The Magistrates of Western Australia

Annual Conference 2006

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Introduction

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

It is a great honour and a pleasure to have been asked to give the opening address at the 2006 Conference of the Magistrates of Western Australia. Although I have an appointment to the Supreme Court of Western Australia, I am firmly of the view that my office is that of Chief Justice of Western Australia, not Chief Justice of the Supreme Court. The primary responsibility of my office is to promote and protect the justice system of this State in all its manifestations. There is quite a respectable argument to the effect that the Magistrates Courts are the most significant component of the justice system of this State, not least because your Courts are the Courts with which ordinary Western Australians have by far the greatest contact, and of which they have the greatest experience. Those experiences significantly shape their view of our justice system. Your Courts are the most relevant to the broadest section of our community and play an absolutely vital role in providing justice to the community and in promoting and enforcing the rule of law.

I am sure you do not need me to remind you that you are at the coalface of the justice system, dealing with a daily caseload that would cripple any Superior Court, often in inadequate facilities and with limited assistance from support staff. While I do not need to remind you of these things, it is, I think, important for Supreme Court Judges to remind themselves of these things from time to time - especially when reviewing what has

occurred in your Courts in the rather more rarified atmosphere of an appeal to the Supreme Court. In dealing with that appeal, we, of course, have the benefit of our dedicated judicial support staff and usually the assistance of counsel, together with time for preparation and contemplation. These are all benefits which you are often denied unfortunately. These are differences which I think we must bear in mind if we are to avoid falling into the trap of reviewing your work with an eye which is too keenly attuned to the perception of error - perhaps of a technical kind. Both I and my colleagues do our best to focus on substance rather than form, which in my view is appropriate at all levels in the justice system, but most particularly at the high volume end of that system, which is in your Courts.

Access to Justice

A recurrent theme which I have endeavoured to address in most of my public remarks since my appointment on 1 May this year has been the theme of access to justice. I am very concerned that to many Western Australians, the justice system is a theoretical concept to which they are denied access for a variety of reasons including the cost of legal representation, complexity, comprehensibility and relevance. These problems are, I think, more acute in the District Court and the Supreme Court. Many of you sit in Courts which operate as an integral part of your communities and to which people do, in fact, have real and meaningful access. That has not come about by accident but because of the steps which have been taken by the Magistracy to adopt practices and procedures which are relevant and comprehensible to the members of the community which we all serve. However, diminishing the obstacles which lie in the path of anybody seeking to understand and participate in the justice system is, I think, an evolving and continuing task which we

must all diligently pursue if we are serious about improving access to justice.

Self-represented Litigants

It borders on the presumptuous for me to speak to you on the subject of self-represented litigants, because, of course, self-represented litigants are a ubiquitous feature of daily life in your Courts, although only an occasional feature of practice in other Courts. Decreasing the complexity and improving the comprehensibility of what happens in our Courts is, in my view, a vital aspect of improvement of access to justice, not least because of the opportunities which it offers to self-represented litigants to meaningfully participate in the court process. Plainly, it is in the interests of access to justice, and also in the interests of the smooth and efficient operation of the Courts, for the Courts to develop programmes to assist and encourage people to present their own cases and to make it easier for them to do so. Simplifying our forms and procedures, reducing the use of legal jargon and technicality are all steps in the right direction. Modern technology, including in particular the internet, provides unparalleled opportunities for the provision of information to prospective court users. However, it cannot be assumed that all prospective court users are computer literate or have access to the requisite facilities. Although some steps can be taken to reduce the disadvantage suffered by some in this area by the provision of computer terminals and kiosks within the public areas of court buildings, it must be accepted that there will be a significant proportion of people who will lack the capacity or enthusiasm for the pursuit of computer-based information or services. This in turn means that any comprehensive programme for the assistance of self-represented litigants must be multi-faceted and cater not only for the computer literate but also for the computer illiterate.

Regional Western Australia

This State occupies about one-third of a continent. It is, however, perhaps the most metro-centric State of all the States that form the Commonwealth, with a very high proportion of its population and corresponding services, such as health, legal and corrective services provided in the metropolitan area. This creates obvious and significant problems for the many regional Magistrates who serve throughout this vast State.

Those of you who are stationed outside the metropolitan area are, of course, the only judicial officer in your district or region unless you are based in Kalgoorlie or Bunbury. While you will receive occasional visits from Judges of other Courts on circuit, in general you are professionally isolated from the sort of informal, regular communication with professional colleagues which informs and assists us all to get through our daily tasks. Often this professional isolation is exacerbated by the need to perform your duties in inadequate facilities and with very limited support and assistance - sometimes on extensive circuits to remote geographical locations which lack some of the basic infrastructure which is normally taken to be indispensable to the administration of justice.

These problems are also exacerbated by the breadth of jurisdiction you are called upon to perform in remote and regional Western Australia. In addition to the standard criminal and civil jurisdictions, you will often be called upon to undertake a miscellany of other tasks including sitting as a Warden, sitting in the Children's Court, sitting as a Coroner and regularly exercising the Restraining Order jurisdiction of the Court. Nobody

should under-estimate the difficulties and challenges created by the sheer breadth of jurisdiction which you are regularly called upon to exercise.

The Use of Technology

Modern technology has the capacity to assist in reducing some of these difficulties. Audio visual facilities are now common and can be supplied at a relatively modest cost. While the desirability of real and practical access to justice requires that courts regularly sit in the communities which they serve, the sheer size of this State and the limited magisterial resources that are available to service it, produce the consequence that there are many occasions when it will be impractical to convene a Court where the crime occurred or where the offender has been located. I am therefore strongly of the view that we should continue to utilize and indeed make much greater use of audio visual facilities to enable cases to be dealt with quickly and effectively wherever they might arise geographically. Transporting persons in custody across large distances to attend Court hearings is not only inhumane, but extremely expensive and time-consuming. While nobody would dispute that, generally speaking, a person should be physically present when being sentenced (if there is a risk of a custodial sentence), or when there is a substantive trial, in most other instances a "virtual" appearance should be quite sufficient. The Chief Magistrate and I will be liaising with the Police Commissioner and Government in an endeavour to promote greater use of existing facilities and the provision of greater audio visual facilities, which I am sure will both save money and improve the timeliness of service delivery.

Criminal Jurisdiction

The criminal jurisdiction of the Magistrates Court is, of course, that which consumes most time and resources. One of the things I have

discovered since my appointment is that, of course, the sentencing of offenders is by far the most controversial topic in the justice system, and by far the topic upon which public comment is most often made.

It is also probably the most dangerous topic for any Chief Justice to address in public remarks, and I therefore embark upon the topic with a certain amount of fear and trepidation.

The primary obligation of the Court is, of course, to protect the community which we all serve. In exercising the function of passing sentence, considerations such as deterrence, both general and specific, retribution, in the sense of imposing a penalty which the community would wish to see imposed upon one who transgresses its laws, and which is proportional to the severity of the transgression, are all important aspects of the sentencing process.

However, it must also be remembered that in a number of cases the community is best protected by reducing the likelihood that a particular offender might reoffend. That is why I have been pleased to actively support and promote what I am calling a "problem-solving" approach to the sentencing function in a number of areas - an approach which is sometimes coined "therapeutic jurisprudence" - a term which I don't myself fully support because of its "feely-touchy" connotations.

The significance of a problem-solving approach lies in the fairly obvious observation that most crime is the symptom of an underlying cause. Drug-related or drug-induced crimes are a symptom of underlying substance abuse. Sexual offences, particularly those against children, are often a symptom of an underlying social or psychological dysfunction, as

are offences of domestic violence. Accordingly, I am very pleased to see that programmes have evolved in the Magistrates Courts whereby the underlying causes of criminality - such as substance abuse or domestic violence, can be identified and addressed as part of a sentencing approach which will reduce the risk of that offender reoffending, but also give appropriate weight to the factors of deterrence and retribution which I have already mentioned. All the research that I have seen conducted on the outcomes of problem-solving approaches to sentencing in Drug Courts and Domestic Violence Courts shows that they have been successful in reducing the risk of reoffending. Thus, the adoption of such an approach is consistent and conducive to the fulfillment of the primary obligation of the Court to protect the community. The Drug Court in this State has proven to be a great success, and for my part, I would like to see its operations expanded to cover all substance abuse, including alcohol. I am very pleased that the initial pilot programme for the Domestic Violence Court in Joondalup is to be extended to other metropolitan centres.

Indigenous Offenders

Another theme that I have addressed regularly in most of my public remarks since my appointment earlier this year is the gross over-representation of indigenous people in the criminal justice system of this State. As I am sure most of you will be aware, indigenous people represent 40% of the prison muster on any given day, whereas they represent only about 3% of the general population. Even viewed in terms of the indigenous population alone, the imprisonment rate in this State is almost double that in the Northern Territory. About one in 16 adult Aboriginal males in this State is in prison on any given day. The situation is no better for juveniles - at Banksia Hill, over 80% of the

inmates are indigenous, and the situation at Rangeview is not much better.

I don't profess to have the answer to this apparently intractable problem, but one thing is clear from the figures I have mentioned, and that is that whatever we have been doing in the past has not worked effectively. At the risk of being branded an instant expert in this complex area, it is also my fairly firm view that there is not a great deal that can be done by the Courts alone or in isolation in rectifying and addressing this problem. The criminality which is reflected in these figures is obviously the symptom of a suite of underlying causes which includes social dysfunction and dislocation, substance abuse, inadequate education, health, housing and employment opportunities and so on. It therefore seems to me that unless and until a whole of Government approach is taken to these issues in a conscious and deliberate attempt to restore traditional culture and lore, the over-representation of Aboriginal people in the justice system is likely to continue.

However, there are things that can be done within the court system to improve the situation. Amongst them is the adoption of an approach in which Aboriginal people are given a greater sense of participation in the justice process through the adoption of sentencing processes such as those utilised in Circle Courts or Koori Courts which have been successful in other jurisdictions.

It is, I think, regrettable that the recent release of the report of the Law Reform Commission of Western Australia on this subject (a reference which I encouraged be given to the Commission when I was its Chairman) has given rise to some ill-informed comment on the operation

of such courts. They do not operate on the basis of two systems of law - one applicable to white people and one applicable only to black, but simply provide a means for applying the universally applicable law to the circumstances which exist in our indigenous communities. They do not provide for "soft options" for black people - in those jurisdictions which operate on an "opt in" basis, a number of offenders eligible to opt in have chosen not to because of their perception that they are likely to be dealt with more severely under a circle sentencing regime.

What these systems do achieve, however, is a relevance and efficiency which is less likely achieved without indigenous community involvement. A process which draws to the attention of an offender, particularly a young offender, the displeasure and disapproval which his or her conduct has caused to people within the community who he or she respects is much more likely to be effective than a process imposed by a white Magistrate who might visit the locality only infrequently. These processes have been employed in your courts in the Goldfields and the Pilbara. For my part, I strongly support the expansion of this approach to other regions of the State and to the Children's Court. However, we must endeavour to provide balanced information which fully and accurately depicts these programmes in the hope that we can reduce the risk of them being stereotyped as "soft options for black people".

Civil Jurisdiction

By saying as much as I have said this morning about the exercise of criminal jurisdiction, I do not mean to diminish in any way the performance of the civil jurisdiction of the Court. It is the civil jurisdictions of the higher Courts that have created the significant access to justice problem about which I have already spoken. Your Courts are

provided with the opportunity to overcome some of the obstacles which lie in the path of meaningful access to Courts as a means of dispute resolution. That will best be achieved if your focus is speed and simplicity and not forensic perfection. Although the term is not often used any more, the expression "summary jurisdiction" seems to me to provide a good guide as to how you should approach your civil work. Interlocutory arguments about such things as pleading, discovery, scope of interrogatories and so on, are all extremely expensive and time-consuming. In my experience, they seldom improve the ultimate quality of the outcome. In the Supreme Court, we are taking steps to actively discourage those pursuits, and I suggest that disputes of that kind should not ordinarily be countenanced in your Courts. Rather, I would encourage an approach which tries to bring each and every case to resolution either by trial or mediation as quickly as possible. I mention mediation in the hope that its use might be encouraged in your Courts. It has proven to be very successful in the higher Courts. In the Supreme Court, for example, less than 5% of our civil lodgments are resolved by a trial - that means that more than 95% are resolved some other way - often by agreement between the parties. It therefore seems to me that the focus of all our processes should be upon getting the parties to the point where they are able to resolve the dispute themselves sooner rather than later.

Accountability

The final topic I wish to address briefly is the subject of accountability. The Courts are the third branch of Government. The accountability of the other two branches of Government is well developed and clear. The legislature must account to the electorate every four years in this State. The Executive is held accountable through a variety of mechanisms

including through the Courts, through Ombudsman, Auditors-General and parliamentary scrutiny.

But the third branch of Government - the Courts, is only accountable to a higher Court in the appellate structure, and then only for the substantive decision and not for the efficiency of their performance. There are limited mechanisms provided in the Schedule to the *Magistrates Courts Act* for suspension and removal from office in the event of disability or misconduct justifying that course, but fortunately there is very seldom need to invoke mechanisms of that degree of severity.

Much more common are complaints of inefficiency or delay. Sometimes those complaints are made to me. In my opinion, it would be most desirable to provide a formal mechanism for the investigation and resolution of such complaints.

In my view, there is no tension between judicial independence and the provision of accountability mechanisms of this kind. The importance of judicial independence cannot be overstated. However, independence and accountability are, in my opinion, quite separate and distinct notions. Independence is the freedom to decide a particular case in a particular way without fear of recrimination or retribution. However, accountability seems to me to have much more to do with service provision. Where service provision is under consideration, what is being assessed is not the outcome of the case, but rather the process by which that outcome was arrived at, and the efficiency with which the processes have been applied.

That is why I publicly support the creation of a Judicial Commission. I have studied and reviewed the operation of the Judicial Commission of

New South Wales and will shortly provide a report to Government on the possible options for the adoption of similar processes in this State.

While a primary benefit from the creation of such a Commission lies in the capacity which it provides for efficient and independent investigation and handling of complaints, the Judicial Commission of New South Wales performs a number of other important functions including the adoption of responsibility for continuing judicial education and the provision of a comprehensive sentencing database for use by all judicial officers in New South Wales, in order to hopefully improve the consistency of sentencing. These are also very important functions which could be performed by a Judicial Commission in this State.

Conclusion

Finally, can I wish you well in your important deliberations and discussions over the next three days. The isolation to which I have referred already reinforces the need for conferences of this kind to be held regularly for full and free interchange of professional views. I am sure that this conference will provide that opportunity and I encourage you to make the most of it.