Administrative independence for New South Wales courts

By Michael Slattery QC

In September this year Bar Council resolved to raise for public discussion the question whether the Supreme Court of New South Wales and the other courts of this state should have greater financial and management independence from the executive[1] . Full administrative independence for our courts from the executive is not an essential precondition for judicial independence but it is increasingly recognised as both aiding judicial independence and as supporting public confidence in the judiciary.

Bar Council has not yet adopted a formal position on the question for several reasons. There are many available statutory models for New South Wales courts to achieve greater financial and management independence. Important questions must be decided such as which courts and which resources should be independently administered. The judiciary, the executive and the legislature, not the Bar, must ultimately settle upon what might be the right model for this state. Nevertheless the Bar is uniquely placed to raise this important question. The times call for it to be examined.

The executive government in New South Wales decides upon and then parliament appropriates the total funds which will be allocated to the Supreme Court and each of the other state courts to enable them to administer their respective functions. The executive also controls how the budgets of all state courts will be expended. Although there is consultation with the judges, through the Attorney General's Department, the executive in effect has control of items such as court staff numbers, staff salaries, information technology, library resources and various utility services. The question now raised by the Bar for discussion is whether the executive or the courts should determine how monies appropriated by parliament to the courts will be spent.

Providing a statutory basis for independent court administration does not mean that the courts would be free of any requirement to account for their operations. The parliament appropriates the funds and the courts will still be answerable to the parliament for their expenditure. Under many statutory models of independent court administration the parliamentary appropriation for the courts is sometimes rather inaptly described as a 'single line budget', as though the parliament only appropriates the global amount of the budget and leaves the details to the courts. The reality of these models is that a parliamentary appropriation only occurs after the courts provide their own detailed cost estimates to the parliament, usually after negotiation with the executive. Importantly though, once the appropriation is approved by parliament, expenditure is managed by the court.

Commonwealth and state models

A generation ago Commonwealth legislators pioneered structures for independent court administration. *The High Court of Australia Act 1979 (Cth)* removed administrative and financial responsibility for the High Court from the federal Attorney-General's Department to the court itself. Later the *Courts and Tribunals Administration Amendment Act 1989* (Cth) transferred the administrative and financial management of the Federal Court, the Family Court and the Administrative Appeals Tribunal to each of them. Federal courts administer their own affairs and receive and expend their parliamentary appropriations, subject to the scrutiny of the auditor-general and annual reporting to parliament.

With only one exception, the judiciary in all states of Australia work with court budgeting arrangements similar to those now used in New South Wales. Under the *Courts Administration Act 1993* (SA) South Australia created a comprehensive Courts Administration Authority, independent of the executive, controlled by the chief justice and the chief judges of the state's other courts. The Courts Administration Authority is responsible for estimating and allocating the appropriations among the Supreme Court and the inferior courts of that state.

At least three recent events now lead the Bar to call for debate about the introduction of independent court administration in New South Wales. These events all suggest an immediate need to promote ideas that will aid judicial independence. Self-managed judicial administration is such an idea. The first event is the intensification of public attacks upon the judiciary, both inside and outside state parliament, this year. The second is the continuation of relentless pressure on state courts' financial resources. The third is the recent conferring of statutory jurisdiction on the Supreme Court to review various forms of executive detention under legislation like the *Anti-Terrorism Act (2005)* and the *Crimes (Serious Sex Offenders) Act 2006*. The second of these events needs further examination.

Court economies

The financial economies now being expected of the Supreme and District courts are such that acceptable standards of civil and criminal justice are difficult to maintain. Two examples of this will suffice. In December 2000 the then president of the Bar Association, Ruth McColl SC, declared in *Bar Brief*:

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> The situation concerning the availability of daily transcripts in the District Court is reaching crisis point. Virtually no civil case has a daily transcript. Recently a two week case was completed with no daily transcript available. This is not unusual.

The president then pointed out that when the District Court was earlier given extended jurisdiction the then attorney general had said that transcription services would be increased. Six years later and despite continuing protests from the District Court and the Bar Association, though improved the situation with transcripts is still a problem.

Public commentators in this state would no doubt be astonished to know that despite improvements in the District Court it is still possible to be convicted and sentenced to a substantial term of imprisonment without the accused even having the benefit of a same day transcript of the evidence at the trial. In every other jurisdiction in Australia daily transcripts are provided in District/County Court criminal trials as a matter of course. It is also possible for civil litigation involving claims for serious personal injury to be conducted in the District Court without a daily transcript.

It is unthinkable that the Cabinet Office or the committees of the New South Wales Parliament would conduct any of their business on the basis that they did not have a daily record of what was being transacted. Nevertheless it is expected that the state's legal system should serve the people of New South Wales without these fundamental resources. It is the people of this state who suffer the most from this under-resourcing of our system of justice.

Failing adequately to fund the administration of justice in this state not only threatens the quality of justice, it also imposes hardship directly on members of the community. Since September this year the Bar Association has been calling on government and the opposition to act on the September 1986 Report of the New South Wales Law Reform Commission which, under Keith Mason QC (as he then was) recommended that jurors in criminal and civil trials in New South Wales be paid at least average weekly earnings. Failure to pay average weekly earnings to jurors in longer trials excludes many people from serving on juries and makes juries increasingly unrepresentative of the community, thereby diminishing the quality of justice. It also imposes financial hardship on the jurors who serve and upon the many small businesses which are expected to subsidise the jury system by making up inadequate jurors' pay.

One of the arguments against change to the present system of court funding and management is that independent court administration cannot of itself provide sufficient funds to operate our courts. Whilst that is true, the courts themselves are best placed to decide where greater efficiencies can be introduced without sacrificing the quality of justice. Open negotiations make it more difficult for the executive to deny resources that the judges say are necessary to maintain acceptable standards in the administration of justice. There is also perhaps a danger that overseeing an independent court administration may distract senior judges from their principal judicial duties. Provided the judges are given sufficient support to manage their own budgets this should not be a problem. The Federal and South Australian legislation both appear to work without difficulties of this kind.

The United States experience

The first working model of an independent courts administration was created in the United States of America with the passage by Congress of the *Administrative Office Act of 1939*. The Act established the Administrative Office and had the effect of transferred financial control of the Supreme Court and other federal courts from the Department of Justice to this agency operating under the supervision and direction of the Federal Judicial Conference. The Administrative Office Act was passed in circumstances that are presently instructive for New South Wales. It was widely perceived by the mid-1930s that the US attorney-general's power over judicial administration was resulting in chronic tensions and frustrations with judges, who were complaining of difficulties in communicating with the attorney-general regarding basic needs. This was exacerbated by the effects of great depression. In the background was a perceived need to strengthen the position of the judiciary against increasing executive power, caused at that time by rising international tensions. The matter came to a head in 1937 when President Franklin D Roosevelt moved to pack the Supreme Court, by proposing legislation to appoint additional federal judges. The *Administrative Office Act 1939* was promoted by the American Bar Association in the interests of the US federal judiciary. It largely resolved the tensions and has worked well ever since.

A proposal

This issue now presents a very significant policy opportunity to any political party wishing to show support for the independence of the state's judiciary. State legislators could offer to consult with the state's judiciary on this question after the March 2007 election, should the judiciary wish to engage on it. A report on the question could then be given to parliament six months after the election. The taking of these simple steps should markedly improve the outlook for the administration of justice in this state.

[1] On behalf of the Bar I wish to thank Justin Gleeson SC and Tiffany Wong of Banco Chambers who have researched this question for Bar Council. An article written by Gleeson SC on the subject will be published in the December 2006 edition of the *Australian Law Journal* (2006) 80 ALJ 862.