Opening of the Legal Year*

Hon Chief Justice Michael Grant

Parliament House
1 February 2018

I would like to take this opportunity today to address the current controversy concerning the conduct of the youth justice jurisdiction in Alice Springs. I do not intend to descend into the specifics of that issue. It is a matter which has been dealt with by the Chief Judge of the Local Court; but it is important to make a number of observations at the level of principle and process.

As a community and culture, we have always jealously guarded the independence of the judiciary. The reasons for that are well-known. It is vitally important to the maintenance of the rule of law that judges are impartial and independent of all external pressures. This enables those who appear before them, and the general public, to have confidence that their cases will be decided in accordance with the law.

Security of tenure is one of the means by which that independence is preserved and given effect. Judges are appointed by the executive government, and retain that appointment until retirement unless removed on the address of the Legislative Assembly on the grounds of incapacity or misconduct. A parliament will obviously be loath to take that step, parliaments have rarely done so, and a parliament would only do so in circumstances of flagrant and serious misconduct. Lapses in appropriate judicial demeanour and conduct falling short of the ideal do not qualify as judicial misconduct warranting removal.

These processes and distinctions are maintained to ensure that the courts do not fall prey to arbitrary and capricious interference by executive governments and sectional interest groups. This understanding must be to the fore of any discussion concerning judicial conduct.

---

* This is an edited version of the speech given by the Chief Justice at the Opening of the 2018 Legal Year.

That understanding in no way ignores or obscures the fact that from time to time there may be instances of inappropriate judicial conduct falling short of misconduct warranting removal. Sometimes these are matters which may be addressed and remedied by way of appeal. In such cases the appellate court will generally make comment designed to prevent, so far as possible, any repetition of the inappropriate conduct. In cases where the conduct is not the subject of appeal, it has historically fallen to the principal judicial officer of the court concerned to address the matter. This has ordinarily been done by way of private discussion and counselling in relation to the offending behaviours.

Sometimes that mechanism has provided an answer to the problem, and sometimes not. In either case, it tends to place the principal judicial officer in an invidious position. It is a task which no head of jurisdiction relishes or wants. It requires a necessarily painful dissection of the offending behaviours and the sanction of a judicial colleague in circumstances where there is no statutory or other clearly defined authority for doing so.

By way of example, the *Local Court Act* provides that the Chief Judge is the principal judicial officer of the Local Court. In that capacity, the Chief Judge is responsible for ensuring the orderly and expeditious exercise by the court of its jurisdiction and powers. That administrative responsibility does not in any way include the exercise of judicial discretion by another judge. The *Local Court Act* provides expressly that in the exercise of his or her judicial functions a Local Court judge is not subject to the direction or control of any person. In essence, each judge is in control of his or her courtroom and conducts proceedings there as he or she sees fit.

When a principal judicial officer deals with a complaint concerning inappropriate judicial conduct, that process may be conducted privately or it may involve some form of public determination. In either case, it will be inappropriate for the principal judicial officer to conduct a running dialogue with the media concerning the matter. In circumstances where there is a public determination, the reasons must speak for themselves. Calls for a principal judicial officer to enter into public debate on such an issue misunderstand the matters in respect of which judicial officers may properly make public comment; they misunderstand the constitutional and statutory position concerning the tenure of judicial officers; and they misunderstand the nature of a principal judicial officer's function and powers – or lack thereof – when dealing with complaints of inappropriate judicial conduct.

The assessment of judicial demeanour and dealings with practitioners appearing before the courts is also a subjective undertaking. What some may see as a robust exchange between a judge and a practitioner testing the cogency of submissions, others may see as judicial bullying. Similar differences of opinion may arise concerning comments made when dealing with offenders during the sentencing process. It is also the case that practice as an advocate requires a degree of resilience and an understanding that submissions will, on occasion, be subject to challenge from the bench. Again, these observations are not to ignore or obscure the fact that from time to time those challenges will descend into the realm of inappropriate judicial conduct.

The various difficulties and shortcomings of the process by which the principal judicial officer deals with complaints concerning inappropriate judicial conduct have long been recognised. In most other Australian jurisdictions judicial commissions have been established to deal with complaints of that nature.

Some years ago an inquiry was instituted under the *Inquiries Act* to deal with a particularly problematic case involving a former magistrate. The commissioner appointed to conduct the inquiry was a retired Supreme Court judge. The commissioner also considered the question whether a standing judicial commission should be established in the Territory. His conclusion was that the jurisdiction was too small to warrant or sustain that model. That is a conclusion which should now be revisited.

Shortly after I was appointed Chief Justice, the then President of CLANT approached me with the suggestion that the time was ripe for the establishment of such a body. I agreed. Since that time I have been involved in discussions with the Chief Judge of the Local Court and the leadership of the Law Society with a view to agreeing a model which the judiciary and the Society could present to the executive for consideration. I understand that an “in principle” agreement concerning an appropriate model was reached within the Society late last year.

The judges of the Supreme Court have now formulated a model which would have the following elements. The process would have a statutory base in a Judicial Officers Act. Complaints would be made to a local registrar. After screening to weed out frivolous complaints, they would be referred to the NSW Judicial Commission to be dealt with on an agency basis.

Such a process would take advantage of that body's long established expertise in the field, while avoiding the conflicts of interest which would necessarily arise in a jurisdiction of this size. The judicial commission would then have a range of statutory powers which could be exercised in the event a complaint is found to be made out, and fashioned to meet the particular requirements of each case.

We intend putting that model to the Local Court judges, the Law Society, the Bar Association and CLANT with a view to making a joint submission to the executive government for the establishment of a process with those elements. If the executive and the legislature see fit to give effect to the proposal, issues such as the current controversy would be dealt with by that mechanism. We believe that process would best serve the public interest.

[ENDS]