Dr David Williams Lecture
Kings College, University of Queensland
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"The judiciary: the people's indispensable though non-elected government"

The Hon Paul de Jersey AC, Chief Justice of Queensland

Salutations

I am very pleased to have the opportunity to deliver the Dr David Williams Lecture for 2001. The remarkable, the late Dr Williams : "Old Collegian", World War II POW camp survivor, UQ Graduate in Arts, with honours – despite having lost his sight in the war, Gowrie Scholarship recipient, Doctor of Philosophy from the University of London (School of Economics), for over 20 years the President of the King's Old Collegians Association, and active King's College Council and Board of Fellows member. I follow many previous fine speakers.

I will speak tonight – if unsurprisingly – of the judicial arm of government. "Government", you ask? For many "government" comprehends only the executive. Courts give judgments, imprison people, but "govern" us? The role of the courts is but imperfectly understood.

I rest on the traditional conception of tripartite government – the legislature, the executive, and the judiciary – excluding the media! Montesquieu, in *The Spirit of the Laws,* explained the desirability of the model:

> "When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.

> Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.
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> All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals."[1]

During his speech at the Joint Commemorative Ceremonial Federation Sitting of Parliament in Melbourne in May, the Prime Minister, the Hon John Howard MP, elaborated his view of the strengths of the Australian system of government.

> "Our democracy has been strong and true and effective because we have put our faith above all else in functioning vigorous institutions. The three great guarantors of liberty and democracy in this country are our robust parliamentary system with the free play and exchange of political views and ideologies, an independent and absolutely incorruptible judiciary, and finally a strong and on occasions a very sceptical media. Those three things together have done more to guarantee liberty and freedom and the Australian way than any other set of institutions."[2]

It was unusual to hear a politician, even a national leader, refer to the importance of an independent judiciary. By non–Judges, that consideration is, more often than not taken absolutely for granted, if not overlooked. It is we Judges who tend to

[1] Montesquieu, *The Spirit of the Laws,* Part 2, Book 11, Ch 6.

speak most vocally of our role in government. Some politicians would claim Judges are to a degree "precious", in their proclaiming of judicial independence.

Delivering the 2000 Boyer Lectures, the Chief Justice of Australia, the Honourable Murray Gleeson AC, spoke of "The Rule of Law and the Constitution" – a choice of topic no doubt inspired by a view that the notions he expressed, basic notions, were at least incompletely understood in the community. Expression of the grand concepts of judicial responsibility, judicial accountability, the rule of law and the separation of powers must not degenerate into cliche, but be upheld as the fundamental underpinnings of our democracy they are.

The Judges do play a vital role in the "government" of the people, and they wield great power. They resolve issues of human rights and high social policy. As an example, recall the recent need for a judicial ruling here on the legality of the operation separating Siamese twins where only one twin would survive. Judges are required to make judgments which deny personal liberty, determine who will care for children, affect local and State economies, and determine the rights of private citizens in civil disputes, vastly impacting on their financial resources, their lives. They have taken on the large and challenging burden of reviewing administrative decisions of executive organs of government – extending even to the management of prisoners. And the High Court determines the meaning of the highest law of the land – the people's Constitution.

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[2] Speech text available of the Centenary of Federation website,

Yet on one view curiously, the people's Judges who wield such power are not elected. Is the role of such a powerful, yet non-elected "arm" of Government, sufficiently understood by the people.

Certainly, interest in the *courts* is, and has been, increasing. Fuelled by an increasingly interested and resourced media, and sparked by the great change in the sorts of issues the judges now determine, the public has become more intrigued by what the courts do and who comprise them. There is growing interest in the blend of gender, background and ethnic origin on the bench; and of course especially at the level of the High Court, the question of where judges may be expected to stand on the issues of the day – conservatively or liberally? There is now more searching interest in how judges are appointed, and we see the development in some jurisdictions of a system even of application and formal interview.

Judges are also now subjected to unprecedented scrutiny in the way they actually carry out their work. They are subjected to trenchant wounding in the media, especially in the criminal jurisdiction, and areas of human rights. Of course criticism is to be expected in a democratic society. That was acknowledged by Chief Justice Gleeson in a recent interview with *the Australian.* But he noted also, importantly, that while Judges cannot guarantee their critics being "polite or intelligent or understanding of the difficulties the judges had to deal with", Judges *should* be "entitled to expect that people who comment on their judgments take the

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www.centenary.gov.au/resources/media_centre/media_release.php?release_id=51

trouble to read them."[3]

Judges welcome the public's increasing interest in the legal system. In the interests of an informed appreciation, the Judges of this State, together with the legal profession, pursue various initiatives: the Law Society's instructional program in relation to schools, a lecture series auspiced by the Supreme Court History Society, and a host of other things, including for example public tours of the courts on Queensland Day, and the recent reconstruction within the courthouse, as a Centenary of Federation project, of the "smoking room" of the QGSY *Lucinda*: the room in which much drafting of the Australian Constitution took place.

I have mentioned the need for understanding the judiciary's powerful role. Why the need? Fundamentally because of the judiciary's governmental role in doing its part to assure the peace, order and good regulation of the people. The courts' work should also be understood in light of their working "on behalf of" the community – in the sense that the Judges are the community's representatives, although upon appointment they act independently. The courts are also necessarily expensive to run, and the people foot the bill: they should know how their money is spent!

One previously lost key had been education through the schools. Civics courses in schools are only recently being rejuvenated. When I spoke about that matter two years ago to the Constitutional Centenary Foundation's Queensland Chapter, I

[3] Henderson, I. "Gleeson to publicly defend judges", *The Australian*, 25 June 2001

strongly advocated that rejuvenation. It struck me then that our children were growing up faced with the fascination of a computer age which regrettably often tends to treat information as significant per se. Information is but the first step towards knowledge, although the information must be there. If our children are to be productive, worthwhile citizens, they need to understand the system which governs them. They need to be able to distil from information the principles on which it is based. That will not occur, on a broad scale, until children are enthusiastically introduced, not only directly to the principal doctrines underlying our system of government, but also to some of the history which spawned them. I was not – am not – for one moment suggesting children should be educated into the depths of constitutional and jurisprudential theory. But it strikes me as unsatisfactory - as at least then seemed to be the case - that most children should be matriculating from primary and secondary schools without knowing anything of governmental structure.

What are these basic notions? First, the separation of powers, a concept sometimes not readily understood, including by persons in high places. Our system of government is the "Westminster system", inherited from England in 1788. The Commonwealth Constitution reflects it. There are three branches of government, the executive, the legislature and the judiciary, each with distinct powers. The executive, comprising the Queen, represented by the Governor-General at the Federal level and the State Governors, together with Cabinet Ministers at both levels, administers the law. The legislatures, the nation's parliaments, make the law. The judiciary, the judges of all the courts of the land,

interprets and applies that law.

In theory, the branches are separate. In practice, however, the executive and the legislature have been brought together in Parliament with systems of checks and balances to ensure they monitor each other. Both the executive and the legislature comprise elected representatives of the people, save of course the Monarch and the Governors, so both those arms are subject to political forces.

For the Westminster system to operate democratically, the independence of the non-political judiciary must however be absolutely secure. Recall the words of Montesquieu. Of course in a democracy the creating and administering of the law must be subject to the will of the people. But to ensure the impartial application of the law, the judiciary must be completely immune from political pressure.

Accordingly, while judges and magistrates are certainly dedicated to public service, they plainly must not be considered "public servants", the designation of those who administer the executive – which stands separately. Public servants implement ministerial policy while judges deliver justice according to law – at no-one's behest.

This, then, raises the notion of judicial independence. What does this independence involve? Essentially, impartiality, and that entails freedom from any external influence which may corrupt. As an important adjunct of that "freedom", judicial officers enjoy statutory immunity from suit in respect of their decisions.

A particular feature of the Australian judiciary is that the judges are not elected, by contrast with the judges of some American States, and some people think us distinctive in that regard. We have all heard of those US judges: they tend to impose outlandishly long terms of imprisonment - up to hundreds of years in length - especially when seeking re-election. In this country, and reflecting the English Act of Settlement of 1701, judges of most courts are appointed for life, meaning usually until the age of 70, subject to removal for misbehaviour. Magistrates in Queensland are appointed until 65 years. This manner of appointment, coupled with rigorous limitations on removal, is an important factor in guaranteeing judicial independence.

In practical terms there is however some difficulty maintaining a <u>completely</u> independent judiciary. That is because there is necessary material dependence on the other arms of government. The executive is the "paymaster". For true judicial independence, the Judges, on traditional analysis, should enjoy security in three respects. Security of tenure, meaning a guaranteed term of appointment, is necessary so that Judges are not concerned about making decisions to please the body responsible for their possible re-appointment. Financial security is necessary, it is said, to ensure that Judges are not tempted to accept bribes - although I would question the need for that justification in modern day Australia. Institutional security, or control over administration of the court, prevents, among other things, the other branches of government from influencing the allocation of Judges to hear particular cases. In Australia, and in many other countries, the judiciary depends upon the other arms of government to respect this

independence. Of course as I have said, the executive pays Judges' salaries and pensions, and as well provides buildings and staff to run the courts, and maintains the legislation which ensures security of tenure. Obviously enough this places the judiciary in a potentially difficult situation. And so I say that the maintenance of an independent judiciary necessarily depends to some extent upon the co-operation of the executive.

Independence used to be a hallmark of public service leadership. The persisting emphasis on necessary judicial independence may interestingly be juxtaposed against the regrettable decline in the once traditional separation between permanent departmental heads leading those who, in the public service, support the executive, and the political heads, being the ministers who comprise the executive.

Now independence has an important corollary, accountability – in a sense the quid pro quo. As the public becomes more interested in the operation of the judiciary, it more and more seeks an <u>accountable</u> judiciary, not just in justifying decisions made in important cases, but also on the more administrative side, in avoiding delay and minimising the expense of litigation. This particular concern has more recently tied in with an executive focus on the courts' <u>productivity</u>, to which I will come.

Accountability is formally achieved by Judges discharging the obligation to give comprehensive reasons for judgment, and the appeal process. Less formal

accountability is facilitated fundamentally by the obligation to conduct judicial proceedings in public. That exposes judicial officers who do not display the requisite qualities to the prospect of public assessment, by the people, their peers, and the media. Public comment and criticism can be powerful forces for enhancement of the quality of judicial performance. A more recent form of public accountability is achieved through the statutory obligation on courts to publish annual reports. Such reports draw public attention, importantly, to rates of disposition of caseloads, and that may lead to pressure for more expedition.

Reverting to the issue of productivity, there is a developing trend, if not already established position, that the effectiveness of the performance of courts is to be assessed as if they were industrial or commercial concerns: what is their output of cases; what are the quality controls which filter the product; increase the quality of your output or suffer a reduction in financial resources; let the extent and quality of the Judges' output affect the extent of his or her remuneration …

Courts are astute to the need to manage their lists efficiently. Of course unnecessary delay is intolerable, and judgments must be duly considered. Courts publish details of their "performance" in these respects. But to deny resources to courts which, while doing their best, are not meeting some particular benchmark set perhaps by reference, or part reference, to other systems where different considerations prevail, or to regulate the return to Judges by reference to their individual performance, ignores the nature and mission of courts of law: they exist to deliver justice according to law. They are not factories or commercial

operations.

The quality of justice will suffer if Judges are denied "thinking time" because of the need to get on to the next case at once; or if a Judge is tempted from the courageous, what he or she believes to be correct decision, to the softer middle line, to minimise the possibility of appeal and reversal; or if a Judge who produces only one judgment a year is to be considered less "productive" than the Judge who produces many, even though the former has spent the whole year continuously engaged in the one complex case.

If one were accurately to "measure" the effectiveness of courts of law, putting to one side for the moment the inaptness of the term "measure", the ultimately relevant consideration would be simply this: the dedication of the Judges to their oaths. Modern Australian courts are conscientious institutions, composed of Judges dedicated to their immutable mission. The system itself extrudes the occasional, very occasional maverick. Courts are open and accountable to an extent which frankly far surpasses that of the other arms of government: the circumstance that almost everything that courts do is done in public ensures that. Modern Judges embrace innovation, where that can benefit the litigants and where resources allow: these are not Bleak House institutions. These circumstances in particular should lead to acceptance of the "efficiency" of the courts of law – or perhaps better put, the accomplishment of their mission. Those who, at high official public level, are determined to make pronouncements upon the performance of the courts of law, should retreat from, indeed abandon a current

preoccupation with the application of industrial models.

May I address one more matter relating to accountability? As has been reported, the Council of Chief Justices is currently considering draft ethical guidelines for judicial officers. This is an initiative of the Chief Justices. It is not being undertaken because of any particular perceived problem, but because of a belief that Judges, comparably with other professional streams of the community, may benefit from having a point of reference to aid their consideration in situations of ethical complexity where the path appropriately to be followed is not immediately clear. The constitutional stipulation, fundamental to judicial independence, that Judges may only be removed from office by the Parliament for proved misbehaviour, does necessarily limit the scope of any such document. What may amount to misbehaviour for this purpose cannot be formulated exhaustively or exactly. Some things are of course obvious: a Judge shown to have taken a bribe would be removed. But the guidelines should serve a better purpose than, for our regime unnecessarily, stating the obvious. Neither should guidelines assume that modern Judges must lead unduly cloistered lives. Few would these days suggest, for example, that a Judge may not enter a public bar. Judges too have "rights" and cannot be driven by any prescriptive, restrictive tabulation of limitations back into the ivory tower from which in recent years they are thought commendably to have emerged. Allowing for these sorts of qualifications, appropriate guidelines should, it is hoped, emerge by the end of the year: and no doubt they will with media fanfare enter the public arena!

These notions - separation of powers, judicial independence, judicial accountability, the delivery of justice according to law – aggregate to the lynchpin of democratic society – "the rule of law". The concept is self-explanatory : the *law* dominates, not the Judges, not the politicians, not the head of state. It is precisely through Judges adhering strictly to the law – not their own subjective versions of morality or justice, and without interference from other arms of government, that legal certainty and democratic freedom may be guaranteed.

This being the judicial charter, there is clearly immense responsibility both on the individual Judge, and likewise on those who appoint the Judge. The responsibility of the independent, individual non-elected Judge, appointed for life, especially in determining issues of personal liberty, is the most serious and pivotal in our society.

A frequent theme of these College addresses has been leadership. The role of Judge provides a particularly high level example of leadership, and one complex to perform. It spawns tensions, between the appointor and the leader; the leader and his or her immediate colleagues; and the leader and the community he or she putatively represents.

The first, between appointor and judge, is manifested in attempts by governments to appoint Judges with particular expectations about their "direction". I have mentioned the growing <u>public</u> interest in the "stance" a particular Judge might take on an issue – assessments on these matters, whether by the public or by

executive government, are not necessarily reliable, and it is often good for judges to disappoint expectations: their honest independence must prevail. I recall the former Lord Chief Justice of England, Lord Bingham's reference to "the great judicial virtue of inconsistency"!

The second tension, between Judges, occurs where individual approaches to matters such as community involvement or public utterance conflict; and with some Judges, in respect of the somewhat delicate issue of reversal on appeal.

Tension between Judge and community is seen when frustrated or disappointed communities perceive their Judges are not responding to their expectations: although it must be said those expectations are not necessarily easily gauged. And of course the Court cannot bend to every breeze that blows – it must deliver an objective judgment detached from the passion of the moment.

The end result is a complex fabric. The Judges' challenge, set upon taking the judicial oath, involves steering through those tensions with unswerving objectivity and independence. We are fortunate in the Australian experience that is successfully accomplished – even if it has produced a public confident not fully to understand the challenge!

When a system serves society well, it is tempting not to concern oneself with underlying concepts. But it is precisely by fully understanding those notions, and enhancing informed public knowledge of them, that our present effective

democracy will be maintained and enhanced. To return to Montesquieu– "The deterioration of a government begins almost always by the decay of its principles."[4] When government is of, for and by the people, its *quality* is necessarily pegged to the people's concern for it – something we, occasionally lackadaisical, Australians must turn to good account!

[4] *The Spirit of the Laws*, Book 8, ch 1