Act 1967 Report by the Queensland Salaries and Allowances Tribunal*, 15 March 2001 pars [56]-[57].

. These references raise deeply disturbing issues.

The 'value for money' perspective has to some extent been introduced, and sought to be considerably extended, with respect to the conduct of Australian administrative tribunals which perform functions of a quasi judicial character. Express targets - such as number of cases to be disposed of per day - have been adopted by some such tribunals. It is not clear to me how decisions made under such direction would comply with the requirements of natural justice. No doubt that will one day be determined.

More significantly, legislation was introduced, but not passed, in the Commonwealth Parliament institutionalising mechanisms of this character across the full range of the jurisdiction of the proposed integrated administrative tribunal. The legislation required members of the new tribunal to enter into performance agreements. Failure to comply with the performance targets could lead to a member being removed. Furthermore, the remuneration of tribunal members was proposed to be linked to performance. There was considerable debate about the implications of this kind of structure for administrative justice. The Senate, being the upper house of the Commonwealth Parliament which is not controlled by the government, rejected the bill, in part for these reasons See Administrative Review Council "*Better Decisions: Review of Commonwealth Merits Review Tribunals Report No 39 Commonwealth of Australia* 1995 pars [4.74]-[4.83]; Australian Law Report Commission: *Managing Justice: A Review of the Federal Civil Justice System Report No 89 Commonwealth of Australia* 2000 pars [9.15]-[9.20]; Administrative Review Tribunal Bill 2000 Clause 24; Hansard Commonwealth of Australia House of Representatives 28 June 2000 18404-18407; 6 December 2000 23494 and following, 23786 and following; Commonwealth of Australia Senate

Hansard 26 February 2000 at 21841 and following. Senate Legal and Constitutional Legislation Committee: *Inquiry into the Provisions of Administrative Review Tribunal Bill 2000 and the Provisions of the Administrative Review Tribunal (Consequential and Transitional) Bill 2000* February 2001 esp at pars [2.10] [3.19]-[3.24] in the majority report and pars [1.15] and following in the minority report.

The greater salience given to efficiency values over recent decades raises important issues for the administration of justice. The relevant public discourse necessarily involves conflicts amongst values to which all subscribe: values such as democracy, efficiency, justice, freedom, equity. It is essential to recognise that these values are not necessarily consistent with each other. There is a wide range of permissible opinion as to whether or not, in a particular sphere of discourse, one of these values operates as the parameter that ought be maximised, with another value as some kind of constraint, or vice versa. Inevitably issues of trade-off between achieving one value at the expense of another will arise. There is rarely a single correct answer.

Those who emphasise the significance of "value for money" often put aside issues of justice and freedom on the assumption that the process of planning for, and measurement of, performance will not seriously affect the attainment of such values. In my opinion, the pressure of the "value for money" approach and the use of performance indicators in the way it is frequently advocated they be used - particularly as a basis for allocation for resources or determination of remuneration - will inevitably impinge on the quality of justice, particularly the requirements of a fair trial. The effects may slowly accumulate over a period of time, but it is quite wrong to assume them away as is often done. Public confidence in the administration of justice will be undermined by the creeping bureaucratisation of judicial decision making.

The 'value for money' perspective appears to assume that improvements in productivity are always available without compromising quality. Even in the case of reducing delays there are limits. Speed is like light. Too much of it obscures rather than illuminates.

I am reminded of the microeconomic reformer who noticed that a Mozart string quartet takes as long to play in 2001 as it did in 1801. In 200 years there has been no improvement in productivity. This, of course, could only occur by an anti-competitive agreement amongst professional musicians. The anti-trust authorities must investigate.

Some things take time. Justice is one of them.

The requirements of open justice, in which the quality of justice is the primary consideration, cannot be measured. Those requirements, not statistics, must continue to be regarded as the basic mechanism of judicial accountability.

We should recognise that inefficiencies in the administration of justice in common law countries are not unintentional. There is no doubt that a much greater volume of cases could be handled by a specific number of judges, if they could sit in camera, not be constrained by obligations of procedural fairness or the need to provide a manifestly fair trial, and not have to publish reasons for their decisions. Even greater "efficiency" would be quickly apparent if judges had made up their minds before the case began. There are places where such a mode of decision making has been, and indeed is being, followed. We do not regard them as role models.

Open justice does not provide the most efficient mode of dispute resolution. Nor, indeed, does democracy provide the most efficient mode of government. In both respects we have deliberately chosen inefficient modes of decision making.

The proponents of the value for money approach will say that of course they would not benchmark against any such jurisdiction. The publication of comparative tables with a view to determining "best practice" and encouraging competition between courts I have discussed the issue of competition between courts in my Address "Economic Rationalism and the Law" to be published in the *University of New South Wales Law Journal*, now accessible at [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc).

, would be confined to courts that observed the requirements of a fair trial. However the requirements of a fair trial do not reflect a fixed body of rules. A court which is being judged on the basis of speed or

cost per case, particularly where this determines budget allocations or judicial salaries, will always be able to "improve" its performance by qualifying and compromising the requirements of a fair trial. Pressure to maximise the number of cases dealt with by a court, let alone in the form of a number per judge, will inevitably compromise the achievement of the primary values of the administration of justice.

Not everything that counts can be counted. Some results or outcomes are incapable of measurement. They can only be judged in a qualitative manner. Justice, in the sense of fair outcomes arrived at by fair procedures, is, in its essential nature, incapable of measurement.

The literature on performance indicators accepts that there must be a "qualitative" dimension to the performance of agencies. What is not usually acknowledged, however, is the fact that there is a considerable diversity in the significance of the qualitative, as against the quantitative, dimensions between different spheres of public activity. With respect to the administration of justice qualitative considerations are of overwhelming significance.

The basic assumption of the "value for money" approach is that all areas of public sector expenditure are equally susceptible to management by plans/goals/performance indicators. Nothing could be further from the truth. Some areas of public activity are such that their most important outcomes or results are measurable, e.g. government trading enterprises. Other aspects of public activity have outcomes or results that are measurable, but they are not of the same central significance to the activity. Many important aspects of health can be measured. Some aspects of education, though I suspect fewer than health, can be measured. With respect to the legal system, most of what matters cannot be measured at all. There is no measurable performance indicator for quality of judicial decision making.

Irrespective of protestations to the contrary, experience suggests that when performance indicators are actually employed in substantive decision making processes, such as the allocation of resources or the determination of remuneration, quantitative measurements, by reason of their concreteness, acquire a disproportionate and inappropriate influence over the amorphous and judgmental matters of quality. Quantitative measurement appears to be objective and value free. Qualitative assessment appears to be subjective and value laden. In fact statistics, by reason of their selectivity, contain and conceal important value judgments.

The literature on performance indicators suggests, under the subheading of "quality", that consumer satisfaction surveys which are used to judge quality in some areas of public expenditure may be appropriate for the courts. I do not doubt there is a role, albeit a limited role, for consumer satisfaction surveys in decision making by courts when directed to issues such as user friendliness of the physical infrastructure and the like. However, they have nothing to offer the primary decision making process of the courts relating to judgments and verdicts, including judgments on procedural matters. Justice, in the sense of fair outcomes arrived at by fair procedures, can only be judged. It cannot be measured.

The managerialist perspective tends to identify citizens as consumers and treats governmental institutions as providers of "services". That is the terminology in use in Australia with respect to this subject matter. It is an approach which is having an influence on the courts. Indeed, the most recent court created in Australia is a new Federal Magistrates Court. By specific statutory provision, permission is given to all to refer to this court as the "Federal Magistrates Service" and it is the policy of the government to prefer that denotation.

Suggestions for the expanded use of performance indicators appear to accept the proposition that the primary role of the courts is to provide a "service" to litigants. This is far too narrow a description of the work that courts do and indeed, in my opinion, is potentially subversive of the rule of law.

Human life cannot be characterised merely as a series of consumer choices. Litigants are not consumers. For many litigation is not a choice. Litigants have rights. They come to court to assert their rights, not to exercise some form of consumer choice. In the criminal justice process, the community asserts rights by way of protecting itself. Litigants are, and should be treated in the courts as, citizens not consumers.

The courts do not deliver a "service". The courts administer justice in accordance with law. They no more deliver a "service" in the form of judgments and decisions, than a parliament delivers a "service" in the form of debates and statutes.

Courts serve the people but they do not provide services to litigants. The proposition that courts serve the people must not be understood in any immediate populist sense. Courts serve the people understood as a historical continuum: with debts to prior generations and obligations to succeeding generations. The administration of justice does, in fact, resolve disputes. In doing so it serves the public as a whole, not merely the litigants.

A court is not simply a publicly funded dispute resolution centre. The enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by a public affirmation of who is right and who is wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of conduct by a public process with public outcomes - these are all public purposes served by the courts, even in the resolution of private disputes. An economist might call them "externalities" They constitute, collectively, a core function of government.

The broader role of the courts is obviously true of the criminal law. But similar objectives, such as deterring conduct through a public process, are often served by civil justice. The constitutional role of the courts, particularly in the supervision of the exercise of public power which occurs in both criminal and civil courts, is likewise incapable of reduction to quantitative measurement.

The judgments of courts are part of a broader public discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances. This is a governmental function of a similar character to that provided by legislatures but which has no relevant parallel in many other spheres of public expenditure. Managerial techniques appropriate for one part of the public sector are not necessarily applicable to another.

It could be said that the most important function which the courts perform is to prevent people using the so-called "service". Court decisions are intended to deter conduct both of a criminal and a civil character, such as negligence. When successful no occasion will arise for the court processes to be invoked. The greater the clarity with which the law is stated in judgments, the greater the likelihood that lawyers can properly advise their clients to avoid prosecution or litigation, e.g. by advice on compliance and by drafting contracts and other instruments.

It is not possible to measure the success of the courts in terms of crimes not committed, accidents that don't happen, disputes avoided by proper advice on compliance or by well informed drafting. There are other areas of public activity in which success may be measured in part by things that do not occur. Perhaps some areas of public health are of this character. This re-emphasises the proposition that many important results or outcomes cannot be measured at all. Again it is clear that the extent to which matters of significance can be measured differs from one area of public expenditure to another.

The literature on the application of performance indicators in the public sector sometimes expressly draws on analogy with the free market, as if the operations of such a market could be reflected in a process of government planning and performance assessment. It is suggested that a focus on outcomes or results and the treatment of citizens as consumers, in a context where a free market is not feasible, will have similar efficiency effects as the operation of a free market has. I do not believe that this is a correct analogy. The more likely source of comparison is with the traditions of socialist planning, rather than the operations of a free market.

The one thing of which there was no shortage in the former Soviet Union was performance indicators. They called it a five year plan. There were performance indicators for everything. There are numerous examples in the history of the Soviet Union about the deficiencies of emphasis on measurable performance when making decisions about society and the economy. One example will suffice.

Nikita Khrushchev in one of his speeches, attacking what he called the "steel eaters" of heavy industry, admitted the deficiencies with respect to nail production. In one five year plan the target for nails was expressed in tons. This proved unsatisfactory because every nail manufacturing plant in the country made only big nails and there was a shortage of small nails. Accordingly, in the next five year plan the target was expressed in numbers of nails. The inevitable happened. All plants produced small nails and there was a shortage of big nails.

Such distortion is endemic to any system of performance indicators. There is no way of replicating a free market with respect to government expenditure by such means. There is no way of creating the form of what Hayek called a "spontaneous order" in a context of government decision making.

A free market is also manipulable by monopolies. However, the ability to manipulate in areas where



goods and services are traded by means of exchange is nowhere near as comprehensive as the ability to manipulate in governmental decision making.

Performance indicators are always partial, like the Soviet five year plan. One provincial party secretary promised to double the output of meat. He did so by slaughtering all the milk cows. He had not committed himself to a target for milk.

It is always possible in a governmental context to manipulate the results by targeting whatever the performance indicators are at any point of time. The less central to the activities of the particular sphere of public expenditure that the performance indicators are, the easier it is to do the manipulation. The argot of managerialism calls this "goal displacement".

Let me give an example from the way in which performance indicators are published on a national basis in Australia. The benchmark chosen treats all cases which take longer than eighteen months to decide as one line item. Nothing is published about the pending caseload. If a case is not decided, it is not recorded in the comparative tables. The best way to give the appearance of increased efficiency is to put off deciding cases that are more than eighteen months old. Eventually, this might catch up with you, but not until after a relevant political threat has passed or the figures can be subsumed in some other development.

There are important areas of public activity in which the role of the hierarchy of instruments of managerialism - from strategic plans through budget plans to standards and indicators - is unlikely to rise above the merely decorative. I suspect that the administration of justice, save in certain respects, is likely to remain one of them. Of primary significance is that in a sphere of government activity in which what is capable of being measured is not of central significance, as I believe is the case with respect to the administration of justice, there is no case for the employment of performance indicators or concepts of "productivity" derived from entirely different spheres of activity, for such purposes as allocating resources or the determination of remuneration.

Nothing in the recent history of public administration, especially in health and education, suggests any grounds for complacency that inappropriate application of performance indicators will not occur with respect to the administration of justice. We would not have to go very far down this road before the mechanics of accountability pose fundamental challenges to the rule of law.

## **Address at the Opening of Law Term Dinner for the New South Wales Law Society**

**ADDRESS BY THE HONOURABLE J J SPIGELMAN AC**

**CHIEF JUSTICE OF NEW SOUTH WALES**

**OPENING OF LAW TERM DINNER**

**NEW SOUTH WALES LAW SOCIETY**

**PARLIAMENT HOUSE, SYDNEY - 29 JANUARY 2001**

Over recent weeks all of you will have heard or read various expressions of opinion about the significance of the celebration of the Centenary of Federation. Many of you will have heard me express my own opinion - on the occasion of my Swearing-in, or at the ceremonial sitting of the Court to mark its 175th anniversary, or on any one of the scores of admission ceremonies that I have conducted - about the great significance of the age of our institutions.

As I have said on these occasions, Australians like to think of ours as a young country. Indeed the second line of our national anthem is: "For we are young and free". However, in terms of the mechanisms of governance - both parliamentary and judicial - this is not a young country, this is an old country.

Few nations have judicial institutions as old as Australian courts, including the High Court which will celebrate its centenary in a few years. Few nations have a tradition of consent by the governed as old as the Parliament in New South Wales or, indeed, as old as the Parliament of the Commonwealth.

By their longevity these traditions give a legitimacy to the institutions which perform these vital functions. One of the significant effects of this historical continuity is the foundation it lays for economic success. In the light of continuing attempts to subjugate the legal system - both in the operation of the courts and in the organising principles of the profession - to market forces, it is appropriate to emphasise the economic significance of the law.

Over recent decades, public policy in all western nations has been influenced by a philosophy which emphasises the significance of market forces and deprecates, or at least, questions, the role of government.

In Australia this approach is often labelled "economic rationalism", an unfortunate term as no-one would wish to come forward as an advocate for "economic irrationalism".

We must recognise that there are limits beyond which this approach to public policy cannot go, without undermining the very foundations of the system that is being advocated. To put it shortly, there is a danger of throwing out the baby with the bath water.

In the Town Hall of Sienna there are two wonderful frescos by Lorenzetti: Allegories of Good Government and of Bad Government. Even a cursory glance at the latter, with its depiction of decay and chaos, would convince anyone that without government and a legal system, there can be no market system.

There is a tendency amongst proponents of market ideology to treat "the market" as some sort of force of nature: as if it were no more than an Oriental bazaar or a Mediterranean rialto. Markets of this face-to-face nature have always existed.

Complex markets, however, are a human construct. More than anything else they are a construct of the law.

A market economy is a very rare phenomenon. Only certain kinds of society, governmental structure and legal system have been able to sustain a market economy. The peoples of the nations of the former Soviet Union realise every day that the benefits of a market economy do not arise simply from the absence of governmental restraint.

An American economist, the late Mancur Olsen, expressed the point well when he said in a book published posthumously last year:

“There is no private property without government - individuals may have possessions, the way a dog possesses a bone, but there is private property only if the society protects and defends a private right to that possession against other private parties and against the government as well. If the society has clear and secure individual rights, there are strong incentives to produce, invest, and engage in mutually advantageous trade and therefore at least some economic advance.” Olsen *Power and Prosperity*, Basic Books, 2000 at p196.

For the maintenance of a market economy Olsen, like many other economists dating back to Adam Smith himself, emphasises the significance of the legal system:

“To realise all the gains from trade ... there has to be a legal system and political order that enforces contracts, protects property rights, carries out mortgage agreements, provides for limited liability corporations, and facilitates a lasting and widely used capital market that makes the investments and loans more liquid than they would otherwise be. These arrangements must also be expected to last for some time.

Without such institutions, a society will not be able to reap the full benefits of a market in insurance, to produce complex goods efficiently that require the cooperation of many people over an extended period of time, or to achieve the gains from other multi-party or multi-period arrangements. Without the right institutional environment, a country will be restricted to trades that are self-enforcing.” Ibid at p185.

In an address last year, Chief Justice Gleeson expressed the opinion that the economic significance of the administration of justice is generally undervalued. His Honour added:

“Economic rationalism should be comprehensively rational. If proper attention were given to the economic importance of the institutional framework within which commerce and industry function, then courts throughout Australia might compete for government funding on better terms.” The Honourable Murray Gleeson AC, “Managing Justice in the Australian Context”, Australian Law Reform Commission Conference, Sydney, 19 May 2000 at p2.

Many aspects of the administration of justice are of significance for the performance of the economy, even though not necessarily acknowledged by all economists. Their tendency is to focus on the contribution that the law makes through the enforcement of contracts and the protection of property to market exchange and to the structures of long term economic arrangements and investments.

A perhaps less tangible, but nonetheless real, advantage to all aspects of social interaction, including economic interaction, is the contribution the law makes to the protection of individual freedoms and the maintenance of justice, understood in the sense of fair outcomes arrived at by fair procedures. Most notably in the criminal law, but also in the administration of civil justice, the protection of freedom and the promotion of justice in this sense, is as essential for the economy as the administration of those aspects of the law which impinge directly upon market transactions. The creation of a societal and institutional environment protecting freedom and promoting fairness, however imperfectly in either case, does appear to be one of the requirements of economic success.

The overwhelming preponderance given to commercial values in contemporary intellectual fashion could, if taken too far, destroy the institutional arrangements upon which, in the long run, a market economy depends.

This perspective is also of significance for each of you as legal practitioners. There is a tendency

amongst many to question whether or not the law is necessary or makes any useful contribution. The thousands of lawyers jokes are, almost without exception, variations on a single theme, to the extent that there appears to be only one lawyer joke, expressed in an apparently infinite number of ways - lawyers are dispensable.

It is true that lawyers do not produce anything of a physical character in the way that manufacturers, miners or farmers do. The intangible nature of a service makes its contribution difficult to understand, unless it has some obvious physical consequences as do medical services.

Acknowledging the essential contribution the law makes as a foundation of the economy, which I have emphasised this evening, counteracts the simplistic approach that lawyers do not really "produce" anything. Nothing could be further from the truth.

The services each of you perform, both directly with respect to economic transactions and also indirectly with respect to the protection of freedoms and the maintenance of a sense of fairness in our society, make a vital contribution to the economic, and to the social, welfare of our nation. There is no job more important, in terms of economic importance, than a legal job.

There is no need for legal practitioners, or the profession as a whole, or the institutions for the administration of justice, to be at all reticent in emphasising, that without the services they perform, no economic progress is possible. An advanced economy is not feasible without lawyers. The alternative is some form of anarchy or authoritarianism, neither of which is compatible with the economic freedom that has created the richest societies the world has ever known.

The suggestion that is sometimes made and more often assumed, that lawyers are not productive in an economic sense, is fundamentally wrong, perhaps dangerously so.

The prevalence of market ideology as a fundamental approach to public policy has affected and is affecting both the courts and the profession. The virtues of unrestricted exchange relationships have acquired a moral salience. Accordingly, public policy has been directed not only to improving or perfecting exchange relationships, but to creating them in contexts where they did not previously exist. Everything is for sale. Everyone is a consumer.

I have said on numerous occasions that it is wrong to approach the administration of justice as if it involves some kind of service provided by the courts to litigants. Human life cannot be reduced to a series of consumer choices. Litigants come to court to assert their rights, not to exercise some form of consumer choice. The courts no more provide a service in the form of hearing and judgment, than the parliaments provide a service in the form of debate and legislation.

The courts administer justice in accordance with law. This is a basic function of government. It is not a forum for exchange relationships.

Greater difficulties arise with the application of market forces in what has been, primarily, a professional relationship. There is a multi-faceted and on-going debate in many nations about the degree to which the legal profession should be treated simply as a business and regulated on the assumption that lawyers operate primarily, if not exclusively, as profit maximisers. The traditional "professional paradigm" of legal practice, contrasts with a "business paradigm" which many believe to be more accurate and some believe to be more virtuous.

Those responsible for the application of policy to the profession, particularly competition policy, operate on the assumption of a business paradigm and regard arguments based on a professional paradigm as just another form of rent seeking. There is no doubt that too much of past professional self regulation was exposed as merely protectionist. But it is not all such.

The difficulty with the application of competition principles is that it may very well have an element of self-fulfilling prophecy about it. If lawyers are treated as if they are only interested in money, that is what they may become.

I doubt that the operation of a free market can perform as efficiently in the context of legal services as it does with respect to other goods and services. There is an ineradicable imbalance in the information available to suppliers and consumers of legal services. The side-lining, and perhaps the destruction, of professional regulation may well prove to be an error. The internalised self restraint of professional values will be lost. The alternative of restraint by market forces may not prove effective. Professional

restraint does not always operate the way it is supposed to in legal ethics protocols. Market restraint does not always operate the way it is supposed to in economic textbooks. Which is best is by no means clear.

In some circles, the pre-occupation with market solutions appears to be a form of utopian social engineering, advocated with a passion that we have not seen since the demise of Marxism. For those of us who believe that traditional professional values, especially ethical values, are worth preserving, these are important issues which require careful consideration. They may not survive the widespread adoption of a business paradigm.

The Law Society will play a critical role in ensuring the continuation of the professional obligations of honesty, fidelity and diligence as the core characteristic of legal practice.

There are certain matters of practical significance in the relationship between the Supreme Court and the profession on which I wish to make some brief observations by way of conclusion on this occasion. Those of you who attended this dinner last year will recollect that I announced a series of changes to the Rules and to the Court's practices designed to enhance the Court's ability to facilitate the just, quick and cheap resolution of civil litigation.

A particular contribution the Court can make in this regard is the reduction of delays which are occasioned by reason of the Court's own processes and capacity. I am pleased to be able to inform you that some significant progress has been made in this regard over the course of the last year.

For many years the Court has had a backlog of cases ready for hearing which have been allocated to a waiting list called a Holding List or General List. Criminal trials, cases in the Commercial List, and Criminal Appeals have traditionally been given dates for hearing as soon as they were ready for hearing. However, for the overwhelming bulk of litigation in the Court, the result of being ready for hearing was simply to get a place in a queue. This has now changed. As at the end of term last year, in every division of the Court, virtually every case ready for hearing was given a date. Matters that have become ready for hearing since the last call over in the respective divisions of the Court, are being given dates for a call over in the near future at which those proceedings will be given dates for hearing. For the foreseeable future, there will be no holding list in any division of the Court.

This change in the Court's capacity to set matters down for trial has not been occasioned by any decline in filings. The Court has received additional resources. Eighteen months ago, two extra judges were appointed, one to the Common Law Division and one to the Court of Appeal. In addition over the period, significant resources have been available to the Court for acting judges. So long as resources of this order of magnitude continue to be made available to the court, and other circumstances do not change, we will make progress in reducing delays in the Court.

The Court will need to focus its case management with a view to ensuring that there is a flow of cases ready to proceed. The practices that have grown up over a long period of time - when saying you were ready simply meant getting a ticket in a queue - will no longer be appropriate. Litigators can expect case management in the Court to require more strict compliance with timetables and adjournments will be harder to get.

For example, over the course of 2000, of the matters listed in the Common Law Division for Final Conference after a Certificate of Compliance had been filed, more than fifty percent sought an adjournment of the Final Conference. Cases should be prepared for hearing by the time of a Final Conference and adjournments should only be given in exceptional circumstances, as clause 50.1 of Practice Note 88 has long provided. It is not appropriate that half the cases are not prepared to take dates for hearing when they claim to be ready.

Over the years, a legal culture developed in New South Wales which accepted that it takes years to get a case on for trial in the Supreme Court. That culture must change. For those practitioners who are capable of preparing their cases expeditiously, the Court is now in a position to reward them for their efficiency, to the advantage of their clients and the enhancement of their reputation. Those of you who have traditionally advised clients that it takes years to get a case on for hearing in the Supreme Court should cease doing so. It is no longer true.

There are at the moment almost two thousand trial cases in the Court - 1600 in the Common Law Division and about 300 in the Equity Division - which are over two years old and which are not ready for hearing. There are, of course, circumstances in which a delay of more than two years in preparing

a case for trial can be justified. However, the overwhelming majority of these two thousand or so cases are not of that character. Obviously, if all of these cases suddenly became ready for hearing in the short term, then something like a holding list would re-emerge. I do not regard this as a serious threat.

The profession should now accept that delays in excess of two years in preparing a matter for a first instance trial in the Supreme Court of New South Wales is no longer appropriate in the usual case.

I wish to conclude with some observations on the statement made by your new President, Mr Nicholas Meagher, shortly after assuming office.

Mr Meagher suggested that considerable efficiencies would be available from greater use of electronic technology in the courts, particularly in the form of electronic filing; electronic access to court files; the conduct of callovers, directions hearings and the like by chat rooms, bulletin boards; and by use of video conferencing. I have for some time been an advocate of similar developments and commend the Law Society for its advocacy of these measures.

Last year in this address I indicated that one of the greatest challenges facing the legal system is to restore a rational relationship between legal costs and the subject matter in dispute in legal proceedings. I recognised then, and continue to recognise, that the Court's practices and procedures impose costs on the parties of a character which are avoidable.

It is an endemic problem in all areas of public administration that the budget of public authorities can often be expended in a manner which imposes additional costs on others, but which gives the appearance of greater efficiency within the narrow perspective of public administration itself.

The classical example is overlisting in the courts which enables a court to give the appearance of greater efficiency in the terms that are measured within the public sector, but does so by imposing the substantial cost of adjournments on the parties. Such costs are frequently significantly greater than anything that is "saved" in the public sector agency's budget itself.

Similar difficulties may arise with respect to attempts to reduce the time which legal practitioners and witnesses must spend in complying with the requirements of attendance at court. There are many occasions when the real costs involved in travelling to and from court or waiting at court are disproportionate to the amount of time actually spent in conducting business in the court. Many of those occasions may be as effectively attended to by electronic communications.

What has been called the "dematerialisation" of the workplace unquestionably has a parallel in the "dematerialisation" of some court processes into their electronic equivalents.

In August 1999 I gave an address to the Women Lawyers' Association of New South Wales in which I considered a number of these new technologies - including electronic filing, video conferencing, chat rooms and bulletin boards - from the perspective of women lawyers, who have a particular interest in the enhancement of flexibility in the work place. I said then:

"One of the difficulties with the widespread use of these technologies is that many will have the effect of internalising to the court, costs which are now borne by the parties. After just over one year as Chief Justice, I do not underestimate the inertia that can be caused by such a phenomenon."

In the eighteen months that has elapsed since I made those observations, I have had no occasion to change my prognosis.

It remains the case that court administration has not deployed information technology to anything like the same degree that the overwhelming majority of firms of solicitors have done.

There are particular difficulties in attracting the necessary skills to the public sector. It is however highly desirable that the application of information technology in the courts progress in order to drive down the costs of litigation. Accordingly, I wholeheartedly endorse the Law Society's advocacy of such developments.

**J M Bennett, *In Witness Whereof (Lawyers, the Law and Society in New England and the Liverpool Plains): The Nineteenth Century*, Armidale, North and North West Law Society, 2001**

**INTRODUCTION**

**BY THE HONOURABLE J J SPIGELMAN AC**

**CHIEF JUSTICE OF NEW SOUTH WALES**

Australians are only slowly becoming aware of the long and proud tradition we have in the mechanisms of governance. We have always thought of this as a young country. Indeed the second line of our National Anthem states: "For we are young and free". However, with respect to the basic mechanisms of parliamentary democracy and the rule of law this is not a young country, this is an old country.

In 1999 the Supreme Courts of New South Wales and Tasmania celebrate the 175th anniversary of their foundation. In 2001 the nation celebrates the Centenary of Federation. In 2005 we will celebrate the 150th anniversary of representative and responsible government in New South Wales. These are old traditions. Their strength is determined to a substantial degree by the longevity of the institutions which continue to operate much as they did at their creation.

The common law and the administration of justice have always displayed a capacity to adapt to changing circumstances. It is an abiding theme of our legal history that at any moment one can detect the concurrent existence of continuity and change. It is feature of Dr John M Bennett's history of law and order in the north and north-west of New South Wales that contemporary lawyers can identify respects in which law and practice have changed as well as broad themes of continuity which make the intellectual processes of our predecessors perfectly understandable to us today.

In this historical study, Dr Bennett continues his significant contribution to the understanding of the administration of justice in New South Wales. He also develops the broad canvas of his *A History of Solicitors in New South Wales* (1984) so as to examine in detail, and bring back to life, the legal and social history of a narrower region of the State. It is the first undertaking of its kind in Australia, and its completion is due to the commendable enterprise and initiative of the North and North West Law Society.

The particular challenges involved in the administration of justice in regional Australia is a topic worthy of detailed consideration, as it receives in this volume. I welcome this most recent addition to the substantial *oeuvre* of legal historical materials from Dr Bennett.