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Future Directions in Judicial Education

Address by

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Introduction

I am very grateful for the organisers of this conference for giving me the opportunity to present this paper on the future of judicial education. The subject of judicial education has become a topic of increasing interest for the Judges of Australia and New Zealand. There are a number of professional bodies in the region working actively and co-operatively in this field. Recent programmes delivered by the National Institute of Canada have awakened interest in the development of a recognisable judicial faculty in Australia and New Zealand, comprising Judges who are appropriately trained and willing to devote their energies to the development of programmes for their judicial colleagues, in conjunction with pedagogical and other experts.

Later in this paper I will turn to a specific review of recent developments in Australia and New Zealand. However, before doing so, I would offer some general observations on the importance of judicial education.

The Importance of Judicial Education

I would like to start with some observations about the philosophical underpinning of judicial education. The importance of judicial education was underscored to me in the course of a conference of the International Organisation of Judicial Trainers in Sydney in 2009, hosted by the National Judicial College of Australia, supported by the other organisations involved in judicial education in Australia. It was a fantastic conference of more than 200 people from 48 different countries around the world all engaged in judicial education. When one listened to the experience gleaned from the various different countries, different judicial backgrounds, different political environments, it seemed to me put judicial education in its context. It opened my eyes to the profound

significance which judicial education has to the rule of law. Of course, it is very difficult to overstate the significance of the rule of law. In Australia we tend to take it for granted, but in most of the countries of the world, judicial officers do not enjoy that luxury. The safety, stability and economic prosperity of most of the residents of this planet depend critically upon the rule of law. Tyranny, oppression and terrorism can only be adequately met by the rule of law. Judicial education has a very important part to play in the rule of law. That was made most evident by Justice Mian Shakirullah Jan from Pakistan who attended the Sydney conference. Justice Jan is involved in judicial education in that country but is also a member of the Supreme Court of Pakistan. Most of you would know the recent turbulent events involving the judiciary of Pakistan. The point forcefully made by Justice Jan was that it was the people of Pakistan who in the end were the ultimate protectors of the independence of the judiciary. It was the people who demanded the restoration of their judiciary, and whose demands became so strong and so loud that it was impossible for the government to resist them.

Where does that observation lead in terms of judicial education? It seems to me to lead to the proposition that independence of the judiciary depends critically upon public confidence. Public confidence depends upon judges doing our jobs well and efficiently. It also depends upon judicial officers being sensitive to the needs of the communities which we serve and upon our ability to effectively communicate to those communities, what we do and why. It depends upon us being sensitive to the social context in which we perform our duties and it requires us to perform them in a way which is relevant to the communities which we serve. If we do all that, we will enhance the public confidence of the community in the judiciary and that is ultimately the vital protection of

our independence. And, of course, the purpose of judicial independence is not to provide a benefit to the judiciary, but to enable the judicial system to function fairly with integrity and impartiality.

Accountability

Independence without accountability has many potential dangers, ranging from despotism to inefficiency. In the judicial context, there is a distinction between individual accountability and institutional accountability. Individual Judges are accountable to the courts above them in the appellate hierarchy in respect of their decisions in particular cases. Courts are accountable, as institutions, to the community for the quality, integrity and efficiency of their administration of justice. Judicial education has an important role to play in assisting institutional accountability, by equipping Judges to serve their courts in ways which enhance the quality of the administration of justice.

In common law systems, members of the judiciary are generally appointed from the ranks of experienced legal practitioners. Until the last few decades, it was thought that the experience and eminence of the practitioners appointed obviated the need for any further education following their appointment to the bench. More recently, the fallacy of this assumption has become generally accepted. The roles of an advocate, and the roles of an adjudicator are, of course, fundamentally different. Under the adversarial system, advocates are required to be partisan, whereas adjudicators are required to be impartial. The assumption that an experienced advocate is qualified, by that fact alone, to be an adjudicator, is no more valid than the assertion that an experienced surgical theatre nurse is thereby qualified to conduct surgery.

Access to Justice

Recent times have seen significant public debate on the subject of access to justice. It is a concept which has many facets, including the extent to which the justice system is comprehensible to the community. Judicial education has the capacity to encourage Judges to adopt techniques which will enhance the comprehensibility of the court process. To that extent, judicial education has the capacity to enhance the public perception of the relevance of the justice system to the community, and through that means, to enhance public confidence.

The Structure of Judicial Education in Australasia

The structure of judicial education in Australasia reflects the incremental creation of different education bodies in different jurisdictions over time. The Australasian Institute of Judicial Administration, and the Judicial Commission of New South Wales were the original participants in the field. Together, they realised and met the need for an orientation programme for newly appointed Judges. That programme, after various modifications and refinements, continues to be delivered today, and forms a significant component of the courses generally provided to the judiciary in Australia. The Institute of Judicial Studies of New Zealand was the next entrant into the field, and has provided a range of educational opportunities for the judiciary of New Zealand, including an orientation programme, and many other specific programmes which have been developed by the Institute since its creation.

Next in point of time were the Judicial College of Victoria, and the National Judicial College of Australia, each being created about 8 or 9 years ago. The AIJA was active in promoting the creation of the NJCA, and since its creation, has largely withdrawn from the field of judicial

education, save in areas of particular interest to the Institute, given its focus upon judicial administration. Since then, the NJCA has assumed responsibility for the delivery of judicial education in all Australian jurisdictions.

Each of the Australian Federal Courts (other than the High Court) has its own education committee, charged with the responsibility of providing judicial education specifically relevant to the members of that court.

In addition, in South Australia and Western Australia, education committees covering all State jurisdictions have been created, with responsibility for providing programmes of common interest to members of the judiciary in those States.

In the superior courts of Queensland, judicial education for the superior courts tends to be funded in part from the judicial allowance provided to members of those courts, with the result that there is a tendency for members of those courts to participate in judicial education programmes provided by the NJCA, or international training organisations.

In the less populist jurisdictions (Tasmania, ACT and NT), individual members of the judiciary have been appointed to take responsibility for the provision of judicial education within those jurisdictions.

Funding

It is difficult to calculate with precision the cost of judicial education in the Australasian region as a whole, or to make meaningful comparisons between the jurisdictions in this regard. However, John McGinness, the Director of the NJCA, has helpfully undertaken an analysis of the publicly available data on this subject. I must, however, emphasise that various factors inhibit the comparability of this data.

According to the publicly available data, the two best resourced organisations in the region are the JCNSW, and the JCV, with annual funding of \$2.95 million and \$2.5 million respectively. According to John's analysis, each provides judicial education to approximately 280 judicial officers (although in the case of JCV, this excludes consideration of the members of VCAT). This produces an annual cost, per judicial officer, in Victoria of just under \$9000, and for New South Wales, a little over \$10,000.

In the case of JCNSW, the amount includes costs for conferences and other judicial education activities, including production, publication and maintenance of bench books, journals, bulletins and research material including monographs.

By contrast, the Institute of Judicial Studies of New Zealand has an annual budget of a little over \$900,000, with which it is required to provide services to approximately 210 judicial officers, resulting in expenditure of around \$4300 per year per judicial officer.

The annual budget of the NJCA is approximately \$520,000. Its services are provided to a little under 1100 judicial officers around Australia, producing an annual cost, per judicial officer, of approximately \$500 per year.

The cost of judicial education in jurisdictions which do not have specific judicial education bodies is very difficult to ascertain from publicly available data. For example, in my own jurisdiction of Western Australia, there is no specific budget item for judicial education. Rather, the amount spent would have to be winkled out of various other line items in the budget, including travel, conferences, etc.

In relation to the Federal Courts of Australia, the publicly available information does not enable an assessment to be made of expenditure on judicial education within those courts.

By contrast, the National Judicial Institute of Canada has an annual budget of approximately \$10.5 million, and provides services to approximately 2100 Canadian judicial officers, producing an annual amount per judicial officer of just under \$5000. However, the total cost of judicial education in Canada is augmented by costs incurred by each of the various courts in that country.

By way of summary from this analysis, it can be seen that there is a significant disparity between the amounts spent on judicial education, per judicial officer, in New South Wales and Victoria, as compared to the amount spent in other jurisdictions.

The National Standard

In 2006, after conducting a review, the NJCA promulgated a national standard for judicial education, applicable in Australia, proposing that judicial officers spend five days each year engaged in judicial education. That standard was adopted by the Council of Chief Justices.

The standard was reviewed by the NJCA early during 2010. Dr Chris Roper was engaged to undertake the project, and conducted a survey to which more than 200 judicial officers in Australia responded. It is beyond the scope of this paper to set out the results of the survey in detail, but it was pleasing to observe that in many courts the standard is either being met, or is close to being met. The survey also gauged the attitudes of members of the judiciary, and of Heads of Jurisdiction, to the standard. Following that review, the NJCA has resolved to recommend the

continuation of the standard to courts, and to also recommend a number of means by which achievement of the standard might be enhanced.

The Review of the NJCA

During 2009, the NJCA commissioned Mr George Thomson, of the National Judicial Institute of Canada, to undertake a review of the work of the College. That seemed timely, given that the College had then been in operation for a little over 6 years. George was good enough to attend Australia for a couple of weeks, and to undertake wide consultations during his time, after which he provided a comprehensive written review of the College and its work. I will briefly mention some of his key findings.

A Collegiate Approach

After looking at the diffuse structure of judicial education in Australasia, Mr Thomson recommended that the various organisations engaged in judicial education should work closely together to develop an integrated and co-ordinated system of judicial education that cohesively met the needs of the Australasian judiciary. Following that recommendation, a meeting of those engaged in judicial education in Australasia was convened in conjunction with the IOJT conference to which I have earlier referred. I am pleased to say that the recommendation for a more collegiate approach was enthusiastically embraced by all present at that meeting. That approach has also been endorsed by the Council of Chief Justices.

There are a number of specific steps that were recommended as a means of achieving this objective. Mr Thomson proposed a shared effort to identify the learning needs of judicial officers. He also recommended the

identification and priority allocation of curriculum development, and agreement as to which organisation would take responsibility for the development of particular programmes or modules of education.

In practical terms, that means that the various entities engaged in judicial education would sit down as a group and discuss their plans for programme development over the ensuing period. Programmes developed within the group would then be made available to all organisations within the group. Subject to availability, trainers experienced in delivery of the programmes would also be encouraged to provide their services to all jurisdictions. Through this means, the benefit to be derived from limited and fragmented resources is maximised.

Mr Thomson also recommended full sharing of educational programming to avoid duplication of effort. I am pleased to report that this recommendation has also been embraced by the various organisations.

Curriculum: a shared resource

Mr Thomson also recommended that the National College take a role with respect to the preservation of curriculum and its availability to judicial officers. It has therefore been agreed that the National Judicial College will maintain a central database for judicial education in this region. A library created in both hard copy and electronic copy of programmes in judicial educational materials will be assembled, with contributions from all bodies engaged in judicial education, for access by all other bodies.

Mr Thomson also recommended improved relationships between the judicial education bodies and the Federal Courts. I am also pleased to report that significant steps have been taken in that regard.

A Modular Curriculum

Mr Thomson also recommended the development of programmes or modules on particular topics. In other words, he contemplates a metaphorical library shelf with different programmes and modules, from which one could choose and put together to enable a programme to be assembled. While he accepted that there was a place for programmes like the National Judicial Orientation Programme in Australia, in which a Judge was asked to set aside five days for a spread of different sessions, his view was that after orientation, more specific modules and programmes would be more desirable to the judiciary.

Consistent with this approach was Mr Thomson's recommendation to create a curriculum and programme model in which judicial officers could choose their own educational development programme. This would enable Judges to map out for themselves what they wanted to learn, where they considered their areas of weakness to lie, and to develop an individually bespoke programme for that judicial officer by reference to the taking of individual programmes and modules. The concept sounds wonderful, but the practical issues associated with delivery of bespoke education programmes in a region as large as Australasia, with a relatively small number of judicial officers, are problematic.

Course Design

In relation to court design, Mr Thomson emphasised that the College should place greater emphasis on what our Canadian colleagues refer to as "three-dimensional course design". That design model integrates content, skills and context. Content is the base of educational material or information that is to be provided during the course. Skills are the

personal skills that judicial officers will need to use to apply the content that is learned at the course. Context is the social context of the content and the skills to be applied - namely, such things as gender, ethnicity, disability, etc. I will deal more extensively with concepts of programme design below.

Faculty Development

Faculty development is not the same as "training the trainers". If one draws a tertiary education analogy, the faculty are the people within an educational institution who are responsible for course design and course delivery. They may or may not be the same as those who actually deliver programmes.

During 2010, two programmes were held in Australia, to which Judges from the Australasian region were invited. We had the benefit of a three-day programme delivered by very experienced faculty members from Canada, acquainting us with various aspects of course design and development.

This is not to say that there is not a need for course training programme facilitators and deliverers. Those are also delivered by a variety of institutions, including the NJCA.

Judicial Involvement

George Thomson also made a number of recommendations aimed at enhancing the capacity for judge-led education. Not only is judge-led education more likely to address the particular needs of judicial learners, but it is also an important aspect of independence. There are from time to time, concerns expressed about the capacity of judicial education to impinge upon judicial independence, by a kind of "gulag" process of

indoctrination. Those concerns have sometimes surfaced in a context in which executive government has expressed a desire to become involved in the provision of judicial education.

Judges are, of course, heavily involved in the work of the NJCA at the moment. They serve on its Council, and on the steering committees for its various courses, and on the Programme Advisory Committee that decides what programmes are to be offered. But they are not involved in the executive work of the College from day to day. Mr Thomson recommended that we create positions designated as "Judicial Associates" to work with the College in the areas of curriculum. Those positions have been created, and two such positions have been filled. We have already seen the significant benefits arising from designating particular judicial officers to have a greater executive involvement in the work of the College.

Pedagogy

Mr Thomson also pointed to the lack of anyone within the NJCA structure with a specific expertise in pedagogy. He recommended that we recruit an experienced adult educator to work with the College on a continuing basis. We have adopted that recommendation, and recruited a consultant who attends our programme advisory meetings, and participates in programme development.

Programme Design

As I have already mentioned, we have benefited greatly from the recent provision of Canadian expertise in the field of programme design. As the Canadians pointed out, effective adult education is quite different in character to a secondary or tertiary education. Effective adult education

has to focus on experiential learning - that is, learning based on one's existing experience, and upon enhancing human skills in a practical environment - in a judicial situation, enhancing skills like communication and the management of people through the courtroom process. This is pithily expressed in a number of slogans, one of which is:

I hear - I forget

I see - I remember (perhaps)

I do - I understand

Contemporary judicial education has moved away from black letter law. That is not to say that there isn't a place for teaching black letter law in a judicial education curriculum - particularly, when new laws are introduced. However, what it does mean is that there is a greater tendency to focus on improving human skills, communication skills, courtroom management skills, efficiency skills, judgment writing skills and what might be loosely described as "court craft".

During the faculty development programme presented by the Canadians, we were introduced to the analysis of adult education designated by the acronym ERCAT. The acronym stands for:

Experience - perhaps by role play, asking participants to relate their experience to the audience, a video, etc;

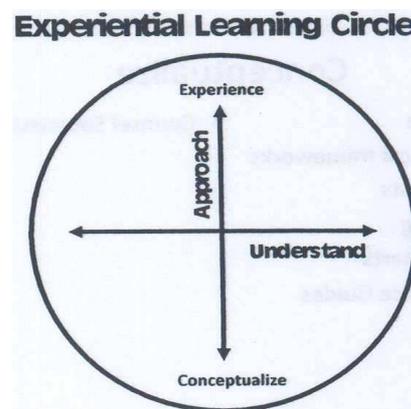
Reflection - discussion and consideration of the experience - by discussion group, etc;

Conceptualisation - the development of an analytical framework within which the product of the process of reflection is embodied

Application - that is, applying the skills acquired in the previous processes - for example, by role play in small groups

Transfer - taking what has been learned and applying it in the work environment.

Sometimes these concepts are expressed in the experiential learning circle:



These concepts underpin the process of programme design. During the faculty development programme, the importance of spending significant time and effort on programme design was emphasised. The old model of thinking of a topic, identifying someone who has some skill in the area, and asking them to present a lecture on the topic will generally not meet the needs and expectations of contemporary judicial learners. What is required to meet those expectations and requirements is the significant injection of resources and expertise into a process which has a number of stages. Those stages can be presented as follows:

1. The identification of learning needs - what is the need or gap which the programme is designed to fill?

2. Learning objectives - that is, what is the programme designed to achieve - what skills and knowledge should participants acquire through the programme?
3. Learning content - that is, what are the precise components of the knowledge that we wish participants to acquire through the programme, and precisely what skills are needed to apply that learning?
4. Learning activities - that is, what are the various activities and teaching methods that will be engaged to impart the knowledge and skills to participants - what components will involve lecture, reading, role play, video, demonstration, group discussion, etc?
5. Detailed planning - that is, the fleshing out of the programme, with the identification of facilitators, trainers, sessions, times, places, etc.
6. Delivery of the programme
7. Evaluation and redesign

This methodology is now being employed in all new programmes developed by the NJCA and, I suspect, by the various judicial education institutions whose representatives attended the faculty development programmes held in 2010. I am confident that the application of these techniques will significantly improve the quality of judicial education which is provided in Australasia in the future. This is, of course, not to say that the standards of judicial education in the region have been inadequate in the past. However, it is to recognise that the provision of judicial education which meets the needs of a contemporary judiciary is a sophisticated task, requiring expertise and significant resources. Judicial

expertise is an essential component of that process, but so also is expertise in the field of adult education, and learning techniques.

Conclusion

At the risk of being branded a nerd, I think this is an exciting time for judicial education in Australasia. The basic structures for the provision of really good judicial education to the Judges and Magistrates of the region are all in place, due to the good work of many over the last 20 years or so. However, we now have the opportunity to apply new skills and expertise to take the quality of judicial education to a new and exciting level. I genuinely believe that we are up to the challenge, and that, in a few years time, when we look back, we will be able to reflect upon a diverse array of programmes that will not only meet the needs of contemporary judicial officers, but also assist those judicial officers to better serve our community.