

BALANCE

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Proper criticism a stimulus

Justice Sir Gerard Brennan and Lady Brennan were the Law Society's guests last month.

Justice Brennan spoke about the High Court, judicial performance and criticism at dinners in Darwin and Alice Springs:

"Let me commend to you the judgments of the High Court.

"Not because of a pride of authorship in my own judgments, nor because of the high respect in which I hold the judgments of other members of the Court, but because it is in those judgments that the law of this country is articulated with the greatest authority.

"Articulation of law - whether it be in the interpretation of the Constitution or of statute law or in the refinement, correction and definition of the common law - is a judicial duty.

"It is a duty which, like all judicial duties, is performed in response to the problems presented in particular cases.

"Unlike other branches of government, the Courts have no discretion to decline to exercise their power, nor to delay an exercise of the power to a

more propitious time. When litigants invoke the jurisdiction of the Court, they choose the issues; they choose the time; they produce the facts.

"Then the Court must ascertain the law by which the case is to be decided. That is the way in which the courts declare the law. They have no prior agenda.

"Special leave procedures filter the cases which come before the High Court, so that its chief work is the review of legal principle. Sometimes

the change would produce in practice.

"The rigorous discipline of judicial method is not a mask for the exercise of political power.

"Once a legal principle is stated in order to determine a case, the law is declared. The reasons which lead the Court to a declaration of law are set out for public examination in the published judgments. They are freely open to criticism. But if the criticism is to have a point, it must be directed

to the principle of law and the reasons assigned for declaring it to be the law. It is not to the point to criticize the result of a case if the legal principle be correct. The published judgments are the Court's account of the way it performs its functions. Especially in technical fields, it cannot give an adequate account in any other way. Certainly not by engaging in public controversy or by endeavouring to manipulate public opinion.

"The Court looks for criticism of its judgments from informed and fair-minded critics, whether lawyers or not. Criticism of that kind is the greatest stimulus to high judicial performance and is welcomed accordingly."

a legal principle may become obsolete; sometimes it may produce inconvenience, inequality or even injustice. The review covers the sources of the relevant legal principle and an appreciation of how it works; if some development is proposed, the Court must assess how the change will fit in which other legal principles and what effect

