Off the Cuff

*by guest columnist Babette Smith**

Management and legal consultant Robert Talbot-Stern believes that lawyers are not suitable for corporate governance. Writing in the July issue of *Company Director*, he argued that they should not be appointed to serve on boards with much broader responsibilities, because they do not have the necessary prerequisite in-depth experience in management issues. Why should a lawyer whose only experience has been in a law firm serve on the board of a major company? Outside their respective specialties, they are amateurs, not professionals.

Talbot-Stern's view raises serious questions for the Australian legal system because, extrapolated, it suggests that the governance of such large public institutions as our law courts is being left to 'amateurs'. There has been little scrutiny of lawyers' role as administrators of the courts because debate about law reform in Australia has focused on the alleged shortcomings of the adversarial system and its practitioners' professional performance. But corporate governance creates the institutional culture that can facilitate or impede change and its influence on the daily operation of the courts can have a potentially major impact on costs, efficiency and access to justice.

The two underlying factors which shape an institution's culture are its organisational structure and its leadership's attitudes.

Three predominant organisational models of court governance can be found in Australia today:

- the 'administrative team' model, which involves management by the Chief Justice working in tandem with the Chief Executive Officer. Judicial members of the court are consulted about policy decisions, but not directly involved in management.

- the 'board of directors' model where the judiciary conceives of itself similar to a board of directors and focuses solely on policy issues and fiduciary duty, delegating management totally to the Chief Executive.

- the 'professional association' model, where the judges, under the leadership of the Chief Justice, approach the task of administering the court in much the same way many once ran their professional bodies. Little distinction is made between policy and management with many of the latter decisions resting with the judges. The Chief Executive Officer administers the financial and human resources of the court and the registry services, but is fundamentally limited in his/her management influence on the judiciary by a subordinate status.

Comparisons between the organisational models reveal that probably the most fundamental cultural influence is the degree of autonomy they possess to administer their own affairs. Most Australian courts are run by ex-barristers, an occupation that provides little experience

of management, but it appears that self-administration creates a court governance culture which changes the assumptions judges bring with them from the Bar.

Commonwealth courts such as the Federal, Family and High Courts are all self-administered bodies and their cultures contain a high level of accountability, which the judiciary does not confuse with infringement of its constitutional independence. In these courts, there is also judicial respect for the financial and managerial expertise of professional administrators. Members of the High Court, for instance, have no difficulty deferring to the greater management experience of their Chief Executive and concentrate their own intellectual skills on establishing the policies within which he or she operates.

Led by the Chief Justice, the Federal Court bench has deliberately educated itself about management issues in order to contribute productively to strategic and financial planning and to understand the responsibility of a self-administered court and the accountability that goes with it. The Court has a committee system, but this is predominantly utilised as a consultative mechanism and for self-education. Only two committees participate directly in management. They are the Practice and Procedure Committee, which handles courtroom issues, and the Finance Committee, which scrutinises budgets and resource allocation and monitors expenditure in liaison with the Chief Justice and the Chief Executive.

The State courts, however, are not self-administering. Structurally, most resemble a division of the local Attorney-General or justice department, which provides a great deal of administrative support and financial oversight. Suggestions for changing to an autonomous system similar to the Federal Court have so far failed, despite in NSW, for instance, considerable urging from the previous Chief Justice of the Supreme Court.

Consequently, at State level, there has been no significant corporate governance pressure for the judiciary to update its approach to management but, equally, the failure to devolve administrative responsibility is often justified as being due to the governance incompetence of the judges.

Many State courts suffer from a judiciary who perpetuates what Talbot-Stern describes as "major difficulties created by specialists who themselves are convinced that, having earned a top reputation in their own field, they can automatically handle equally well the broader issues of a multi-million dollar company".

This assumption of infallibility exacerbates the lawyer's occupational tendency to confuse process with results and to assume professional seniority equates with management expertise, all of which is reinforced by the close relationship between bench and state legal professional bodies, where practitioners perpetuate the same amateur management culture. The net effect is that highly qualified court administrators can find their ability to act paralysed by administrative deference to judges - and to practitioners serving on court committees - who lack the management skills to progress decision making.

While such a situation might be acceptable, if unwise, in the voluntary management of a professional association, it is surely inadequate for the administration of large public institutions.

Questions about the impact on costs of these different styles of governance are raised by the Report of the Productivity Commission for 1996-97. The table headed "Efficiency" includes a comparison between the courts. The cost per civil lodgement in the Supreme Court of NSW was $3411 as against $2699 for the Federal Court.

The cause of law reform might be significantly advanced by examining the governance of our State courts.

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