

LIBERTY AND PROSPERITY: THE EXPERIENCE OF JUDICIAL EDUCATORS

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The Australian experience of judicial education and development reflects in part the Australian legal tradition, as well as the country's political, economic and social history. In the same way, the experience of judicial education in the Philippines, our very gracious host, reflects its own history and traditions. Inevitably, judicial educators' experience of judicial education depends on the national environments with which they are familiar.

At the same time, judicial educators around the world are engaged in much the same, or very similar, activities. Judicial educators, wherever located, share many common goals. Their work is primarily directed to equipping judicial officers with the knowledge and skills they need to discharge the responsibilities of office at the highest reasonably possible standard. Their work assumes that respect for the courts and the rule of law depends on the learning, integrity, and judicial ability that judicial officers possess. They also recognize that high quality judicial education and opportunities for continued judicial development are central to promoting high quality judging and, in turn, the maintenance of the rule of law on which liberty and prosperity depend.

Thus, despite their different backgrounds, judicial educators around the world, including from this region, share a great deal in common. The establishment of the Asia Pacific Judicial Educators Forum in February 2003 recognizes this fact. The Forum was essentially the work of the Philippine Judicial Academy. The Academy brought together judicial educators from many places besides the Philippines - Australia, Bangladesh, Cambodia, Indonesia, India, Laos, Myanmar, the Pacific Islands, Pakistan, Papua New Guinea, Thailand and Vietnam. The Charter of the Forum states that its principal purpose is to provide judicial educators and institutions in the Asia Pacific region with the opportunity to exchange information and resources to improve the quality of judicial education in Asia Pacific. The Forum predicates that the promotion of judicial education not only promotes the well-being of the courts and judges in member countries but also the rule of law throughout Asia Pacific.

The Forum is not the only international body devoted to judicial education and development. There are other bodies, including the International Organization for Judicial Training, the constitution of which also expressly recognizes that the promotion of judicial training assists in the furtherance of the rule of law. Most recently, the Asia Pacific Judicial Reform Forum, which grew out of another meeting in Manila in November 2005, agreed that judicial education was a core concern for judicial reform.

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International recognition of the importance of high quality training and professional development opportunities for judicial officers is comparatively recent. Recognition of the value of well-directed, well-organized and well-taught judicial education is also relatively recent in Australia. I have little doubt that the growing international interest in the development of suitable programs has helped to promote a similar interest in Australia. This is part of the 'internationalisation', if I may call it that, of judiciaries through-out the world.

Twenty years ago in Australia, many judges regarded the prospect of "judicial education" as a threat to judicial independence and even to the rule of law itself.² Even as recently as 1998, a senior and respected Australian judge expressed the concern that judicial education could undermine judicial independence. He suggested that there were a number of ways in which this could happen.³ He said:

"The first, and most obvious, is that a programme which is apparently sponsored by and/or controlled by government would seriously affect perceptions of the separation of the judiciary from government. There would be the real risk of a perception that government was telling judges what to do and how to do it. Further, government would quickly come to believe that it was doing just that, start enjoying it, and seek to go further."

The judge also saw a threat to independence in the education itself. He commented:

"Within the profession, we have generally approached the content of education programmes in an ad hoc way, but that is not the way in which professional educators would carry out the project; nor should they. They would want to find out what judges do and what they should know; then they would want to see where the shortfalls occur in current performance. On that basis, they would design an appropriate programme. Any useful programme would also involve some method of assessing the extent to which instruction was assimilated and its long term benefits."

The judge believed that this would lead to scrutiny of the work of individual judges, which was, in his opinion, inconsistent with the prevailing ethos of the judiciary.

The concern that a culture of judicial education would undermine judicial independence partly explains why judicial education in Australia is very largely judge-initiated and judge-led. Australian judicial officers have accepted judicial education only on the basis that they ultimately control it.

Today, notwithstanding some judicial reluctance to embrace judicial education, programs of orientation and professional development have been

² Hon. Justice Peter Underwood AO, "Educating Judges – What do we need?", Speech to the Judicial College, 2004, located at www.supremecourt.tas.gov.au

³ Hon. Justice JA Dowsett, "Judicial Education", Paper presented to the Judicial Conference of Australia Colloquium, November 1998, located at www.jca.asn.au/pubs/dowsettpaper

institutionalised in most Australian courts. The Chief Justice of Australia's highest Court recently described this as "the most important change within the judicial branch of government" during his time on the bench.⁴

Judicial education actually began with various Australian courts developing their own programmes. Committees of judicial volunteers, dedicated to improving their courts' professional development, designed and organized conferences and workshops to meet their courts' respective needs. There was often little funding for these activities. Inevitably, the quality and availability of these programmes varied greatly across federal, state and territory courts. Unsurprisingly, enthusiasm for judicial education also varied, depending perhaps on the quality of the available programmes.

Apart from a natural suspicion on the judiciary's part that change might not be a good idea, there were other reasons why judicial education grew only slowly in Australia. These reasons have more to do with Australian history than with the value of judicial education. One significant factor was Australia's constitutional structure and the traditions of its legal system. The Australian court system is organised on the same federal basis as the legislative and executive arms of government. There are three principal bases for court organization: state, territory and Commonwealth (or national). Each Australian state and territory has its own court structure.⁵ The Federal Court of Australia, the Family Court of Australia (a specialist court), and the Federal Magistrates Court are Commonwealth (or national) courts. The High Court of Australia is the highest appellate court in the country, hearing appeals from both state and federal intermediate courts.⁶

Thirty years ago, there were very few federal judges with a distinctly national perspective - apart from the seven justices of the High Court.⁷ State and territory judges worked within the geographical limits of their respective states and territories. The creation of the Federal Court in 1976 initiated change. The Federal Court (a trial and appellate court immediately below the High Court now consisting of 48 judges) has national responsibilities. Importantly, its judges have demonstrated an enthusiasm for self-improvement through training and development. There has been a further increase in the size of the federal judiciary with the recent establishment and growth of a Federal Magistrates Court, now numbering 44 Federal Magistrates.⁸

⁴ Hon. Chief Justice Murray Gleeson AC, "Outcome, Process and the Rule of Law", Speech to Administrative Appeals Tribunal 30th Anniversary, Canberra, 2 August 2006, located at http://www.hcourt.gov.au/speeches/cj/cj_2aug06.pdf

⁵ Each Australian state except one, Tasmania, has a three-tiered court structure – Supreme Court, District or County Court, and Magistrates or Local Court. Tasmania, the Northern Territory and the Australian Capital Territory have a two-tiered structure – Supreme Court and Magistrates Court.

⁶ There are also numerous other courts and tribunals in Australia that exercise specialised jurisdictions.

⁷ See also Hon. Chief Justice Murray Gleeson AC, "The State of the Judicature", Speech to 19th Biennial Conference of LawAsia, Gold Coast, 24 March 2005, located at www.hcourt.gov.au/speeches/cj

⁸ There are currently 42 Family Court judges. As at 24 March 2005, there were 956 permanent judicial officers in Australia.

Another important reason for the slow development of judicial education in Australia has been the way judges were traditionally recruited. Traditionally, judges in Australia have been appointed in the later stages of their professional careers. Members of the High Court, Federal Court, Supreme Courts and County or District Courts were generally appointed from amongst experienced lawyers who specialised in court work. Even today this remains very largely true. The following statistics are illustrative of this generally late recruitment. On appointment to the Federal Court, 4 of the presently serving judges were 40 years of age or less; 9 judges were 45 years of age or less; 19 judges were 50 years of age or less; 33 judges were 55 years of age or less; and 44 judges were 60 years of age or less. Four judges were over 60 years of age on appointment.

Until comparatively recently, newly-appointed judges did not undertake any special course of judicial studies to equip them for judicial life. Since they were previously practising lawyers, usually with considerable courtroom experience as advocates, it was assumed that they could take up the responsibilities of judicial office without further education. Once on the bench, it was assumed that each judge would be responsible for arranging and undertaking whatever continuing education he or she thought appropriate and beneficial.

There is slight evidence that patterns of recruitment are changing, although some judicial officers have been appointed at earlier stages in their careers, and from amongst lawyers in government service, legal academics and practitioners in private practice who were not advocates. For example, between 2000 and September 2006, there were 20 appointments to the Federal Court. 17 of the newly-appointed judges had been advocates with a good deal of court experience. 3 of the new appointees were not advocates but had experience in private practice, others in government and academic institutions.

Over the last 20 years or so, Australian governments have been looking to appoint judicial officers from a larger group than that composed of experienced advocates, who have usually been men. Governments have looked to increase the participation of a broader spectrum of people, especially women, in the judiciary and this has led them to look to government, the universities and private practice. There is an increasing understanding that there is a connection between changing policies regarding judicial recruitment and judicial training. As the present Chief Justice of the High Court of Australia has said:

“Outside the ranks of experienced advocates the sort of people that governments might want to appoint to judicial office would be reluctant to accept such appointment unless proper arrangements are made to equip them to perform the task. Even among experienced advocates, these days, such arrangements are necessary, but they are doubly necessary in the case of others.”⁹

Further, there have been calls at the community level for judicial education.

⁹ Hon. Chief Justice Murray Gleeson AC, “Judicial Section and Training: Two Sides of the One Coin”, Speech to the Judicial Conference of Australia Colloquium, Darwin, 31 May 2003, located at www.hcourt.gov.au/speeches/cj

These grew out of concern for some apparently ill-advised comments by judges in socially sensitive cases. In public discussions, it is now generally accepted that Australian society is increasing in diversity, and that, in discharging their responsibilities, judicial officers are likely to encounter situations, attitudes and values outside their personal experience.

Significantly, within the courts, commitment to judicial education is not confined to newly-appointed judicial officers with little prior courtroom experience. There are in Australia today well-organised programmes for the orientation and instruction of newly-appointed judicial officers.¹⁰ Although attendance is voluntary, judges appointed to superior courts from the ranks of experienced advocates now ordinarily attend orientation programmes. Most new appointees appreciate that, just as legislatures seek to keep pace with new and complex social, technological and other issues, so too must they. They also appreciate that the efficiency with which a case is conducted in court may depend upon the skill of the presiding judicial officer.

Orientation programmes are residential and the programme leaders are generally more experienced judges. The topics covered reflect the complexity of judicial work and the core competencies needed of a modern judge. They include judicial conduct and ethics, using technology, court craft and judgment writing. Specific attention is given to assessing the credibility of witnesses and dealing with evidence, unrepresented litigants, and sentencing and alternative dispute resolution. There are also segments on physical and mental health issues. Separate orientation programmes are conducted for magistrates.

The focus of these courses is to assist newly-appointed judicial officers with the transition to the courts and to help them acquire the basic skills needed by a trial judge. One important reason for the broad acceptance of orientation programmes is that they are considered to be of high quality and to provide valuable information for the new judicial recruits.¹¹

Judicial education and professional development in Australia does not stop with training the new appointees. There are an increasing number of high-level courses designed for experienced judicial officers, although judges are not required to complete any continuing education training. The courses offered and prepared reflect aspects of the judicial role. Broadly speaking, such courses deal with: (1) the application of the law, especially new legislation or law proving especially difficult to apply because of contextual changes; (2) decision-making, especially giving reasons for decision; (3) case management, both pre-trial and in court; (4) judicial

¹⁰ In the 2005-2006 year, there were two National Judicial Orientation Programmes conducted in Australia, with a total of 45 judicial officers from superior and intermediate courts all over the country attending. Participants are charged a fee, which is borne by their respective courts.

¹¹ In some places mentoring schemes have been established, as for new magistrates in New South Wales. The Chief Magistrate pairs each appointee with an experienced member of the court. There are guidelines that identify the parties' responsibilities. Mentoring is intended to provide informal, practical and immediate help for the newcomer. Its introduction is actively under consideration in other courts, including the Federal Court (see Judicial Commission of New South Wales Annual Report 2004-2005).

conduct on and off the bench; (5) the relationship between the courts and society, especially vulnerable individuals and communities; (6) updating judicial officers with new knowledge (including technology) and fresh perceptions that affect judicial work; and (7) management of work-related health issues.

Australian judicial education and development programmes are still frequently conducted by the courts themselves for their own members. These courses are tailored to meet the specific needs of the court. For example, the Federal Court, which is largely self-governing through an extensive committee system, has an "Education Committee". Amongst other things, the Committee is responsible for arranging at least two two-day workshops a year on matters concerning the work of the Court. Recent topics have included statutory interpretation, the use of transcript analyser in long trials, and expert witnesses. Judges select topics that are perceived to be relevant to their work. Again, the leaders of the workshops are often judges, as well as academics chosen by the judges to talk to them. In the Federal Court, the result is that the judges are committed to drawing as much as they can from these workshops. Participation has promoted a positive attitude to life-long learning and an acceptance that judges must necessarily adapt their work practices to changing technological and social environments. Involvement in the judge-run programmes has also encouraged a high degree of collegiality, which is vitally important for the efficient working of the court and the mental and physical health of the judges themselves.

In Australia, besides the courts themselves, various other agencies have undertaken judicial education in Australia.¹² Until recently, there has, however, been no single agency in Australia charged with responsibility for national judicial education. Across the country, the quality and availability of judicial education has therefore been very varied. Until very recently, it was not organised in any well-ordered way. Only two of Australia's six states have their own judicial education agency. The Judicial Commission of New South Wales, established in 1986,¹³ is the oldest and best funded agency involved in judicial education. Its work is well-respected.¹⁴

The establishment and development of the National Judicial College of Australia has signalled a significant shift in Australian judicial education. This is possibly the most important recent development in judicial education in Australia.¹⁵

¹² For example, the Australian Institute of Judicial Administration Inc is a research and educational institute associated with Monash University. It is dedicated to promoting excellence in judicial administration and many of its educational activities are conducted with other bodies. The Judicial Conference of Australia, established in 1993, is dedicated to the maintenance of a strong and independent judiciary, and is also involved in promoting judicial education. Its governing Council consists of judges and magistrates drawn from all over Australia.

¹³ *Judicial Officers Act 1986* (NSW)

¹⁴ The other state agency is the Judicial College of Victoria, which began operation in 2002: see www.judicialcollege.vic.edu.au.

¹⁵ In January 2000, the Australian Law Reform Commission had recommended the establishment of an Australian Judicial College under the control of the judiciary (*Managing Justice: A review of the federal civil justice system*, Report No 89, p 175). Over a year later, in May 2001, the National Judicial College Working Group submitted a report to the Standing Committee of (federal, state and territory) Attorneys-General (a body described in J Wade, 'The Standing Committee of Attorneys-General', *Victorian Bar News*, No 86, Spring 1993, pp 14-16). The report recommended that a national institution should be established to provide professional development for judicial officers of the Commonwealth and of the participating states and

The College¹⁶ is now four years old and is hosted by the College of Law at the Australian National University. Its Council consists of judicial officers, nominees of the Commonwealth Attorney-General, and the participating state and territory Attorneys-General. Regional Convenors assist in advising on the College's projects and policies and advertising the College's programmes. It is still a small organisation, with only three staff involved in the day to day organization of College business. Its budget is also modest. The College's operating costs were met by contributions totalling \$367,794 in 2005-2006 from the Commonwealth Government and the Governments of four states (New South Wales, Queensland, South Australia and Tasmania) and two territories (the Australian Capital Territory and the Northern Territory). The cost of delivering programmes is met, in part, by registration fees for judicial officers' attendance at its courses.

The chief purpose of the College is to deliver high quality professional development programmes, although it has other projects that it believes contribute to this work. Notwithstanding its modest resources, it has quickly become an important agency for improving national judicial education. Last year around 270 judicial officers attended its programmes. Judges and magistrates from all over Australia are eligible to attend its programmes, although some programmes are limited to particular courts or categories of judicial officers. The College seeks written feedback from participants. Currently, responses indicate a high level of satisfaction with its programmes.

The College seeks to follow best practice for adult learning. It designs its programmes around small groups of judicial officers (between 20 and 30). The emphasis is on sharing knowledge and experience. The focus of the College's work is on the practical aspects of judicial work. This includes communication skills and judicial health. Sessions are led by judges and appropriately qualified experts.

The College generally does not adopt the large formal lecture model. It has found that structured discussions of practical problems work best. For example, in a judgment writing programme, participants bring along examples of recently prepared and published judgments for discussion and review. The participants learn through individually re-writing and discussing their judgments with small groups, with the assistance of professional writers. Judges speak very highly indeed of this course, the demand for which continues to grow. It must be borne in mind that judges rarely have this opportunity to reflect on their approach to writing or to obtain professional feedback.

One of the programmes run by the College is specifically designed to be a refresher for experienced judges and to encourage them to reevaluate their judicial work. The programme covers such issues as pre-trial identification of issues, case management, new technology, sentencing, cultural diversity and cultural change, interpreters, alternative dispute resolution and dealing with judicial stress and

territories.

¹⁶ The following account of the National Judicial College of Australia is drawn principally from its Annual Report 2005-2006. The Hon. Justice SC Kenny is an alternate member of the Council and nominee of the Chief Justices of the Federal and Family Courts

maintaining good health.

The College has run other programmes on, for example, children and the courts, and sentencing. Another particular interest has been the development of indigenous social awareness programmes. The College intends to concentrate on the indigenous community and its relationship to criminal sentencing, granting bail, and making domestic violence and child protection orders. The College hopes that such a programme will assist judicial officers to understand indigenous cultural practices and to apply appropriately the law in indigenous communities.

The College has recently secured endorsement for a National Standard for Judicial Professional Development, by councils representing all heads of Australian jurisdictions,¹⁷ the other major judicial education bodies,¹⁸ and the Australian Association of Magistrates. The National Standard states, in writing, the amount of time judicial officers should commit to professional development and the courts make available to enable them to do so. It is intended to be a benchmark to encourage judges, courts and government to make a commitment to professional development.¹⁹ The Council is intending to complete its work on a proposed National Curriculum for Professional Development during next year.

The development of the National Standard expressly acknowledges what we all intuitively know: judicial education is costly. There are the direct and indirect costs of providing courses and programmes to individual judicial officers. There is also the cost of lost judicial time. Even in the short time it has been available in Australia, judicial education has proven to be a sound investment. Time spent out of court on judicial education is not be regarded as non-productive. On the contrary, courts in Australia are increasingly seeing these activities as essential to the maintenance of a modern judiciary, in which the litigants, business concerns, and the local and international communities can have confidence.

In order to protect judicial independence, the Australian experience is that professional development should be judge-led. The present Chief Justice of the High Court of Australia explained this:

“The first reason concerns the constitutional principle of judicial independence. The purpose of independence of the judiciary is to ensure both the reality and the appearance of impartiality in judicial decision-making. That purpose would be undermined if the training and continuing education of judicial officers were in the hands of people who do not share the judiciary’s

¹⁷ Council of Chief Justices, Council of Chief Judges and Council of Chief Magistrates

¹⁸ Judicial Commission of New South Wales, Judicial College of Victoria and Australian Institute of Judicial Administration

¹⁹ “A National Standard for Professional Development for Australian Judicial Officers”, 28 April 2006, Prepared for the National Judicial College of Australia by Christopher Roper with the support of the Judicial Conference of Australia and the Australian Institute of Judicial Administration. According to the Standard, each judicial officer should be able to spend at least five calendar days each calendar year participating in professional development activities relating to the judicial officer’s responsibilities. This standard need not be met in each year but can be met on the basis of professional development activities engaged in over a period of three years.

*independence.*²⁰

This means that judicial education and development should be controlled by the judiciary and the content and methods of delivery decided by the judiciary. It does not mean that the judicial officers should necessarily be the course presenters. Concern for judicial independence has also led to the view that judicial education and training agencies are best co-located in universities or the courts themselves.

The Australian experience is that judicial education must be voluntary on the part of the judges themselves. Judges learn best when they choose to attend programmes that deliver courses on topics that they have identified as useful for their work. Judicial officers at all levels choose to attend programmes that are well run and relevant to their work. Court administrators who actively encourage their judges to attend work-enhancing programmes, especially by ensuring they have time allowances made to enable their attendance, secure the judges' attendance and well-run and well-respected courts. Adverse public criticism of non-participating judges does not assist in involving them in judicial education; involvement is best expanded by the courts' positive encouragement.

Plainly enough, those providing courses should have the best support practicable in preparing and presenting courses. It is vital that courses and workshops be dedicated to genuine judicial needs. They must not be taken over by government or other interests groups to develop their own agenda. Judicial educators in Australia have also recognized that it is important to state the aims of their programmes clearly and to identify specifically the judicial officers for whom they are likely to be most beneficial. Not all programmes will suit all judges. In a country such as Australia, the experience of the National Judicial College indicates that courses and workshops must be offered across the country, and not, for example, primarily in Canberra.

Distance education is therefore likely to become an important part of the judicial educators' work in countries like Australia. Both the College and the Judicial Commission of New South Wales have recognized this and both have been developing distance education programmes to be delivered electronically. These programmes have not been easy to develop in Australia, because courts and judges do not necessarily yet have the resources and the skills to make the programmes work. The College has not given up, however, because electronic distance education is seen as a means of providing professional development to judges without their needing to travel from their courts.

As we have seen there are various social and cultural changes that have brought about this shift in attitude to judicial education. Judges have always borne the responsibility for resolving justiciable disputes between the government and the individual and between individuals, but the context in which they carry out their work has changed. There is now almost universal acceptance that the courts carry out their work in a context of constant social and technological change. These changes frequently give rise to the disputes that come before the courts. If they are to resolve

²⁰ Hon. Chief Justice Murray Gleeson AC, *The Future of Judicial Education*, Judicial Officers' Bulletin, Vol 11, No 1, p 2

these disputes justly and according to law, judges must have the knowledge, social understanding and judicial skills reasonably necessary to do so. High quality and well directed judicial education can greatly assist them in acquiring necessary knowledge and skills and in promoting essential social understanding..

The work of the courts themselves is also constantly changing. In most places, judges carry heavy workloads, and their work is increasing in its complexity. They have limited resources within the courts to support them. Societal expectations of the judiciary and the administration of justice are also changing, and confidence in the judiciary can all too easily be undermined by judges' failure to satisfy these expectations. Judicial officers need suitable programmes of education and development to equip them to meet these pressing demands. These programmes require the support of the community the judges serve, through the government support, appropriate funding and the provision of time to participate.²¹

In Australia, commitment to judicial education and development is constantly increasing. The Chief Justice of the High Court recently stated that if there was one thing he wanted to achieve in his remaining two years of office, it was "to promote wider awareness of the importance of an adequately funded and managed Australia-wide programme of judicial education."²² In that he included participation in international, and especially regional, activities of both basic and advanced judicial studies.

The Australian community, like most communities around the world, expects that the judges will take proper steps to ensure that they maintain the up-to-date knowledge and skills to discharge their responsibilities. Ultimately, it is in the national interest of each country that it has a sound judicial system. So too it is in the international interest that all states have sound judiciaries. High quality judicial education fosters high quality judiciaries.

²¹ See Hon. Chief Justice John Doyle AC, *Investing in the Judiciary*, (2004) *Journal of Judicial Administration*, Vol 14, No 1, pp 14-15

²² Hon. Chief Justice Murray Gleeson AC, "Outcome, Process and the Rule of Law", Speech to Administrative Appeals Tribunal 30th Anniversary, Canberra, 2 August 2006, located at http://www.hcourt.gov.au/speeches/cj/cj_2aug06.pdf