

**ADDRESS TO THE JUDICIAL COLLEGE OF VICTORIA  
INTENSIVE TRAINING SESSION  
FOR THE MAGISTRATES' COURT OF VICTORIA**

**2 June 2004**

**THE IMPORTANCE OF JUDICIAL ETHICS**

I have been asked here tonight to speak on the importance of judicial ethics. The ethical conduct of judicial officers at all stages of the judicial process is, in conjunction with impartiality and the independence of the judiciary, one of the pillars of the effective operation of our system of justice. This paper will not adopt a 'broad-brush' or philosophical approach to judicial ethics in that its focus will be instances of what is expected of judicial officers so that their conduct is concomitant with ethical conduct. I will also draw on the interconnectedness of judicial ethics with the tenets of the impartiality and independence of judges which will throw into high relief the importance of the ethical domain in relation to judicial officers, an importance which cannot be understated.

The independence of the judiciary is fundamental to our system of justice. Important to the maintenance of that independence is public confidence in the judiciary. Chief Justice Gleeson of the High Court has spoken eloquently on this connection<sup>1</sup>:

Confidence in the judiciary... requires... a satisfaction that the justice system is based upon values of independence, impartiality, integrity, and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully.

Courts and judges have a primary responsibility to conduct themselves in a manner that fosters that satisfaction. That is why judges place such emphasis upon maintaining both the reality and

the appearance of independence and impartiality. In addition, built into the infrastructure of our institutional arrangements, there are rules and conventions designed to secure and maintain the same confidence.

The maintenance of public confidence in the judiciary is itself predicated on a number of factors, and central to these is ensuring the ethical conduct of the judiciary, which conduct includes impartiality and behaving with integrity. Ethical conduct, as distinct from the concept of morality, is directly dependent upon rules or at the very least a set of guidelines. To this end, as you know, the AIJA published for the Council of Chief Justices of Australia the *Guide to Judicial Conduct*. As indicated in its preface, the Guide is intended to provide practical guidance to judicial officers in relation to the conduct expected of them. The Guide is also acts as a reinforcement of the case law which has dealt with matters of judicial propriety.

The case of *Evindon*<sup>ii</sup> is apposite. *Evindon* involved an appeal of the determination of the Planning Division of the Administrative Appeals Tribunal in relation to the grant of a permit in respect of the Esplanade Hotel in St Kilda. The appeal was based on a telephone conversation senior Counsel representing Evindon had with a Deputy President of the Tribunal who was to preside the following day in the hearing of the matter. The appeal Court held that the private communication which had not been revealed to the other parties constituted a denial of natural justice despite the fact of the Court's acceptance that senior Counsel had not acted with an improper motive in making the telephone call. The Court made reference to the basic principle of the law that justice must not only done but be seen to be done. The Court also cited a passage in *R v Magistrates' Court at Lilydale; Ex parte Ciccone*<sup>iii</sup> where McInerney J gives exposition to the principle of judicial officers remaining aloof from the parties so that no suspicion

can be formed that the judge has had communication with a party without the foreknowledge or consent of the other party; the principle operates to ensure that judicial impartiality cannot be compromised.

The Court in *Evindon* extended the principle to tribunals. The *Guide to Judicial Conduct* also cites the case of *R v Magistrates' Court at Lilydale* in a section on private communication which falls within a chapter devoted to conduct in court which has as its object maintaining public confidence in the independence, integrity and impartiality of judicial officers.

*R v Magistrates' Court at Lilydale* is particularly appropriate in the context of this seminar not only because it involves a magistrate; the case is indicative of the high standard of ethical conduct which has to be met by judicial officers so as to maintain public confidence and to avoid any perception of bias. The pertinent facts in that case involve a magistrate who in making his way out to a view, travelled in the same vehicle as Counsel for the respondent; the car was also driven by a man who was to be a principle witness for the respondent in the matter, although at the time the magistrate was not aware of the driver's status as a witness. The respondent argued that the magistrate in accepting the lift to and from the view had displayed merely a lack of 'nicety'. The Court found that despite there being no evidence to indicate the magistrate's decision was actually biased, nonetheless a reasonable person might suspect or conclude that the applicant was not likely to receive a fair and unbiased hearing. Lord Denning is cited in the judgment: "justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking the judge was biased (p.131)

The perception and appearance of a judicial officer evincing ethical conduct is therefore as important as the actuality of such behaviour. 'Doing justice' which is itself fraught with difficulties such as interpreting facts that are not always clear

from the evidence, seems to demand no less of those who are appointed to attempt to dispense justice.

As is clear from the Guide, however, judicial ethics seem to permeate every facet of a judicial officer's life; the ethical domain is where the private meets the public. Discretion is advised in relationships of a personal nature and social activities, and it is made clear that such 'constraints' have to be accepted as being part of judicial office. Care is also to be taken with professional and commercial relationships as these might be scrutinised particularly where there is the potential for conflicts of interest. The recent High Court case of *Ebner v Official Trustee in Bankruptcy*<sup>v</sup> is apposite. In *Ebner*, a judge failed to disclose, through oversight, the large sum he inherited which sum was held in the defendant bank; it was only after finding in favour of the bank that the judge discovered the financial interest he had in the bank. The High Court held that there was no need for a retrial but the decision revealed that the concept of judicial ethics is not unproblematic, as Kirby J who dissented in *Ebner* has remarked in relation to the decision, "Underpinning the different opinions were different legal views informed by perceptions of different ethical imperatives"<sup>v</sup>. The *Guide to Judicial Conduct* represents an attempt to provide a standard in relation to judicial ethics and in so doing eliminate significant divergence of opinion.

The ethical conduct of judicial officers is a prerequisite for the proper functioning of our legal system. Judicial ethics promote the independence, impartiality and integrity of judicial office. These bastions of the legal system and the rule of law have their sources not only in relevant case law and in a practical guide such as the *Guide to Judicial Conduct* but in international instruments such as the *Universal Declaration of Human Rights*, which provides in Article 10 for the right to a fair and public hearing by an independent and impartial tribunal. The Constitution is of course also a source, providing as it does for the separation of powers. Perhaps it is the necessary tension between the executive and

legislative arms of government and the third arm , the judiciary, which underpins the need for, and the importance of a high standard of judicial ethics.

### **Judges in Modern Society**

Chief Justice McLachlin of the Supreme Court of Canada has considered the role of judges in modern society and the changes that they must face. She observed:

“The nature of the questions they decide, and the public expectation that they will decide them fairly and well, place new demands on judges. It no longer suffices to be a competent legal scholar and a fair arbiter. To perform their modern role well, judges must be sensitive to a broad range of social concerns. They must possess a keen appreciation of the importance of individual and group interests and rights. And they must be in touch with the society in which they work, understanding its values and its tensions. The ivory tower no longer suffices as the residence of choice for judges. The new role of judges in social policy also demands new efforts of objectivity. Often the judge will have strong personal views on questions which a judge is asked to decide ... But the task of judging is not accomplished simply by plugging one’s personal views into the legal equation. The judge must strive for objectivity. This requires an act of imagination. And it requires an attitude of ‘active humility’, which enables the judge to set aside preconceptions and prejudices and look at the issue afresh in light of the evidence and submissions. The judge must seek to see and appreciate the point of view of each of the protagonists. She must struggle to enunciate the values and issues. Then she must attempt to strike the balance between the

conflicting values which most closely conforms to justice as society, taken as a whole, sees it. It is impossible to eliminate the judge's personal views. But by a conscious act of considering the other side of the matter, the judge can attain a level of detachment which enables him or her to make decisions which are in the broader interests of society. In the end, the judge can know no other master than the law, in its most objective sense.<sup>vi</sup>

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<sup>i</sup> Hon. Murray Gleeson AC, Chief Justice of Australia "Public Confidence in the Judiciary", 76 *The Australian Law Journal* (2002), 561.

<sup>ii</sup> *The Mayor, Councillors and Citizens of the City of St Kilda v Evidon P/L & Ors* (1989) Supreme Court of Victoria Appeal (Unreported, Kaye, McGarvie and Ormiston JJ, 3 November 1989).

<sup>iii</sup> P1973} VR 122.

<sup>iv</sup> (2000) 75 ALJR 277.

<sup>v</sup> The Hon Justice Michael Kirby, "A Global Approach to Judicial Independence and Integrity" 21 *University of Queensland Law Journal* (2001), 147.

<sup>vi</sup> McLachlin, B., "The Role of Judges in Modern Society", The Fourth Worldwide Common Law Judiciary Conference, Vancouver, British Columbia, Canada, 5 May 2001.