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Managing relations with the executive

The Hon P de Jersey AC,
Chief Justice

Chief Justices, Your Honours, ladies and gentlemen, I am very pleased, and honoured, to welcome you to the Supreme Court of Queensland. This court operates over a geographically large area, although Queensland accounts for only about one-fifth of the Australian population. This Supreme Court comprises 24 Judges, three of whom reside outside this capital city. They reside in the substantial coastal centres of Rockhampton, Townsville and Cairns. The court sits in 11 centres around the State, as well as in Brisbane. It includes both a Trial Division and a permanent Court of Appeal.

The court was statutorily inaugurated in the year 1861, so as such, celebrates its 150th anniversary in the year 2011.

I am privileged to be the State's 17th Chief Justice, appointed in 1998. The third Queensland Chief Justice was Sir Samuel Griffith, who went on to be the first Chief Justice of the High Court of Australia. You may have seen, or will see, his visage – albeit not especially lifelike, in the re-creation outside the so-called "upper deck gentlemen's smoking room" of the Queensland Government Steam Yacht Lucinda. Substantial drafting of the Australian Constitution took place on board that vessel, in that room, in the year 1890, while it was moored on the Hawkesbury River outside Sydney. The drafting party was led by Sir Samuel Griffith, then Premier of the State, hence the use of the government vessel – now of course aircraft would facilitate that mission. Our replication was unveiled in the year 2001, as part of our celebration of the Centenary of Australian Federation.

The renowned, indeed venerated Sir Samuel Griffith, whose definitive portrait hangs in this room, would be gratified, ladies and gentlemen, by your presence here today.

May I turn now to the topic I am to address?

We frequently proclaim the essential importance of the separation of the judiciary from the executive, and of course from the legislature also. But it would be coy and unrealistic not to acknowledge the necessary interaction between the judiciary and the executive in particular. Each is an arm of government, its function directed towards ensuring the peace, order and good government of the people. It is unsurprising therefore that those two arms of government should to some degree interact.

Fundamentally, it is the executive which in this democracy appoints the Judges. It falls to the executive also to provide the financial resources necessary for the maintenance of the courts. Each of those considerations involves the prospect of substantial interaction: to what extent should the executive be influenced, or controlled even, by the judiciary, as to the identity of those to be appointed to the courts? How far should the judiciary be involved in securing and allocating the resources, and what is the scope for public criticism where courts are left without adequate resources?

The day to day operation of the courts may spawn other engagements between the judiciary and the executive. To what extent should an executive government, unhappy about the decisions or administration of a court, feel itself entitled to voice criticism in the public arena? Conversely, in the event that a Judge is unfairly criticized through the media, who should defend the Judge: it is realistic to expect the relevant member of the executive, the Attorney-General, to do so?

Then on another level, we see contemporary courts, at least in this country, being asked to assume roles arguably more executive than judicial in character. For example, courts acting administratively, on an ex parte basis, regularly authorize covert surveillance by police officers of suspected criminal activity. More controversially, courts determine whether prisoners, who if free would pose serious risk to the safety of the community, should be detained in custody beyond the completion date of the finite terms of imprisonment to which they have been subjected. On one view those roles denote departure from the traditional core function of judging. It is I suppose a compliment to

courts that the executive has vested those jurisdictions in them: or has the executive simply hived a difficult and potentially unpopular responsibility into a realm where the decision-maker is not subject to the ballot box?

Probably the most marked example of the retreat by Judges from their traditional role, with the assumption of executive functions, occurs when they conduct commissions of enquiry; and when they advise governments of the day on draft legislation, even though limited to proposals which would impact on the work of the courts of law.

A rather curious example of acute interaction between the executive and the judiciary in some Australian jurisdictions is to be seen in the role of a Chief Justice as Lieutenant Governor or occasionally Acting Governor. Thereby heading the executive in the absence of the Governor of the day, the head of jurisdiction assumes a role which might be thought inconsistent with the separation of powers. That is the view which has recently been taken by the Queensland Parliament's Reform Committee. However the situation has not in this State led to any practical discomfort over many years, and the public has I suspect been reassured that the role of Governor is in the Governor's absence assumed by the holder of a high office conspicuous for its independence and objectivity. That this occurs does however further illustrate how, in the interests of good government, a degree of flexibility and compromise may sometimes be tolerated.

My purpose today is not to suggest a "right" way of proceeding in these varied situations. Experiences and views will differ. It may be that my identifying some of the issues will spark helpful commentary and discussion.

The object must ever be to ensure that any judicial interaction with the executive, or assumption of administrative responsibility, is never so marked as to blur the essential independence of which, for example, Montesquieu spoke in "The Spirit of the Law" (part 2, book 11, ch 6):

> "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.
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> 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."

We have in this country been fortunate to have governments which have respected that separation. During his speech at the Joint Commemorative Ceremonial Federation Sitting of Parliament in Melbourne in May 2001, 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."

It was somewhat 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 speak vocally of our role in government. Some politicians may claim Judges are to a degree "precious", in their proclaiming of judicial independence.

Delivering the 2000 Boyer Lectures in this country, 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 cliché, but be upheld as the fundamental underpinnings of our democracy which 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. Judges are required to make judgments which deny personal liberty, determine who will care for children, affect local, and State and national 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 of Australia determines the meaning of the highest law of the land – the Constitution.

It is plainly essential that in discharging these critical responsibilities, the Judges act independently. 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 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.

That said, there is necessarily large scope for interaction between the executive and the judiciary, and that may come as a surprise to some interested members of the public.

Fundamentally, there is necessary material dependence on the other arms of government. The executive is the "paymaster". It is the executive which 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. The maintenance of an independent judiciary necessarily depends to some extent upon the co-operation of the executive. In some Australian jurisdictions, those potential difficulties have been reduced by according the courts at least the power independently to allocate the resources provided by the executive. Plainly a jurisdictional head may have to be involved actively with the executive in ensuring the adequacy of the resources provided; and as an instance of judicial independence, to be entitled to put pressure on an executive which fails to meet reasonable expectations, including by public comment, as through annual reports tables in the parliament.

Related to the provision of financial resources to courts is the issue of remunerating the Judges, guaranteed remuneration of appropriate order being an essential pre-requisite to assure judicial independence. Desirably, remuneration for Judges should be determined by a tribunal separate from the executive, whose determinations are self-executing. That is the case in Australian jurisdictions, subject to the parliament's power to disallow a determination by motion in the House. It goes without saying that assuming the truly independent functioning of such a tribunal, one would expect a power in the parliament to disallow a determination to be exercised only with great circumspection. As the recent history of this country shows, where the Judges consider the power has not been so exercised, the burden on the head of jurisdiction in his or her consultations with the executive may be considerable.

Also fundamentally, there is the composition of the courts: it is the executive which appoints the Judges. 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 heard of some 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 or 72, subject to removal for misbehaviour. This manner of appointment, coupled with rigorous limitations on removal, is an important factor in guaranteeing judicial independence.

There has recently been some academic debate within this State as to whether the power of the executive, through the Attorney-General, to appoint Judges, should not be subject to some fetter to enhance public accountability – for example, by means of an independent commission which makes recommendations, such that in the event of an Attorney's appointing outside the names recommended, that fact may be published. That sort of debate is not confined to this jurisdiction: it is being pursued actively for example at the moment in the United Kingdom.

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 of Australia, 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.

It must be a given that a Chief Justice is comprehensively consulted as to judicial appointments, and his or her views given genuine, and not merely nominal, weight. Whether the current system should be modified is moot, and controversial.

A related issue concerns complaints against Judges. Some Australian jurisdictions have independent statutory bodies which receive and process complaints against officials engaged in public administration, and in Queensland for example, that extends to Judges. Plainly, the approach of such an investigatory body should sufficiently respect the aspect of judicial independence. Accordingly here, when the Crime and Misconduct Commission is dealing with a complaint against a serving Judge, its manner of proceeding must be approved by the Chief Justice.

Let me turn now to the issue of public criticism of Judges and courts. There has at the national level in this country been a large issue whether the Attorney-General of the day should publicly defend a Judge unreasonably criticized, or whether, on the other hand, it should fall to, say, the Chief Justice, to come to his or her defence.

Judges are now subjected to unprecedented scrutiny in the way they actually carry out their work. They can be 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 has been acknowledged by Chief Justice Gleeson, 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 trouble to read them".

Views may differ on who should respond to unfair criticism. A truly independent Attorney-General would be ideal for the role, although in this country Attorneys-General are politicians, and members of executives. The affected Judge cannot realistically respond himself or herself; and a head of jurisdiction, in responding, may be criticized as collegially motivated. My own view is that a Chief Justice must be prepared to enter the public arena in support of an unfairly injured colleague, with the public acceptance of what is said hopefully guaranteed by the esteem in which the holder of that office is held by the community. The same holds, of course, in relation to criticisms of particular decisions of courts. None of this is to gainsay the important role an Attorney-General can discharge in this area, should he or she be prepared to assume and discharge it.

I mention, finally, the arguably difficult aspect of Judges' assuming administrative roles. In the interest of good government, a degree of compromise must I suggest be accepted. On balance, for example, I think it acceptable that a Supreme Court Judge authorize the issue of a covert search warrant: that enhances public confidence in the independence of the process. Likewise, I feel it is unobjectionable, and potentially desirable, that Judges comment on draft legislation which may affect the work of the courts. I appreciate the potential for embarrassment, should a court be asked subsequently to pass on the validity

or interpretation of provisions which have been considered in draft. In this court, I am assisted in this area by a standing committee of two Judges, and no problematic consequence has as yet arisen.

As to the other matter mentioned at the outset, commissions of enquiry, experience differs from jurisdiction to jurisdiction within this nation. To reduce the prospect of unnecessary conflict, the Judges of the Supreme Court of Queensland expressly resolved some years ago not to constitute Royal Commissions of Enquiry, on the basis those bodies, which recommend to the executive, are not judicial and Judges desirably should not constitute them. This is also the policy position of the Supreme Court of Victoria. We have also been influenced, obviously, by the undesirability of diminishing public confidence in the independence of the court, because of involvement in matters of often essentially political controversy.

Judging in the 21st century is uniquely challenging, as is heading a jurisdiction. The end result is a complex fabric. The Judges' challenge, set upon taking the judicial oath, involves steering through an array of tensions with unswerving objectivity and independence. We are fortunate in the Australian experience that is successfully accomplished – even if it has produced a public which may not fully understand the challenge.

Experiences will, as I have said, differ on some of these subjects, and I hope what I have said this afternoon may provoke some interesting debate.