

The Rule of Law in a Globalised World: Challenges to Judicial Independence in the Context of Modern Government.

*Keynote address delivered for the 75th Anniversary of the Victorian Division,
Institute of Public Administrators Australia
Thursday 18 November 2004*

I thank Mr Peter Harmsworth for that warm introduction and I am very impressed by his erudite description of the issues to fore of the law in our society.

I have to say when I arrived today and then as I came and sat at the table, I was somewhat intimidated by the music that was playing loudly over the speakers, which reminded me of the sort of music one sometimes hears or used to hear at rock concerts in anticipation of the great rock star.

I hate to disappoint you, I am not Madonna and I'm not Britney Spears or anyone else you might have had in mind but there we are.

For the purpose of my remarks to you today there is a preface that might be useful for me to provide. That is my background and I am very grateful for what Peter Harmsworth told you about my career which is different and indeed, I suspect, unique in Australia in terms of a head of jurisdiction.

I come from a background where I had a parent who was a public administrator in Victoria for a period of almost fifty years and I myself spent one way or another, thirty years either in, or about the public sector. I spent eleven years in the Victorian Public Service, left it for a few years and here I am back working for the public again. In my lifetime experience I have also

(as one does) in my extra-curricular activities, seen and worked with government at a different level, through state school councils, as a parent, so I have had dealings with agencies well beyond the usual law and justice type department.

I have had the benefit during my professional lifetime to observe a very dramatic change in the way in which public administration occurs in this State. When I first started working in the Victorian Public Service the transition had barely started but the Premier of the day Sir Rupert Hamer conducted what was, by today's standards, a very small, downsized government and before his government, during the time of the Bolte regime, the government really consisted of two ministers, Sir Henry Bolte and Sir Arthur Rylah and advised from time to time by Chief Parliamentary Counsel, John Finemore, QC and occasionally, by the then Chief Justice Sir Henry Winneke. Government departments were such a small entity compared to with the mega departments that we see today.

There has been a dramatic change and modern government is something quite beyond the comprehension of those who worked in the times of the 1960's and the early 1970's. Now why is this relevant? Well you see, it is relevant to judges because much of judge made law, judicial traditions and activities were developed and refined prior to, certainly by the 1960's and the 1970's and this is part of the challenge that I will develop as I describe it to you today.

But first of all, I wish to proffer the question: is the new style the best style?

There are, of course, criticisms of modern managerialism and there are complaints that the Harvard Business School has forced the pendulum of public administration to push far too much one way so that public administration is preoccupied, if not fixated, with accountability and “squaring off” the budget.

There is, too, complaint that there is a prevailing assumption that “same fit” is universal and “same fit” is “good fit” for all. But I proffer the question: should the courts be treated the same way as prisons? Should the courts be treated the same way as police? Are courts just another government agency?

There is criticism also that in modern government there is a dominant assumption that a government service should be; first of all, cost effective – ideally cost neutral; secondly, conform to political - compared to institutional - ideals; and thirdly, it should ignore, or at least, relegate as a priority, institutional ideals. It seems to be accepted, or certainly should be accepted by government that there are fundamental obligations of state and I suspect that there is little issue about that. The fundamental obligations are first, shelter through housing; secondly, medical services through health provision; thirdly, educational services through education; and fourthly, process according to law. But I proffer the question: without the last, process according to law, it is not possible to have the first three. Who said that? Aristotle. Justice comes first and must always come first.

I turn then to the question of the “fit” of government. I start out first of all with the role of public servants. I suggest that the role of the public servant is critical to the management, conduct, development and progress of government. Public servants should be capable of frank and fearless advice. They should be courageous; they should be fearless; they should have the courage to stand up to intimidating ministers (intimidating ministers are nothing new, they were around in my day, when the frank and fearless tradition prevailed). However, there is the modern tension of the contracted public servant compared with career public servants. I wonder what happened to that expression – “Public Service”? It has been replaced in Victoria by the phrase “Public Sector Management”.

There is also another phenomenon, the change of the profile of the advisor. The non-political advisor, that is to government. The advisor these days, more often than not, does not come from a law or arts or engineering or technical other specific professional background. Generally, the profile of the advisor is to come with a management degree, possibly augmented by an economics or commerce qualification.

But I cannot resist interpolating the question: what does a management qualification teach or develop within the individual?

I remember years ago when I was in the Public Service of Victoria in the 1970's, this very in-vogue degree called an MBA came to the fore and if you

wanted to get anywhere, well you had to get an MBA. But what did the MBA teach? (And I can speak from personal experience, having ventured into the Melbourne School of Business Management). The degree taught control, it taught mechanisms, it taught systems, it taught routines. But I postulate the question: did it teach its graduates how to think? How to think outside the square? Did it teach the graduates to think within the framework of fundamental societal institutions and mores? These questions are important because they have had an impact on the profile of the public servant, the public sector advisor, who now facilitates government. I remember once, when I was heading up to Parliament House from the Law Department offices which were then in Queen Street, catching the tram up Bourke Street, and I was going with two Parliamentary Counsel, one of whom was John Finemore, QC and for those of you who may have known him, and those of you who didn't, he could only be described as an old public service campaigner. And we were talking about administrators and these new managerial people and how difficult they were to deal with and how they just didn't understand. And he said to me, and I remember it graphically on the tram ride on a 'W' class tram: "*They think administration is a science*" he said, "*it's not – it's an art.*" Worth thinking about.

Of course, modern government has seen another phenomenon, and that is the rise of the political advisor. It is useful to make a comparison between the "policy advisor" and the "political advisor". Originally, when "political advisors" came to the fore, they were the "link" person with the electoral office. I have a

recollection of when they really started to move and gain their ground, and one Attorney General arrived at the Law Department with two political advisors and they challenged, they investigated, they directed, but above all else, they purported, on occasion, to speak on behalf of the Minister. Who were they? To whom were they accountable? The political advisor had an increased presence and they have continued to have an increased presence and political advisors have come to have real power in our government as we know it.

Of course, the presence of the political advisor gave rise to a tension, a rivalry, between the political advisors and the career government advisor.

The outcome, I suggest, was twofold.

First of all, the political advisor had come to the fore, exercising substantial power. A phone call can be made by very senior people to the Minister's office and a response can be received that the Minister is unavailable, but you can speak to the advisor. Often the caller does not wish to speak to the advisor. Who is that person? Who is that political advisor? Effectively, I suggest, the advisor is a politically faceless and unaccountable individual. The "political advisor" has become the political shadow cast by the Minister, and is on occasion, as I suggest, the voice of the Minister.

But on the other hand, what has happened to the career government advisor? That advisor has found herself or himself in a position of competition with the

political advisor – there has been a rivalry. Inevitably, there has become a blurring of the role of the frank and fearless government advisor with the political advisor.

The direction seems to always lie with the application and enforcement of government policy. This of itself, I suggest, is the fundamental shift of government as an institution. The public service no longer exists in its traditional sense. There is a “public sector” that executes government policy.

But what, then, of the role of the executive? Does this shift that I have described within government matter? Is it important? I suggest that it does matter. For those who work in government there is a critical touchstone to the concept of government. For those who have confined their horizons to management theory, there is the trinity: the trinity consists of the legislature - the parliament; secondly; the executive – the government of the day and its mechanisms; and thirdly, the judiciary – the interpretive and enforcement vehicle.

So, you might ask – so what? If the executive has become dominant, is that any different from the demise of the Crown and its replacement by the legislature? Well, I suggest that if one aspires to a streamlined, monostructural government then it is very good. It is a desirable end. The judiciary could, then, become a ceremonial and formal institution, perhaps similar to the role of Her Majesty the Queen’s representative.

If one wishes to dispense with such institutions and structures and complete the transformation of the executive, why not go all the way? Why not have an elected public sector? These issues I suggest give rise to a challenge. They are all interesting issues, but most of all, from my perspective, they provide the context for the modern judiciary. The judiciary itself, notwithstanding this context, has not changed very much. Or has it?

If a judge of the 1960's sat on a bench of the years of the 2000's , how would that individual find things? Well first of all, I suggest that the individual would be astonished by the size and the complexity of the trials. Secondly; the 1960's judge would be astonished by the sheer duration of those trials. The judge would also be astonished by the intensity of the trials, what is, in fact, packed into a very confined space, or allocation, of time. The judge would be overwhelmed by the sheer volume of paper. The judge would be amazed and bewildered by the application of technology. The judge would also be appalled to see the levels of security that are imposed and required by modern courts. The 1960's judge would be astounded at the role, power and persuasion of the media.

The expectations imposed upon the modern judge would be a matter of complete amazement to the 1960's judge. Let me give you a short list. The modern judge, compared with the 1960's judge, is expected to have trial management skills to rival the finest administrator in any multi-national corporation. The modern judge is expected, also, to have the intellectual capacity to rival, match, then even surpass the best minds in the land. Next,

the modern judge, compared with the 1960's judge, must have staying power; the endurance of the best distance runner, with a simultaneous capacity to run one hundred metres in less than ten seconds whenever required. Next, and perhaps more than anything, the modern judge must have courage to swim the widest, deepest, fastest flowing rivers.

The 1960's judge would be appalled by first of all the diminution of the respect for judicial office in the modern community. Secondly; the 1960's judge, I suggest, would be astounded, amazed and probably appalled at the relegation of the most critical legal function to a new entity called the business unit. In the year of the 150th anniversary of Eureka, it is timely to recall that one of the things those diggers fought and died for, under the Southern Cross, was a constitution. That eventual Constitution encompassed, interestingly enough, the court – recognition of the trinity of modern government.

But let me say a little bit more about the modern setting. It is all very well, it might be said, to talk about constitutional theories, history, political theories and practice. Time, just as structures, have moved on, it might be said, particularly by those from a managerial background. From a judicial point of view, that is hard to take. Judges are trained from the outset, when they go to law school about things like: the rule of law, the constitution, the doctrine of separation of powers, the independence of the judiciary. For the public sector and from the political perspective, there might be a sneering, even a quiet uttering at all this: "*get real*".

So this context is the one facing the modern judiciary. The modern judiciary lives in the past and present at the same time. A bit similar to being a teenager and a geriatric simultaneously. The concept it is amusing; it might be humorous but might I suggest you think about this: if you are ever threatened by a bad or roguish government, if something you treasure or value is confiscated by government, or if you, a family member, a friend, neighbour, person down the street, is incarcerated without adherence to process, what is the institution that protects the individual? The answer is obvious.

Now I will make some concluding remarks.

First, the courts are here and they are here to stay. Secondly, the executive, incorporating the public sector, is here and it too, is here to stay. Thirdly; a government comes, a government goes. But whilst in power, the judiciary and the executive are needed by government to maintain our democratic structure. Fourthly; I suggest that the three institutions – the courts, the executive and the legislature – must operate, must in fact co-operate with and have respect for the other. It might be as simple as that. But respect comes from understanding, from knowledge.

So just as the career public sector personnel, political advisors and for that matter, elected representatives should know and understand and respect the judiciary – the courts; so too, must the courts endeavour to understand the pressures and demands of modern government. That said, it will not and

cannot always be springtime. Inevitably, there will be tension that must be teased out, and sometimes, in fact, confronted. These tensions are never ending. They stretch, they challenge but to do away with those tensions through acquiescence to political expediency, or, popular phenomena, would be disastrous. It would lead to each of us living within the Orwellian nightmare.

What I have said may be interpreted, translated, into management jargon or social worker speak: "*she's just talking about partnership – that's fine*". I am not. The judiciary cannot and must not engage in partnership with the executive and the government. That would involve abrogation of institutional function.

But, it is naïve to say the judiciary can operate without a nexus with executive and government. It is also naïve to say the judiciary is beyond being accountable for its costs, expenditure and process. Ultimately, I suggest, it all comes down to the institutional jigsaw of modern government. Sometimes, more often than not, the pieces fall into place. Occasionally, a piece is lost or worse still, a part of the puzzle is knocked off the table. It is the search for and relocation of the missing piece that is the continuous challenge for all in government, including one component of the trinity, the modern judiciary.