2007

District and County Court Judges' Conference

Opening Address

The Hon Wayne Martin
Chief Justice of Western Australia

28 June 2007
Esplanade Hotel
Fremantle, Western Australia

The Honourable Chief Judge Kennedy of the District Court of Western Australia, the Honourable Jim McGinty MLA, Attorney General for Western Australia, distinguished guests too numerous to mention.

I would like to commence my remarks by acknowledging the traditional owners of these lands, the Nyoongar people, and by paying my respects to their Elders.

It's a great pleasure and an honour to speak at the opening of this important conference. I am sure I don't need to tell you that the District and County Courts are the primary trial courts of this country for the more serious criminal matters, for personal injury claims, and for middle-ranking civil claims. After the Magistrates' Courts, your courts are the courts with which ordinary Australians are most likely to have direct contact and experience. It is impossible to overstate the importance of the contribution to the administration of justice in this country which is made by your jurisdictions.

This conference provides an invaluable opportunity for collegiate interaction and feedback which I am confident will enhance the quality and efficiency of the administration of justice by your courts. I am sure there are many things we can learn from each other about better ways of conducting court business. That important objective will also be enhanced by the stimulating and challenging programme which the organisers of this conference have compiled. The range of topics to be addressed over the next few days is so diverse that it is challenging to extract any dominant theme or themes, but if I was to attempt to undertake that task, the themes of increasing relevance and accessibility

appear to me to emerge from the business sessions which the organisers have assembled.

These themes of relevance and accessibility are dear to my heart. I have spoken of them often since my appointment. It seems to me that improving relevance and accessibility to our courts is not just a laudable objective, but a practical necessity if the Australian justice system is to be worthy of that description. As I have said with tedious repetition, it is, I think, incumbent upon all branches of the judiciary to critically analyse and review our processes and procedures with a view to identifying ways in which we can be more relevant and comprehensible to contemporary Australia, searching assiduously for ways in which we can reduce delay, increase efficiency, reduce cost and thereby improve accessibility to ordinary Australians. In a very real sense, for many Australians – particularly the large number of Australians who are neither very rich nor very poor, the justice system is a theoretical concept to which they are denied practical access.

Criminal Law

The administration of the criminal law is, of course, a dominant aspect of the jurisdictions exercised by each of your courts. It is therefore not surprising, and entirely commendable that the organisers should have devoted a number of sessions to looking at ways in which the efficiency and comprehensibility of our criminal processes might be improved. There is, I think, an identifiable trend around the country whereby criminal trials are taking longer and are increasingly complex. This is a movement in exactly the wrong direction. We must find ways of making trials shorter and simpler.

Over the last 20 years or so, the civil courts have adopted processes designed to identify early the real issues in each case and focus preparation upon those issues. They have aggressively and successfully applied methods aimed at achieving early resolution by way of agreement. Those processes have been successful, so that, for example, in the Supreme Court of Western Australia, less than 4% of our civil lodgments are resolved by a trial and, surprisingly, our trials are, with some notable exceptions, generally occupying less time.

While, of course, some different considerations apply in the area of criminal law, for my part, I cannot see any particular reason why the lessons that have been learnt on the civil side of the court's work, in terms of the advantages of early identification of the real issues in a case, and the active encouragement of processes of resolution other than by trial, cannot be successfully applied in the criminal side of the Court's work.

With those objectives in mind, in the Supreme Court of WA we are actively case managing our criminal cases. Continuity in the management of individual cases is enhanced by much of that role being performed by the Judge in Charge of the Criminal List. I can see scope for further improvement in that respect by the adoption of a docket system for the management of each case through to trial by one Judge of the kind which we have now successfully adopted on the civil side of the Court's work. We have also introduced a programme of criminal mediation, and our inaugural mediator, Mr Ron Cannon, will be addressing your conference. Although the programme is of relatively recent origin, early indications are very positive, and we have resolved to expand the programme, utilising the services of another mediator, Mr Kevin Hammond – formerly Chief Judge of the District Court of WA

and most recently Corruption and Crime Commissioner. We are very fortunate to have been able to secure the services of these experienced and respected practitioners.

I share the view, expressed by many, to the effect that the criminal law has become chronically over-intellectualised. The cumulative effect of the criminal jurisprudence enunciated by appellate courts in Australia over the last several decades has been to turn a criminal trial into a kind of booby-trapped labyrinth for trial Judges. Aspects of the process are incomprehensible to the average Australians who serve on the juries which are such a vital aspect of the process. The directions which a trial Judge is now required to give to a jury have become so complex and formulaic that I suspect they leave many juries glazen-eyed and mystified. You will have the benefit of hearing from one of the world's leading experts in relation to research on issues affecting jury performance, and from one of Australia's most experienced former Judges, who is now tasked with the responsibility of simplifying jury trials and, in particular, jury directions in the course of the important reference now under consideration by the New South Wales Law Reform Commission.

Indigenous Issues

No conference dealing with criminal practice in Australia can fail to address the issues which confront the indigenous people who are so grossly over-represented in our criminal courts, and this conference is appropriately directing attention to those issues. Despite decades of well-intentioned effort, the over involvement of Aboriginal people in the criminal justice system is increasing, rather than decreasing. Most jurisdictions in Australia now have summary courts specifically designed

to deal with indigenous people, utilising respected indigenous community members as an integral part of the process. They have proven to be successful in improving the relevance of the judicial process to Aboriginal people, and in reducing recidivism. Together with problem-solving courts, like drug courts and domestic violence courts, they present rays of hope in improving the relevance and effectiveness of our criminal processes.

My own view is that the time has come to look carefully at the scope for extending the approaches and processes which have proven to be successful in summary courts beyond those courts and into the higher jurisdictions. The best way of protecting the community, which is after all the primary function of a criminal court, is by reducing the risk of re-offending. In my view, the time has come to look carefully at applying techniques which have successfully evolved in summary courts into our higher courts – including the involvement of respected Aboriginal people in the sentencing process.

But we must accept that there is a limit to the capacity of the courts themselves to reduce the over-involvement of Aboriginal people in the criminal justice system. That is because criminal behaviour is often the symptom of a raft of underlying causes. With Aboriginal people, those underlying causes often include poor health, education, housing, social and cultural dislocation, lack of employment opportunity and substance abuse. Unless and until those issues are addressed by other agencies of Government, I fear there is not a great deal the courts themselves can do to reduce Aboriginal offending. However, the recent attention given to these issues by a range of Governments gives cause for optimism in this area.

Civil Cases

I have already mentioned the steps which have been taken in relation to the civil work of the courts in recent years in the area of case management and alternative dispute resolution. In the Supreme Court of WA, in common with a number of other jurisdictions around the country, we are aggressively pursuing change in these areas. We have embraced the principle of proportionality, which requires that the delay and expense involved in any interlocutory step must be proportional to the contribution which that step will make to the achievement of a just outcome. We have actively discouraged interlocutory disputes with some success, challenged assumptions about the need for pleadings and general discovery, and compelled conferral between practitioners and mediation between parties before any dispute is resolved by the court. If these techniques can be successfully used in major commercial disputes, there would not seem to be any reason why they could not be successfully applied in the middle-ranging civil disputes that are tried in your courts, and I am sure that many of your courts are doing just that.

Relationships between Superior Courts

Finally, I would like to say a little on the potentially sensitive subject of the relationship between your Courts and the Supreme Courts of the States. The nature of the relationship between the superior courts in each jurisdiction does, I think, vary from jurisdiction to jurisdiction and from time to time within each jurisdiction – depending upon the personalities involved. The vital need to improve relevance and accessibility seems to me to require us all to try harder to improve the collegiality of the relationships between the superior courts in each jurisdiction.

I am pleased to record a strong and cohesive working relationship with Chief Judge Kennedy. However, relationships of this importance cannot be left to depend upon personalities. Integration and cohesion must be structural and systemic. I think there is more we can do to improve flexibility in the boundaries of the jurisdictions of our respective courts, and to improve efficiencies in such areas as courtroom utilisation - particularly in regional areas, libraries, technology, benchbooks and so on. Who knows, one day we might even hold joint conferences.

South Australia provides the paradigm model in this area. As you will be aware, all the courts of that State are administered by an authority governed by a board comprised of the heads of jurisdiction. Collegiality, flexibility of jurisdiction and the efficiencies that go with it are structural and systemic. I have expressed this view before, but I'm afraid whenever I have the Attorney General as a captive listener, I take the opportunity to re-emphasise my views on the subject.

It only remains for me to join those who have welcomed you to Western Australia and, in particular, the wonderful City of Fremantle, and to wish you well in your important endeavours.