

CONFERENCE

Confidence in the Courts

9–11 FEBRUARY 2007 | CANBERRA



Confidence in the Courts

The Hon PHILIP RUDDOCK MP
Commonwealth Attorney-General



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ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

**Confidence in Courts Conference
National Museum of Australia, Canberra
9.00 am, 10 February 2007**

CHECK AGAINST DELIVERY

[Acknowledgments]

- First, I acknowledge the traditional owners of the land we meet on, and pay my respects to their elders, both past and present.

[Other Acknowledgments]

- Senior Judge, Tony Skoien ["SKAIN"], District Court of Queensland – chair
- Chief Justice John Doyle, Supreme Court of South Australia, Chair of National Judicial College of Australia Council

- Chief Justice Marilyn Warren, Supreme Court of Victoria
- Chief Justice Wayne Martin, Supreme Court of Western Australia
- Distinguished guests
- Ladies and Gentleman

[Introduction]

1. It is a great pleasure to open this second day of the Confidence in Courts conference.
2. This is an important conference.
The rule of law requires public confidence in the courts.
As Chief Justice Gleeson has said¹, the acceptance of judicial decisions rests, not upon coercion, but upon public confidence.
3. A society governed by the rule of law is one where disputes are decided by a competent, independent and impartial judiciary.
It is a society where citizens and governments obey those decisions because they trust in the courts.
4. All lawyers, the media, judges and governments have separate and complementary roles to play in ensuring that there is confidence in our courts.

¹ Gleeson, *Judicial Officers' Bulletin*, vol 14, no 7 (August 2002) at 49.

5. Lawyers have an ethical duty to the courts which is "paramount"².

That ethical duty cannot be allowed to conflict with some other duty – it cannot be confined or put to one side.

A lawyer has no choice but to be frank in responses and disclosures to a court³.

A lawyer must be diligent in observing undertakings given to a court or an opponent⁴.

6. Media and other commentators have similar obligations to observe.

The first clause of the Australian Journalists' Association's *Code of Ethics* requires journalists to "[r]eport and interpret honestly, striving for accuracy, fairness and disclosure of all essential facts."

² *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 15 [26] per Gleeson CJ, Gummow, Hayne and Heydon JJ (see also at 119 [379] per Callinan J).

³ See, eg, Solicitors' Rules (NSW), Statements of Principles for Rules 17-24.

⁴ *Ibid.*

7. And of course judges and governments have a role to play as well.

I propose to focus on each of these roles in this speech.

8. I begin with the government.

[Governments]

9. In 1832, following a decision of the Supreme Court of the United States, President Jackson is said to have remarked that "[Chief Justice] John Marshall has made his decision, now let him enforce it"⁵.

10. There is a debate about whether President Jackson did in fact say those words.

Regardless, they describe a situation where the rule of law is suspended, where there is no respect for or confidence in the courts, and where coercion is given greater emphasis than law.

⁵ See Hall, "Jackson, Andrew" in Hall (ed), *The Oxford Companion to the Supreme Court of the United States*, 2nd ed (2005) at 511.

11. Governments must do a number of things to ensure public confidence in the courts.

The first is to show respect to them.

[A-G's role with respect to criticisms of the judiciary]

12. In a robust democracy, the courts and their decisions will be scrutinised closely.

I have always encouraged that.

Constructive criticism can be very useful.

13. However, I am displeased when legitimate debate descends to personal attacks on judges.

14. As Attorney-General, I have a role in defending the Constitution and the specific roles of the courts and Parliament.

15. While I do not consider that attempts should be made to stifle legitimate debate on matters of public interest, I believe that personal attacks are unhelpful.

16. I also believe that commentators, who purport to have relevant expertise, should inform the parties to a dispute.

They might then be called to have that expertise tested.

17. Similarly, parties who consider that there has been an error of some sort in their case should think about an appeal.

Appellate courts are there for a reason.

[Complaints commission]

18. I do not consider that a complaints commission is a good idea.

19. I think such a commission would undermine appeals and judicial review.

A complaints commission would risk allowing parties, effectively, to re-agitate their action at first instance.

[Judicial appointments commission]

20. There have also been suggestions for a judicial appointments commission.

I do not support this proposal either.

21. I have said on many occasions that I consider Australia to have a federal judiciary of the highest calibre.

This owes much to our system of appointments.

22. The responsibility of appointing federal judicial officers falls on the Executive.

23. That means that the Government can be held accountable by the public, if it be thought that our appointments lack merit.

24. I am aware of criticism that our appointments process is politicised and secretive.

25. I can assure you that the Executive takes the responsibility of appointing judicial officers very seriously.

26. The essential criterion for appointment is merit.

27. This means excellence, a demonstrated capacity for industry, and a temperament suited to the performance of the judicial function.
There are also minimum statutory qualifications that must be satisfied.
28. When I consider candidates for appointment, I consult extensively to ensure that no suitable person is overlooked.
29. The Law Council has proposed a Judicial Appointments Protocol.
This would require me to consult formally with certain office holders before appointing a federal judicial officer.
30. I think that such a protocol would not increase transparency or public confidence.
In some cases such consultation would be highly inappropriate – for example, where the head of a legal professional body is friends with a candidate.
31. I do not think it is possible to be so prescriptive about these things.

32. An alternative approach is the United States approach, where elected Senators scrutinise candidates for appointment.

I think that such an approach would raise far more problems than it would solve, relating in particular to politicisation.

33. I consider that the best measure of the process is the results.

Our federal judiciary is respected and highly capable.

[Judicial education]

34. In 2002 the Government set up the National Judicial College of Australia.

We contribute more than 50 per cent of the College's base budget, and have made a number of supplementary grants.

35. All the States and Territories – except Victoria and Western Australia – support and fund the College.

I would strongly urge Victoria and Western Australia to support this excellent initiative.

[Ensuring efficiency]

36. Public confidence in the courts is achieved through the maintenance of an efficient and effective court system.

37. In 2000, this Government established the Federal Magistrates Court to handle less complex family law and general federal law matters.

38. The Federal Magistrates Court has been a success. It has assisted the Family Court and Federal Court with their workload.

It has enhanced access to justice for all Australians.

39. The Federal Magistrates Court has grown to reflect its expanding jurisdiction.
- In 2004 to 2005, the Government provided additional resources for eight Federal Magistrates to handle migration matters.
- The *Migration Litigation Reform Act* of 2005 made the Federal Magistrates Court the principal court for first-instance migration litigation.
40. In 2006 the Government provided funding for five Federal Magistrates to handle new workplace relations jurisdiction.
41. The Government monitors on a continuous basis the shape of the federal justice system.
42. This requires us to consider whether judicial resources need to be transferred from the Federal or Family Courts to the Federal Magistrates Court.
43. As judges of the Family and Federal Courts have security of tenure, any such shifts in resources are linked to retirements.

44. When a judge retires, the Government looks at whether to replace the judge with a magistrate or a judge.
45. Our decisions are informed by a careful assessment of the appropriate jurisdiction, the workload and resources of each of the federal courts, and how best to meet the needs of the community.
46. The views of the courts are a key part of this.
47. Finally, access to the courts must mean access for everyone.
- The Australian Government funds a range of legal assistance programs to ensure that disadvantaged people have access.
48. More than \$260 million is spent annually on these programs.
49. They provide information and advice about the law and about court processes.
- In some cases, legal representation may be provided.

50. In addition, duty lawyer services are available in the Family and Federal Magistrates Courts and the Family Court of Western Australia, to help self-represented litigants.
51. The courts have emphasised the benefits of duty lawyer services.
52. The Government supports volunteer services to help people understand court processes and manage their expectations about the likely outcomes of proceedings.
53. I am very proud that this Government has created a sound framework for the federal court system.
54. I would also like to congratulate the courts on their initiatives to enhance public access to justice.
55. Chief Justice Bryant recently spoke about a new initiative being piloted by the federal courts at Newcastle, Dandenong, Townsville and Parramatta.

56. Under the program, where a family law registry is located in a place where there is no Federal Court presence, the family law registry will accept general federal law applications for both the Federal Court and the Federal Magistrates Court.

57. This is a very valuable initiative.

58. The courts are also actively developing efficient electronic services such as the Federal Court's electronic filing service, and the joint Family Law e-search facility.

59. These initiatives allow the public access to courts and court information on the internet, further enhancing access to justice.

[Judges]

60. I come then to the role of judges in ensuring confidence in the courts.

61. Recently, I met with some stakeholders in the family law system in Cairns.

If ever there was an area of law likely to test people's confidence in the courts, it is the one dealing with the disintegration of a personal relationship.

62. Often by the time a family law matter reaches a court, each "side" will have a strong view about the best outcome, and may be easily disappointed.

63. The only thing that can be done – and the government has done this – is to articulate some specific principles, and then to have those principles applied by the courts.

64. In the context of family law our focus is on children – we look to the best interests of the child.

We say that each child has a right to know both parents, and that each parent takes joint responsibility for raising his or her child.

We also say that children's safety and well-being are essential – we do not tolerate abuse.

65. Those principles are to guide a court's adjudication.
66. And assuming that there has been no error or bias, I think that people are likely to accept that adjudication – not because they necessarily like the result, but because they have had a say in it. People need to have a say. That is a basic, democratic principle.
67. What people will not accept, in my opinion, is when a court goes beyond the power given to it – when a court, to quote Sir Owen Dixon⁶, feels discontented with a result and purports to act "in the name of justice or of social necessity or of social convenience".
68. It has been said that judicial activism ensures "the death of the rule of law"⁷. That was by one of our High Court judges. I would respectfully agree.

⁶ "Concerning Judicial Method", (1956) 29 ALJ 468 at 472.

⁷ Heydon, "Judicial activism and the death of the rule of law", (2003) 23 *Australian Bar Review* 110.

69. As was said in one High Court judgment, by Justice McHugh⁸:

"Law is one of the most important means by which a Western society remains socially cohesive while encouraging the autonomy of its individual members and the achieving of its social, political and economic goals. But the effectiveness of law as a social instrument is seriously diminished when legal practitioners believe they cannot confidently advise what the law is or how it applies to the diverse situations of everyday life or when the courts of justice are made effectively inaccessible by the cost of litigation."

⁸ *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 215 [88].

70. Sir Owen Dixon said that judges must not abandon the "high technique and strict logic of the common law"⁹.

He extolled "attempt[s] to develop the law as a science"¹⁰.

And he said, famously, that "[t]here is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism"¹¹.

71. That, with respect, must surely be the ultimate statement of a judge's role in ensuring confidence in our courts.

72. People who approach a court in good faith, seeking justice according to law, should not be left disappointed.

⁹ "Concerning Judicial Method", (1956) 29 ALJ 468 at 471.

¹⁰ "Concerning Judicial Method", (1956) 29 ALJ 468 at 471.

¹¹ "Swearing in of Sir Owen Dixon as Chief Justice", (1952) 85 CLR xi at xiv.

73. It is also as well to remember that courts, along with professional associations, are able to enforce professional obligations.

They are "in a position to deploy, speedily and decisively, condign and heavy sanctions against practitioners in breach of ethical rules"¹².

74. The *Guide to Judicial Conduct*, which was issued a few years ago under the authority of all of the chief justices in Australia, emphasises judges' duty to conduct themselves in a manner that will strengthen public confidence in the judiciary.

75. Judges and magistrates must be, and must be seen to be, independent, impartial, competent and accountable.

They should not engage in political activity, however tempting it may be.

¹² *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 ALR 58 at 127 [266] per Callinan and Heydon JJ.

76. Judicial officers should not publicly express views on legal issues that may come before the courts. It seems to me that if there is to be a separation of powers, it should work in both directions.

[Conclusion]

77. I believe the Australian experience is that our federal courts justifiably enjoy the confidence of the public.

78. Current confidence reflects the quality of the federal judiciary, the legislative frameworks that govern the federal justice system, the resources that are there for federal courts, the dedication of court staff and judicial officers, as well as a number of excellent initiatives that the courts are developing to streamline court processes and functions.

79. Everyone should support and maintain this system.