From the Profession

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FUNDAMENTAL ISSUES FACING THE JUDICIARY OF THE 21ST CENTURY

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The impending closure of the current 1,000 years in the Christian calendar and the coincidental commencement of the next, has excited interest around the globe. Not the least reason for that is the predicted disasters which will befall those who rely upon computers infected with the Y2K bug. But this aggregation of events may well have been avoided had those responsible paid regard instead to the Chinese lunar calendar. Given that it dates from 2,600BC the problems of the bug would never have arisen or would by now have been long gone.

This is as good a time as any for review, introspection and forecasting. There are plans for the celebration of achievements and commemoration of misfortunes, along with expectations for advancement in all aspects of human endeavour and predictions of doom and gloom. No doubt there are many, however, who share the sentiments of Albert Einstein "I never think of the future – it comes soon enough".

An Internet search discloses hundreds of sites relating to millennium conferences. The range of subject matter is extensive, embracing the relatively innocuous, such as information management and galaxy morphology and those sounding a little sinister, such as "The End of the World as They Know It" and "The Time Bomb". I hasten to add that the first of these concerns environmental factors and the other focuses on the 2000 crisis, as it has come to be called.

The focus of many of these conferences is on lessons to be drawn from the past and their implication for the coming age and so it is here.

Although honoured to be invited to address this session, I wondered what I could usefully contribute. I am a Chief Justice in what must be amongst the least populous jurisdictions in the region. We have only about 190,000 people spread over a landmass of nearly 1.4 million square kilometres, or one sixth of the Australian continent. It is a multi-cultural society including about 50 thousand indigenous people, the remainder having come from all over Australia and other parts of the world including the Asian and Pacific regions. Early economic development was heavily supported by the labours of Chinese people, many of whom remained. Succeeding generations have made a significant impact for the good of Territory society.

The Supreme Court has six Judges. We sit throughout the year in the capital Darwin, located in the tropical north, and regularly visit Alice Springs in the desert centre of the continent, 1,500 kilometres to the south. It is a court of general jurisdiction exercising its authority in criminal, civil and supervisory cases, and on appeal from lower courts and tribunals. The Judges sit in trials at first instance and also as members of the appeal court. The purpose of this brief sketch about the court and its work is to show the legal issues before it are wide ranging and I suspect that the practical problems facing it are not much different to those in judicial systems elsewhere.

Before proceeding further, it might be helpful if, as lawyers often do, I define the terms of the subject under consideration as I see them. "Fundamental issues" are topics for discussions which go to the essential foundation of the subject matter. Those issues are to be distinguished from the factors which make up the environment in which they arise. The surrounding circumstances may not emerge in all jurisdictions, and those that do may not have the same effect, some may be helpful for the judiciary and others detrimental. I bear in mind that those attending this conference come from different societies, with varying traditional, cultural and legal backgrounds. But the literature discloses that many factors having a bearing upon the judiciary and in the way it discharges its functions are not confined within jurisdictional boundaries. I have selected four environmental factors which may tend to influence the fundamental issues, they are The Consumer, Technology, Globalisation and Planning for Change. Each will be briefly discussed before moving to what I suggest is the essential foundation of

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the judiciary.
As to the "judiciary", it comprises the judicial officers of the State collectively and for these purposes is not restricted to the higher courts, but includes all those whether called judges, magistrates or by some other description at all levels in the court structure who perform judicial functions.

The Consumer
The primary function of the judiciary is the resolution of disputes; parties to disputes, whether citizen or State, are encouraged to bring those disputes before the courts for impartial resolution. Self-help by the stronger party is not acceptable. At the heart of the system then are the people in dispute and it is essential to good government in a well ordered society that the judiciary be supported by the confidence of the people it serves. To the extent that that confidence is diminished will the authority of the judiciary be diminished, and other means sought to resolve disputes. That confidence, or lack of it, is a relevant feature of the environment. It can be shaped by external factors such as unjust criticisms of judicial decisions or courts, and delays in the administration of justice brought about by lack of adequate resources, particularly in the number of judicial officers required to do the job. In addition, there are matters going to the internal operations of courts which can operate for good or ill on the public perception of the administration of justice. Adopting the language of consumerism, the services rendered by the courts, within available resources, have become increasingly subject to scrutiny by the customer. The language of trade and commerce may be foreign to the judiciary as it goes about the task of maintaining the rule of law, but that task is oriented to the people, they rely upon it and are entitled to expect that the courts will take into account their needs by looking at the system from their perspective when designing the way in which this most important services is delivered.

It is suggested by some that courts are organised for the convenience of the judiciary, court staff and lawyers, forgetting the host of other people who come to the court building, most of whom do not want to be there. Some litigants, and perhaps all offenders, I suspect, are in that category, but there are others, such as witnesses and, where they are part of the system, jurors as well as visitors who drop in to follow a particular case or merely look around to see what is going on who must also be taken into account. Their perspective of justice and hence confidence in the court system is largely governed by personal experience on the usually rare occasions when they go to the courthouse.

This issue has been the subject of a very recent report by Professor Stephen Parker of Griffith University to the Australian Institute of Judicial Administration. Accepting that there were qualifications as to the methodology and what could safely be inferred, the Professor concluded, amongst other things, that "all court systems in Australia are moving in the direction of consumer orientation and a culture of service", although at different stages and by diverse means. The report suggests that the stimuli to the changes include, in particular:

(i) shifting beliefs about the way that all large institutions should plan and organize themselves internally for improvement;

(ii) new thinking about public sector management; and

(iii) a sense that public respect for the system of justice (as refracted through the attitudes of political leaders and the media) is in danger of collapse.

He adds that an additional stimulus seems to lie in a growing diversity amongst the people who use the courts, especially in terms of ethnic and cultural background and capacity to understand the language and procedures of courts.

As may be expected in a report focussed on the consumer, much of the language draws upon that of business management. The recommendations are focused upon firstly, promoting better communication and identification of needs of the users, next the environment, facilities and support available in the courts, and finally, developing the means for sharing best practice amongst the courts. It is a report which is likely to receive close and detailed attention in Australia and perhaps elsewhere.

The demand that the services of courts be more accessible, especially in terms of cost, and that the disposition of cases be prompt, both in getting a hearing and in delivery of judgment thereafter, are real, but not new. It lay behind the transformation of the English system of civil justice brought about by the Judicature Acts and Rules of the mid 1870s.

Much is now being done in some courts by way of individual case management by judicial officers which is intended to cut down on time before trial and at trial. That is happening especially in the civil jurisdiction, but more attention is being given to similar techniques on the criminal side of the register. The community, especially victims, is entitled to expect that those accused of committing a crime be dealt with fairly, but without unnecessary delay, those not proven guilty discharged and those found guilty sentenced appropriately. Too often the outcome of a trial, civil or criminal, is dependent upon the memory of people whose appearance in the witness box has been so long delayed as to dim their recollection of relevant events. Justice may be impaired because of forgetfulness brought about by lapse of time and there are many reasons why that can occur. Much is now being done to overcome that grave problem, but it is likely to persist. I suggest that greater judicial control over the progress of cases to trial, and the conduct of the parties at trial will be necessary to firmly, but fairly, overcome the deliberate delaying tactics, abuse of process and exploitation of the procedural system by the more cunning, powerful or wealthy party to defeat the cause of the other side. Confidence in the court system will not be maintained if all parties to litigation do not receive a fair go. There is little value in having an impartial and independent judiciary if the procedural system it administers can be manipulated to work injustice.

In the civil jurisdiction there is a growing interest in the use of alternative, or as some refer to it, additional, dispute resolution procedures (ADR). It is not confined to settling minor neighbourhood arguments. Special procedures have been developed to apply them to the emotional and personal disputes which arise within families, particularly regarding the care of children and as well to commercial fights involving huge amounts of money. Courts must ensure that their own failures do not cause them to become irrelevant and thus oblige people to seek alternative means of resolving their differences. I do not suggest that there is no place for ADR, it has a long and honourable tradition in many societies, but it is important to recognise that there will be something very wrong if people are obliged to go to ADR because they cannot rely upon the courts. Some courts have embraced some or other aspects of ADR, others are actively considering whether they

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should and if so, how. I am inclined to the view that rather than ADR being perceived as an alternative to a failing court system, it should be recognised and integrated into the services which can be provided through the court system. There is a real danger that if the courts do not maintain their rightful place, justiciable disputes will not always be resolved by or with the assistance of an independent and impartial tribunal. If public confidence in the judiciary is not maintained it is made easier for the legislatures to take away its jurisdiction and vest it in tribunals before whom parties may not enjoy the protection which is the cornerstone of the judicial office.

I will not expand upon the question of cost as a barrier to justice. It is well understood. But among the many factors that influence cost are those relating to court procedures. Much of that is based upon outmoded tradition and needs revision to take more account of the needs of the modern customer, and to protect the less powerful party from procedural oppression.

Technology

Developments in the sciences have had a revolutionary impact upon individuals and the institutions of society. They always did. For example consider the effect of the invention of the wheel, the printing press, the steam engine and the biro. The courts are not immune and many have absorbed and utilised the opportunities offered especially in the modern field of information technology. Other courts, either because of lack of resources, reluctance on the part of judicial officers to become involved, or other reasons, have not. There are a number of real advantages to the courts and the customers which have been identified and applied. No doubt there will be others. For example, data collection and storage in electronic form greatly assists the speedy recovery and marshalling of information such as sentencing and other statistics; communication between linked computers is fast and cheap; paper files and other records are being displaced by the floppy disk and CD rom saving not only forests, but storage space; with video conferencing facilities becoming more widely available the necessity for travel by a lawyer or witness to the courthouse to be seen and heard is being reduced. The evidence of a witness or submissions by a lawyer can be received from next door or across the world. Properly applied, these technological aids can make a very significant improvement in court efficiency and reduce cost and inconvenience to the parties.

Video monitors in the courtroom will not be the only change to the furniture. The laptop or maybe the palm held computer will become more and more evident as files and books disappear. The keeping of written notes of evidence will not be necessary, as transcripts of proceedings are produced as people speak. These techniques and more are already being used in some courts and despite what reservations some older judges might have, they will not go away. We should all welcome the opportunity to develop new skills.

It is becoming increasingly unnecessary for the lawyer to invest in books, or gain access to the law library of a courthouse or university to conduct legal research. In many places he or she can go into the statutes and examine the decisions of courts via a local area network or the Internet. These computerised legal research systems were mainly set up with the judges and lawyers in mind, but now any litigant proposing to appear in person has equal access providing only he or she can hook into the Web. Such a litigant may not be indigent or untutored in the law. Some will be better prepared than others, just like lawyers, but I suggest that the cost of engaging a lawyer coupled with more ready access to legal resource material is likely to give rise to an increasing number of customers appearing in person. The courts must learn to accommodate that, remembering that such a litigant's impression of justice and the court will depend upon how he or she is treated in the course of the proceedings, both at the preparatory stage and upon the hearing. The attitude of court staff and courts towards the unrepresented party is an important matter. Professor Parker recommends that guidelines should be prepared by judicial officers so that best practice is identified.

Globalisation

It is not a recent phenomena but it is becoming increasingly common to find substantial similarity between the laws of different nations. The common law and civil law systems which have been around for centuries are but examples. The Declarations and Conventions of the United Nations are having a significant impact. For example, the United Nations Convention on Contracts for the International Sale of Goods, commonly known as "the Vienna Convention", governs the formation of contracts of sale and the rights and obligations of the buyer and seller arising from the international contract. As of February 1998, it had been ratified by a large number of countries, including for present purposes, China, Mongolia, New Zealand, Singapore, the United States of America and Australia.

We are frequently referred to decisions of courts in countries having similar legal systems to our own; the need for the movement of capital across national boundaries often requires that statutory regulation and dispute settlement procedures are available to the satisfaction of the potential investor. For example, securities and anti trust statutes of the United States of America were imported into the countries of Eastern Europe in recent years. Law is exported, just like commodities. It is not only in the area of trade and commerce that law is becoming more common, there are schemes for cooperation in relation to criminal activity which spreads across political boundaries. There are legislative and treaty mechanisms for international assistance in criminal matters, including extradition. This all too brief a look at these developments is designed to simply remind us of what has transpired in the harmonisation of some areas of law between countries, and to point to the prospect of further developments of that kind.

It is relevant to touch upon it because given that the judiciary administers much of that law, it may be confidently supposed that many judicial officers will become involved in disputes involving laws with which they may not be entirely familiar, but in respect of which guidance may be available from other jurisdictions.

The shingle of a foreign law firm is tangible evidence that law is being globalised. In Australia governments are presently considering the course to be followed regarding local registration of foreign lawyers wishing to practice a law of a place outside Australia within our country. The American Bar Association, the Council for the Bars and the Law Societies of the European Community and the Japan Federation of Bar Associations have issued invitations to like organisations to participate in a forum on transnational practice for the legal profession to be held in Paris on 9 and 10 November 1998.

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But it is not just the law and lawyers moving around the international community, so do judges. For example, Australian and New Zealand judges, or retired judges, are commissioned to sit in some island nations of the South Pacific where the law and procedures are similar. It does not take much imagination to develop a scenario whereby given the similarities between laws, a judge from one country with particular expertise might be commissioned to act as a judge of another in relation to a dispute involving parties, lawyers and witnesses located in different parts of the world. None of them would need to physically move, videoconferencing and data transfer technology giving satisfactory and instantaneous communication between everyone, the whole proceedings being broadcast to the public in audio and video in real time by satellite.

Planning for Change

The pace of change in the environment in which the courts go about their business seems to be accelerating. They have had difficulty responding on all fronts because generally they are slow to recognise problems, and not geared up to make a rapid response when they become pressingly obvious. Judges are not usually good managers, their expertise lies elsewhere. Concepts behind business management vocabulary such as mission statements, goals, strategic planning, implementation and evaluation are not well understood by most judicial officers. The public servants who support the courts are more familiar with these things as they go about the administration of public funded resources, but there is a need for the judiciary to apply much the same methodology in respect of the administration of justice, which is a far more valuable commodity. The administrators and the judiciary working together for common goals, each playing its distinctive role, can be powerful instruments for change in the public good.

Fundamental Issues

None of these matters give rise, in my mind, to a fundamental issue facing the judiciary in the 21st Century. They are certainly factors operating in the environment in which the courts discharge their solemn responsibilities. They are examples of issues which, left unacknowledged or unattended, may lead to a lessening of the authority of the courts as the institutions charged with the administration of justice.

There are significant challenges to be met, but they do not arise in isolation. Nor are improvements to accessibility to the courts, the building of public confidence, harnessing of technology or accommodating new laws and skills ends in themselves. Important as they may be, they are but to achieve the ultimate objective, which is the maintenance of a competent, independent and impartial judiciary. That is the essential foundation.

It can do no harm to constantly remind ourselves, and the communities within which we work, of the principles involved. For that purpose I turn to the most recent authoritative statement as contained in the Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region adopted by unanimous resolution of the Chief Justices at the 6th Conference of Chief Justices of Asia and the Pacific on 15August 1995, and amended in August 1997. It derives in part from the Basic Principles on the Independence of the Judiciary adopted by the United Nations General Assembly by consensus in 1985. It is now supported by Chief Justices or their representatives from Australia, Bangladesh, the People's Republic of China, Fiji, India, Indonesia, Japan, Kiribati, the Republic of Korea, Malaysia, Marshall Islands, Nauru and Tuvalu, Nepal, New Caledonia, New Zealand, Pakistan, Papua New Guinea, the Philippines, the Russian Federation, Seychelles, Singapore, Sri Lanka, Tonga, Vanuatu and Vietnam.

It is a wide ranging Statement containing sections dealing with the independence of the judiciary, the objectives of the judiciary, the appointment of Judges, their tenure and conditions of service, jurisdiction, judicial administration, relationships between the judiciary and the executive, resources required by the courts and the rules that should apply in times of grave public emergency which threaten the life of the society. It is worthy of wide public distribution and understanding.

It is asserted that the Judiciary is an institution of the highest value in every society (Article 1), it refers to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law and that an independent judiciary is indispensable to the implementation of that right (Article 2), it states that the independence of the judiciary requires that it shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source and that the judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature (Article 3), it provides that the maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society observing the Rule of Law, and that it is essential that such independence be guaranteed by the State and enshrined in the Constitution or the law (Article 4).

Article 5 proclaims it the duty of the Judiciary to respect and observe the proper objectives and functions of the other institutions of government, but that it is the duty of those institutions to respect and observe the proper objectives and functions of the Judiciary. Particular reference might also be made to Article 8 which says that to the extent consistent with their duties as members of the Judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly. It will be noted that the Statement affirms the obligations upon the independent judiciary as well as stating those matters which are necessary for its independent and effective functioning.

We come from a variety of systems of government and legal systems, but the principles and values proclaimed in the Statement are of universal application. These principles and values are fundamental. The independence of the judiciary is designed to ensure that impartial decisions are given in each case according to law and so that it can check abuse of power emanating from any source, public or private. It is not an end in itself, and it is not designed for the benefit of the judiciary, but for the benefit of the people. The judiciary is not free to disregard those principles and values, it is obliged to uphold them.

The fundamental issues facing the judiciary of the 21st Century are as they have been, the maintenance of the principles of the independence of the judiciary. To achieve that each court must have the confidence of the people it serves that it is able to protect them from unlawfulness, redress wrongs and failure to perform duties and enforce their rights in a fair and impartial manner. To those ends each court must ensure that any action or inaction, intended or not, which may have the effect of adversely affecting its independence is resisted, and do all within its power to ensure that it has that necessary confidence of the people without which it may become too easy for it to lose its essential foundation.