

**Speech to Teachers registered for the Court Induction Professional
Development Day - 10 May 2010.¹**

On behalf of the Chief Justice and the other judges of the Supreme Court, I welcome you to the Supreme Court. Thank you very much for registering for this induction day. The judiciary of Western Australia is grateful that you, or the schools from which you come, wish to educate children about the fundamental democratic institutions of our society and, in particular, the Western Australian judicial system.

My topic today is the 'role of a judge'.

We all possess a certain image of a judge. Traditionally, he is old, male, and wears a long bottom wig and colourful robes. He is stern, conservative and authoritarian. On no account does he ever talk to the media. His words are the law, and he expects them to be treated like that by everyone from litigants to his long suffering, next door neighbours.

Though some will say that things have not changed enough, it is inarguable that things have changed. You need only to look at the State's judges to see that whilst they are generally over 40, they do not all fit the myth of the white Anglo Saxon male judge. There are women (if not enough), there are younger judges bringing up young families, judges from different ethnic backgrounds (although not enough) and judges who did not go to the 'right' schools.

Further, judges are making efforts to bring courts and the legal system into the 21st century. The judiciary is doing away with more and more of the traditional legal symbols of bygone days. Symbols such as wigs and gowns have now gone the way of witchcraft and LP record players;

¹ This paper was authored by Justice Lindy Jenkins and contains original material and material from the website of the Association of Superior Court Judges of Canada. Acknowledge is also made of assistance obtained from various remarks made by the Right Honourable Beverley McLauchlin, Chief Justice of Canada.

although that is no doubt to the regret of many members of the legal profession. Senior members of the judiciary sometimes conduct media interviews and engage with the public on judicial matters of public interest. Judicial documents have been redrafted into 'plain English' and judges try to draft judgments which avoid unnecessary 'legalese'.

Despite that hardly a day goes by now without some criticism being levied against the judiciary. Often the criticism relates to a particular judgment or sentence, but on occasion it relates to the role of the judiciary in society more generally, or even to the role of a particular judge.

Much of the increased attention can be traced to the changing role of the courts in modern society and a result of a change in the way the public relate to public institutions, including the courts. The English lawyer and writer, John Mortimer, spoke of "a general decrease in the awe and wonder with which the population looks at its established institutions," an attitude from which the courts are not exempted. He said:

Many years ago, when I first took up the law, proceedings in court were shrouded in myth. In those days the country at large believed that trial invariably came to the right conclusion, that police officers told nothing but the truth, and that judges were miraculously conceived and were born unencumbered with the usual human luggage of preconceived ideas, kneejerk reactions, prejudices, failures of the imagination, inability to admit mistakes, or pure bloody-mindedness.

In part, those 'myths' no longer represent how the general public feel about the judiciary because there have been a small number of trials which have led to unjust results and in some cases that has been because police evidence has subsequently been shown to be unreliable. These days, unless evidence is supported by audio and visual recordings of the events and DNA evidence, it is not likely not to be accepted by a jury. Technology is now seen as the only sure way to measure truth.

But the change in attitude is also because the public are much more willing to question anything said by a person in authority. Whether it is said by a parent, a teacher or a judge.

That is why it is essential that young Australians are taught about the Rule of Law, the role of judges and the functions they play in maintaining our ordered and fair society. An essential part of the Rule of Law is that there exists a body of people, the judges, who enforce the law. They are not above the law or regard themselves as such but they do have the obligation to enforce and proclaim the law. It is important for students to learn that respecting the decision of a judge plays much the same role in society as respecting the decision of an umpire in a football or netball match.

In a sporting contest, it is important for the players and spectators, whether or not they like the decision itself, the rule or the person who makes it, to recognise the role of the umpire, his or her right to make a decision which will effect the outcome of the game and to be prepared to comply with and accept the decision of the umpire. If these things are not recognised a game would erupt in chaos.

Similarly in society, it is important for the next generation, whether or not they like the decision, the law or the judge, to recognise the role of the judge, his or her right to make a decision which will effect people's lives and to be prepared to comply with and accept the decision of the judge. If these things are not recognised society will erupt in chaos and society may end up being ruled, not by the law, but by the barrel of a gun.

So, what is the Rule of Law? It means many different things to many different people, but the intent is generally the same. Whenever two people have a conflict or there is a dispute between the government and an individual, the dispute needs to be settled in an equitable, fair and peaceful manner. The Rule of Law is the doctrine that says that all people are equal before the law and are all to be judged by the ordinary courts and the ordinary law, in the absence of the exercise of arbitrary power. Without the Rule of Law, disagreements could become violent affairs where there is justice for no one, or only for the powerful.

Australia has entrusted the responsibility for maintaining the Rule of Law to the judiciary. The judiciary is one of the three branches of Australian government along with the legislature and the executive. It is in charge of every court in Australia, from the lowest trial court to the High Court of Australia. The duty of a judge is to independently uphold the laws of Western Australia and Australia and ensure that they are applied in an equal manner to all persons who appear before the courts. The role of a State judge is to interpret and apply the law fairly to all Western Australians, whether they are poor or rich, privileged or underprivileged. Everybody has the right to be judged by the same law.

The Role of the Judge

Judges play many roles. They interpret the law, assess the evidence presented, and control how hearings and trials unfold in their courtrooms. Most important of all, judges are impartial decision-makers in the pursuit of justice. Australia has what is known as an adversarial system of justice - legal cases are contests between opposing sides, which ensures that evidence and legal arguments will be fully and forcefully presented. The judge, however, remains above the fray, providing an independent and impartial assessment of the facts and how the law applies to those facts.

Most criminal cases - and almost all civil ones - are heard by a judge sitting without a jury. The judge is the "trier of fact," deciding whether the evidence is credible and which witnesses are telling the truth. Then the judge applies the law to these facts to determine whether a civil claim has been established on a balance of probabilities or whether there is proof beyond a reasonable doubt, in criminal cases, that the accused is guilty. Anyone who faces a serious criminal charge has the right to trial by jury. The jurors become the triers of fact and assess the evidence while the judge takes on the role of legal director, explaining the law to the jurors. The jurors must apply the law as the judge explains it to them. That is another important safeguard to ensure that every citizen is tried by the same law. The jurors then retire to deliberate on a verdict. In criminal cases the jury's

verdict, either "Guilty" or "Not Guilty" must be unanimous. In civil actions, juries only sit in civil defamation actions. That is very rare.

If the accused is convicted, whether after a trial or because he or she has pleaded guilty, the judge passes sentence. The penalty can range from a fine to a prison term depending on the circumstances of the offence and the offender and the maximum penalty which has been prescribed by parliament for that offence. In civil cases the judge decides whether a claim is valid and assesses damages, grants an injunction or orders some other form of redress to the plaintiff, unless a jury has been empanelled to make these decisions.

Judicial Independence

The judiciary is independent from other branches of government. Governments appoint and pay judges, but once appointed judges are shielded from bureaucratic control. Judges must be able to make courageous, even unpopular decisions knowing that no one - a chief justice, another judge, a government official or even the most powerful politician - can fire them or cut their salaries as retaliation. Justice is not a popularity contest, and judicial independence also protects judges who make controversial decisions that spark public outrage. Independence is vital to fostering public confidence in the fairness and objectivity of the justice system.

Having said that, some commentators have suggested that judges should be elected or their tenure should be able to be cut short if they make unpopular decisions. I suggest that society is better served by having a truly independent judiciary. One of the judiciary's roles is to protect the individual from abuses of power by the government. If a judge knew that they were coming up for re-election or that a government was likely to terminate their contract if they made a decision which the government did not like they would be less likely to perform that role as an independent bulwark between the individual and the State.

A number of measures are taken to protect this independence. Judges oversee the administration of the courts and the government does not set hearing dates or assign a judge to a particular case. An independent body reviews judges' salaries and benefits and recommends improvements and changes. Judges also enjoy security of tenure - Supreme Court judges can remain on the bench until the age of 70 and can be removed from office only after a joint sitting of both houses of Parliament vote to remove the judge from the bench. Finally, judges enjoy legal immunity and do not have to worry about being sued for something they say or do while carrying out their duties.

Judicial Impartiality

It is not enough for the judiciary, as an institution, to be independent - individual judges must be seen to be objective and impartial. In their personal lives, judges must avoid words, actions or situations which might make them appear to be biased or disrespectful of the laws they are sworn to uphold. They must treat lawyers, accused persons, litigants and witnesses with respect and must refrain from comments that suggest they have made up their minds in advance.

Outside the courtroom, judges do not socialize or associate with lawyers or other persons connected with the cases they hear. Otherwise, they may be accused of favouritism. Judges typically declare a conflict and withdraw from a case that involves relatives or friends. The same is true if the case involves a former client, a member of the judge's former law firm, law partners or a former business associate, at least until a year or two has passed since the judge was appointed and those ties were severed. Judges often choose not to own shares or make other private investments, in case they are called on to decide a case involving a company in which they have a financial interest.

Judges often choose to avoid many forms of community involvement. Judges may undertake community or charitable work but cannot offer legal or investment advice in case they are called on to decide a case which involves a consideration of the correctness of that advice. Judges can not be

paid to do anything other than their judicial duties, but can accept appointments to serve on royal commissions, inquiries and other official investigations, so long as there is no conflict with their role as a judge. Judges cannot take part in politics in any form; although they must vote, like any citizen.

While judges have been more willing in recent years to make public speeches or agree to media interviews, they refrain from expressing opinions on legal issues that could come before them in a future case. In respect of media interviews, you may have wondered why you never hear a judge defend his or her actions in public. The reason is that judges must remain impartial. They must say what they have to say in court in their judgments. Once they have said it, their role in the proceeding is at an end. It would be quite wrong for them to then comment on and defend their own decisions.

How Judges Make Decisions

In the course of a single case, a judge may make countless decisions interpreting a piece of legislation, or applying legal principles and precedents established under the common law. If there is a High Court of Australia or other higher court ruling in the State that interprets the law or deals with a similar dispute, the judge is obligated to make a ruling that is consistent with this precedent. However, the details of every case are different and the judge may be able to "distinguish" the rulings of other courts and make a decision that breaks with precedent. And, of course, if a novel issue arises and there is no precedent to follow, the judge must craft a decision that breaks new ground but is consistent with the principles laid down in common law. Judges also consider common law precedents from other jurisdictions and countries. While not binding, these may offer guidance as to the best way to resolve a dispute.

A similar approach is taken when deciding the sentence to impose on someone convicted of a crime. The *Criminal Code* and in the case of minor offences, other statutes (such as the *Road Traffic Act 1974 (WA)*) set out the maximum prison term for each offence. The maximum penalty is reserved for the worst crimes and the worst offenders. For many offences, there is a wide array of sentencing options – spent convictions, fines, community supervision or suspended conditional sentences served in the community or imprisonment to be served immediately (see the *Sentencing Act 1995(WA)*) which can be imposed. The judge must take into account the seriousness of the offence, the offender's background and prospects for rehabilitation and the need to deter others from committing crimes. Judges also review the sentences other judges have imposed for similar crimes, to ensure the punishment is fair and fits the crime. In Australia, sentencing is not based on revenge but rather on the fundamental concepts of protection of the public, fairness, deterring others from committing crime, punishment and reforming the individual offender.

How Judges are Selected

The State government appoints State judges after consultation with the judiciary and the legal community. Candidates must have at least 10 years' experience as a lawyer and most have practised law for far longer.

District and Supreme Court judges are selected after consultation between a senior government official, the Solicitor General, and senior members of the judiciary. The appointment is then made by State Cabinet, on the recommendation of the Attorney General and ratified by the Governor in Executive Council.

How Judges are Held Accountable

Judges take an oath to uphold the law and to administer it fairly.

Despite their independence, judges are accountable for their actions and decisions. Hearings, trials and decisions are open to public scrutiny, so justice is seen to be done and the public and the media can discuss and criticise the work of the courts. Nearly all judgments and sentencing remarks delivered by judges of the Supreme Court are published on the Supreme Court website. A judge's ruling can be appealed to a higher court and, if an error has been made, a new trial will be ordered or the decision will be corrected. A decision of a single judge may be appealed to the Court of Appeal which is constituted by three judges. A decision of the Court of Appeal may be appealed to the High Court of Australia.

Allegations of misconduct, if proven, can lead to a judge being subject to remedial measures, or in a very grave instance, to a recommendation that the judge be removed from office.

Conclusion

Like the umpire in any conflict, a judge's decision will not always be popular or right. What is important is that students learn to respect the integrity of the judicial process. Hopefully, through study of the system they will learn to have faith in the judicial process and develop a lifelong belief that when other institutions fail, they can count on the fairness of the courts.

The old role of a judge as a symbol of authority, sometimes understandable, sometimes not, whose edicts from on high must be uncritically accepted as just and fitting, has gone. The judges in modern society are not potentates: they are rather servants; servants of the people in the highest and most honourable sense of that term.

In some respects, judges do set themselves apart from the community but they do not do so in order to show that they are better or more important than others. It is so that they can better perform their role as independent and impartial decision makers. This is a fundamental requirement in order to maintain the Rule of Law. It is easy to misinterpret the way judges

behave as a form of elitism. That is why it is important for you to educate children about the Rule of Law and the role of the impartial and independent decision-maker in maintaining our ordered, peaceful and fair society.