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Courts as (Living) Institutions and Workplaces

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I asked to speak on this topic late in 2018 after the program for this conference had been organised in draft. The organisers and a previously scheduled speaker (Susan Kenny) graciously permitted me to come on to the program. I thank them for allowing me to speak.

The initial impetus for my desire to speak was the speech given by a former senior judicial officer, which was substantially reproduced by a national newspaper.

The speech used statistics concerning time taken to deliver judgments by single judges in one year, 2017, as the basis for generalised criticism of both the Supreme Court of New South Wales and the Federal Court of Australia, but particularly the latter. As I contemplated what I would say about the speech, I came to the view that I would make some wider remarks about the accountability, organisation and governance of courts in a digital era. The importance of being in a digital era is that vast bodies of accessible information exist in the public domain about how institutions, including courts, work. Australia pioneered the free public access of judgments on Austlii, and now all courts in Australia publish electronically virtually all written judgments. All these judgments can be accessed, searched and analysed thanks to digital technology.

I will begin with the speech of the former senior judicial officer. I do not wish to dwell on it. My objection was the broad body of generalisations taken from a narrow group of metrics. But a discussion of it throws up some points about which it is important to comment.

The speech criticised Australian judges, in particular judges of the Federal Court of Australia and the Supreme Court of New South Wales for what was articulated as a culture of slackness or prevarication. It was not clear whether this was seen as a widespread vice amongst all judges on the courts or limited to some judges only. But the statement that "the Australian performance, particularly the Federal Court is a matter for shame" would indicate a general criticism. The courts as institutions, and judges personally (though not by name) were criticised.

May I say at the outset that I am not thin-skinned, nor are the men and women who are the judges of the Supreme Court of New South Wales and the Federal Court of Australia who were so trenchantly criticised. I know every judge in both courts and calling their work, their performance as judges, and the work of their courts shameful should never have happened, because it is not true. With the utmost respect to one so distinguished in legal intellectual achievement, it was wrong to say it.

The most trenchant of the speech's criticisms was that there were a number of judgments delivered after a period of greater than 12 months from reserving or final submissions. In particular, from that single metric, highly critical generalisations were made. It should be noted at the outset that the percentage that the author derived of these judgments in the Federal Court was 3.7%. That is, 3.7% of judgments of single judges in 2017 took over 12 months. What does this single statistic tell one? Very little, for a number of reasons, but, as it happens, the

first is sufficient to despatch it in its own terms. The author deliberately excluded all judgments delivered in 0 to 6 days, ostensibly on the basis that they were minor interlocutory matters and statistically insignificant. In fact, they were 52% of the single judgments of the court in the year, covering a variety of subjects from practice and procedure to single judge substantive appeals. This reduced the key single metric from 3.7% to 1.7%. This was in fact 29 judgments by 14 judges (out of 1668 single judgments of the Court). In one part of the speech, judges were criticised for what was said to be a lack of use of extempore judgments, yet 52% of the single judge work of the court (in number) was delivered either on the day or within 6 days, but nevertheless left out of account in the calculation of the denominator.

The notoriety of this attack presumably encouraged a senior journalist from a rival national newspaper to write his own piece on Federal Court judges' "productivity". He produced a ranking table of speed and "productivity" from digital records of the court for a number of years which were data-mined from the internet. Leaving aside some of the mistakes caused by typing inaccuracies in the underlying information, his metrics included numbers of words or pages written per day on first instance judgments and the average length of time for single judgments. With respect, the approach was arbitrary and simplistic.

I do not propose to stay to discuss the 29 judgments referred to in the speech of the former judicial officer. Some should not have taken so long. That much can be accepted. As a general rule, with the exception of large complex cases (of which there are always a number) judgments should not take that long. But if they do, there is no basis from that fact alone for the kind of institutional or personal criticism that was made. It is a cause to seek to know why it happened. It may have been for reasons of work allocation and workload, time allocation, illness or the pressure of other work. In fact, in that year, one of the judges involved was gravely ill for a

number of months leading to a significant delay in a number of judgments. The cause may be seen as my fault as head of jurisdiction. But the metric does not tell one anything of itself, in particular that those judges have, or the court as a whole has, some shameful culture of slackness.

What I wish to discuss is more important than the use of these simplistic bases of criticism. Courts are public institutions made up of people. Their purpose is the public and independent exercise of a species of governmental power of a particular, and special protective kind – the judicial power. The essence of this power is its **exercise in a particular way** – the public exercise of power, displaying equality before the law, impartiality, the appearance of impartiality, the right of a party to meet the case against him or her, and the fair, and to the extent possible, correct, determination of the issues in dispute. None of these characteristics can be measured; none can be translated into any metric; all are deeply important to the fabric of society; all are attributes as to the control of power as it is exercised by the state or by others against people. Of course, the power should be exercised with reasonable despatch. Time can be measured. Time and despatch are one aspect of a whole exercise of power; time does not define the quality of the exercise of the power, but is part of its assessment.

This description of the fundamentals of the courts' work does not mean that an institution set up at public expense to exercise this power is not accountable in an appropriate way, conformably, in particular, with its independence, to the people it serves for how it undertakes its task. That accountability is critical. It is one of the bases of trust and confidence of the polity as a whole, including the people, in the administration of justice. An aspect of the assessment of that accountability can be expressed or analysed in terms of efficiencies and time-based metrics. But this is only ever an aspect of evaluating and articulating the worth and

value of the exercise of the power and the performance of the obligations of the institution, and of the men and women who form it. One can object to the trenchant generalisations of the former senior judicial officer, and the simplistic approach of the journalist, but be met by a far more sophisticated interlocutor: one who wishes to discuss how to measure productivity of courts. **My central point is that to ask how one measures the productivity of courts is to ask a profoundly misleading question.** This is so because it assumes that the exercise of judicial power is something which can be measured in terms of quantitative production. In dealing with this more sophisticated interlocutor it is fundamental to begin with some bedrock propositions which are rarely stated in our modern society. First, nothing of real importance in life, and certainly nothing of real importance in the law, is capable of definition – perception, description, articulation, and illumination, yes – definition, no.

Secondly, if something is incapable of definition, it is incapable of translation into measurable numerical or quantitative exactitude.

Thirdly, the use of metrics or measurements of things related to these things of real importance, is only ever a surrogate or default way of re-conceptualising or re-presenting the reality of these things of real importance; it is not, and never can be, the reality itself.

The consequence of these and related propositions is the realisation that the worth or accountability of courts as institutions is not metrically derivable or measurable. That does not mean that the worth cannot be evaluated. It is not done, however, by metric measurement or analysis, whether simple or complex. The difference between measurement and evaluation is critical. It is not mere semantics. One is an exercise in calculation, the other is drawing of value-laden conclusions from the balancing of considerations of the whole.

None of the above propositions, nor the conclusion or realisation taken from them, means that metrics or statistics are not vital for helping to understand, and helping to draw evaluative conclusions about, the execution of the governmental task of exercising judicial power. Many metrics or statistics for a judge, individually, or the court or part of the court, will be vital in raising questions (perhaps through comparative analysis about different periods of time or between different people, perhaps through an application of common sense) and in assessing what is happening. They may illuminate or suggest problems, personal or systemic; they may suggest solutions; they may help foster self-confidence, or help provoke a realisation of complacency; they may help the formulation of provisional hypotheses for investigation . But they will not give a measurement.

Let me give you the simplest example. Four judges over a year do a body of seemingly similar cases which generally take about one to four hours each to hear. One judge delivers 35 judgments in the year; the second delivers 150; the third delivers 250; and the fourth delivers 1,000. Who is the most and the least productive? Is it useful to rank these judges in some way? Are there questions for examination or inquiry by the head of jurisdiction? As to the first question what does being "productive" involve? What is happening? As metric measurements the figures answer themselves without qualification: the judge delivering 1,000 is the most productive. But if "being productive" involves each litigant having a sense of a fair hearing and if 900 appeals (many successful) are generated by the 1,000 decisions, there may be minimal "productivity" in 1,000 judgments per year.

It is the questions that are raised and the inquiries and the answers made and obtained from those questions that are the most valuable aspects of these statistics. It might be that upon close examination of the workload and discussion with the judges concerned (and other judges) that

250 is a balance of experience, dedicated hard work, pre-reading and scrupulously fair, but efficient, procedure; that 150 is the best the judge (who has only just come on to the court) could do working to the best of his or her capacity in the way he or she approached the cases (which approach may improve with experience) ; that 1,000 is risking the court's reputation for fairness and impartial justice; and that 35 reveals a judge who may not be coping with the demands of the office for some reason, perhaps health. But the inquiries may reveal other, quite different things.

The institutional complexity of a judicial organisation and the complexity of the work done by its judges are to be recognised, but not over-emphasised. Institutional and work complexity do not deny the capacity to evaluate institutional and individual execution of duty, but they hint at its difficulty and they necessitate the recognition of the human undertaking of the judicial task, and of the evaluation of the task.

This recognition of the humanity of the judicial task brings one to appreciate that to evaluate the execution of duty one must know what the judge does. That knowledge must be set in the context of the nature and character of the work of the court, the quality of the material presented to the judge, and the nature and the character of the governance and organisation of the court.

Let me begin with what the judge does. A metrically-centric framework comes easily to mind: judges write judgments, so judgments (number, length, speed) are sometimes posited as the metric of measurement of output or productivity. But a judge's work is far more than that. Especially (but not only) in a self-administered court, with a focus on skilled case management, perhaps in a docket system, a judge's day, week or month will be taken up by many tasks essential to the life of the institution and essential to the exercise of judicial power, but which

do not lead to any words in a published judgment. There is time in case management (reading, preparation and conduct of case management hearings); there is time in hearing cases perhaps for days, weeks or months that settle without judgment (even though one may have been fully prepared); there is time in presiding over jury trials; there is time in delivering lectures to the profession and other judges; there is time in professional reading to keep tolerably up to date on the varied areas of the law in which the judge may sit, requiring a familiarity with current cases in the court and other courts in Australia and internationally; there is the considerable time taken by judges in assisting in the administration of the court by sitting on committees and other aspects of participating in the governance of a self-administered institution. The tasks of time management and docket management are not straightforward (especially in courts with mixed appellate and first instance responsibilities), and especially with the complexity and factual weight of paper and volume of electronic communications in commercial life and litigation in the last 20 years. Those who confidently assert that all judges should write all judgments (whatever the nature and circumstances of the case) within three months (or whatever other arbitrarily chosen time) are likely to have little conception of this kind of judicial life. Some judges can do this. Sometimes, that is because of their extraordinary talent, which may not, sadly, be universal. Sometimes, it is by their steadfast refusal to do more than one thing at a time (this latter attitude not being very helpful collegiately or institutionally when "mucking-in" is necessary).

The metrically-centric analysis of a judge or a court based on judgments (number, length and speed) also ignores the varied character, difficulty and nature of the work of a court. Different courts have different types of work. It is almost impossible to compare courts directly. Whilst all cases are unique, some kinds of cases can be grouped into more or less homogenous groups. Some courts have work of limited and repetitive character, but of great volume; others have

work of a wide variety of character and complexity, but in less volume than the former court. Understanding what work and what cases judges must do and hear to exercise judicial power, and understanding the quality of the assistance from the profession, will help tell one what assessments, measurements or statistics or metrics may be useful to assist in evaluating the operation of the institution, and those who work in it.

In the discussions so far, I have avoided, where possible, the word "efficiency". It is a word that, in its place, is both helpful and useful. But I have avoided it for a number of reasons. Chief among them is that the evaluation of the worth and the operation of a court (as an institution exercising power) must be humanly focused. Judges are not production units on an assembly line; nor should they be given cause to think that they are, or that they are viewed as such. Words such as "efficiency" may connote such sentiment. Yet, that said, as judges, we are all accountable for the work we do, for how we do it, and for the funds and resources which the people of Australia through Parliament provide to us to undertake our task.

That accountability, it is to be remembered, is not just for the week, or the month or the year, it is for a time on the bench of a decade or more. The "efficiency" or "productivity", if that is to be the language of discourse, is over the working life of the judge. The work we do is intellectually and physically demanding. Most judges in superior courts must deliver full written reasons in every (non-jury) case. The work involves significant volumes of reading, analysis and writing. Time in court is but a fraction of the endeavour. Energy, enthusiasm and a love for the work is required.

Courts, as human institutional organisms, are, inevitably, not perfect. Judges may become sick; judges may miscalculate their time; judges may miscalculate how long things will take; judges

may become fatigued; some judges are rapidly decisive; some require more time for reflection; judges make mistakes; sometimes cases are pleaded or presented in an over-complicated way that increases the volume and required time of the judicial task; sometimes proper assistance is lacking. What one needs to see in any court, however, is a rational and coherent structure and organisation of operations, a demanding, but fair and tolerably equal, distribution of work, enthusiasm and energy for the task amongst the judges, pastoral assistance where required, a realisation of the necessity for despatch in judicial business, and an environment for personal physical and mental well-being. These things are not always easy to achieve.

I saw first-hand last year the angering and dispiriting effects (in both courts) of unwarranted and hyperbolic generalised criticism on dedicated, hard-working and in some cases, nearly exhausted judges towards the end of a long year. The angry reaction of these people, often working long hours, usually on the weekend, to keep up with the flow of work, was often not fit to print. But to my observation, dismay and concern, that expression of anger was often followed by an expression of dispirited feeling, of self-questioning as to the worth of the service. They were not being thin-skinned. They objected to unfair criticism. All judges understand that it is a privilege and a deep honour to work hard for, and serve, the Australian people.

The proper functioning of the courts it not measured by the identification of one metric of delay in delivery of some judgments of some judges, nor by multiple metrics. It is the evaluation of the overall performance of the institution in the exercise of judicial power that is important. That involves the complexity of a living human organisation. It requires to be in place governance and operational structures that reflect virtues of efficiency and personal well-being; systems that promote collegiality, hard-work and business-like despatch of cases; systems,

governance and operational structures that permit problems and difficulties to be identified before they arise or before they become intractable; and an environment that emphasises the human, the fair and the just in how judges treat each other and, most importantly, how they treat the litigant and the lawyers who come before them.

An institution and a workplace so-described does not just happen. It is not **measured** by metrics. Such an institution and workplace is not a natural or logical feature or function of any particular way of organising a court, whether self-administered or not. Just because courts may be statutorily defined by reference to the judges of the court does not mean that what judges (as individuals or groups) want is good for the court as an institution.

In an age of digital storage of information, and so the digital accessibility of information, there has arisen a greater demand for accountability of public institutions by reference to that information. This is neither to be feared nor resented. It has to be recognised and taken into account. Accountability brings a need for being able to explain and justify how one is undertaking the task with which one is entrusted. For an institution, that involves the process of reporting and disclosure. All courts (other than the High Court) are subject to appellate review. All are open to the public. Courts produce annual reports, with a variety of institutional information. The Federal Court, for instance, is also subject to regular questioning at Senate Estimates Committee hearings. It may be that the institutional information made public can be improved. Perhaps there should be an examination of what further statistical information should be made publicly available. For instance, all United States federal courts publish publicly their reserved judgments lists. It is worthy of consideration. The New South Wales Court of Appeal publishes a list of issues outstanding by reference to reserved judgments. But there is no lack of accountability.

Some (such as the former senior judicial officer and the journalist) may want to see institutional accountability supplemented by personal accountability through naming and criticising judges by reference to the chosen metrics or metric analysis. One of the vices of this approach (leaving aside the potential for undermining independence by personal pressure) is the self-confident (likely false) assumption that the critic's metric is not only true in its limited terms, but without question or qualification supports the unqualified generalisations sought to be drawn from it.

As judges, we should, perhaps, get used to a degree of scrutiny by metrics. What we do is public. When we do it is public. And, we cannot expect all commentary to be fair. This will place a high premium on courts organising themselves in a way that most effectively brings about the performance of their fundamental tasks – the proper exercise of judicial power, the protection of the rule of law, in a manner that is just, fair, and with appropriate despatch; **and with governance and operational systems that permit and facilitate that to be demonstrated.**

The choice of the appropriate organisational structure and operational systems for any particular court is one that requires significant thought and insight. Not all courts are the same. Jurisdictional, institutional, historical, and cultural factors are all important. How courts are organised and how they work, both at macro and micro levels, will be affected by all these considerations.

Modern organisations of the size of Australian courts do require a degree of organisational and systemic structure and governance that is thoughtful and deliberate. It must, however, be premised on the realisation of the ever present truth that human organisations are not static, but

dynamic and ever-changing. Change in a human organisation is brought about by external and internal environments: externally such factors as changing governments, changing societal attitudes and demands, changing technology, changing volumes and types of work; internally such factors as changing personnel, changing attitudes of judges, changing technology. Nothing remains the same. It is a mistake to think that by making changes X and Y to a court in order to solve problem Z that reform can then stop and business-as-usual be resumed. Business-as-usual is, in fact, constant change.

Managing change is one of the greatest challenges of any organisation. It absorbs large amounts of energy and requires thoughtful attention. Change management is, however, crucial. An important factor in its success is the recognition of the essential humanity and decency required to effect change. I do not mean by that that difficult decisions that may adversely affect people cannot be taken. They always have to be. But they must be taken fairly and in a human way.

What do I mean by a "human way"? I mean humane, but also I mean something more. To explain this I need to come to one of the most important topics of all today: the abstractionism and deconstruction of whole human thoughts, human values and human institutions into what is seen as their taxonomically organised and abstractedly expressed constituent parts. There is a modern cast of mind in deconstructing a whole proposition into a series of abstracted definitional propositions. The impetus is often a sensible one, perhaps to examine (or "unwrap" as is sometimes said) the constituent elements of a whole idea or entity. From that process one may well get valuable insight, but the process often goes further, past insight or explanation, to definition through abstraction. The deconstructed parts then, in their length and repetition and abstracted form, stand as the default, the re-presentation, of that human whole idea or

human whole entity. For instance, instead of describing the fairly straight-forward human traits that make up a good judge using language that is experientially based – intelligence, experience, legal knowledge, decency, fair-mindedness, patience, and balanced good judgment, some would define these human qualities in an abstracted hierarchy or framework using language that is abstractedly definitional. The same can happen with courts with the development of so-called frameworks for excellence through abstracted definitional terms written on the premise that one can define excellence or define fair-minded or define good judgment. One knows when one is reading this kind of material because one is overcome by a suffocating sense of meaningless of the phraseology that is being used.

This overwhelming of human institutions by deconstruction, abstraction and bureaucratisation has struck at universities and hospitals and other institutions. There are countless protocols, quality assurance manuals, procedure manuals, mission statements, check lists, questionnaires, and formal requirements written in language that needlessly abstracts and categorises, and that deadens thought and does little, if anything, to illuminate. The essence of the problem is that the experientially human is deconstructed and abstracted into definitional or quasi-definitional form in an endeavour to define, to be certain and measurable and complete.

This cast of mind treasures price over value, measurement over evaluation, and a certain structure over the elusive place of talent. It founds the tyranny of metrics.

This is not an idea just relevant to a discussion organisation concerning the organisation of courts, it also relates to the very law with which we deal as well. Deconstruction and particularism and the mania for completeness and certainty plague our statutes, especially Commonwealth drafting. Corporations legislation, competition legislation and taxation

legislation are notable examples. The elemental particularisation of modern day legislation – its deconstructionist form, sometimes arranged more like a computer program than a narrative in language to be read from beginning to end – reflects this modern cast of mind intent on particularity, definition and taxonomical structure that is scientific only in a mechanical Newtonian sense. If legislation is to be built on complex and interlocking definitions, or if doctrine is to be ordered minutely in the attempt to express exhaustively the minute reach and particular application of the underlying norm, there comes a point where the human character of the narrative fails, where its moral purpose is lost in a thicket of definitions, exceptions and inclusions. The vice is not just lack of clarity; that is bad enough. Worse, it is a loss of human context, a loss of the expression of the human purpose of the law. Language is vital for the expression of the idea in a way that makes its implicit boundaries, context and meaning understandable, if not entirely explicable. To deconstruct into parts and to attempt to express by the exhaustive expression of all the parts may not give an understanding of the whole because it may hide the implicit in the whole: that which emerges only from the whole.

How are these ideas of importance for court institutional governance and organisation?

First, they emphasis the necessity for the human in organisational and governance structures. What we do is exercise a special kind of governmental power as independent judicial officers; we are not producers of words per day. How we organise ourselves, what we demand of each other and of ourselves should be seen in that light.

Secondly, and related to the first point, we should eschew abstracted, theoretical structures, unless they reflect and reinforce the human experiential expression of what we do. One does not need a framework of court excellence to be an excellent court. Ticking all the boxes on the

framework of court excellence does not make an excellent court. We should develop and express our systems and operational methods of working in experiential human terms, not management double-speak. A managerialist approach to court organisation should be resisted. That is not to say that thoughtful organisation is not important, it is vital.

Thirdly, we should value and embrace a whole working arrangement, even if it does not accord with some abstracted, deconstructed theory. What is important is what works, which may be influenced by history, by personalities or by culture.

Fourthly, structures should be flexible, fluid and appropriately porous in order to cater for change, for diversity, for individual idiosyncracy and brilliance, and to combat rigidity.

The modern court institution must be capable of facilitating the exercise of judicial power in a way that reveals **upon examination** that the public funds provided by Parliament are being wisely and prudently spent, and that judicial time and energy is being effectively and efficiently harnessed. This is why one comes back to the essential place of metrics as a tool of operational management and evaluation, but not measurement. Courts must accept that degree of scrutiny and examination. It is the natural consequence of being entrusted with the responsibilities of judicial power, and if it be relevant, self-administration. It is facilitated by being open and frank both with Parliament and with the Executive, and by recognising that demands for despatch, coherence and responsiveness are natural and reasonable expectations upon skilled professionals.

Listening to me you may have detected a degree of ambiguity in what I have been saying. You would be correct. There are a number of ambiguities. The courts are the custodians of the task

of the independent exercise of the protective judicial power. That task is not measurable. Indeed, definition of the task if not possible. But metrics and statistics are vital for managing and for helping to evaluate, describe and articulate the quality of the exercise of power. But they should not be taken to extremes, or as a replacement or surrogate, for understanding the human in an organisation. A damning critique of metrics in the management culture can be seen in the lucid book review by Stefan Collini in the 8 November 2018 London Review of Books of two books, *The Tyranny of Metrics* by Jerry Z Muller and *The Metric Tide* by James Wilsdon.

My sense of ambiguity is drawn from my recognition that one simply must know what the organisation, and the judges who constitute it, is, and are, doing. You cannot run a court and justify what it does or does not do without knowing what judges are doing, or not doing. What the metrically-centric managerialist does not, or refuses to, understand, however, is that metric measurement is not reality; it is, at best, a proxy, useful only for management and a broader evaluative assessment.

Courts must be organised with coherent and readily understandable governance and operational structures. There must be a constant search for doing things better, if possible. The essential aim is not, however, an efficient low cost system; rather the essential aim is a just and effective human institution for the exercise of judicial power, as well-run as possible.

Contradictions and ambiguities will always exist. They abound. Some judges are quick at writing; some are slower; some judges make more mistakes when writing quickly than others do when writing more slowly; some judges have a greater gift of human insight than others; some judges have a greater gift of expression than others; some organise their time better than

others; some read more quickly than others. What a surprise. Judges have different human qualities. Writing quickly is not the measure of quality.

Those responsible for designing and implementing institutional governance and operational arrangements must be, in significant part, judges. This is so in order that the experiential necessities of exercising judicial power be at the heart of governance and operational arrangements. That is not, however, to say that whatever judges want judges should have. Judges must recognise that they have an overriding obligation of a dedication to the execution of their functions with reasonable despatch. Heads of jurisdiction must recognise the necessity to foster a workplace for judges in which the institution as a whole can thrive, through the energy and enthusiasm of individual judges.

How statistics and metrics are used in all this is the question. They should be seen as management and operational tools, and aids to evaluation, but not as measurement integers. They provide a platform and a base for inquiry, discussion, analysis, evaluation, description, and where necessary, change and adaption in the human organisation. They do not provide a basis for measurement. They should be seen as the necessary and useful granular particularities, the certainties, ordered and organised as best that logic and order permit that then are contextualised into the human institution with its uncertainties and ambiguities and indefinable characteristics, drawn from its function related to the proper exercise of judicial power and from the people who are its judges.

Statistics or metrics are sometimes touted as agents for behavioural change. To some degree they are or can be. However, metrics can always be worked around. Stefan Collini's book review has some wonderful examples of bureaucratic work-arounds of KPIs.

The human aspects of judicial life should dominate and pervade the institutional life and structures of the Court. That is what will make it a vibrant and energetic workplace in which to work. But institutional accountability requires governance, operational structures and techniques that disclose in detail the work of judges and of the court. Only then can the search for constant improvement succeed; only then can judges be defended with confidence from the kind of attacks that may come; only then will there be the capacity to expose the fact, if it be the fact, that a judicial institution is not working as well or as effectively as it might; and only then will there be the capacity to expose the fact that the institution is working as effectively and efficiently as it can and that it needs further resources if more is to be demanded of it.

Critical to the willingness of Parliament to fund the courts adequately (as it has a constitutional duty to do) and of the Executive to take necessary funding decisions to Parliament is a measure of confidence held by those branches of government, through demonstrable practice and records, that the courts are working in an optimum way for the execution of the judicial power. Without an ability to demonstrate that fact it becomes hard to influence other branches of government not as familiar with the day-to-day operations of the court as judges are.

May I move to another aspect of courts as a workplaces. Courts are, of course, workplaces for judges and staff. The responsibility of heads of jurisdiction and those who assist them to maintain working environments for judges and their staff that are conducive to mental and physical health and well-being should be understood and express. The likely best way to foster this in judges and staff is to ensure a sense of trust, and individual autonomy in managing and conducting their working lives.

Courts are also workplaces for practitioners. It has always been the case that how a judge behaves in court can affect practitioners in important ways – professionally and personally. We all remember judges who were unpleasant; we all remember judges in front of whom it was a joy to appear. That is part of the humanity of the courtroom. Judges, however can forget the power they have – in a look, an eye roll, the timbre of the voice, the cutting remark, but also, the smile.

There is now a social and legislative concern with "bullying" in the workplace. Part 6-4B of the *Fair Work Act* is concerned with workers bullied at work. Section 789FD(1) provides that a worker is bullied at work if an individual or a group of individuals repeatedly behaves unreasonably towards the worker or a group of workers of which the worker is a member and that behaviour is a risk to health and safety.

Whilst, of course, practitioners are not workers of the Court, the reality is that judges influence significantly the working environment in which practitioners spend their time. Whether we like it or not, many of us have been guilty at some point of being hurtful or rude or intimidating. The Victorian Bar has agreed upon a protocol with the Supreme Court of Victoria for communication of complaints on this subject. It is worthy of careful consideration.

Politeness and civility are not just aspects of the proper conduct of judicial power, they are important aspects of making the Bar a more equitable place. If judges are polite and civil, the alpha male instincts of some barristers will be curbed.

Two ways of approaching the subject might help. The first is simply to be aware, constantly, of the power imbalance between bench and bar. A raised eyebrow, or a scowl, or a careless barb, can have serious consequences in a given context. This is not to be oversensitive. It is

to recognise reality. The second is to try to frame one's persona with occasional (or perhaps frequent) displays of courtesy, generosity and sometimes simple kindness, especially to young practitioners, or those showing some weakness, or lack of confidence. I will never forget the small kindnesses of Denis Needham, Brian Cohen, Ian Sheppard, John Kearney and David Hodgson. They were intelligent, civil and kind people. But some of them could be very short, some could even lose their tempers. When they did, if it wasn't your fault, you still forgave them. They were not grumpy unpleasant judges, they were busy men, who were generally civil and kind. So, a lapse could never be taken the wrong way, and would always be forgiven, without a thought. I will single out one of them. Many of you would not have known David Hodgson. His death in 2012, at 72, was a huge loss to Australia, to the law and to philosophy. He was a judge for 28 years, in the Equity Division, Chief Judge of that Division, and later a judge of the Court of Appeal in New South Wales. Allow me to repeat something I said at his memorial service about his relationship with the Bar that is relevant to this topic:

> "In particular for the young barrister, appearing before David Hodgson was one of life's pleasures of legal practice. He was polite, kind and interested in, and respectful of, one's submissions. Even if one had missed the point, or put something less than happily, he would suggest a reframing of the proposition. A debate would then often ensue about the proposition's validity. Sometimes, the debate appeared to be carried on by him with himself. When the correct principle was exposed and refined, it was invariably attributed to counsel. He was also practical, efficient and polite. The Bar, especially the junior Bar, loved him, not just because of the way he treated them, but also because he treated their clients with the same respect and courtesy while attending to their problems with evident diligence and skill. His court epitomised what courts should be like."

I have attempted to identify some of the challenges of courts in a digital age; an age in which statistical criticism (fair or unfair) will be easy, and to be expected. Courts will have to cope with that. Importantly, how they cope and how they organise themselves must be in ways that place the human character of the institution at the centre of considerations about how judges deal with each other in their governance, organisational and operational structures and with the profession and the public in court, so that the execution of the protective judicial power can be best achieved.

Hobart

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