

# Judicial Conference of Australia Colloquium 2009

## Friday, 9 October 2009.

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### *Acknowledgments:*

- *Traditional custodians, people of the Kulin Nation*
- *The Hon Justice Marilyn Warren, AC, Chief Justice, Supreme Court of Victoria;*
- *The Hon Justice Ruth McColl, AO, President, Court of Appeal, Supreme Court of NSW and President, Judicial Conference of Australia;*
- *Distinguished members of the Judiciary*

As Attorney-General of this great State, I feel privileged to have played a part in a revolution within Victorian law in recent years.

It's been a revolution based on a vision of the law as a service, rather than a system – one accessible to those who need to resolve disputes; one that offers an opportunity to change direction to those who deserve a second chance.

Occurring under the banner of the *Justice Statements 1 & 2*, our blueprint for the road ahead, I'm also proud that many of our reforms - from problem-solving courts to the Charter of Rights and Responsibilities - are being taken up on the national stage.

I am increasingly convinced, however, that it is cultural change within the law itself that will truly clinch the deal and make that final difference for the public – change that must be lead at every turn by an engaged; adaptable; and robustly independent, yet accountable, judiciary.

Of course, Government can and does provide the tools to support the judiciary in all these things.

To support the judiciary in remaining engaged, for example, the Government established both the Judicial College of Victoria and the Sentencing Advisory Council, not only to improve the resources available to the courts but to provide avenues for dialogue with the community.

Similarly, to support the judiciary's ability to adapt in the way it does business, Acting Judges legislation, I believe, offers a mechanism for Courts to access even more judicial resources.

Less controversially, it seems, we've also urged the courts and profession at large to relinquish what I describe as their addiction to the horsehair and epic submissions of the adversarial tradition.

Instead, we've created the office of Associate Judge to mediate appropriate matters outside the litigation process, and, more recently, legislated for Judge-led Mediation to be conducted in the Supreme and County Courts using the authority and expertise of judges to resolve disputes early.

These reforms, I'm pleased to say, have been welcomed by a majority in the courts. In particular, I am grateful to our Chief Justice for her support for the Judicial Mediation program, and for urging the judiciary to be creative, rather than assuming that endless public money is the only way to reduce delay.

Nevertheless, there will always be certain walls of ritual against which the waters of reform can and will ebb.

For example, the substantial increase in women appointed to Victoria's benches, including our Chief Justice, was viewed as the end of civilisation to the profession's more territorial men. Yet, lo and behold, the sky has not fallen in.

Victoria is now reaping the rewards of a judiciary that better reflects its population; which has reclaimed ‘merit’ to mean ‘the best qualified’; rather than ‘the best connected’; and which is better equipped to withstand public scrutiny as a result.

Here, we reach the crucial point I wish to make today. I take my responsibility to defend the judiciary extremely seriously – much more so than some Attorneys that history has recently and thoughtfully bestowed on the nation.

I will *always* defend the independence of the judiciary and I will *always* defend judicial discretion. I will always stand firm against insidious and, frankly, lazy calls for mandatory sentencing from the less imaginative corners of politics.

Similarly, I challenge the notion that their independence means that courts should keep their nose out of law-making and simply apply the law without interpretation.

I cannot, however, do these things in a vacuum. Every Attorney needs to be able to point to a judiciary that is openly demonstrating the kind of leadership to which I referred at the outset.

This means, then, that I also challenge the assumption that a truly independent and robust judiciary should not be able to withstand an element of public scrutiny – an engagement with the community that enables it to be stronger and far more effective.

In short, I see judicial independence as a sword, rather than a shield; and a strong judiciary as one that is on the front foot – out in the community, explaining the principles behind decisions without having to make excuses; bringing the population with it.

A great example of this is the argument made recently in the pages of a Victorian newspaper by Victoria's Chief Magistrate in relation to mandatory sentencing.

An example of less integrity, of course, is found in parting shots made by those retiring from the bench against numbers in their own ranks; and I will continue to call on those with the fortitude to step up and defend their own.

Cementing the confidence of the public, however, requires more than paying them the simple courtesy of adequately explaining the principles behind sentencing when possible.

Cementing the confidence of the public means that the law needs to come in from the cold – in some quarters, descend from its lofty view of itself as a detached and immutable system and, as I said earlier, embrace its true purpose as a *service* available for those who need its assistance.

With public service, of course, come certain responsibilities. Any workplace expects its employees to conduct themselves appropriately, but all public servants – whether politicians, bureaucrats, police, teachers, nurses or judges – need their conduct to be beyond reproach.

Fairly or not, however, the judiciary is the subject of particular and unprecedented public and media scrutiny. As especially well remunerated public servants – that is, those there to serve the public good – people look to judges for exemplary behaviour – and they do so in the assumption that those who sit in judgment upon others cannot do so properly if their own conduct is tarnished.

The strength and independence of the judiciary right around the nation – as well as the consummate conduct of the vast majority of the nation’s judges, as with any profession – should not be sullied by the clumsy misdemeanors of a few.

As the Chief Justice of Hong Kong, Mr Andrew Li, said in a speech to open the 2009 Legal Year, “All judges at all levels of court are no doubt conscious that day in and day out, their performance is judged in the court of public opinion. The judges are well aware that the collective reputation of the Judiciary depends on the maintenance of high professional standards by each and every judge.”

That is why, in coming weeks, a discussion paper will be released by my Department that explores new options for investigating complaints and concerns regarding judicial conduct that falls short of behaviour warranting removal from office.

Just as there are complaint and investigation mechanisms in other areas of life when consumers are dissatisfied with discourteous, delayed or inappropriate service, there should also be a transparent mechanism for bona fide complaints about the inappropriate conduct of judicial officers.

Informed by a Working Group comprising representatives from across the legal system, the Discussion Paper will be available for public comment. While I'm not going to preempt the content of the paper, I urge you all to contribute to the coming discussion and debate.

For that's what the judiciary should always be doing.

Absolute and unfettered judicial discretion in specific cases should not prevent the judiciary from engaging in public debate about the law as a wider entity; about the courts; and about the very important service that they provide.

Just as Governments should be confident enough to test their daily workings in full view of the community, so too should the judiciary. It is crucial, then, that the leadership evident in so many ways in the courts, in particular in courts in Victoria, and in forums such as this one, continues to filter out into the public domain.

It remains my privilege to declare this conference open.