John Doyle[*]

THE INAUGURAL SELWAY LECTURE[†]

THE MACHINE OF JUSTICE – WHO IS DRIVING IT?

I INTRODUCTION

There are no signs that the Australian public, or public commentators, spend much time thinking about our judicial system as an institution for the administration of justice, about how the institution functions and is governed or managed. The judicial system attracts attention sporadically, and usually in response to a particular case or incident, although there are some recurrent themes in the media such as sentences being too light, and the exposure of individual judicial misconduct.

The public and public commentators probably think of the judicial system as remote from real life, inscrutable, following ancient and unchanging practices and procedures. John Galsworthy wrote '[j]ustice is a machine that, when some one has once given it the starting push, rolls on of itself.' Australians probably think of the justice system as something that has been started, and is simply rolling on of itself, unchanging and unrelated to the real world.

Aspects of our judicial system may contribute to that impression. Judicial independence causes the judiciary to emphasise its separation from the legislature, from the executive government and from other sources of power and influence in society. That can create an impression of remoteness. Until recently the approach of the legal profession and of the judiciary was to avoid contact with the media, to keep out of the public gaze. That added to the sense of remoteness. Our official discourse is replete with jargon that makes a good deal of our published material (judgments and reasons) difficult for a non-lawyer to absorb. And until about 20 years ago, Australian courts emphasised the logical and inductive aspects of their reasoning, minimising the part played by community values and attitudes. And so an impression of permanence was created. And it is true that our procedures are rooted in the history of the common law.

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So it is not surprising that the judicial system should seem remote, inscrutable and unchanging, little influenced by the society within which it functions.

That no doubt explains why there is so little informed discussion, outside the judiciary and the judicial system, about how the judiciary as an institution operates, about its governance and management.

I propose to take this opportunity to canvass some aspects of the functioning of the judicial system in South Australia, and in particular to comment on changes that are occurring. I believe that what I am going to say is true of courts generally throughout Australia, but I will confine my attention, by and large, to this State.

I have selected this topic for several reasons. First, because the late Justice Selway was a student of government. The system of government fascinated him. His interest extended to the workings of each of the three branches, the legislature, the executive and the judiciary. The matters on which I am going to speak are matters on which he held characteristically firm views. My second reason for speaking on these matters is to provide information to the public, in the hope of arousing some interest in these matters, and in the hope of stimulating some discussion. They are matters in which the public has an interest, because of the importance of the administration of justice.

I propose to speak first about the process of change within the judicial system, and within the judiciary. Who or what drives or produces change? How is it managed? Does the process of change have any implications for the principle of judicial independence? Who is accountable for change, or for the lack of it?

I also wish to speak a little about the efficiency of our system for the administration of justice. How does one strike the balance between justice and efficiency? How does one measure efficiency? What is being done to measure efficiency in Australia?

This will lead me to speak briefly about the funding of the courts of this State. How is the funding organised? If funds are needed to promote change or improvement in the judicial system, to improve efficiency, or to provide facilities that the public require, how is that managed?

A common thread between these topics is the issue of the governance or management of the courts as an institution. How is the judicial system managed so that it will respond adequately to the needs of society, yet remain truly independent?

This is a question worth asking. We all understand that an independent judiciary is a fundamental aspect of our system of government. We also expect that the administration of justice, both civil and criminal, will be conducted in a manner that

reflects the values of contemporary Australian society, that advances objectives that we want to be advanced, and in a manner that attracts the confidence and support of the community.

If that is so, who ensures that the judicial system is pursuing the desired objectives? How is that done?

II Change

I begin with the topic of change. There is a lot of change occurring. It is not change of a kind that provoked the famous saying, 'the more things change, the more they stay the same'. The law is always changing, but a lot of that change leaves things the same. I am talking about change that reflects changes in values and objectives, change that reflects new approaches. That is what I mean by real change, and that is what I am talking about.

It suffices to sketch the change in broad terms.

I begin with court registries. The emphasis in court registries is on service to court users, on providing assistance. Of course, most court staff always tried to be helpful. But now the organisation focuses on service delivery, and emphasises it. Advances in information technology, such as the electronic recording of court processes, and the electronic lodgement of court documents, are being embraced in an attempt to meet the expectations and needs of court users and of the business community. The fact that we talk of doing business, of court users and of a culture of service, speaks for itself. This terminology would not have been used when I began practice in the early 1970s.

The courts are not service providers. Administering justice is not a business. We do not have clients. But our approach to those who resort to the courts has changed and is changing. We have learned from the private sector. We are responding to community expectations.

The courts have changed a lot over the last 25 years or so, and are changing. The value of forms of dispute resolution other than litigation is now recognised, and resort to alternative dispute resolution (ADR) is encouraged by the courts.

Courts and judges have assumed much greater responsibility for, and exercised more influence over, the pace and duration of litigation, both civil and criminal. 'Case management' is the term usually used to refer to this process. The merits and benefits of intensive case management are a matter for debate. But no longer do courts leave case management to the parties. Courts also concern themselves with the cost of litigation, although with little success in relation to the cost of litigation in the higher courts. The judicial process is no longer seen as only concerned to do justice in the sense of arriving at a correct result in fact and in law. Civil courts are

also concerned with achieving a sensible and practical outcome. I do not suggest that they depart from deciding the facts and applying the law. What I mean is that there is more consideration of the cost of the process, more emphasis on achieving an outcome which will be sensible from the parties' point of view. Criminal courts are concerned with the interests of victims of crime, with the position of vulnerable witnesses, with getting at the origins of criminal conduct, for example through what are commonly known as drug courts.

While this is a very broad generalisation, the judicial system is no longer concerned with simply getting the facts and the law right. These days courts also have an outcome orientated objective, and see the process as having such an objective. This is a topic in itself, but today I will leave it at that.

Changes in the administration of justice in the criminal courts are particularly significant. There is increased emphasis on the punitive aspects of sentencing, and on punishment as a means of preventing crime. Much legislative change affecting the criminal courts is directed to this end. There is a greater emphasis, quite rightly, on the interests of victims, and on adjusting procedures to accommodate their interests. There is much more attention given to the interests of those who appear before the court who are in a vulnerable position, such as children, and victims of sexual offences. There have been a number of changes to criminal procedures to limit the ability of an accused to exploit the obligation of the prosecution to prove guilt beyond reasonable doubt, without the accused having to give any indication of his or her line of defence, of what is admitted and what is denied.

Our criminal justice system was concerned with only two issues. They were proof of guilt and the imposition of an appropriate sentence. As a result of legislative changes, the system now attempts to achieve some satisfaction of the interests of the victim, to protect the vulnerable, and to redress the balance as between prosecution and defence, by limiting the ability of the defence to exploit the burden of proof that the prosecution bears. Again, these changes, and the thinking that underlies them, are a topic in themselves, but for present purposes it suffices for me to identify the change that has occurred.

The courts are responding to advances in information technology, to the extent that they can get funding that enables them to do so, and are grappling with its potential to change court processes. We have not yet grappled adequately with the potential for advances in information technology to affect two fundamental aspects of our system. They are its oral nature, and the extent to which it depends upon confrontation in the courtroom between those who give evidence and the opposing side, in the presence of the judge. But however one grapples with that issue, the fact remains that advances in information technology are steadily changing the way in which registries and judges in court transact their work.

The make up of our judiciary is also changing. It is a more diverse group than in the past. This is difficult to prove because of the lack of available information, but in my own mind there is no doubt about this.

There is now a very strong sense of an Australian judiciary. There is a lot of interaction between the judiciary in the States and Territories, and with the Commonwealth judiciary. Until about 20 or 30 years ago, the judiciary was very much a State-based institution, with a relatively limited amount of contact between the judiciary in different locations.

The judiciary is much more inclined now to see itself as a profession. The value of professional development for the judiciary is now recognised. We now have a national judicial college to provide professional development programs to the judiciary. This is something that would have been almost unthinkable 25 years ago.

These are illustrations. My point is that substantial change is occurring, and some of it reflects change in fundamentals of our system of justice.

So who or what is driving the change? Who manages the change? Who ensures that overall what happens is in society's interests, and does not compromise the interests of justice?

Some of the change is the result of legislation enacted by Parliament. It is mainly in the area of criminal law and procedure that Parliament is enacting change that reflects a real change of approach. The influence of Parliament is easy to see, because it expresses itself in the form of a statute. This focus on criminal law and procedure as the area calling for change no doubt reflects the contemporary concern about the crime in our community, a concern contributed to by the media's pre-occupation with crime as a convenient source of good stories.

Whatever one might think about the focus on criminal law and procedure, it is appropriate that Parliament should be a source of real change in our system of justice. Parliament has ultimate authority over the law, and it is its responsibility to ensure that the law and the administration of justice reflect contemporary and appropriate standards and values.

This means that politics and public sentiment and, again, the media, also play a part. But this is how it must be in a democracy.

The executive government also has some influence over change. It can exert influence over the manner in which justice is administered by providing funding for innovations, or by limiting funding and so making it difficult for a particular activity to occur. The Drug Court could not function without specific funding and other forms of support being made available. On the other hand, a pilot program involving adult offenders and victims meeting to talk about the effect of crime on

the victim ended, despite its apparent success, because further funding could not be obtained. The ability of the courts to take advantage of advances in information technology is dependent upon substantial funding being available. In South Australia there is much more that we would do in this area if we could get the funds. In many respects our ability to provide a good standard of service in court registries is limited by our funding.

The executive government exercises influence quite apart from its control over funding. There is a discussion and exchange of ideas, at various levels, between the courts and the Attorney-General's Department in particular. This can result in the courts being encouraged to innovate and to experiment.

There is another source of influence from the executive government that is more subtle. The Commonwealth Government, through the Australian Bureau of Statistics and through the Productivity Commission, collects a vast amount of data about expenditure by the States and the Commonwealth on courts, and about their work[1]. It is a truism that a decision to collect and report certain data, often called management data or performance indicators or quality measures, has an effect on the behaviour of people within the system being measured. When the data is treated as an indicator of efficiency or quality, and is used, or is believed to be used, as a basis for funding, it is a natural response of the system to focus on the reported measures and to try to improve performance in those areas. A danger is that the sound working of the system can be distorted, by paying undue attention to what is being measured.

My point is that it is sometimes overlooked that the exercise of collecting data on workload and expenditure can have an influence on behaviour.

But because the ability to exert influence in the manner described is less obvious than in the case of Parliament, and indeed at times is almost invisible to outside observers, there is a need for care on both sides, that is by the Executive and by the courts.

We have a duty to encourage efficiency by the courts, and to support the collection and publication of data that helps measure efficiency and detect inefficiency. But we have an equally clear duty to resist any tendency to treat justice as a commodity that can be measured, weighed and packaged, and treated as a mere output.

So change comes through the influence of the executive government, and properly so, but its management calls for a proper recognition of the unique aspects of the administration of justice, and of the independence of the courts.

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1 Steering Committee Report, 'Report on Government Services 2006', (Australian Government Productivity Commission, 2006), Part C, http://www.pc.gov.au/gsp/reports/rogs/2006/index.html at 14 May 2007.

A further source of change is the direct operation of public opinion, including the media, on the judiciary and on the courts.

This also is a legitimate source of change in our judicial system. The courts administer justice on behalf of the community, and to meet certain community needs. The community has a right to express its opinion about the administration of justice, and a right to expect that, within certain limits, the courts will respond to its concerns. Once again, there is a balance to be struck. If the community expresses strong concern about a particular kind of offence, it may be appropriate to increase the level of punishment for that kind of offence. If a particular procedure no longer accords with contemporary life, and the community indicate this, it is appropriate for the courts to consider changing it. The wearing of wigs is an example. If the community makes it plain that they expect better facilities than our courts offer, the government should provide the necessary funding.

On the other hand, we cannot and do not administer justice or manage the courts according to opinion polls. We have our own responsibility in that respect. The influence of public opinion is real, although difficult to measure.

Now I come to the influence of the judiciary and of court staff and administrators on fundamental change.

A lot of the change, particularly at what I might call the operational level, has been generated by the judiciary and by court administrators, although sometimes influenced by sources that I have identified. The service philosophy at court registries was adopted and implemented by court staff. Changes in civil case management have been largely judge driven, as have changes in criminal case management. Specialist courts, such as the Nunga Court and the Domestic Violence Court, have been largely the product of judicial initiative, although sometimes depending on government funding support. The response to advances in information technology has come largely from the judiciary and from court administrators. The judiciary and court administrators have responded to calls for greater attention to the interests of victims of crime and vulnerable witnesses. There is a good deal of interaction between the judiciary, court staff and groups that represent particular interests such as Victims of Crime, Aboriginal people, and so on. We meet with these groups, consider their arguments and do our best to respond to them in an appropriate manner.

A lot of the change is the result of initiatives pursued by individual judicial officers or groups of judicial officers, or by court staff, taking up a particular issue and pressing it within their court.

Some of the change is stimulated by interaction between members of the judiciary and administrators in different parts of Australia. Ideas circulate, are discussed and implemented, and observed by others. Bodies such as the Australian Institute of

Judicial Administration play an important part in the movement, discussion and elaboration of ideas.

Committees and working groups operate within each court, stimulating and implementing change. Heads of jurisdiction exercise a general kind of supervision. These days most heads of jurisdiction accept a responsibility to promote change. But the head of jurisdiction will usually need to find support within his or her court for change, because change will often affect judicial practice and cannot be imposed on judges, because of judicial independence. A collegial approach to change is necessary. The impetus for change comes from a range of sources, as I have said.

No one person or body, other than the head of jurisdiction, is charged with responsibility to identify and implement change as appropriate. Change rests with the judiciary as a whole, and with the court administrators.

I can understand that to some this would seem surprisingly, and perhaps alarmingly, amorphous. It may help to recall that the common law is a system of law developed by judges in a similar way.

An aspect of judicial independence is that the judiciary itself has a collective responsibility to adjust the workings of the system for administration of justice, subject to Parliament and the availability of resources, to ensure that it remains as efficient and effective as it can be, and to ensure that it responds to the needs of society as they change. In short, judicial independence carries with it certain responsibilities.

So when we ask, as I did, who or what drives fundamental change in the administration of justice, the answer is that it comes from a variety of sources. Somehow or other the balance between judicial independence and the right of parliament, the government and the public to influence change, is observed. By and large the main players show common sense, and acknowledge the fundamental principle of judicial independence.

However, the manner in which change is implemented and managed has some limitations that should not be overlooked.

One difficulty is that the judiciary and court staff are mainly occupied in the routine discharge of their duties. The consideration and promotion of change falls to those who can find time to do so, and who have the interest and energy to do so. This can mean that desirable changes do not occur, because the potential initiators simply lack the time to give it the required consideration. Heads of jurisdiction have plenty to do exercising their own judicial functions and managing their own court.

A second limitation is that thorough consideration of change sometimes call for financial and human resources that courts lack. Some kinds of change warrant very careful investigation and consideration. We do not have a strategic planning section, whose function is to consider change. Moreover, the implementation of change will often depend on getting funding support from government, and this is usually difficult, for a mix of right and wrong reasons. The difficulty in getting funding can have a dampening effect, which is undesirable.

A third limitation is that much of the debate about change and its implementation takes place within a limited group – judicial officers and court staff. I have not overlooked the role of the Attorney-General and his advisers. Nor have I overlooked the input of groups outside the judiciary that have an interest in a particular aspect of the administration of justice, such as the Victim Support Service. But much of the debate about change tends to be an internal debate.

There is no private sector with which we can make helpful comparisons in relation to our core functions. Areas like health and education provide a striking contrast in that respect. The Courts Administration Authority does not have funds that enable it to support a strong policy advisory division, with access to our collective knowledge and experience, charged with ensuring that we keep abreast of change. There are few other proponents of change. Academic interest is not much directed to this area. One does not come across chairs in judicial administration, or in contemporary judicial method. Nor do we find that the so-called 'think tanks' concern themselves much with how justice is administered, despite the fact that many of them are concerned with social issues. A 'think tank' that took a sustained and intelligent interest in how courts work and in how they go about administering justice could make a real contribution to the quality of justice. Nor are there substantial organisations with an interest in our work, who can provide constructive criticism. Compare the medical profession, whose work is scrutinised by government, by their own colleges, by the health insurance industry and by other groups. Major issues affecting medical practice are subject to vigorous debate from the point of view of a number of different interests. I have not overlooked the role of professional bodies such as the Law Society and the Law Council of Australia. They do contribute to debate, but their contribution could fairly be regarded as coming from much the same group as the judges.

Nor have I overlooked the views expressed by the public from time to time, and by views expressed through the media. The public and the media do on occasions identify flaws in our processes that call for systemic change. But the input of the public and the media tends to be intermittent, and often focuses on a particular aspect of a particular case, rather than on the desirable general rule.

My overall point is that debate within the judiciary about change occurs within a limited group. I believe that Australia's judiciary and the public would benefit from a wider range of inputs into debate about change and our methods and practices.

Having said all that about the process of change, who does oversee change to ensure that it does not compromise the interests of the administration of justice?

The High Court has held that the *Australian Constitution* prohibits the conferral, on State Supreme Courts at least, of functions that are inimical to or inconsistent with the fair and impartial discharge by those courts of the judicial function, in a manner consistent with the requirements of judicial independence. So to that extent the High Court exercises a kind of oversight. That oversight is internal, or involves self-regulation, because it is for the High Court to decide what is a function that cannot be conferred on a State Court, or what changes in procedure or process are inconsistent with essential judicial requirements.

Apart from that, as is so often the case in our system of government, there is no formal system of oversight. The system operates on the basis that the prime movers will be alert to the danger of compromising the integrity of the administration of justice, sensible in what they propose, and respectful of the constitutional role of the judiciary. It is a particular responsibility of a Chief Justice to raise concerns with the Attorney-General, and of the Attorney-General to protect the position of the courts in the interests of the administration of justice. In short, to a considerable degree oversight depends upon the due observance of established conventions.

That is not to say that there is no possible cause for concern. These days, it is the exercise of criminal jurisdiction that most frequently attracts comments from the Executive Government, Members of Parliament and the media. Criticism of court decisions is a legitimate part of our process. But sometimes the criticism proceeds on the basis that the court is wrong *because* the court did not do what the government or Minister wanted or expected, or *because* the decision is not what the public want. And so sometimes change is considered in that context. That approach displays a dangerous confusion. It is appropriate for the government to say that if a certain decision reflects the state of the law, the law should be changed. But it is both wrong and dangerous to suggest that a decision is wrong because is not the decision that the government advocated or the public agrees with. That approach implies that the courts should be doing what the government or the public wants. This may seem a fine line to some, but it is an important line. However, subject to that, it seems to me that change is satisfactorily managed within our system.

So, at the end of the day, Parliament as lawmaker, the Executive Government as the provider of resources and the judiciary and court administrators are responsible for change in the judicial system, or for the lack of it.

III EFFICIENCY

I turn to the issue of efficiency. Efficiency appears to be a universal good, and so one might think that the efficiency of the courts should precede any consideration of change. If the courts are not efficient, that should be put right before we think

about change. I suppose that most people would look to the head of jurisdiction to ensure that the jurisdiction functions efficiently, and within certain limits that is a reasonable approach. However, by way of defence, it is fair to make the point that efficiency is affected by the human and physical and technical resources that are available to a court, and by the practices of those who use the courts. There are distinct limits to the ability of a head of jurisdiction to ensure that the jurisdiction functions efficiently.

The first issue that has to be faced here is that of how one measures efficiency against justice. For example, a litigant in person will usually take longer to present a case or conduct a defence than will a party represented by counsel. That seems inefficient. But most would say that justice requires that the litigant in person be allowed to present the case or defence. Hearing appeals that lack merit is an inefficient use of resources, but most would say that such inefficiency is a by-product of the conferral by Parliament of the right of appeal which we must accept.

Generally our system of law subordinates considerations of efficiency to considerations of justice. And so when we consider the efficiency of the administration of justice, we have to bear in mind that there are inefficiencies that must be tolerated in the interests of justice.

Subject to that, it is reasonable to expect courts to conduct themselves and their business as efficiently as they can. If we are to maximise efficiency, we need some kind of measure of efficiency. How do we do that?

As far as I am aware, no reliable measures of efficiency have yet been devised. Efficiency cannot be measured by the length of a case. If a case takes ten days, who can say that it could have been completed in less, without compromising the interests of justice? Any view will be at best an informed expression of opinion. Reasonable estimates can be made of the appropriate length of a case when there is a sufficient number of a particular type of case to enable generalisations. Most appeals against sentence that come to the Court of Criminal Appeal should take and do take about two hours. But there are always exceptions. So the length of cases has not produced any particularly helpful measures of efficiency.

Most courts now record the length of time that a case is within the system. That is, the time taken from lodgement to final disposition. It is also common to record the time that elapses between the end of the hearing, if there is one, and the delivery of judgment. But these are not efficiency measures. They are merely observations of fact. I suspect that by adopting intensive case management of all civil lodgements and, more doubtfully, of all criminal lodgements, courts could reduce the time that a civil case and criminal case takes from lodgement to final disposition. But truly intensive case management occupies a substantial amount of judicial time and

resources, and also tends to impose added costs on the parties. And so one can question the net gain from intensive case management.

One also has to be careful about equating efficiency with the speed with which cases are disposed of. In making that point I do not want to be thought as indicating an indifference to delay. I regard delay as one of the problems of our judicial system. Cases are taking too long.

Commonwealth agencies collect data on the public expenditure on the administration of justice, and calculate things like the cost per lodgement or cost per disposition in different courts. This does enable a comparison to be made between courts. The cost per civil or criminal lodgement in the Supreme Court of New South Wales can be compared with the cost per lodgement in the Supreme Court of South Australia. It might be thought that a higher cost per lodgement in one court compared with another is an indicator of inefficiency. But even here caution has to be exercised. First, there is no point at all in making a comparison unless the workloads are similar or are comparable. There is no point, for example, in comparing the cost per lodgement in the Magistrates Court with the cost per lodgement in the Supreme Court. Second, even when workloads are comparable, what do we learn by being told that the cost per lodgement in the Supreme Court of South Australia is X per cent higher or lower than the cost per lodgement in the Supreme Court of New South Wales? The difference may be attributable to qualitative differences. That is, the lower cost jurisdiction might not be providing facilities that the higher cost jurisdiction is providing, and that should be provided. The lower cost jurisdiction might be benefiting from economies of scale. Once again, I am not suggesting that there is no value at all in these comparisons, but merely making the point that the value is limited.

It is unsatisfactory that we should know as little as we do about how to measure the efficiency of our courts. The requirement to administer justice is pre-eminent. But justice can come at an unacceptable price. It is not, I suggest, true justice to allow counsel to spend a day in cross-examination on a topic which can be completed in an hour. At a certain point we must face the fact that in a situation like that the costs inflicted on the public and on the opponent are an indicator of injustice. If a judge is occupied in a case too long, other cases are likely to go unheard. It is unjust that a litigant should have to pay for the cost of legal representation attributable to a case taking much longer than it should.

The courts should dispose of their caseload in an efficient manner, subject to the interests of justice. However, as I have already said, there is a lot contained in that proposition. We have to be careful not to equate efficiency with speed, and we have to be careful not to equate efficiency with shifting costs from the court (or the public sector) to the litigant (or the private sector). It would be helpful for heads of jurisdiction and administrators to have reliable information by reference to which

they could assess the efficiency of their systems. But the truth of the matter is that such measures do not exist at the moment.

I believe that governments could and should be doing much more in this area. Only governments have the resources to help courts identify appropriate measures, to collect the data and to present it. Before we do anything like that we would need to clarify the meaning of cost and efficiency as applied to courts, and identify data that would provide information that would enable us to develop meaningful measures.

Until we do that, all I can do is assure the public of this State that the courts are doing their best, but that their best involves a good deal of intuition and informed judgment.

IV FUNDING

I come then to the funding of courts. I have already explained how the availability of resources can underpin change, and how the unavailability of resources can not only mean that a particular change does not proceed, but can have a general dampening effect on the promotion of change.

How do courts get the financial resources that they need to administer justice, and how do they get the resources that they might need to implement change?

In South Australia the Courts Administration Authority is the statutory authority with the responsibility to provide administrative support to the courts of the State. The Authority is governed by the State Courts Administration Council, which comprises me, the Chief Judge and the Chief Magistrate. Under the *Courts Administration Act 1993* (SA), each year we formulate a budget proposal which can go forward only if approved by the Attorney-General.

That proposal is discussed in detail between officers of the Authority, of Treasury and of the Attorney-General. The officers of the Treasurer and of the Attorney-General have full information about the operation of the courts and about our finances. There is an assumption that, by and large, funding will continue to be made available for existing operations. On the other hand, funding for new proposals must be won in what is a competitive process. The requests for funding exceed the revenue available, and at the end of the day Cabinet must make a decision on which new proposals are to be funded and which are not. And so the process acquires an undeniably political flavour.

In the last decade or so in South Australia, as in other places in Australia, 'efficiency dividends' have regularly been imposed in relation to funding for on-going services. An estimate is made of what is required to provide on-going services, but the appropriation is then reduced by a certain percentage euphemistically called an "efficiency dividend". The adoption of that approach by

different governments over a number of years has meant, in the case of the Courts Administration Authority, that there is little or nothing in our funding for on-going activities which can be applied to the process of change. And so few proposals for new funding have been approved by Cabinet, and the amounts involved are so minor by and large, that the process of change generated from within the Authority and from within the Court, has slowed distinctly.

In recent years, as I have regularly complained in the Annual Report of the Courts Administration Authority, we have reached the point at which our recurrent funding is barely sufficient to sustain existing operations. For the last two or three years we have exceeded our funding. The Attorney-General has made up the shortfall, from appropriations available to him, and so the system has continued. We continue to say, what are we meant to do, when it is said that we must live within our resources. Should we hear less cases? Should courts stop going on circuit? Should we refuse to order psychiatric reports that are to be prepared at public expense? We have an obligation to administer justice, to list cases before judicial officers who are available to hear them, to go on circuit to towns that are a sufficient distance from Adelaide to make it unreasonable for parties to come to Adelaide, and to provide the courts with information that various statutes contemplate will be provided to them.

We should not have to subordinate the interests of justice to accord with the amount that the Government proposes by way of statutory appropriation.

And, I repeat, these funding difficulties have a dampening effect on the system as a whole, because enthusiasm for change is dampened by the knowledge that funding for change is unlikely to be found.

I am not looking back to a golden age when courts had easy access to funds. I doubt whether that golden age ever existed. I accept that funding must be justified. I simply make the point that in South Australia we believe that the funding for the courts is inadequate. We cannot demonstrate that we are efficient, because there are no reliable measures of efficiency. Government funding, whichever party is in power, is influenced by electoral considerations. As the saying goes ‘there are no votes in courts’. Areas funded by government such as police, education, health and social welfare are more electorally sensitive than are the courts. It is not surprising that we find it difficult to win funding for new projects compared with projects in such areas.

The courts have resisted the temptation to advance their own agenda through the media. We are not part of the political process. I do not believe that the public interest would be served by having a ‘media savvy’ judiciary, regularly using the media to prod government to support its funding proposals, its interests and policies. But I am concerned that our ‘dignified silence’ is having adverse effects.

The end result is that the courts are under-funded, and the public are not getting the service from the courts and the facilities at the courts that they should get.

V Conclusion

So in this way, change, efficiency and funding are all closely linked.

To summarise, courts are part of a third and independent arm of government. But the courts must look to the Executive Government to provide funding through Parliament.

To that extent the courts are vulnerable. Their ability to meet the public interest in the administration of justice to the fullest extent depends upon funding support from the government. It is proving difficult to obtain that funding support. In Australia there is no apparent risk of a direct assault on judicial independence. I have no reason to fear one. But the ability of the courts to serve the public as well as they can is compromised.

We are changing. We are alert to the public interest in change within the courts. But change could be better managed and supported than we are presently able to do.

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