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Justice for the Courts

Chief Justice Brian Martin

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JUSTICE FOR THE COURTS

The Hon Justice Brian Martin AO MBE
Chief Justice of the Supreme Court of the Northern Territory

INTRODUCTORY INCONSEQUENCES

In his novel "The Tribulations of a Chinaman in China" published in English in 1883, Jules Vern referred to an ancient Chinese proverb: "When swords are rusty and spades bright, when prisons are empty and granaries full, when temple steps are worn by the footprints of the faithful, and courts of justice are overgrown with grass, when doctors go on foot, and bakers on horseback, then the empire is justly governed". I am indebted to the Honourable Chief Justice Yong Pung How of the Republic of Singapore for this reference. Concluding his paper delivered at the Third Asia Pacific Courts Conference in Shanghai the Chief Justice concluded: "I shall leave you to contemplate the reality and the implication of courts of justice being "overgrown with grass" in the 21st Century". Inscrutable, or just ambiguous?

When surfing the Internet in the hope of discovering something novel, new age, erudite and marginally useful for a paper in this forum, I came across a commentary on what was perceived by the author to be the policies of the United States Congress in relation to certain classes of criminal conduct. It was encapsulated in the title "Trail 'em, nail 'em and jail 'em". I thought "fail 'em" might be a suitable lead, but since it is considered that the judiciary should not engage in public policy debate with the Executive or Parliament on such matters, I will not venture further. However, I do

wish I had added the article to my computer's "favourites" list. For the life of me I cannot now find it.

A FAIR GO FOR THE JUDICIARY

As much as the judiciary has tried to stay out of the political fray, it has been inexorably drawn into it. The nature of the criticisms of judgments of the courts has led to a reappraisal of the manner in which the response, if any, is to be made. The success with which the issue is dealt with will have much to do with whether the public opinion of the judiciary will be justly formed.

The abandonment by Attorneys-General of the traditional role of defending the judiciary means that the judiciary must now speak for itself or find some other means of publicly conveying its responses. It is important that in doing so, it not become enmeshed in the same practices adopted by some other public disputants. The judiciary must avoid the unseemly gambits of declining to reflect upon the real issue, avoiding the substance of the criticism, taking on the critic personally or acting in an otherwise mischievous manner. Adopting the tactics employed by some others to deflect criticism rather than face it, places the judiciary in no better position than those others. Obfuscation will not do. It diminishes integrity and good standing.

Judges know that the information media does not always accurately and completely report what is said by the critic. There are many reasons for that, misunderstanding by the reporter, bad editing, editorial comment mixed up with news and plain stirring. On the other hand, the report could be entirely accurate, the problem being that the critic is misinformed, obscurantist or deliberately misleading.

The one way in which the judiciary should respond to unfair and unjust criticism is fairly and justly. Most Judges have little or no experience to equip them to engage in the political debate, as it has unfortunately come to be. In any event, they ought not to attempt to engage the critic or his publicist on his field, playing by his rules. The much better response is to shift to ground where there is a demonstrable advantage.

Those engaged in the adversary system know the value of particulars. If they are sought and not supplied, it may be reasonably assumed that there are none. If they are sought and supplied, then the response can be made accordingly. I recently had the experience of wishing to investigate allegations made by a Minister of the Territory Government which reflected adversely on Territory judges. The Minister had been quoted in a Territory newspaper as saying that women's groups often had expressed concern at the attitude of some members of the judiciary towards women in rape cases and had been appalled to see offenders walk free on numerous occasions. Those remarks were made in the context of proposed laws to expand the mandatory sentencing regime of the Northern Territory to embrace crimes of violence and sexual abuse. The reply referred to media reports and statements attributed to Judges from South Australia and Victoria. The only report about a Northern Territory Judge took him to task for having made comments in relation to the relative seriousness of the circumstances of a particular sexual offence. That is a function carried out routinely in relation to all types of crime and must be so if appropriate penalties are to be imposed, taking into account the facts relating to the offence. As to offenders walking free – in context they must have been persons convicted of rape or serious sexual offences – an example given was of a person who had in fact spent six months in

prison. The other referred to a person who, having offended for the second time by way of indecent dealing with a girl, was released on a good behaviour bond. I do not venture upon the merits of the sentences imposed on either of those occasions, but it is remarkable that the supporting material, press clippings, going back to about 1993, provided but two examples to support the Minister's attack and one of them was plainly wrong. Indeed, in her memorandum responding to the request the Minister expressly said that the concerns expressed by women's groups was Australia wide and coverage of events in other Australian jurisdictions may frequently colour local opinion about the effectiveness of the Territory legal system. Such an admission does more harm than good to the Minister's views. It can hardly be relevant to the subject of an attack by a Territory Minister upon the Territory judiciary administering Territory law.

With a view to trying to ensure that no more unfounded criticism is made, I have taken the initiative to ensure that the Attorney-General and shadow Attorney-General are provided with a transcript of the sentencing remarks of any Judge upon request. There will be no excuse for criticism from that quarter which is not fairly based.

Intemperate and unjustified attacks founded upon a community perception, which is misconceived, generated by misleading media reporting, is not fair or just to the judiciary. But it is more serious than that, it has the potential to undermine the judiciary as one of the three arms of democratic government such that criticism of the courts can be used as an excuse for the introduction of unfair and unjust laws.

Writing in a somewhat different context in the Weekend Australian of 10-11 January 1998 the editor said: "Credibility, as effective political leaders know instinctively, is like currency. If it is nurtured through consistency, honesty, acceptance of responsibility and the courage to take decisions – even (or especially) when acting in accord with good principles and judgment is hard – credibility is enhanced. If it is impaired through inconsistency, hypocrisy, evasion of responsibility and timidity it is quickly devalued". There is scope for the judiciary to pick up on that theme. It should take any opportunity presented to enhance its credibility by demonstrating its adherence to those positive criteria.

The second leader on that day spoke of the revival of the judiciary debate. It commented upon Justice Michael Kirby's paper to a legal conference in Hawaii where he looked back on a year of unprecedented criticism of the High Court. It was pointed out that the Commonwealth Attorney-General urged Judges not to overlook an opportunity to explain their little understood work to an interested public. The editor went on to suggest that it is more important for the Judges to keep trying to explain their role to the wider public, and noted that both the Attorney and his Honour were at one in condemning criticism of the courts that is personal, ignorant or abusive. "Judge bashing is not just an Australian sport but the below the belt blow seems more willingly struck here ... Just as the courts are among many institutions now under increased scrutiny, the judiciary debate suffers from failings general to public debate in Australia." The editor pointed out that that debate is calculated to denounce the opponents and win the approval of the converted, rather than persuade the great majority of people who are willing to consider reasonable argument.

Occasionally, whilst responding to foreshadowed legal challenges to the validity or application of legislation, Ministers of Government say things which could be easily interpreted as endeavouring to influence the outcome. It is an attitude which can effect the impartiality of the Court in the public eye by conveying the impression that the courts are instruments of the government of the day. Any such remarks should be avoided; they probably emanate from an enthusiastic desire to demonstrate strength and conviction as to the righteousness of the political cause. But they are disrespectful, apt to mislead, and redolent of the old adage. "If you want loyalty you need a cause, and to have a cause you need an enemy".

We must become more aware of the possibility for confusion arising in the public mind in regard to the position and role of the courts. In a paper prepared for delivery at the Shanghai Conference, Canadian Professor Carl Baar said:

> "Those of us who are professors of political science universally categorise courts as political institutions. This is not because we believe that courts are partisan or Judges are biased but because we define politics very broadly, to include a full range of authoritative decision making – whether by legislators, executives, administrators or judges. Rather than using the term "political" with its pejorative meaning in the eye of the judiciary (let alone the public) and the onerous implication that courts are merely instruments of the government of the day, I will begin with a more neutral statement of general principle: Courts are State actors".

He went on to explain that that was because courts are established under the Constitution and laws of the particular country and they are state actors in the sense that they function in support of the exercise of state power.

Professor Baar goes on to observe that notwithstanding the distinct and separate role of the courts that the fact that the judicial process relies upon input from many resources and can have outcomes which impact upon other arms of government can lead to confusion as to who may be responsible should there be a failure in the "criminal justice system". The courts may be blamed for the outcome of a criminal case that was a result of a prosecutor dropping a charge prior to trial or failing to conduct the trial properly. The failure of police investigations or rejection of ill-gotten confessional material by the court may also lead to the court being blamed for the outcome, the discharge of the accused.

Criticism of the judiciary, or any member of it, can come from a number of quarters at any time and sometimes at much the same time. It is simply not possible for the judiciary, unaided, to meet them all. To find time to prepare an adequate response, with the necessary immediacy, is extremely difficult given the responsibilities of a Chief Justice. In the meantime the false impression given to the viewer, listener or reader remains, and the passage of the impressions from one person to another has the potential to lead to embellishment and even greater harm. Public scrutiny and criticism calls for the ability to make a public response in a timely and effective manner. That calls for appropriate resources being made available to monitor the media and Parliament and the ability to fashion a response without the distraction of having to get on with the day to day duties of a trial or appeal. Judges simply cannot pop out of their chambers to do doorstop interviews on short notice; they do not have the time to properly prepare media releases. In some States funds have been made available to appoint a media liaison officer who is permanently available for the obvious purpose. I suggested to a former Attorney-General that given the needs

which I have identified, funds be made available to appoint such a person in the Territory, who could be called upon, as occasion required. The proposal was flatly rejected.

The present Attorney, when asked about the comments I had made seeking to restrain members of the Legislative Assembly from making unfair and outrageous statements regarding the judiciary in the House, replied that Members can say whatever they like in the House and the Chief Justice has the right to criticise. Given that acknowledged right, it follows that the resources ought to be provided whereby it can be effectively exercised. That would provide the judiciary with a measure of justice.

It is suggested that Judges should not engage in public debate. It is argued that judicial self-defence against public criticism is generally unwise for a number of reasons, of which the following are at the forefront. A response in the public media will reduce the Judges to the level of their attackers and to the level of the protagonists in all other media fuelled debates. I have tried to demonstrate that by endeavouring to shape the ground upon which the defence is to be mounted, the strength of that argument is reduced. It is also said that in making public responses the Judges confirm or encourage a community perception that they are political partisans. A fair and moderate response based upon fact and not rhetoric ought to overcome that possible perception. Another suggestion is that nothing in the training or experience of Judges implies any particular aptitude in dealing with the media. That is acknowledged, but in my view there is no reason why it should be necessary for a Judge to respond in so direct a manner. To avoid that disadvantage it is essential that there be an onside media savvy person available. (I have taken these arguments

against public response from Judges from an article "The High Court and the Community" by Doctor R P Austin reported in Volume 4 of the Journal of the Judicial Commissioner of New South Wales commencing at p17. Doctor Austin has since been appointed a Justice of the Supreme Court of New South Wales).

Just a few days ago I had the experience of my ineptitude in dealing with the press being well demonstrated. There had been published a letter to the editor of the only local daily newspaper, highlighted by a sub-editorial headline, calling upon the Chief Justice to provide details of how Judges go about sentencing, and in particular arriving at what was called "discounts". I thought the best way to approach this was to set out the essential features of the law found in the Sentencing Act and to add a brief commentary. When the reply had not been published for over a week I contacted the editor suggesting that since it was seen to be in the public interest to publicly call me to account, it would be in the public interest to publish my account. His ready explanation was that my reply was simply too long, not only did it exceed the space normally set aside for letters to the editor, it was also greater in length than the usual feature articles. However, he added that he would be making room for it and expected it to be printed within a day or two. That happened, and I have written thanking him for his consideration. Clearly the response would have been published earlier and may have had greater impact had it passed through the hands of my own editor, someone knowledgable about the restraints upon the newspaper publisher and able to shape the material to be more readily accepted.

Sir Anthony Mason is reported to have said that Judges commonly speak and write about the law and the judicial function, not only in law journals, but also in literary

reviews and even newspapers. In his view, there is no place in a modern democratic society for a supine judiciary, although there is a case for the exercise of self-restraint, but not only by Judges.

WHAT HAVE THE JUDICIARY BEEN DOING IN THE MEANTIME?

It is all very well to talk about the means by which the courts should be able to respond to unfair criticism. More importantly, there is a need for the courts to be proactive in heading off grounds for criticism, and informing the public of what the courts are doing to tackle some of the long standing defects in the system. Cost and delay are obvious subjects of discontent. They are outcomes arising from a variety of factors, including complexity of the law, the factual content in which disputes arise and the judicial resources available to manage, hear and decide cases. When it comes to complexity of the law there is probably not much the Judges can do since guidance and authority emanate from many sources. The impact of the World Wide Web requires special attention outside the bounds of this paper. As to factual content, it is no longer possible to dispose of a murder trial in a day (see the judgments of Krewaldt J. in the 1950s), and appeals from conviction absorb the Judges for extended periods in and out of Court.

The role of a Judge as a Judge is limited in most jurisdictions to getting on with doing what Judges are appointed to do. They may also be engaged with their colleagues in making rules to govern the practice and procedure of their courts and involved in standing and ad hoc committees dealing with court governance and administrative support. . Beyond those things, they can do little without adequate resources being provided by the Parliament and Executive. They can make suggestions, but whether

they are implemented depends upon Parliamentary appropriation of the money and Executive authority to spend it.

As to my Court, I would like to mention firstly a few of the initiatives introduced of recent times which have not entailed the spending of any money, and next, those which would not have been, or will not be, able to be implemented without the authority of the Attorney-General and the allocation of resources.

- Commencing in about 1994 we undertook a clean out of the civil registry files to establish a base line for case flow management. The system introduced has been reviewed from time to time and improved upon. It is soon to receive further refinement in the light of experience. It now has the support of the Law Society; the benefits to the parties to litigation are now recognised as also being a benefit to the profession. Time must be available to a Judge who is charged with management of a case, out of court, so that he or she can devise a management programme and revise progress if the plan is to be successful.

- A qualified system is in place whereby proposed legislation, which may have an effect upon the jurisdiction of the courts, is the subject of consultation between the then Attorney-General and the Chief Justice. This is one of the rare areas where it is appropriate for judicial officers to become engaged in policy matters. Amongst other things their expertise may assist in the shaping of legislation so that it will operate efficiently and without added cost and complexity to litigants. It also provides the opportunity for an assessment of the judicial resource implications.

- The traditional January vacation has been largely done away with. It is still the time for leave preferred by many in the profession and some members of the judiciary. However, rather than having just one judge on duty during January, we now endeavour to tailor the number available to the amount of work which the Crown and other litigants foreshadow as likely to be ready to be heard. The system has only been running for three years, but it is proving to be increasingly popular. It is especially convenient for matters not requiring the attendance of witnesses, such as appeals, guilty pleas, interlocutory applications and the occasional urgent application. It is not limited in that way, a criminal trial has been held without difficulty. There is no limitation on the type of matter which could be dealt with in January so far as the Court is concerned provided adequate notice is given to ensure that a judge is available. Reasonable prior notice is needed, not only so that the appropriate judicial resources can be mustered, but because there are obligations for supporting service upon court reporting and staff of the Office of Courts Administration.

- Since about April 1995 the Court has been especially supportive of the need for interpreter services. There is currently an enquiry being conducted by the Anti-Discrimination Commissioner into that field, and the Commissioner has been informally made aware of the particular impact which lack of adequate services has upon the judicial process. The Crown is at a particular disadvantage in investigating and prosecuting alleged offenders without interpreters being available when required.

- Subject to suitable arrangements being made, the Judges have demonstrated their willingness to sit other than in Darwin and Alice Springs to suit the convenience of parties. They can sit as the Court within the Territory and as Commissioners anywhere. Judges have been to Ali-Curung, Groote Eylandt, Adelaide, Sydney and Los Angeles. The Court has commenced sitting at Katherine, starting in a small way with a few short, but busy, sittings each year. We have asked the Executive to undertake studies as to the additions and alterations which need to be made to the Courthouse in Katherine with a view to holding jury trials. I have no doubt that such trials can and should be held there. We continue to sit in Alice Springs for three or four weeks at a time, totalling 28 weeks in all this year.

- Together with other jurisdictions we have adopted a uniform style for our judgments and they are to be found on the Internet at the usual sites.

- Members of the profession now have a reliable and regulated way of contacting a duty Judge out of normal Court hours.

- Changes have been developed over the last couple of years to ensure that adequate time is available on a fixed basis for the taking of pleas, the hearing of justices appeals and the like, and for Judges to have reasonable time, as required, to attend to reserve judgments. The previous system whereby those duties were undertaken on an ad hoc basis as time became available proved to be unsatisfactory as the volume of work increased.

- Draft rules to better regulate business in the criminal jurisdiction have been circulated for comment. They are modest, but are aimed at endeavouring to ensure that trials do not go off or become prolonged for lack of preparation. It is hoped that the presently unsatisfactory waiting time for trials will be reduced.

- Although there has been little demand for it thus far, the Judges will be looking closely at the issues surrounding additional dispute resolution mechanisms within the next few months.

- A real effort has been made within the bounds of judicial independence to arrive at joint or concurring judgments in the appellate jurisdiction of the court. There is a general benefit to the court in the maintenance of unity and consistency. In their absence reactions from other branches of government and the public might be there is no need for the courts (Computer Simulation of Judicial Behaviour – Alan Aikenhead and Widdison, Web Journal of Current Legal Issues).

These are matters largely under the Judges' influence and control, not requiring any significant resources. In addition, the courts have been supported by the provision of funds which have enabled the following to be introduced:

- Although relatively minor in the overall scale of things, it has been of significant importance to people who are hearing impaired to have access to facilities which enable them to follow the proceedings in Court. Witnesses, members of the public and others have been able to use the system which is quite discrete and, I

am told, produces a very worthwhile result.

- Video conferencing equipment has been installed at Darwin and Alice Springs and is being increasingly used. It provides very substantial advantages by way of cost saving. Evidence, submissions from counsel, arraignments of prisoners in custody are able to be taken over the telephone wires onto the in court television screens. Of course, it is two way. The Territory Parliament has enacted legislation agreed upon by Attorneys-General to be adopted commonly throughout Australia providing a firm foundation for the use of telephones and television in the taking of evidence and submissions and appearances before the Court from anywhere. It came into operation on 16 June, and if supplementary rules or practice directions are required, they can be introduced as the need is identified. (As many of you would be aware, there is one singular disadvantage with this international medium, that is, having to meet the convenience of witnesses who are only available when the Judge and others involved would normally be sound asleep). The equipment allows videoconferencing transmission in Darwin into either a criminal trial court or a civil trial court, but not both. There have been frequent clashes, especially when it is being used for the taking of evidence from a vulnerable witness. Work is being undertaken with a view to the facility being simultaneously available in each jurisdiction.

The following are examples of improvements to efficiency and reduction of cost which will require further funding:

- Aspects of information technology have been and will continue to receive detailed attention. Judges who would like to have them now have access to computers which are gradually being programmed to receive legal resource material not only on the Internet but through CD-ROMS held in the Darwin Supreme Court library. When the technical problems are overcome, I hope that that access will be available to Judges and Magistrates where ever they may be sitting in the Northern Territory and from their homes.

- We are exploring digital recording of transcript, electronic filing of documents and ensuring that Territory Courts will be able to make their contribution in the approved format to the electronic appeals process initiated by the High Court of Australia through the Council of Chief Justices.

- A committee was formed as recently as May with a view to formulating a plan which will take into account the technological needs of those having to do with the courts and the services provided to those who come into contact with the administrative office (I refuse to call them customers or clients). The committee has representatives from the Law Society and Bar Association, the Judiciary, the Office of Courts Administration, IT consultants and representatives of Government Departments specialising in the area. Special attention will be given to areas outside Darwin and Alice Springs.

The following are designed to enable the public to better understand the position of the courts in society and their role:

- I hope we will be able to take a leaf out of the book published by so many courts by way of a site on the Internet. Public information as to the role, make up and function of the courts, their judgments and statements made by judicial officers of public importance can all be made readily accessible by that means.

- Within the next few weeks progress should have been made to enable representations to go to the Attorney-General for the incorporation into the court building in Darwin of an educational facility to do with the law and the courts. It is intended to be a hi-tech means of explaining to the public what the law is about, especially in the context of the Territory population, how it is administered by the courts, the place of the courts in the institutions of government and what is involved in running a case. I have never quite accepted that having a group of young school children come in and sit in court for half an hour or so is likely to assist them very much in their appreciation of what the courts are all about. Apart from anything else, they seem to arrive just when explicit details of alleged sexual offending is being introduced.

- In conjunction with those projects, Terms of Reference are being drafted as a basis for a survey to be undertaken as to the public perception of the Supreme Court and its associated administrative activities.

Beyond all of that there is yet a further significant development which will take place on Thursday 1 July, the 21st birthday of Self-Government. The Judges and counsel will do away with wigs in the civil jurisdiction.

I conclude with a metaphor penned by Richard Susskind in his book "The Future of Law" (Clarendon, Oxford 1996):

> "At a colloquium of the world's leading manufacturers of electronic power tools, an image of the latest version of a gleaming electric drill is thrown on the screen. The executives are asked whether this is what their companies sell. They nod wisely. But then they are shown a photograph of a hole, neatly drilled in the wall. The colloquium leader corrects the audience. "That is what we sell." Few indeed are the hardware customers who are passionate about a drill. They are concerned with what drills do."

The legal profession and the Courts must learn this lesson. With all that is novel and intriguing around us, we must not lose sight of our equivalent of the hole in the wall - the administration of justice according to law. That is timeless.

PROTAGORAS

A SOPHIST'S PROBLEM

A law professor made a contract with a pupil on a contingent basis. The professor was not to be paid until his pupil won his first case as a lawyer. When the professor thought he had taught the pupil enough, he asked for his fee, but the pupil refused because he had not won his first case. The shrewd professor sued the pupil, since he thought he could not lose. If the professor won he would get a judgement against the pupil and thus get paid, whereas if he lost the pupil will have won his first case and the professor would be entitled to be paid, under the terms of the contract. At the trial, the pupil, in his first case ever, moved that there is a non-suit. The pupil explained that he could not lose because if he won the case he would not have to pay the professor, whereas if he lost he would not have won his first case and therefore would not have to pay, under the terms of the contract.

Who should win the lawsuit, and why?