DELIVERING JUSTICE IN THE LOWER COURTS ON THE SNIFF OF AN OILY RAG

Presented by Chief Judge Dr John Lowndes of the Local Court of the Northern Territory at the Criminal Lawyers Association Northern Territory 16th Bali Conference June 2017

There is an imperative for all courts to be adequately funded and resourced at all times – and this is particularly so in relation to the lower courts.[1] However, the current administrative relationship between the judicial and executive branch of government in relation to the funding and resourcing of the majority of the lower courts around Australia[2] is not conducive to meeting this imperative. The existing organisational arrangement cannot guarantee that the lower courts are consistently provided with the funds and resources necessary to enable the lower courts to administer justice at the coalface of the Australian judiciary. Without adequate funding and resources, the lower courts are left to administer justice "on the sniff of an oily rag".

You may well ask what does it mean to do something on "the sniff of an oily rag"? Well, it simply means undertaking an activity or activities with a meagre, slim or frugal amount of resources, especially money. Analogous phrases are doing something "on a shoestring" or a "shoelace" or "bootlace". Again, these idioms connote undertaking an activity or activities with limited money and resources, conjuring up the image of getting by on less than is required.

I am very grateful to the conference organising committee for choosing the theme of this year's conference because it provides a conceptual "springboard" for drawing attention to a plethora of contemporary and pressing issues relating to the funding and resourcing of the lower courts around Australia; and to convey the single important message that justice cannot be administered in the lower courts on "the sniff of an oily rag". Simply put, justice cannot be done "on the cheap" in the lower courts.

The paper begins with the imperative for all courts to be adequately funded and resourced. The second part of the paper sets out the importance of judicial funding in the lower courts and the reasons why the funding and resourcing of the lower courts should be an absolute priority. The next part of the paper explains why the current administrative relationship between the executive and the lower courts does not guarantee the provision of adequate funding and resources for the lower courts. The fourth part of the paper considers the way forward and how the current funding and resourcing of the lower courts may be enhanced by re-designing the administrative relationship between the judiciary and the executive, including the strategic

[1] The lower courts are the Magistrates' Courts around Australia and the Local Court of the Northern Territory (formerly the Magistrates Court).

[2] Those lower courts are the Magistrates' Courts of New South Wales, Victoria, Queensland, Western Australia, Tasmania, the Australian Capital Territory and the Local Court of the Northern Territory.

measures that the courts themselves may take to ensure that they receive adequate funding and resources.

THE IMPERATIVE FOR COURTS TO BE ADEQUATELY FUNDED AND RESOURCED

The need for all courts to be adequately funded and resourced has been widely recognised and documented in a number of international instruments of considerable stature.[3]

The first instrument in time is the *Syracuse Draft Principles on the Independence of the Judiciary*. Article 24 provides that in order to "ensure its independence the judiciary should be provided with the means and resources necessary for the proper fulfilment of its judicial functions".[4] Article 25 goes on to provide:

> The budget of the judiciary should be established by the competent authority in collaboration with the judiciary. The amount allotted should be sufficient to enable each court to function without an excessive workload. The judiciary should be able to submit their budgetary requirements to the appropriate authority.
>
> > [Note: An inadequate provision in the budget may entail an excessive workload by reason of insufficient number of budgeted posts, or of inadequate assistance, aids and equipment, and consequently be the cause of unreasonable delays in adjudicating cases, thus bringing the judiciary into discredit].

In its 1982 Report on the "Independence of the Judiciary in the LawAsia Region – Principles and Conclusion", the Human Rights Standing Committee stated as follows (Principle 13):

> (a) The Committee is aware of instances, in the LawAsia region, where the facilities which are now provided to judges and to the court system are below what is the minimum acceptable level at which judges and courts can carry out their functions properly.
>
> (b) The Committee recognises that there may be economic circumstances in which it is impossible for facilities to be provided to judges and the court system at what would otherwise be an appropriate level.

[3] These international instruments are referred to in Justice Smith's paper "Court Governance and the Executive Model" Judicial Conference of Australia Colloquium, Canberra 2006, Appendix C, pp 43-45. The Appendix contains a summary of the international instruments which reflect on the requirements of judicial independence, as identified in the Canadian Judicial Council Report on "Alternate Models of Court Administration".

[4] See also the Report of a seminar held in Tokyo on 17 and 18 July 1982: "Independence of the Judiciary in the LawAsia Region – Principles and Conclusion" Principle 6 where it is stated that "it is essential that the judges be provided with the facilities necessary to enable them to perform their functions".

(c) However, a proper system of courts and the proper performance of the judicial functions are essential to the maintenance of proper values, the rule of law and the attainment of human rights within a society. The Committee therefore recommends that the provision of such facilities be seen as having a priority of the highest order in the ordering of each society.

The Committee concluded that these standards in relation to the provision of facilities represent an important part of the minimum standards necessary to be observed in order to maintain the independence of the judiciary and functioning of an effective judiciary in the LawAsia region.

The IBA Minimum Standards of Judicial Independence, which were adopted in 1982, have this to say about the funding and resourcing of the judiciary (Article 10):

> It is the duty of the State to provide adequate financial resources to allow for the due administration of justice.

Articles 2.40-2.42 of the Universal Declaration on the Independence of Justice state as follows:

> The main responsibility for court administration shall vest in the judiciary.
>
> It shall be a priority of the highest order for the State to provide adequate resources to allow for the due administration of justice, including physical facilities, appropriate for the maintenance of judicial independence, dignity and efficiency, judicial and administrative personnel and operating budgets.
>
> The budget of the court shall be prepared by the competent authority in collaboration with the judiciary. The judiciary shall submit their estimate of the budget requirement to the appropriate authority.

According to Article 7 of the *United Nations Basic Principles of the Independence of the Judiciary* 1985 “it is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions”.

Procedure 5 of the *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary* provides that:

> States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including appointing a sufficient number of judges in relation to case-loads, providing the courts with necessary support staff and equipment, and offering judges appropriate personal security, remuneration and emoluments.

The Statement by the Australian Bar Association on “The Independence of the Judiciary” 1991 speaks at some length about the need for the judiciary to control the administration and operations of courts (at 4.2):

4.2.1 Courts cannot dispense justice according to a formula. Likewise, ordinary principles of administration do not apply to the judicial process. Their application would result in injustice, as well as much other harm. It is nevertheless tempting for a bureaucrat to assess the efficiency of courts in terms which are incompatible with their true function. In order to avoid this, the judges must themselves be responsible for the administration of the courts of which they are members. The Australian Bar association agrees with Mr G.E. Fitzgerald QC, who in the *Report of a Commission of Inquiry Pursuant to Orders in Council into Possible Illegal Activities and Associated Police Conduct* said (at p 134):

> The independence of the judiciary is of paramount importance, and must not be compromised. One of the threats to judicial independence is an over-dependence upon administrative and financial resources from a government department or being subject to administrative regulation in matters associated with the performance of the judicial role. Independence of the judiciary bespeaks as much autonomy as possible in the internal management of the administration of justice.

4.2.2 The judicial arm of government relies upon the legislative and executive arms of government for the resources necessary to fund the operations of the courts. This reliance cannot be eliminated. It nevertheless carries with it the inherent risk that he who pays the piper will call the tune. It is vital that this risk be reduced to the irreducible minimum.

Courts must therefore have the right to control their premises, facilities and staff. This is a necessary element of an independent judiciary. Otherwise, to take an extreme example, a government could hamstring the courts by removing staff and other support facilities. The Australian Bar Association agree with the Chief Justice of South Australia, who in an article entitled "Minimum Standards of Judicial Independence" published in (1984) 58 Australian Law Journal 340 at 341 said:

> It is essential that control of court buildings and facilities be vested exclusively in the judiciary. The court must have the right to exclusive possession of the building or part of the building in which it operates, and must have the power to exercise control over ingress and egress, to and from the building or part thereof. The court must have the power to determine the purposes to which various parts of the court building are to be put and the right to maintain and make alterations to the building. If a court is not invested with such rights of control over its buildings and facilities, its independence and its capacity to properly perform its function are impaired or threatened in a number of respects.

4.2.4 It is nevertheless appropriate here to make a general point. It is the duty of each court, within the limits of the resources and powers available to it, to dispose of its business as quickly and efficiently as is compatible with its primary duty: the dispensation of justice. In this context, the Australian Bar Association recognises that the involvement of government may be necessary if a particular problem is to be solved. Extreme care must be exercised in those cases to ensure that such involvement does not compromise judicial independence. It should never encroach upon the judicial functions of the court. It should never be initiated until the relevant Bar Association and Law Society have been consulted…

> 4.2.6 The right of a court to control its premises, facilities and staff should be entrenched by statute. It must then be a first priority of government, subject only to unavoidable budget constraints, to provide the courts with the necessary funds.
>
> 4.2.7 Without adequate funding, ostensible independence is reduced to a myth. The Australian Bar Association wishes to emphasise that a social order compatible with an advanced, civilised society is unattainable unless governments are prepared to provide the courts with the facilities required for the proper discharge of their duties. It follows that the number of judges must be adequate and that their support staff and facilities must be such as to enable them to work at their optimal level.

The *Beijing Statement of Principles of the Independence of the Judiciary* 1995 Articles 41 and 42 address the matter of judicial resources:

> It is essential that judges be provided with the resources necessary to enable them to perform their functions.
>
> Where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, the essential maintenance of the Rule of Law and the protection of human rights nevertheless require that the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources.

The Commonwealth (Latimer House) Principles on the Three Branches of Government provide that in order to ensure the existence of an independent, impartial, honest and competent judiciary that is integral to upholding the rule of law, engendering public confidence and dispensing justice:[5]

> Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought.

The Latimer House Guidelines for the Commonwealth reinforce the imperative for courts to be appropriately funded:[6]

> Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.

A working definition of "judicial independence" has been said to include a requirement that courts must be provided with adequate financial resources to fulfil their functions and the judiciary itself or a judiciary council must be solely responsible

[5] IV) Latimer House Principles.
[6] II) 2. Latimer House Guidelines.

for managing the judiciary's budget.[7] If established, a judiciary council should be composed primarily of judges and its powers and functions set out clearly in law.[8]

It is important to bear in mind that none of these international instruments represent "hard law" which refers to "agreements and rules of international law that impose precise and legally binding obligations on States".[9] However, the instruments constitute "soft law", which is the label given to "international agreements that are not formally binding or impose no clear or precise obligations on State parties, or to interpretative statements on treaties such as the general comments issued by the UN Human Rights Committee and the UN Committee on Economic Social and Cultural Rights, which carry no binding force".[10]

As noted in the report of the Canadian Judicial Council Project on Alternate Models of Court Administration, those instruments containing "soft law" requirements in relation to finance, budgeting and court administration:

> all recognise the importance of administrative autonomy and consider at least some aspects thereof to be requirements of judicial independence.[11]

The Report goes on to note:[12]

> The persuasive force of these international documents is recognised not only by international courts applying international law but also by Canadian courts applying domestic law, especially constitutional law. The Supreme Court [of Canada] actually refers to such documents when determining the content of the principle of judicial independence …The phenomenon is easily explained, since the reasons for defending and protecting judicial independence usually transcend domestic legal systems.

One may well inquire which, if any, of the Australian jurisdictions comply with the requirements of these international "soft law" instruments.

It is interesting to briefly consider whether there is any "hard law" in Australia that has identified or even suggested the existence of constitutional protections in relation to the funding and resourcing of the operations of courts. Ananian –Welsh and Williams have recently given consideration to this aspect of operational independence:[13]

---

[7] Briefing Paper 41 September 2013 "The International Standards for the Independence of the Judiciary" The Centre for Constitutional Transitions Democracy Reporting International written by Richard Stacey and Sujit Choudry, p 1.

[8] Briefing Paper 41 September 2013 n 7, p 1.

[9] Briefing Paper 41 September 2013 n 7, p 4.

[10] Briefing Paper 41 September 2013 n 7, p 4.

[11] Canadian Judicial Council Report n 3, pages 68 and 69.

[12] Canadian Judicial Council Report n 3, p 67.

[13] R Ananian –Welsh and G Williams "Judicial Independence From the Executive: A First Principles Review of the Australian Cases Monash University Law Review (Vol 40 No 3) 593 at 612 – 613.

> … there have been no cases that identify or even suggest constitutional protections for the operational independence of federal, state or territory courts. Indeed, it is difficult to envisage a scenario in which a court, or some person or organisation acting on its behalf, could litigate its own operational independence. That said, potential constitutional protections for operational independence exist in the separation of judicial power derived from Chapter III of the Constitution and in the *Kable* principle derived from that principle. These principles provide a basis for broad constitutional protection. They could conceivably be interpreted to prohibit executive interference in the practical functioning of courts where that interference would erode the fundamental values of judicial independence or integrity. Moreover, in a series of cases the High Court has stated that the defining and essential characteristics of federal, state and territory courts must be preserved. The court has recognised that an exhaustive list of these characteristics is neither possible nor desirable, but has indicated that any such list would include features such as independence and impartiality and the provisions of reasons for judicial decisions. It might be argued that these essential and defining characteristics of courts include practical necessities such as court funding and staff. On this basis, operational features of judicial independence might find constitutional protection.

This argument was alluded to by former High Court Chief Justice Robert French, who when dealing with the funding of courts in a constitutional framework, made reference to the following extract from the joint judgment of Gummow, Hayne and Crennan JJ in *Forge v Australian Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76:[14]

> …the relevant principle is one which hinges upon maintenance of the defining characteristic of a "court", or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to "institutional integrity" alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.

The Chief Justice then went on to say:[15]

> The consequence of these considerations for the funding of federal and state courts might be thought obvious. Whether by constitutional rule, implication or convention, courts have a fundamental and distinctive role to play as essential infrastructure of our representative democracy. They are not merely providers in a market for dispute resolution services.

Ananian –Welsh and Williams give further consideration to the funding aspects of operational independence as follows:[16]

---

[14] Chief Justice Robert French "Boundary Conditions: The Funding of Courts within a Constitutional Framework" (2009) 19 JJA 75 at 77.

[15] Chief Justice Robert French n 14 at 77.

[16] Ananian –Welsh and Williams n 13 at 613.

> On the other hand courts have traditionally been subject to significant direction as to their operation. This means that the mere regulation of court fees, funding or case management, for example, is unlikely to transgress constitutional limits. Considering the deferential position of courts to the executive – even in decisions such as court –restructuring as considered in *Quin* - only extreme threats to operational independence may do so. Perhaps, for example, a refusal to provide any funding to a court might prompt judicial consideration of constitutional principles to protect that court's operational independence. However, even in such an extreme case the law provides no means of compelling Parliament to appropriate the necessary moneys for this purpose.

Apart from the impressive and influential series of international soft law instruments which stress the imperative for courts to be adequately financed and resourced, a number of commentators have stressed the need for the judiciary to be properly funded and resourced to enable courts to perform their critical functions independently and impartially in a democratic society that adheres to the rule of law.

Justice Steven Rares, Immediate Past President of the Judicial Conference of Australia, points out that the "independence of the judiciary…involves a concomitant commitment by the other branches of government to provide sufficient resources, within the available means of the State, to the courts to enable them to perform their functions effectively".[17] His Honour goes on to explain that "it is the responsibility of Parliaments to provide sufficient funds to enable the courts to function appropriately"[18] and that "it is a fundamental obligation of the legislative branch to provide adequate fiscal support for the judicial branch…in terms of resources for the Courts as functioning institutions".[19]

Former Chief Justice King (of the Supreme Court of South Australia) put it thus:[20]

> It is the law minister's function to demand of Cabinet that adequate resources be provided and to explain publicly why an adequately performing judicial system is so fundamental to society that financial pruning must never be allowed to impair its ability to deliver prompt and effective justice.

In order to put these observations in proper perspective, it is necessary to explain that the process by which courts are publicly funded involves an interaction between the executive and legislative branches of government. As the Hon Justice Susan Kiefel (now the Chief Justice of the High Court) has stated, the reality is that the courts will always remain dependent on the executive for judicial funding and court

[17] Justice S Rares "What is a Quality Judiciary?" (FCA) [2010] FedLSchol 44 at [16].
[18] Justice Rares, n 17 at [22].
[19] Justice Rares n 17 at [24].
[20] L J King "The Attorney General, Politics and the Judiciary" (2000) 74 ALJ 444 at 454 cited by E Campbell and HP Lee *The Australian Judiciary*, pp 61-62.

resources and there always will need to be interaction between the executive and the judiciary in that sphere.[21]

After noting that "the ability of courts to perform their functions efficiently is dependent on adequate public funding" Campbell and Lee says:[22]

> This requires the involvement of the executive arm of government in determining the number of judicial officers to be appointed and the amount of funds to be allocated to the court system. This in turn requires the Parliament to pass the necessary legislation to appropriate public money.
>
> There cannot be expenditure of public money without parliamentary authorisation.

A necessary incident of the Westminster system is that it leaves the judiciary having to rely "on the goodwill of the legislature for its resources"[23] – as well as the goodwill of the executive branch of government.

Inadequate funding and resourcing of the courts by the other branches of government has implications for the rule of law. Former Chief Justices Sir Gerald Brennan AC and the Hon Robert French AC have made it abundantly clear that courts "cannot trim their functions" and are obliged to hear and determine all cases brought before them within their jurisdiction.[24] Both Chief Justices emphasise that "if the Courts could not hear cases because of lack of resources, the rule of law would be immediately imperilled".[25] It would seem to follow that if courts cannot hear and determine cases properly, then the rule of law is equally at risk.

However, the rule of law is not the only thing that is at stake. Campbell and Lee point out that reliance by the courts on the two other branches of government for their funding has implications for the independence of the judiciary.[26] However, the authors stress the need to consider these potential dangers from a balanced perspective in the way that Professor Stephen Parker has:[27]

> The power to decide a court's budget has some potential to be used to undermine judicial independence because declining resources and working conditions are bound to concern dedicated professional people. Similarly, the failure to increase the number of judges proportionate to the increase in workload can make the judges of a court, collectively, supplicants to government…

[21] The Hon Justice Susan Kiefel "Judicial Independence" North Queensland Law Association Conference May 2008, p 1.
[22] Campbell and Lee n 20, p 61.
[23] Campbell and Lee n 20, p 62.
[24] The Hon Sir Gerald Brennan AC "The State of the Judicature " (1997) 72 ALJ at 35; The Hon Robert French AC " The State of the Australian Judicature" (2010) 84 ALJ 310 at 317-318 cited by Justice Rares n 17 at [23].
[25] Justice Rares n 17 at [24].
[26] Campbell and Lee n 20, p 61.
[27] S Parker "The Independence of the Judiciary" in B Opeskin and F Wheeler (eds) *The Australian Federal Judicial System* 80, cited by Campbell and Lee n 20, p 61.

> It may be reprehensible to refuse to appoint more judges because a government does not like the decisions of a court or the behaviour of the Chief Justice. However, refusing to appoint more judges because the work practices of the court are thought to be inefficient might be supportable on the facts.

As pointed out by Campbell and Lee, the latter may not be an unreasonable position for the other branches of government to take, as "parliamentarians are entitled to take an interest in the day- to- day workings of the court" – for after all "the courts are funded by annual parliamentary appropriations, and expenditures from public funds must be accounted for".[28]

Inadequate funding and resourcing of courts by the executive and legislative branches of government can have a serious impact upon adjudicatory independence and the ability of courts to act consistently with the principles of justice as "politicians and bureaucrats could use their control over the necessities of judicial life to pressure courts into rendering particular kinds of decisions";[29] and "excessive judicial dependence of the executive in the operation of the courts may have a deleterious impact on the courts to provide a high standard of substantive justice".[30]

Many years ago, former Chief Justice David Malcolm pointed out the consequences of the under-funding of courts:[31]

> The provision of court infrastructure, things as basic as office space, filing cabinets and typewriters or personal computers, is an important part of the efficient and effective administration of justice. The inadequacy of funding, resulting in under-staffing or the lack of court facilities may be at the root of problems such as delays in bringing matters to trial. The result may be a consequent loss of public confidence in the legal system as a whole.[32] There is little point in the judiciary developing and implementing an effective case management system unless they are provided with the administrative resources to operate the system.

WHY THE LOWER COURTS NEED TO BE ADEQUATELY FUNDED AND RESOURCED

While all courts need to be adequately funded and resourced, this need is paramount in the lower courts.

The lower courts deal with the great majority of cases coming before the various courts in the States and Territories. These courts are "the undervalued work –

[28] Campbell and Lee n 20, p 241.
[29] T W Church and P A Sallman" Governing Australia's Courts", p 9.
[30] Church and Sallman n 29, p 9.
[31] Chief Justice Malcolm "Judicial Independence" International Society for the Reform of the Criminal Law 15th International Conference, Canberra, 28 August 2001 pp 12-13.
[32] Justice Nicholson "Judicial Independence and Accountability. Can They Co-Exist?" (1993) 67 ALJ 423.

horse"[33] of the judiciary or put another way, the "engine house" of the judiciary. The judicial workload of the lower courts – and their outputs – alone are sufficient to argue the case for proper funding and resources.

Although the lower courts are courts of limited jurisdiction, new legislation – of which there has been a proliferation in recent times – is often directed at the exercise of that jurisdiction, and has its greatest impact on the lower courts in terms of judicial workload and labour intensity.[34] This increases the need for the lower courts to be adequately funded and resourced.

The lower courts are the first and often only point of contact that members of the public have with the judicial system.[35] Being at the base of the judicial hierarchy, the lower courts are "the shop front" of the judiciary: they operate at the coalface of the judicial system.

Former Chief Magistrate of Victoria, Ian Gray, fittingly referred to the Magistrates Court as the "People's Court":[36]

> …there is a unique, robust and close connection between the Magistrate and the people – all of those in the passing parade of humanity through the Court. There is a particular appeal for me in the immediacy of the eyeball to eyeball justice that we do as Magistrates. We preside over a "court of the people".[37]
>
> The People's Court is many things. It is a "modern" court of justice; it is accessible, procedurally straightforward rather than technical and complicated, a court of high professional standards, and increasingly a court where there is a structure of supports and services for offenders, victims and witnesses. It is, at least in the major urban centres, a court with an ever increasing use of such things as video conferencing and various information technology and support systems.
>
> Above all it is the Court to which people come – hundreds of thousands of them each year across Australia, where summary justice is done, day in day out in a huge variety of cases, where we come face to face with ordinary people and their ordinary and extraordinary problems. It is the Court where we are daily exposed to the richness, the sadness and the complexity of the human condition.

First impressions and perceptions of the judicial system – as well as the justice system - are formed at the level of the community's interaction with the lower courts.

---

[33] J Willis "The Magistracy: The Undervalued Work Horse of the Court System" Law in Context, p 134.

[34] Dr John Lowndes "Judicial Independence and Accountability at the Coalface of the Australian Judiciary", a paper presented at the Northern Territory Bar Association Conference in Dili, East Timor, July 2016, p 29.

[35] Lowndes n 34, p 29.

[36] Former Chief Magistrate Ian Gray "The People's Court – Into the Future" 12th AIJA oration in Judicial Administration Queensland 2002, p 1.

[37] Willis n 33, pp 134-136.

It is essential that the People's Court embrace and reflect the core values of a court:[38]

- equality before the law;
- fairness;
- impartiality;
- independence of decision-making;
- competence;
- integrity;
- transparency;
- accessibility;
- timeliness;
- certainty.

As recognised by the International Framework for Court Excellence (IFCE), "these core values guarantee due process and equal protection of the law to all those who have business before the courts".[39] The adoption of these core values also helps to ensure courts are able to "deliver the quality court services essential to fulfilling their critical role and functions in society".[40] This is no truer than in the People's Court, where the emphasis should be on developing a fair, accessible and efficient judicial system that "creates positive relations among citizens and between the individual and the State".[41]

There is a direct relationship between the need for all courts to be adequately funded and resourced and the *International Framework for Court Excellence* (IFCE) due to its focus on the quality of justice delivered by courts. The IFCE implicitly recognises that courts must be adequately funded and resourced to ensure that, as a key public institution, they are able to "deliver the quality services essential to fulfilling their critical role and functions in society".[42]

[38] "The International Framework of Court Excellence" (IFCE) section 2.
[39] IFCE Section 2.
[40] IFCE Section 2.
[41] IFCE Section 1.2.
[42] IFCE Section 2.1.

While the IFCE emphasises that "excellent courts manage all available resources properly, effectively and proactively", it reflects the flipside that "excellent courts have sufficient material resources to fulfil their objectives and carefully manage and maintain these resources".[43] As pointed out in the Framework:

> Poor quality of courtrooms, inadequate buildings, a lack of office space for judges, court staff and court records, inadequate office material and equipment, including computers, will have a negative effect on the court's performance and the quality of the service delivered.[44]

The IFCE stresses the importance of effective financial management in the sphere of court administration: [45]

> Sound and proactive management of financial resources requires effective budgeting, fiscal management and independent auditing of accounts. Courts need to ensure they have adequate financial and management expertise, appropriate court facilities and office space, and where appropriate, technology for a proper functioning of a court.

However, all of this requires that courts be adequately funded and resourced in the first place and continue to be supported by the financial, material and human resources that are necessary to enable them to function properly, and to improve their performance by using the important analytical tools provided by the IFCE. This tool cannot be put to full and effective use by a court which is running on the sniff of an oily rag. Though, that said, the IFCE has the potential to provide an under-funded and under-resourced court with an argument for greater funding and resources.

The core values of a court are either concerned with the quality of justice that is delivered or with the efficiency and effectiveness of the court. As stated by Chief Justice Wayne Martin, the level of resources available to support the judiciary in terms of personal staff, research facilities, clerical and administrative support will obviously affect the quality and efficiency of the justice provided by the court.[46] In most courts "decisions will have to be made as to the allocation of limited resources between competing areas of court operations"; and if the court is to "achieve its fundamental objectives the choice between competing priorities must be made by close collaboration between the judiciary and administration".[47] The importance of the lower courts being adequately funded and resourced cannot be overstated. Without sufficient resources – human, material and financial – the lower courts cannot deliver quality justice and function as an efficient and effective public institution at the "grass-roots" level.

---

[43] IFCE Section 3.1.3.
[44] IFCE Section 3.1.3,
[45] IFCE Section 3.1.3.
[46] Chief Justice Martin "Court Administrators and the Judiciary – Partners in the Delivery of Justice" (2014) International Journal for Court Administration" Vol 6 No 2, p 16.
[47] Chief Justice Martin n 46, p 16.

As noted by Justice Smith, "community confidence in the court system is critical to acceptance of the rule of law", and that confidence not only depends upon "the reality and appearance of individual and institutional independence and impartiality of the courts", but also on "the accessibility of the courts and the efficiency and quality of the work done by judicial officers" – those latter aspects in turn being dependent upon "adequate resourcing of the courts".[48]

The need for the lower courts to be adequately funded and resourced is also supported by the fact that the lower courts have traditionally had a "greater awareness and responsiveness to the concerns and needs of the community".[49] As pointed out by Willis, the lower courts have historically been "more responsive to changing needs, new pressures and new demands placed on them" than the higher courts, and have been innovative in a number of ways, as well as being renown for their efficiency and vitality.[50] Therefore, they have been, and continue to be, appropriate forums for implementing therapeutic or restorative, or more novel approaches to the administration of justice. As elegantly put by Willis, "the magistracy should not be removed from the 'people' and be limited in its capacity to deal sensibly and innovatively with new and difficult challenges".[51]

Governments around Australia should be capitalising on the traditional ability of the lower courts to be responsive to the needs of the community and their innovative approaches to the administration of justice by supporting the establishment of problem-solving or solution-based courts within the structure of the lower courts. Governments should be optimising their use of the lower courts as willing participants in developing problem-solving or solution-based courts based on the principles of therapeutic jurisprudence and facilitating the mainstreaming of the techniques of therapeutic jurisprudence throughout the justice system.

Needless to say these initiatives are not possible without a deep and continuing commitment on the part of governments to provide the necessary material, human and financial resources.

As pointed out by Bartels, "many problem-oriented approaches are resource intensive, requiring specialised staff, money and access to medical, social and other services",[52] and these resources have obvious and significant cost implications".[53] In particular, court intervention programs applying the principles of therapeutic jurisprudence are a direct response to "assembly line" justice, or what has been

[48] Justice T Smith "Court Governance and the Executive Model" a paper delivered at the Judicial Conference of Australia Colloquium Canberra 2006, p 17.
[49] Willis n 33, p 134.
[50] Willis n 33, p 129.
[51] Willis n 33, p 158.
[52] L Bartels "Challenges in Mainstreaming Speciality Courts" Trends & Issues in Crime and Criminal Justice No 383, Canberra , Australian Institute of Criminology October 2009, p 3.
[53] Bartels n 52, p 3.

described in the USA as "McJustice".[54] Consequently, these programs tend to be more labour intensive, adding to the time that judicial officers spend on individual cases, which necessarily adds to court time. This has the potential to require more judicial resources. That is why research needs to conducted to examine the time taken to deal with defendants when adopting a more problem oriented approach to justice and the court time required for a range of court intervention programs.[55] However, as stressed by Bartels, the research needs to be more broadly based and needs to consider the impact on the resources of the criminal justice system as a whole. [56] Such research needs to be adequately funded.

The overall benefits and cost effectiveness of such programs needs to be considered. As noted by Bartels, "if court interventions can be shown to be effective in reducing recidivism and promoting well-being, including health and employment, costs are likely to be saved in areas of government expenditure".[57] The Law Reform Commission of Western Australia made the following observation about the cost effectiveness of problem solving courts: [58]

> Successful court intervention programs will result in cost savings to other areas, for example savings to the health system from reductions in drug/alcohol use and mental health problems and savings to the welfare system because of increased employment.

Speciality court programs may be effective in other ways. For example, "greater judicial involvement in defendant case management may ultimately promote efficiency in the administration of justice", thereby saving "time and money in other aspects of the justice system", and "more effective case management may serve to counteract some of the additional burdens on court time which problem-oriented approaches necessarily require".[59]

Although Australian governments from time to time have supported such initiatives in the lower courts, many have operated on an ad hoc basis with limited and non-recurrent funding.[60] Furthermore, the programs have not been properly and consistently funded and resourced for sufficiently lengthy periods of time to evaluate their effectiveness - and hence come and go with the change of governments or even within the term of a single government. It is a must that interventionist programs be independently and properly evaluated and that exercise be factored into the funding process.[61] As Dr Cannon rightly observes:[62]

---

[54] Law Reform Commission of Western Australia on "Problem –Oriented Courts" 2008, p7.

[55] Bartels n 52, p 3.

[56] Bartels n 52, p 3.

[57] Bartels n 52, p 3.

[58] Law Reform Commission of Western Australia n 54.

[59] Bartels n 52, p 4.

[60] Bartels n 52, p 5.

[61] Bartels n 52, p 3. The author stresses the importance of sufficient funding being provided to enable appropriate data collection for the purposes of evaluating programs and to undertake well designed studies that employ comparable control groups and accurately identify "genuine program effects" – and which "measure appropriate outcomes to determine the cost effectiveness of speciality court programs". See also A

> Specialist courts should be subject to regular independent research- this is essential for honest performance evaluation and even more important to maintain and augment budgets.
>
> Feeling good about our work will not convince Treasury departments of anything. How much additional cost do we spend on each defendant, and how much prison time and community cost by reducing recidivism does that expense save. Given the cost of keeping a prisoner in a high security prison, I believe an honest appraisal of TJ will prove it be cost effective. Only that will ensure it is adequately resourced.

One cannot overstate the need for the lower courts to have a "cohesive policy on the future of problem oriented justice"[63] and to develop a strategic plan in relation to the introduction of specialty court programs over the medium to the long term. However, policy development and strategic planning of this sort requires a deep and continuing commitment on the part of governments to provide the necessary material, human and financial resources. In that regard, the recent submission made by the Federal Court of Australia to the Australian Department of Foreign Affairs and Trade in relation to the Foreign Policy Paper 2017 – stressing the need to ensure that programs are allocated sufficient time and funding to produce and measure impacts - strikes the right chord:[64]

> Due to the complexities inherent in development, short term or piecemeal projects are ineffective in delivering tangible and sustainable outcomes. Long term strategic plans need to be developed and delivered, which are capable of evolving as capacity is built and mid-term goals are realised. Enabling the development of strategic projects over the medium to long term (5-15 years) will allow for generational change, the growth of capacity and the empowerment of actors to manage and guide their own development. Delivering support over longer timeframes enables learning and behavioural change to be embedded and consequent beneficial changes within society to be felt and measured. It also needs to be recognised that some projects will yield beneficial outcomes which are either not readily measurable or which are measurable only well beyond the life of a particular project. For example, behaviours in conformity with Latimer Principles may already be present but their resilience may be fragile and the acceptance of the promoted value of adherence to them vindicated by events and behaviours which occur many years after the life of a given project.

Although the lower courts are generalist courts exercising a very broad jurisdiction - with some exercising the jurisdiction of an intermediate district/county court – there is

---

Cannon "Therapeutic Jurisprudence in the Magistrates' Court: Some Issues of Practice and Principle" (2007) 16 JJA 256 at 259.

[62] Dr Cannon n 61 at 259.

[63] Bartels n 52, p 5.

[64] Page 3 of the submission.

an increasing trend towards specialisation in the lower courts.[65] However, specialisation does not come cheap, and must be adequately funded and resourced.

A prime and contemporary example of this trend towards specialisation is the establishment of specialised family violence courts which are being established across the nation as a part of a national response to family violence.[66] This response, which has received considerable funding, recognises that in the long run the efficiency gains through specialisation may produce better outcomes that result in substantial savings elsewhere in the system.[67] It also recognises the following values inherent in specialised family violence courts:[68]

- greater integration, co-ordination and efficiency in the management of cases through identification and clustering of cases into a dedicated list case tracking inter – agency collaboration and referral of victims and offenders to services;

- greater consistency in the handling of family violence cases both within and across legal jurisdictions;

- greater efficiency in court processes;

- development of best practice through the improvement of procedural measures in response to regular feedback from court users and other agencies;

- better outcomes in terms of victim satisfaction, improvement in response of the legal system (better rates of reporting, prosecution, convictions and sentencing), better victim safety and potentially changes in offender behaviour.

However there are wider reasons why the lower courts - as the most innovative and resourceful tier of the judiciary - need to be adequately funded and resourced in relation to speciality court programs that apply the principles of therapeutic jurisprudence.

These reasons are linked to the aspirations of excellence espoused by the International Framework for Court Excellence (IFCE) and the complementary relationship between the IFCE and the principles of therapeutic justice.

---

[65] Indeed s 21(3) of the Local Court Act (NT) requires the Chief Judge in assigning a Judge to deal with matters in a particular division of the Court to have regard to the Judge's expertise in relation to matters dealt with in that division.

[66] Family Violence – A National Legal Response (ALRC Final Report 114) 11 November 2010.

[67] ALRC Final Report n 66 at [32.11].

[68] ALRC Final Report n 66 at [32.23].

As pointed out by Richardson, Spencer and Wexler, therapeutic justice is a broad field of interdisciplinary discourse – involving the study of law as a therapeutic agent - which is consistent with the IFCE.[69] The two are complementary in that both are directed at improving legal systems, laws and legal processes.[70] Both promote innovation and reform "with the aim of creating excellent courts and tribunals that are fair, efficient, effective, impartial, and that enable access to justice for their users".[71] They are ideal partners in a perfect partnership.

However, the authors identify "the promotion of well-being" as another goal that excellent courts should ideally strive for; and say this can be achieved using therapeutic jurisprudence and the IFCE.[72] The authors point out that:[73]

> TJ and the Framework each have something to offer the other: the Framework offers TJ, among other things, a tool which can be used to mainstream principles and practices of TJ into courts, including the problem-solving courts (or problem-oriented) or solution-focused courts as they are often referred to in Australia and New Zealand operating within them.

The authors also argue that the IFCE will "add rigour to the ongoing assessment and reform of problem-solving courts by incorporating them into the overall self-assessment process that courts undertake in implementing the Framework", and thereby provide the Framework with "an additional dimension that has the potential to further improve the experience of court users and promote well-being".[74] The IFCE and therapeutic jurisprudence provide the analytical tools by which the courts can promote the well-being of individuals and the community.[75]

The lower courts are the courts where this intersection between therapeutic jurisprudence and the Framework and the enhancement of well-being is most likely to unfold. The promotion of well-being is a worthwhile goal, for as the authors point out the Productivity Commission in Australia has recently concluded in its 2014 Report on *Access to Justice Arrangements* that "the overriding objective of any civil justice system (and by analogy any criminal justice system) is to enhance community well-being or quality of life".[76] With an increasing emphasis on "the relationship between a well-functioning justice system and the well-being of individuals and the community",[77] the lower courts need to be adequately funded and resourced to

---

[69] E Richardson, P Spencer and D Wexler "The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Well-Being" (2016) 25 Journal of Judicial Administration 148.

[70] Richardson, Spencer and Wexler n 69 at 148.

[71] Richardson, Spencer and Wexler n 69 at 148.

[72] Richardson, Spencer and Wexler n 69 at 148.

[73] Richardson, Spencer and Wexler n 69 at 148 – 149.

[74] Richardson, Spencer and Wexler n 69 at 149.

[75] Richardson, Spencer and Wexler n 69 at 149.

[76] Richardson, Spencer and Wexler n 69 at 149 citing Productivity Commission of Australia, *Access to Justice Arrangements: Productivity Commission Inquiry Report Vol 1* (Cth 2014), p 3.

[77] Richardson, Spencer and Wexler n 69 at 149 citing Productivity Commission of Australia, *Access to Justice Arrangements: Productivity Commission Inquiry Report Vol 1* (Cth 2014), p 6.

promote community well-being through the medium of therapeutic justice and the IFCE.

A powerful example of the growing emphasis on "the role of justice systems to improve the well-being of individuals and the communities that justice systems serve"[78] - and a natural extension of the principles of therapeutic jurisprudence - is the Charter for Sustainable Justice.

The Charter for Sustainable Justice is a document co-produced by Alexander F De Savornin Lohman (former legal attorney, Rotterrdam-Utrecht, the Netherlands) and Jaap Van Straalen (entrepreneur and editor, Amsterdam, the Netherlands) and written in close co-operation with Dr Andrew Cannon (Deputy Chief Magistrate in South Australia and Professor of law at Flinders University). The Charter is written as a brief, clear and sound basis for the sustainability movement[79] describing basic principles of socially sustainable justice.[80]

The concept of sustainable justice, which underpins the Charter, has been described in these terms:[81]

> To understand the concept of sustainable justice one should realise that justice is a power institution and that deployment of power causes harm if it is not consciously managed so that any deployment of power will lead to effects that support sustainable interests of society. We know from natural sources of power, like water, electricity or gas that if a dike, a cable or a pipe breaks down we get a flood, a shock, a fire or an explosion. We know as well that advanced technology enables us to achieve unprecedented results with the least use of power. These principles are seamlessly applicable to judicial power. However, men have created judicial power, but neglected to develop a solid system of dikes/isolation/pipes, with advanced technology to secure that the best results would be achieved with the least use of judicial power, and to prevent that deployed power will cause unnecessary harm, to litigants, to the litigants' social networks, and to society as a whole.
>
> Values derived from the sustainability movement are excellent agents for making justice more effective and constructive to society. No other criteria are more to the point and appropriate to justice. No other criteria get deeper insights in the effects of the justice system on the quality of life in society. For that reason it is appropriate to work out a concept of Sustainable Justice in a Sustainable Justice Charter.
>
> Conflicts are symptoms that harmony in someone's social network is impaired. No doubt that it will be anyone's interest that the quality of his social network will be restored sustainably in the shortest possible time. From the perspective of social sustainability conflict resolution is therefore: restoring balance and harmony in relationships.

[78] Richardson, Spencer and Wexler n 69 at 148 (Abstract).

[79] The sustainability movement is one of the most influential trends in law and justice of the 21st century.

[80] A copy of the full text of the Charter is attached to this paper.

[81] The Center for Sustainable Justice, which can be accessed at sustainablejustice.org

> Justice is deployment of power. Courts are power institutes. Judges are the main distributors of judicial power. In a democracy judicial power is attributed to courts by the people and for the benefit of society. From the perspective of social sustainability, and from the general rule of law perspective, civilians may expect that judicial power will be deployed in ways that are beneficial to society and beneficial for their general well – being. Therefore, courts should be transparent towards civilians about their value for society, the beneficial effect that court activities have on the quality of social life and social well-being.
>
> Conflicts are dynamic phenomena, rooted in the emotional world. They grow when upcoming relevant emotions in a relationship are not shared. If they would be shared the relationship would change. If not, they crop up and become the source of conflict that will be acted out in a variety of issues and disputes in the material world.
>
> Conflicts, and the dynamic of conflict, should be observed as normal phenomena in human life. They are related to stagnation in development of human consciousness by free human will. Consciousness development is fundamental to human being. It is what human beings discern from all other living beings on the earth, plants and animals. They unconsciously develop habits, and follow many habits of others. But human beings are always free to change habits. Feelings and emotions are the driving forces for this change. The human mind and intuition are the human agents to direct and change human behaviour. Unlike plants and animals, human beings are rational beings, having a free will. They are always able to use their free will to get a better life. Except during sleep or phases of unconsciousness there is no moment that human beings are not developing consciousness about their lives, and the way that they prefer to live. Conflicts cause stagnation in this continuing and "organic" process of consciousness development by free will.
>
> Conflicts are changing continuously. Everything that occurs or happens in relationship to it, is changing it. They escalate, or de-escalate. Conflicts grow when sharing of emotions are blocked; they shrink when emotions are shared. Therefore, rational arguments generally cause escalation of conflicts. Contrarily, sharing emotions, personal stories and perceptions, including being listened to (as that is an essential aspect of sharing), have a de-escalating effect. Sharing of emotions and personal stories transform relationships and creates room for other behaviour of either side. It helps overcoming the cause of stagnation of consciousness development by free will, and thereby resolving the underlying conflict.

Turning to the actual Charter, this is a document that actively promotes the values of social sustainability in law and justice, and which emphasises the fact that courts and judicial officers can function more constructively and effectively by including values of social sustainability in their focus:[82]

> Courts can achieve outcomes that improve inter-humane relationships and social networks rather than risking to worsen them; they can contribute substantially to general social well –being by adopting socially sustainable values.

[82] Center for Sustainable Justice n 81.

In common law countries, including Australia and New Zealand, there are many examples of developments towards sustainable justice, whereby courts and their judicial officers use judicial power to solve problems by "starting at its roots".[83] This approach is designed to improve "relations between those who are directly involved and society as a whole" and to arrive at "sustainable solutions" which result in "greater effectivity of justice done".[84] These innovative developments include:[85]

- community courts;
- drug courts;
- problem solving courts;
- integrated family courts;
- intercultural courts;
- judicial mediation;
- restorative justice;
- therapeutic justice.

It is no coincidence that all of these developments towards sustainable justice have originated in the lower courts for the reasons given earlier. There are very sound public policy reasons why these initiatives need to be supported by governments around Australia. The lower courts need to be adequately funded and resourced to support the opportunities for the justice system and its judicial officers via these courts to achieve socially sustainable outcomes.

A recent article by Bookman[86], addressing the engagement of the judiciary with the community, provides added justification for ensuring the lower courts are adequately funded and resourced.

The author argues that "community engagement is an ethical obligation incumbent upon the judiciary as an institution".[87] Courts need to engage the communities they serve; and that could be no truer than with the People's Court.

[83] Center for Sustainable Justice n 76.
[84] Center for Sustainable Justice n 76.
[85] Center for Sustainable Justice n76.
[86] S Bookman "Judges and Community Engagement: An Institutional Obligation" (2016) 26JJA 3.

Bookman defines "community engagement" as follows: [88]

> A relationship between judges and their local communities, whereby each party imparts information to, and learns from, the other. This relationship may take many forms, but its ultimate objective is to promote the understanding of each party to the other.

The author identifies seven essential principles that must underpin any process of engagement with the community:[89]

- community engagement as an ethical obligation incumbent upon the judiciary;
- two-way engagement;
- engagement with a broad range of groups;
- long-term planning at the local level;
- general oversight by the Head of Bench and adherence to ethical guidelines;
- adequate provision of resources; and
- incorporation of community engagement into judicial education.

Community engagement is something that excellent courts aspire to. Consistent with the IFCE, community engagement not only bolsters public trust and confidence in the judiciary, but more fundamentally "improves the functioning of the justice system as a whole".[90] As the lower courts (the People's Courts) deal with the greatest volume of work coming before the courts, and being the first point of contact that most people have with the judicial system, it is imperative that there be an exchange of information between the courts and their local communities – via a process of community engagement. Public trust and confidence in the lower courts depends upon community engagement. The proper functioning of these courts also depends upon community engagement.

However, as Bookman points out, community engagement is not cost-free:[91]

> In order for a community engagement program to be successful it must be appropriately resourced. Resourcing may include rostered time, professional support and some limited material resources (such as the provision of appropriate venues). This includes the provision of online resources. Members of the community depend on the internet as a source

[87] Bookman n 86 at 3 (Abstract).
[88] Bookman n 86 at 5.
[89] Bookman n 86 at 4, 16-18.
[90] Bookman n 86 at 9.
[91] Bookman n 86 at 18.

of information and engagement. Online resources must meet community expectations by being of high standard and regularly updated.

Professional expertise is of particular importance. Effective engagement requires communications and pedagogical advice. As Elias CJ has observed, community engagement must involve more than simply repeating constitutional concepts such as "some sort of charm against an evil empire".[92] Particularly in educational settings, such as schools, creative and informed pedagogies will be vital.

LACK OF ADEQUATE FUNDING AND RESOURCES IN THE LOWER COURTS

Despite the importance of providing the lower courts with adequate funding and resources these courts tend to be under-funded and under-resourced as a result of the administrative relationship between the judiciary and the executive branch of government which exists in New South Wales, Queensland, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory.[93] In those jurisdictions the traditional departmental (executive) model of court administration prevails. This model of court governance is incapable of ensuring that the lower courts (as well as the intermediate or superior courts) are always provided with an adequate level of funding and resources in order to properly perform their functions. The fundamental problem with the executive model is that the judiciary has little, if no, input into the allocation of public monies to the courts, and lacks control over the way in which funds granted to the courts are expended. The executive model can leave the lower courts bereft of necessary funding and resources, resulting in these courts running on the sniff of an oily rag.

The executive model of court administration has the following constituent elements:[94]

> … court services are provided by a "generalist executive department" [such as the Department of the Attorney General of a State or Territory] which is responsible for a variety of justice and justice-related services.[95] The traditional model treats court employees as public servants who are employed by the executive arm of government. Those employees are accountable to the executive government through a chief executive officer. Byron describes the working relationship between the judiciary (which includes the magistracy) and these organisations in these terms:
>
> > The courts' divisions of these organisations work in consultation with the judiciary in matters of court administration. The administrative authority of the judiciary in these circumstances is obtained in part by legislation, but in

[92] S Elias "The Next Revisit: Judicial Independence Seven Years On" (2004) 10 Cant L.Rev 271 at 221.

[93] It should be noted that this administrative relationship also exists in relation to the superior courts in these jurisdictions.

[94] J Lowndes "The Australian Magistracy: From Justices of the Peace to Judges and Beyond" (2000) ALJ 592 at 602.

[95] G Byron "Court Governance: The Owl and the Bureaucrat" (1999) 8 JJA 142 at 150.

> the main by means of convention, co-operative effort, negotiation and structural devices and arrangements.[96]

A number of shortcomings with the executive model of court administration have been identified, which clearly explain why the lower courts are often under-funded and under-resourced.

First, the judiciary has limited responsibility for the court services and has no formal power over them.[97]

Secondly, the allocation of public money is undertaken by public servants who may have totally different priorities to those of the judiciary.[98]

Thirdly, in "mega-departments", which are the hallmark of the executive model, the judiciary is left to deal with subordinates in the administrative hierarchy – and not the executive head or heads of the generalist executive department.[99] Alford, Gustavson and Williams point out that the lack of the judiciary's control over necessary resources under the executive model is underpinned by:

> the enlargement of the organisational distance between the courts and the budgetary decision-makers, largely as a result of "mega-departments". Court administrative units find themselves two or three layers down from the levels at which direct input to the key budget decision-makers is possible. Consequently the judicial arm of government does not deal as an equal with the Executive arm over these crucial resource-allocation decisions, but rather with the latter's hierarchical subordinates.

Fourthly, this structure results in the court lacking an adequate say at two stages of the budgetary process. First, the judiciary has no direct input at the point where government as a whole determines the budget for each of its agencies and programs. Secondly, the judiciary lacks authority over the management of finances within programs once they have been allocated, and indeed sometimes finds out after the fact that monies have been reallocated without consultation.[100] This leads to financial uncertainty and unpredictability which do not provide a sound basis for the proper funding and resourcing of courts.

As highlighted by Justice Smith, the fundamental difficulty with the executive model of court governance in terms of its ability to provide the judiciary with adequate funding and resources to allow courts to perform their function in society is that courts are "mere entities within entities in partnership with other entities" and "indistinguishable from any other entities", rather than as the third arm of

[96] Byron n 95 at 150.
[97] Justice Moore "Judicial Independence: Breaking Free from the Executive Branch", p 5.
[98] Justice Moore n 97, p 5.
[99] Justice Moore n 97, p 6.
[100] Alford Gustavson and Williams "The Governance of Australia's Courts: A Managerial Perspective" AIJA 2004, p 85.

government.[101] The executive model diminishes the status and role of the judiciary as the third independent branch of government:[102]

> So long as the courts are a part of a mega-department, the executive culture will always be one in which the courts are seen as minor units and not the independent third arm of government.

As Justice Smith has stated, detailed executive control of the budgeting process is likely to "adversely affect the performance of courts because of the insufficient and inappropriate resourcing and inefficiencies in administration".[103] The reality under the executive model, is that it is:[104]

> the government that controls each line of expenditure and change from the historic expenditure and the provisions of additional funds and resources will only occur if it will advance the immediate political agenda of the particular time.

According to Alford, Gustavson and Williams the executive model is problematic for judicial independence:[105]

> Judicial independence has the potential to be compromised by the lack of control that courts under the traditional model have over the money, staff and infrastructure they need to carry out their work. This is especially noticeable in respect of court finance. At its most basic, it means that decisions about the allocation of money are made by public servants whose priorities diverge from those of judicial officers. Judges consequently find that in some cases they cannot do some of the things they need to do in order to act consistently with the principles of justice such as obtain a transcript quickly or go on circuit to deal urgently with a bail case.

Church and Sallman have drawn attention to the possible impact of the judiciary's lack of administrative independence (under the executive model) on adjudicatory independence:[106]

> Judges concerned with the lack of administrative independence in Australia frequently draw links between adjudicatory and administrative independence, arguing that without the latter the former is put at risk. They point out the potential dangers to adjudicatory independence in a court system administered by the executive branch of government – dependent upon the executive for nearly all their administrative needs, from staffing and financing the courts, to providing equipment and supplies to maintaining the very court buildings in which justice is dispensed… and the ultimate concern is that politicians and

[101] Justice Smith "Court Governance and the Executive Model", Judicial Conference of Australia Colloquium Canberra 2006 cited by Justice Moore n 97, p 7.
[102] Justice Smith n 101 cited by Justice Moore n 97, p 7.
[103] Justice Smith n 101, p 19.
[104] Justice Smith n 101, p 19.
[105] Alford, Gustavson and Williams n 100, p 85.
[106] T.W Church and P.A Sallman "Governing Australia's Courts" AIJA 1991, pp 8-9.

> bureaucrats could use their control over the necessities of judicial life to pressure courts into rendering particular kinds of decisions. Of more practical day –to - day concern is that excessive judicial dependence on the executive in the operation of the courts may have a deleterious impact on the ability of the courts to provide a high standard of substantive justice.

The authors question the extent to which the traditional executive model in fact compromises judicial independence:[107]

> Those who argue that administrative independence is a prerequisite for adjudicatory independence of the courts often fail to explain how the judiciary in Westminster systems around the world (including Australia) have managed to maintain independence over a long period of time, despite excessive executive administration of the courts. Further, it is frequently overlooked that courts necessarily rely on the political branches of government for both funding and organisational and jurisdictional arrangements, whatever system of court administration is in operation. It is arguable that this almost inherent dependence of the branch of government possessing "neither the sword nor the purse"[108] is a far more potent threat to its independence than the fact of judicial administration being conducted by officials of the executive branch…
>
> For these reasons, it is not immediately clear to us why executive administration of the courts adds much more of a threat to adjudicatory independence than the already unavoidable dependence of courts and judiciary on the political branches of government for their financial and organisational support.

However, Church and Sallman accept that "the absence of overt threats to courts and judicial officers does not necessarily indicate that adjudicatory independence is in a healthy state".[109] The authors go on to say:[110]

> A judiciary that is accustomed to depending on the executive and legislative branches for its administrative needs might well suffer a decline in its adjudicatory independence.

This point was put well by Justice McGarvie:[111]

> A court in which those responsible to the executive decide the way in which operations of the court will be managed, the way cases will progress towards hearing and which cases will be heard by which judge at which time, is not likely to produce the impartial strength and independence of mind which the community requires of the judges. The relationship between administrators and judges will tend to develop to one where the judges are well cared for and even prized, but are treated as senior staff

[107] Church and Sallman n 106, pp 11-12.
[108] The expression is that of Alexander Hamilton on the *Federalist* No 78.
[109] Church and Sallman n 106, p 9.
[110] Church and Sallman n 106, p 9.
[111] Church and Sallman n 106, p 9 citing Justice McGarvie "Judicial Responsibility for the Operation of the Court System" 63 ALJ 79 (1989), p 84.

who do specialised public work in the courts which the administrators run on behalf of the executive.

The relationship between the executive model and judicial independence is probably best summed up by Alford, Gustavson and Williams:[112]

> …it seems difficult to argue that the traditional departmental model is optimal for judicial independence. The governance of the courts under this model has at least the potential to indirectly influence what should purely be judicial decisions – not by seeking to impinge upon or bias their content, but rather by having the effect of constraining or directing the flow of inputs which lead up to those decisions. The fact that judicial independence in practice does not appear to have actually been undermined, even if it may be a little frayed at the edges, is due to among other things to the vigilance of judges themselves, as well as the ingrained values of (departmentally employed) court staff.

It is apt to refer to the Victorian Courts Strategic Directions Statement 2004 because it addresses the negative impact of the executive model of court governance on judicial independence, community perceptions of that independence and the separation of powers between the three branches of government:[113]

> Institutional independence gives fundamental support to the independence of each individual judicial officer and the appearance of such independence. The greater degree and detail of the executive branch's control over the policies, resourcing, administration and staff of the courts the weaker:
>
> - the reality and appearance of independence of the institutions and the judicial officers...;
>
> - the culture of independence within those institutions and the judicial officers…;
>
> - the support for judicial independence within the culture of the executive branch.
>
> Further, the greater the degree and detail of such control in law and fact the greater the opportunity for the executive branch to interfere directly, or indirectly, in the work of the courts, including the conduct of hearings and making [of] decisions. The Civil Justice Committee commented:
>
> > If it is accepted that judicial officers are constitutionally responsible for what happens in their courtrooms, they must have some involvement in the determination of administrative policies affecting courts operations. If they are not and the Executive Government purports to have complete responsibility and control, then the concept of rule of law, the principle of judicial independence, the doctrine of separation of powers (insofar as it is

[112] Alford Gustavson and Williams n106, p 86.
[113] Justice Smith n 101, pp 17-18.

> acknowledged in a responsible system of government on the British model) are put at risk.

Alford, Gustavson and Williams have argued that the executive model is "equally problematic in terms of efficiency and effectiveness of the courts",[114] in that it establishes[115]

> a misalignment of authority and responsibility, in which those who have the core operational responsibility (judges) lack clear authority over the necessary resources to carry out that responsibility.

As observed by the authors, this is "a problem not only for judicial independence but also for efficiency".[116]

Developing this line of argument, Bunjevac says that the institutional design of the executive model impacts upon the efficiency and effectiveness of courts by producing a "misalignment of policy objectives in the areas of court administration, judicial management and case management".[117] The misalignment comes about for a number of reasons:

- Court administrators and their departmental superiors lack sufficient understanding of, or access to "some of the critical aspects of judicial operations", and therefore are not equipped to "facilitate the most efficient choices among competing court priorities";[118]

- Due to the dual administrative arrangement under the executive model, judges do not possess "the appropriate level of managerial aptitude and the analytical infrastructure to undertake data collection, research, analysis and planning, which are required in order to contemplate new and improved judicial administrative arrangements and case management strategies";[119]

- Judges are not in "a position to fully understand the operations of the organisations in which they control the most critical outputs".[120]

The misalignment between authority and responsibility and the misalignment of policy objectives under the executive model of court governance presents as an organisational obstacle to the administration of justice in "the most efficient, innovative and responsive manner".[121] The International Framework for Court

[114] Alford Gustavson and Williams n 100, p 86.
[115] Alford Gustavson and Williams n 100, p 86.
[116] Alford Gustavson and Williams n 100, p 86.
[117] T Bunjevac "Court Governance: The Challenge of Change" (2011) 20 JJA 201 at 204.
[118] Bunjevac n 117 at 204, citing C Baar *Alternative Models of Court Administration* (Canadian Judicial Council 2006), p 93.
[119] Bunjevac n 117 at 204 citing Baar n 118, p 15.
[120] Bunjevac n 117 at 204.
[121] Bunjevac n 117 at 204 referring to W Vormans and P Albers "Councils for the Judiciary in EU Countries (CEPJ, 2003), p 100.

Excellence (IFCE), which will be discussed later, is designed to assist courts in delivering justice in a more efficient, responsive and effective manner. The institutional design of the executive model is incompatible with the IFCE.

However, Bunjevac identifies a much deeper problem with the executive model: the international organisational divide that exists within the model is "potentially responsible for the overall loss of authority and accountability of courts as public institutions."[122] Although the courts "are responsible and accountable to the public for the delivery of certain standards of performance, service and quality", neither court administrators nor judges have "the requisite degree of control over the core operational processes of their organisations to be fully responsible or accountable for the outcomes".[123] They do not have even "the basic degree of financial, administrative and budgetary discretion that modern organisations enjoy".[124] As pointed out by Justice Smith, "this is a formula for an absence of accountability, mistrust and responsibility shifting".[125]

As pointed out by Church and Sallman, the traditional executive model of court governance limits judicial participation in the formulation of budgetary priorities in the court due to "the combined impact of the very limited discretion involved in the entire budgetary system, the lack of formal structures within courts which would enable judicial officers to participate in the process, the shortage of non-judicial staff in the individual courts to help the judiciary in developing and justifying specific proposals and – undoubtedly – the sheer frustration on the part of judicial officers about the whole process".[126]

Chief Justice Wayne Martin of the Supreme Court of Western Australia points out that the executive model of court governance is predicated upon an incorrect premise, and fails to embrace the partnership between the judiciary and the executive branch of government that is a necessary foundation for a court governance structure which enables courts to operate in the interests of the administration of justice:[127]

> The assumption which underpins the executive model of court administration to the effect that all functions which are performed by a court can be classified as either judicial or administrative is demonstrably false.
>
> The fact that the effective performance of many of the functions performed by contemporary courts requires close collaboration between the judiciary and administrative personnel should inform the creation of court governance structures which embody a partnership in which each of the partners has

[122] Bunjevac n 117 at 204.
[123] Bunjevac n 117 at 204.
[124] Bunjevac n 117 at 204 referring to Alford, Gustavson and Willliams n 100, p 85.
[125] Justice Smith n 101, p 16.
[126] Church and Sallman n 106, p 23.
[127] Chief Justice Wayne Martin "Court Administrators and the Judiciary- Partners in the Delivery of Justice" (2014) International Journal for Court Administration Vol 6 No2, p 17.

> different but equally important roles in the achievement of their common objective: the delivery of justice.

A fundamental difficulty with the executive model is that it has an inadequate structure to foster and maintain a common understanding between the judiciary and the executive as to the fundamental objectives of courts.[128] Furthermore, as highlighted by Justice Smith, "an inevitable consequence of the [executive] model is that departmental officers do not see the courts as being the third arm of government and do not fully understand the need to protect their independence and the security of their data".[129] A further consequence of the executive model is that "the judicial officers and court staff find themselves constantly in the position of having to challenge DOJ policy and initiatives which may impinge adversely on the independence of the courts, their operations and security of their data".[130] As also highlighted by Justice Smith the executive model of court governance imposes a fetter on independence and actions:[131]

> Every time the courts have concern about the operation of DOJ policy or initiatives, a judgment has to be made within the courts as to whether a challenge should be made because of the potential damage it will do to the working relationship between the courts and DOJ. That in itself places a fetter on the independence of the courts and their ability to function.

Worse still, the executive model of court governance is that it is prone to cultivating a "them" and "us" relationship between the judiciary and the executive[132] that impedes a working partnership of the type described by Chief Justice Martin.

The institutional design of the executive model of court governance presents formidable organisational obstacles to the adequate funding and resourcing of the lower courts. It is not surprising that the lower courts are often under-funded and under-resourced. Without adequate funding and resources, there are significant obstacles to the strategic long term planning of the activities of the lower courts. Without adequate funding and resources, the lower courts are unable to administer justice in the most efficient, innovative, responsive and effective manner. According to the IFCE, they are the objectives that all courts should aspire to achieving.

As pointed out by the Chief Justice of the Supreme Court of NSW, the Hon Justice Tom Bathurst, a systemic problem with the executive-judicial relationship in relation to the funding and resourcing of courts is the tendency of the executive branch of government to treat the third (but independent) branch of government – the judiciary

[128] Chief Justice Martin has stressed the importance of this common understanding within a model of court governance: Chief Justice Martin n 127, p 13.
[129] Justice Smith n 101, p 16.
[130] Justice Smith n 101, p 16.
[131] Justice Smith n 101, p 16.
[132] Church and Sallman n 106, p 64.

– as a public service provider.[133] Accordingly, courts are treated by the executive and its agencies as part of the public service and as "just another government department",[134] the funding and resourcing of which is left to be determined by applying largely inappropriate public sector criteria such as performance, productivity and efficiency.

A similar concern was expressed by former High Court Chief Justice Robert French who upon learning that the High Court would be affected by a budget cut by way of an "efficiency dividend"[135] wrote to the Prime Minister and the Attorney General pointing out the constitutional independence of the High Court and urging that the Court be exempt from this fiscal measure:[136]

> The High Court is, as no doubt you well appreciate, not to be treated, for funding or for any other purposes, as analogous to an agency of the Executive Government… In particular, its funding should not be treated as an aspect of the deployment of funds within the executive branch of government… I am writing to request that the Government consider not applying to the High Court a proposed efficiency dividend which would have a significant adverse effect upon the court's ability to provide the services it now does throughout Australia".[137]

The tendency under the executive model of court governance to treat courts as a governmental agency is accentuated at the level of the lower courts. Although these courts have been structurally independent of the executive branch of government for several decades, the judicial officers who preside over these courts continue to carry the title of "magistrate" – an anachronistic title that is connected with a public service magistracy of a bygone age.[138] Consequently, the magistracy remains in the shadows of the past and in particular continues to be treated as an agency of the executive, as it was in bygone days, and financed and resourced as if it were still a public service magistracy - rather than as an integral part of the independent Australian judiciary.

An inevitable consequence of the executive model and the concomitant tendency to treat courts as just another government department, providing a public service, is the increasing tendency applied by the executive on the courts to be more efficient and

---

[133] Chief Justice Tom Bathurst "Separation of Powers: Reality or Myth" JCA Colloquium, 11 October 2013, Sydney at [16].

[134] Chief Justice Bathurst n 133 at [42].

[135] An "efficiency dividend", a typical fiscal tool used in the public sector, is an annual reduction in resources available to an organisation. It is usually applied as a percentage of operational (running costs).

[136] Ananian-Wesh and Williams n 13 at 612.

[137] It is noteworthy that the High Court is the most autonomous court in Australia – based on the autonomous collegiate model of court governance - and yet the imposition of the "efficiency dividend" treated the Court as if it were a mere agency of the Executive. However, the Chief Justice's letter had the effect of persuading the Prime Minister to agree to limiting the impact if the cuts by exempting the High Court from a 0.25 percent increase to the dividend: Ananian – Welsh and Williams n 13 at 612.

[138] Lowndes n 94, p 28.

to increase their productivity.[139] The attendant risk to judicial independence under these circumstances is significant and was identified over 25 years ago:[140]

> There may also be a greater risk to judicial independence if, in order to receive additional resources, judges are asked to be more productive. The stage is set for the quality, or timeliness, of justice being bargained for increased resources (see the former Chief Justice of the High Court, Sir Anthony Mason "The Courts and Their Relationship with Government", Address to the Bicentennial Legal Convention, August 1988) This must be resisted.

Apart from the threat to judicial independence, the methodology of determining the level of funding and resources for courts by reference to the criterion of performance, productivity and efficiency is problematic because such criteria are inappropriate determinants for judicial funding and their use can impede the proper funding and resourcing of courts.

As observed by the former Chief Magistrate of Victoria, Ian Gray, a great deal has been written about efficiency, outputs, performance standards and indicators and accountability in relation to the performance by courts of their vital functions.[141]

The trouble with "performance standards" – or perhaps some might say the mischief they cause - was identified by Justice Sackville some time ago: they imply that performance is capable of being assessed and therefore measured.[142] This has been a source of controversy, as pointed out by Ian Gray:[143]

> As Sackville notes, the Chief Justice[144] has vigorously argued that "reliance by the new public management on quantitative measurement carries with it serious dangers". This is because an emphasis on "outputs" which are measurable as distinct from outcomes, which involve matters of judgment has significant distorting effects. Concentration on outputs which are readily measurable and less costly to monitor, gives an inappropriate significance to considerations of efficiency over those of effectiveness.

Justice Sackville further highlights the inherent dangers in the "new public management" approach to the evaluation of the services delivered by courts:[145]

> These warnings about the dangers associated with the inappropriate use of quantitative performance standards are very powerful. In particular, any attempt by the Executive Government to make courts "accountable" by linking resources to quantitative performance standards may well threaten core judicial functions. Yet care must be taken not to throw the baby out with the bathwater. One reason

[139] J Lowndes n 94 at 601 where the author refers to the observations made by Church and Sallman n 29, p 3.
[140] *Court Management Information (Discussion Paper)* AIJA 1991, p 16.
[141] Ian Gray n 36, p 5.
[142] Justice Ronald Sackville "From Access to Justice to Managing Justice: The Transformation of the Judicial Role", Journal of Judicial Administration (2002) Vol 12, p 5 cited by Gray n 36, p 5.
[143] Gray n 36 p 5 citing Justice Sackville n 142, p 5.
[144] This is a reference to Chief Justice Spigelman.
[145] Justice Sackville n 142, p 5 cited by Gray n 36, pp 5-6.

> why the Executive Government maybe prone to rely on inappropriate measures of judicial performance is that the courts themselves have done little to develop worthwhile measures of workload and output.
>
> It is undeniable that many aspects of judicial work cannot be reduced to simple (or even sophisticated) quantitative benchmarks. But such benchmarks can be very useful, for example, in determining whether a court is acting effectively to minimise avoidable delays or costs in litigation. Despite calls for co-ordinated efforts to collect comparable statistics in order to identify best practices among courts, very little has been done to achieve this objective.
>
> Courts should not be surprised if the Executive Government publishes and seeks to make use of inadequate or misleading statistics when the courts are content to do much the same thing. Doubtless there is little practical value in comparing, for example, "non-appeal matters finalised" across different courts without any attempt to take account of the nature and complexity of different "matters". Yet the courts themselves present data relating to the disposition of widely divergent "matters" without distinguishing between different categories of cases.

As Gray puts it:[146]

> We should never accept a framework of standards that dictate performance measurements according to speed or throughput. However, we have no alternative but to identify and promote acceptable methods of calculating the resources required to run our courts and assisting in the formulation of appropriate budgets.

Gray stresses the need for magistrates' courts to deliver proper justice and to avoid being a court of "McJustice" in the same manner that McDonalds is a fast food outlet:[147]

> We do not want to preside over a legal system that once prompted a United States Judge to say "we sure aren't good for you – but we are fast".

As stated by Justice Steven Rares, Immediate Past President of the Judicial Conference of Australia, "courts are not sausage factories, cases are not mere statistics, the real work of the courts in society cannot be totalled up, and measured by arbitrary tools, such as key performance indicators, as some commentators, accountants, economists and politicians may believe".[148] Courts must not be "required or measured to meet targets, or the management school's holy grail of key performance indicators"; and they are not "production lines intended to meet other people's targets".[149] As Justice Rares correctly points out, courts are "an

[146] Gray n 36, p 6.
[147] Gray n 36, p 11.
[148] Justice Rares n 17 at [3].
[149] Justice Rares n 17 at [74].

independent arm of government for a good reason: it is so that they may continue to perform central function of doing justice according to law".[150]

His Honour goes on to make these observations:[151]

> One case may take 10 minutes to hear and determine, another 10 months. The statistics will reflect that each case was one case but one took many times longer to decide. Did that mean the second judge was less efficient or less good, than the other? Of course, any attempt at comparison would be not only meaningless, it would be fundamentally misleading…
>
> The role of the judicial branch is to do justice according to law in each case – not in a selected number of cases or by some statistically verifiable methodology. Justice cannot be made to fit the statistician's or bureaucrat's facts or figures. A case that takes a short time to hear may involve legal issues of great significance or difficulty that will take a judge or judges considerable time to consider and resolve, before he, she or they can deliver reasons for judgment. There is no valid relationship between the time it takes to hear a case and the time it takes to decide that case or between the time one case takes to hear and determine as against that taken with any other.

A hallmark of the executive model of court governance is its focus on statistical information in relation to outcomes. Chief Justice Wayne Martin has drawn attention to the dangers that are inherent in placing too much emphasis on "the statistical reporting of outcomes".[152] The dangers involve "a potential threat to the fundamental objective of the judicial branch of government which is the provision of justice".[153] Such a threat arises "if judges are influenced in their management of individual cases by a desire to improve statistical outcomes, rather than focus upon the needs of justice in each individual case".[154] The formulation of budgets that place an emphasis on statistical outcomes have the potential to diminish the quality of justice by undermining the need to do justice in the individual case. Budgets along these lines can leave courts under–funded for the purposes of discharging their core function of doing justice.

Chief Justice Martin has also highlighted that "if wrong or inaccurate measures of performance are used by the executive government to inform decisions with respect to the amount or the allocation of the resources provided to the court, the quality of justice delivered by the court will be diminished".[155]

There is a tendency for governments to inappropriately treat the judicial branch of government as a business. Chief Justice Martin of the Supreme Court of Western Australia has made it clear that " a court is not a business venture" and that "courts

[150] Justice Rares n 17 at [74].
[151] Justice Rares n 17 at [71] and [73].
[152] Chief Justice Martin n 127, p 13.
[153] Chief Justice Martin n 127, p 13.
[154] Chief Justice Martin n 127, p 13.
[155] Chief Justice Martin n 127, pp 13-14.

are indispensable to the rule of law, and the value of the rule of law, or the provision of justice in an individual case, defies quantification on a balance sheet".[156]

It is not unusual, as mentioned by the Chief Justice, for the methodology of a "business case" to be applied in relation to the appointment of judicial officers.[157] However, the Chief Justice goes on to say:

> The concept [of a business case] has no ready or apparent application to an enterprise in which the fundamental objective is the delivery of justice.
>
> It may be possible to make some sense of a "business case" in the context of a court if there are service and performance parameters which can be measured objectively and against which expenditure can be assessed. So, if the failure to appoint a judge will result in an increase in the median time taken to resolve cases in the court, the consequence of failing to appoint a judge can be assessed, albeit not in terms of revenue or profit. However, that assessment is only useful if one places an economic value upon the timely disposition of cases. But if "justice delayed is justice denied", can an economic algorithm be usefully applied to the quality of justice provided by a court? And, if the failure to appoint a judge not only delays median times to resolution, but increases the workload of the judges to the point where the quality of justice provided in individual cases diminishes, how is that to be measured in a "business case".[158]

Clearly, the consequences of the failure to appoint a judge would have a significant effect on the quality of justice delivered by the court and for obvious reasons would justify the appointment. However, the appointment would be difficult to justify by the application of a "business case".

Former Chief Justice of the Supreme Court of New South Wales, Justice Spigelman, has warned of the dangers of quantitative assessment of the work done by courts and the quantification of performance standards.[159] Although not opposed to quantification,[160] the Chief Justice has warned two qualifications that must apply to any quantification of performance standards.

---

[156] Chief Justice Martin n 127, p 14.

[157] Chief Justice Martin n 127, p 14.

[158] Chief Justice Martin n 127, p 14.

[159] Chief Justice Spigelman "Measuring Court Performance" (2006) 16 JJA and "Quality in an Age of Measurement: The Limitations of Performance Indicators" The Sydney Leadership Alumni Lecture The Benevolent Society Sydney 28 November 2001.

[160] Indeed under his leadership he was prominent in adopting time standards in the Supreme Court of New South Wales: Alford, Gustavson and Williams n 100, p 43. It should be noted that Chief Justice Spigelman has never doubted the importance of such matters as delay and costs, as these are matters which are both capable of assessment in quantitative terms and which provide information that is useful to the courts and the publication of which serves to enhance the accountability of the courts: Chief Justice Spigelman "Measuring Court Performance n159 at 70.

The first is that many of the "most important dimensions of the quality of the work of a court are incapable of quantification":[161]

> My central proposition is a simple one. Not everything that counts can be counted. Some matters can only be judged, that is to say they can only be assessed in a qualitative way. It is of primary significance to recognise that there are major differences between one area of government activity and another as to the centrality of those matters that are capable of being reduced to quantitative terms. In spheres of governmental decision – making the things that can be measured are the important things. In other spheres the things that are important are not measurable. The law is at the latter end of the spectrum.

Chief Justice Spigelman makes it clear that the law is one of those significant areas of public decision- making in which there is "no measurable indicator of quality" and there is "simply no escaping qualitative assessment for evaluation".[162] In the words of the Chief Justice:[163]

> …this means that decision-making processes which are based only on quantitative measurement are so defective as to be irrational.

The Chief Justice argues that the managerial approach to the administration of courts – which carries the title of managerialism – does not work for courts:[164]

> The managerialist focus is on matters capable of measurement, like efficiency and effectiveness. This does not, however, represent the full range of values which are of significance for public decision-making. Other values such as accessibility, openness, fairness, impartiality, legitimacy, participation, honesty and rationality are also of significance. They are not capable of measurement, not even by proxy indicators.

The problem with the managerial approach is that it has an inherent "institutional bias to downgrade the significance of quality or to attempt to measure it by some kind of proxy indicator".[165] This can have serious ramifications because it can result in courts being under-funded and under-resourced.

The fundamental problem with the managerial approach to court governance is that it bases its legitimacy on a false perception of the role of courts – as exposed by Chief Justice Spigelman:[166]

> I have no doubt that the courts serve the public. However, they do not provide services to the people. The distinction is not merely semantic; it is fundamental. The courts do not deliver a "service". Courts administer

[161] Chief Justice Spigelman "Measuring Court Performance" n 159 at 70.
[162] Chief Justice Spigelman "Measuring Court Performance" n 159 at 72.
[163] Chief Justice Spigelman "Measuring Court Performance" n 159 at 72.
[164] Chief Justice Spigelman "Measuring Court Performance" n 159 at 72.
[165] Chief Justice Spigelman "Measuring Court Performance" n 159 at 73.
[166] Chief Justice Spigelman "Measuring Court Performance" n 159 at 74.

> justice in accordance with law. They no more deliver a "service" in the form of judgments and decisions than a parliament delivers a "service" in the form of debates and statutes.

This misapprehension as to the role of courts has far reaching implications, as referred to by the current Chief Justice of the Supreme Court of New South Wales, the Honourable Justice Tom Bathurst:[167]

> The most crucial threat to the separation of powers today is… the increasing trend by governments to treat the courts as service providers and judges as public servants. This tendency by the Executive undermines the reality and perception of the institutional independence and capacity of the courts and puts pressure on the judiciary to prioritise "efficiency" over other considerations equally important to the fair determination of disputes.

The second qualification imposed by Chief Justice Spigelman relates to the danger that "if some dimensions of performance are measured and others are not, those that are measured will be given more attention than those that are not:[168]

> Irrespective of protestations to the contrary, experience suggests that when performance indicators are actually employed in substantive decision making processes, such as the allocation of resources or the determination of remuneration, quantitative measurements, by reason of their concreteness, they acquire a disproportionate and inappropriate influence over the amorphous and judgmental matters of quality. Quantitative measurement appears to be objective and value free. Qualitative assessment appears to be subjective and value laden. In fact statistics, by reason of their selectivity, contain important value judgments.

Chief Justice Bathurst has also expressed concern with the executive's "approach to evaluating the courts' work and financing of the judiciary".[169] Although the Chief Justice says that there is no issue with elements of the courts' performance being measured,[170] but rather "the issue with external measurement is how the courts are measured":[171]

> The problem with external performance measurement is, first, that the indicators used often do not reflect the reality of the courts' operations. To

---

[167] Chief Justice Bathurst "Separation of Powers: Reality or Desirable Fiction" JCA Colloquium Sydney October 2013 at [16].

[168] Chief Justice Spigelman "Quality in an Age of Measurement: The Limitations of Performance Indicators" n 159, p 20.

[169] Chief Justice Bathurst n 167 at [35].

[170] Indeed, as His honour says at [38]

> … the Supreme Court itself prepares an internal monthly to bi-monthly "Court Operations Report", which reports on matters including the number of new filings, backlog, and timeliness at various stages of the determination process. That information is essential for the Court's internal accountability and management, providing not only the capacity to explain court operations and expenditure, but also highlighting problem areas to be addressed.

[171] Chief Justice Bathurst n 167 at [39] – [40].

> give one example, the Productivity Commission measures the average number of attendances per finalisation – in other words the number of times parties are required to be present in court before binding orders are made – as an indicator of efficiency. However, the number of attendances says nothing about either the financial efficiency or the quality of the courts' management of cases. As the Commission itself acknowledges for example, a high number of attendances, due to intensive case management, may in fact result in more "financially efficient" outcomes for litigants. It is therefore concerning that such indicators may be used to measure court performance and in turn judicial funding.
>
> More fundamentally, by judging court performance based primarily on financial efficiency and timeliness to the exclusion of other factors, external performance reviews miss the fundamental point that not everything that is important to the administration of justice can be measured, let alone quantified in dollar terms. In other words, as former Chief Justice Spigelman has put it, "not everything that counts can be counted".[172]

As the Chief Justice points out, although efficiency is important it does not "necessarily tell us anything about the quality of justice".[173] In fact efficiency – taken to an extreme - has the potential to undermine the administration of justice:[174]

> There are a number of ways to make a court efficient. For example, the Supreme Court could institute a system where cases had no discovery, no oral argument, a maximum of five pages of written submissions and judgment would be delivered with no reasons. Our performance indicators would be through the roof. Such a situation would also fundamentally undermine aspects of the administration of justice, including procedural fairness and rightly erode community confidence that the judiciary was fairly and impartially making decisions according to law.

The Chief Justice concludes with the following observations in relation to the treatment by the executive of the judiciary as part of the public service – including being subject to "government wide performance indicators":[175]

> The more courts are treated as just another government department, to be judged primarily against how efficient they are, the more pressure there is on court staff and in turn judges to prioritise the "measurable criteria of time and money" at the expense of other factors… structurally what is occurring is that external bodies, including agencies of the Executive, are putting pressure on the judiciary to conduct its operations in a way that may not necessarily advance the interests of justice.

[172] Chief Justice Spigelman "Measuring Court Performance" n 159 at [70].
[173] Chief Justice Bathurst n 167 at [41].
[174] Chief Justice Bathurst n 167 at [41].
[175] Chief Justice Bathurst n 167 at [42].

This public sector efficiency approach not only poses a threat to the separation of powers,[176] but can lead to inadequate and inappropriate funding which inhibits the ability of courts to deliver justice.

Another difficulty with the managerial approach is its emphasis on efficiency as well as effectiveness. As identified by Fix-Fierro there are problems with applying the notions of efficiency and effectiveness to courts:[177]

> When translated into the judicial arena, this means that courts should settle disputes in a "just, speedy and inexpensive manner" as a well-known formula has it. However, trouble begins as soon as we attempt to define terms such as "dispute settlement", "just", "speedy" and "inexpensive" with more precision. And matters are further complicated by the realisation that the simultaneous fulfilment of these values requires "trade-offs and compromises" "speediness" may come at the expense of "justice"… unlimited access to the courts may result in considerable backlogs and delay; "justice" may demand the possibility of a slow, costly appeal process; while a court proceeding, even if it is regarded as just, speedy and inexpensive, may not be able to "settle" the underlying dispute at all.

As highlighted by Chief Justice Bathurst, the misconceived treatment of courts as service providers results in the judiciary being made subject to two budgetary demands or constraints – namely "efficiency dividends" and "benefit realisation".[178]

The Chief Justice explains the nature of "efficiency dividends" thus:[179]

> There is at present in NSW a consistent demand put on the courts to find "efficiency dividends", which… is a treasury department euphemism for budget cuts. Currently the requirement is a 1.5% efficiency dividend each year. That is a demand made of each of the Department of Attorney General and Justice's "business centres", with the starting point being that the courts, each of which is its own "business centre", are to be treated like any other "justice service provider".

As regards the constraint of "benefit realisation", the Chief Justice makes these observations:[180]

> …there is the demand that any new investment into the Court carry a "benefit realisation". This is management speak for a requirement that the investment translate into a financial saving down the track – a clear example of the consequences of the managerial approach of quantifying everything. The requirement for a benefit realisation carries two consequences. First, it means that if the benefit of a reform cannot be quantified in dollar terms it will not receive support unless the cost of the

[176] Chief Justice n 167 at [42].
[177] Fix-Fierro *Courts Justice & Efficiency -A Socio-Legal Study of Economic Rationality in Adjudication* (2003) at [8].
[178] Chief Justice n 167 at [44]-[48].
[179] Chief Justice n 167 at [44].
[180] Chief Justice n 167 at [46].

> reform is minimal. Second, anything that is changed, for example reforms to court or IT operating systems carries with it a corresponding future budget cut at the point when the Department deems that the financial benefit will have been "realised".

The latter budgetary constraint can result in a lack of funding which can in turn limit the extent to which "courts can engage in forward planning or invest in reforms that will strengthen them organisationally and allow them to better fulfil their functions into the future"[181] – particularly in the manner envisaged and encouraged by the IFCE and the principles of therapeutic jurisprudence, as well as the concept of sustainable justice.

In the final analysis, the fundamental problem with the current arrangements for the funding of courts – especially under the executive model of court governance – is that the executive branch of government fails to take into account the qualitative factors inherent in the administration of justice in considering the appropriate allocation of funding and resources.

Whether the quality of a judiciary can be measured remains a live issue, as raised by Justice Rares:[182]

> There is no simple answer to the question whether the quality of a judiciary can be measured. If the question is addressed qualitatively, the answer may be yes. This is because a society that values, and has confidence in, its judiciary as adhering to the core values that I have described[183] will have and see the quality. But if the question is addressed to quantitative measures, the answer is an emphatic no. That is because courts do not perform a function that is susceptible of quantitative evaluation…
>
> There can be no prescriptive rule for ascertaining quality in a judiciary. One size most certainly will not fit all. A busy trial court, such as a court of summary jurisdiction presided over by a magistrate will perform a very different role to a superior or appellate court. But each judge, in whatever court he or she sits, must bring to their task the core values that I have identified, if they are to gain the confidence of the society whose judicial power they exercise.

However, although the measurement of the qualitative aspects of the judiciary remains debatable, it is clear that an over-emphasis on the quantitative aspects of the work of courts at the expense of the performance of the qualitative aspects of judicial work is certain to leave courts under-funded and under-resourced.

[181] Chief Justice n 167 at [54].
[182] Justice Rares n 17 at [71] and [75].
[183] These are independence, impartiality, integrity, fairness, transparency and diligence.

THE WAY FORWARD: ENHANCING THE FUNDING AND RESOURCING OF THE LOWER COURTS

It is apparent from the foregoing analysis that the traditional executive model of court administration is not a model that is conducive to ensuring the lower courts receive a level of funding and resources that is necessary for those courts to properly perform their role in contemporary society. The executive model cannot guarantee that the lower courts will have an adequate input into the formulation of court budgets and that their input will be appropriately considered when it comes to the allocation to them of public monies. Nor can the executive model guarantee that the lower courts will have a say as to how funds, once allocated, are to be expended within the court system.

The question that arises is whether there are alternative models of court governance that have the potential to ensure that the lower courts receive adequate funding and resources. The answer to that question largely depends upon whether any such alternative model is capable of affording the lower courts a greater say in the formulation of the budget, the amount of funds to be allocated and control over how the allocated funds are spent.

The search for any alternative model that has the potential to provide such capabilities must naturally begin with an examination of the models of court governance that currently operate in Victoria and South Australia. Do either of these models, which represent a "breaking free from the executive branch of government",[184] provide an antidote against under-funding or under-resourcing that leaves the lower courts operating on the sniff of an oily rag.

The model of court governance that currently operates in South Australia is best described as the "judicial autonomous" model.[185] This model owes its existence to the *Courts Administration Act* 1993 (SA).

The objects of the Act are:[186]

(a) to establish the State Courts Administration Council as an administrative authority independent of control by executive government;

(b) to confer on the Council power to provide courts with the administrative facilities and services necessary for the proper administration of justice.

The State Courts Administration Council (the Council), which is established pursuant to s 6 of the Act, consists of:[187]

(a) the Chief Justice of the Supreme Court;

[184] Justice Moore n 97.
[185] Justice Moore n 97, pp 12-13.
[186] *Courts Administration Act* s 3.
[187] *Courts Administration Act* s 7.

(b) the Chief Judge of the District Court;

(c) the Chief Magistrate of the Magistrates Court.

The Council is responsible for providing or arranging for the provision of the administrative facilities and services for participating courts[188] that are necessary to enable those courts and their staff properly to carry out their judicial and administrative duties.[189] However, a participating court remains responsible for its own internal administration.[190] The Council may establish administrative policies and guidelines to be observed by participating courts in the exercise of their administrative responsibilities.[191]

The Council has the powers of a natural person and may enter into any form of contract or arrangement, acquire, hold, deal with and dispose of real and personal property and provide services on terms and conditions determined by the Council.[192] All court houses and other real and personal property of the Crown set apart for the use of the participating courts is under the care, control and management of the Council.[193]

Section 16 of the Act creates the office of State Courts Administrator. The Administrator is the Council's Chief Executive Officer[194] and is, subject to control and direction by the Council, responsible to the Council for:[195]

(a) the control and management of the Council's staff; and

(b) the management of property that is under the Council's care, control and management.

The Council is supported by senior staff[196] and other staff.[197]

Turning to matters of finance, the money required for the purposes of the Act is to be paid out of money appropriated by Parliament for those purposes.[198] The Council is

[188] Participating courts are: the Supreme Court; District Court; the Environment, Resources and Development Court, the Industrial Relations Court of South Australia; the Youth Court of South Australia; the Magistrates Court; the Coroners Court and any other court or tribunal declared by regulation to be a participating court.

[189] *Courts Administration Act* s 10(1).
[190] *Courts Administration Act* s 10(2).
[191] *Courts Administration Act* s 10(3).
[192] *Courts Administration Act* s 11(1). These powers are subject to the restrictions imposed by subsections (2) and (3).
[193] *Courts Administration Act* s 15.
[194] *Courts Administration Act* s 17(1).
[195] *Courts Administration Act* s 17(2).
[196] Senior staff are appointed by the Administrator with Council approval: s 18.
[197] Other staff of the Council are appointed by the Administrator: s 21.
[198] *Courts Administration Act* s 24.

required, from time to time, to prepare and submit to the Attorney General a budget showing estimates of its receipts and expenditures for the next financial year or for some other period determined by the Attorney General.[199] The budget must conform with any requirements of the Attorney General as to its form and the information that it is to contain.[200] The Attorney General may approve a budget submitted under this section with or without modification.[201] The Council may not expend money unless provision is made for the expenditure in a budget approved by the Attorney General.[202]

It should also be noted that the Council presents an annual report that is tabled in Parliament and that the Chief Justice is able to argue for appropriate funding either by appearing before Parliament to present the budget of the Courts Administration Authority[203] or through the annual report.[204]

The first distinctive feature of the South Australian model is that represents a clear departure from the traditional executive model of court governance by creating a judicial council which acts an institutional cushion between the judiciary and the executive. As Justice Moore has put it, the model "supports judicial independence because the court administration is not under the direction of the Executive and it can manage its resources independently of politicians or bureaucrats".[205]

The second distinctive feature is that unlike the position under the traditional executive model of court administration, the judicial autonomous model enables the judiciary to have a high degree of autonomy and significant input in relation to the formulation of the budget – including the setting of priorities for the courts. This is important because those who are responsible for the courts' outputs have a say in the budget. Although this represents a big improvement on the quality of court administration provided by the traditional executive model, the South Australian model still requires co-operation with Treasury, and the budget submitted is ultimately subject to the approval of the Attorney General. If the overall level of funding that is provided is too little, the judiciary can be left under-funded and under-resourced.[206]

Alford, Gustavson and Williams have identified one possible disadvantage with the South Australian autonomous model, namely a "possible problem of accountability in having judicial officers acting in an analogous capacity to public service executive in

[199] *Courts Administration Act* s 25(1).
[200] *Courts Administration Act* s 25(2).
[201] *Courts Administration Act* s 25(3).
[202] *Courts Administration Act* s 25(4).
[203] Section 5 of the Act provides that the Council, the Administrator and the staff of the Council may be collectively referred to as the Courts Administration Authority.
[204] Justice Moore n 97, p 12.
[205] Justice Moore n 97, p 12.
[206] It should be noted that each court within the structure has a budget and a Principal Registrar who is answerable to the Head of Jurisdiction for the management of that budget.

making budget bids".[207] A further problem identified by Justice Moore is that the judicial autonomous model "requires close collaboration between parties and inter-personal co-operation among the Chief Justices".[208] It is foreseeable that the three Chief Judicial Officers making up the Council may have competing priorities for their respective courts, and this may well affect the formulation of the budget and the setting of priorities. In that regard the provisions of s 9 of the Act should be noted.[209]

Turning to Victoria, the *Court Services Victoria Act* 2014, which came into effect on 1 July 2014, created a new model of court governance. The object of the Act is to support judicial independence in the administration of justice in Victoria by establishing an independent public sector entity (Court Services Victoria)[210] to provide the administrative services and facilities necessary for the Victorian courts and VCAT to operate independently of the direction of the executive branch of government.[211] Section 8 of the Act provides that the function of Court Services Victoria (CSV) is to provide, or arrange for the provision of, the administrative services and facilities necessary or desirable –

(a) to support the performance of the judicial, quasi-judicial and administrative functions of –

(i) the Supreme Court; and

(ii) the County Court; and

(iii) the Magistrates' Court; and

(iv) the Children's Court; and

(v) the Coroners Court; and

(vi) VCAT; and

(b) to enable the Judicial College of Victoria to perform its functions.

CSV has the power to do all things necessary or convenient to be done for or in connection with, or as incidental to, the performance of its function.[212]

[207] Alford Gustavson and Williams n 100, p 92.
[208] Justice Moore n 97, p 13.
[209] Section 9(3) provides that a decision supported by the votes of the Chief Justice, or in the Chief Justice's absence, the Chief Justice's deputy and one other member of the Council is a decision of the Council. As Justice Moore puts it, "the Chief Justice has a power of veto": Justice Moore n 97, p12.
[210] *Court Services Victoria Act* s 5.
[211] *Court Services Victoria Act* s 4.
[212] *Court Services Victoria Act* s 9.

The Courts Council (the Council) which is the governing body of CSV, is established by s 10(1) of the Act. The Council, which is chaired by the Chief Justice, consists of:

(a) the judicial members of the Council; and

(b) up to 2 other members appointed under s 14.[213]

The judicial members of the Council are:[214]

(a) the Chief Justice;

(b) the Chief Judge;

(c) the Chief Magistrate;

(d) the President of the Children's Court;

(e) the State Coroner;

(f) the President of VCAT.

The Council has the general direction and superintendence of CSV and may perform the function and exercise the powers of CSV.[215] The Council has the following additional functions and powers:[216]

(a) to direct the strategy, governance and risk management of CSV;

(b) to appoint, in accordance with the Act –

(i) the Chief Executive Officer of CSV; and

(ii) a Court Chief Executive Officer for each jurisdiction;

(c) any other functions and powers conferred on it by or under the Act or any other Act.

Subject to s 16(2) of the Act, a question arising at a meeting of the Council,[217] is decided by a majority of votes of the members present and voting on the question.[218] Section 15(5) provides that in the event of a vote on a particular question being tied, the Chief Justice has a casting vote in addition to a deliberative vote. Further, s 16(2)

[213] *Court Services Victoria Act* s 12(1).
[214] *Court Services Victoria Act* s 12(2).
[215] *Court Services Victoria Act* s 10(2).
[216] *Court Services Victoria Act* s 11.
[217] The Council must convene at least 4 times each calendar year: s 15(1).
[218] *Court Services Victoria Act* s 15(4).

provides that the Council may not make a decision if, after the subject matter of the decision has been discussed at a meeting of the Council, the Chief Justice is of the opinion that the decision is incompatible with, or would substantially impair or detract from the institutional integrity of a jurisdiction or the capacity of the Supreme Court to function as a the Supreme Court of the State.

The Council is required to act consistently with the function and objects of CSV.[219] The Council must also take into account any business, corporate or strategic plan when making decisions in respect of the provision of administrative services and facilities to each jurisdiction.[220] The Council also has the duty of ensuring that adequate procedures are established for its effective operation.[221]

Section 22 of the Act provides that the Council must appoint a Chief Executive Officer of CSV. The functions of the Chief Executive Officer include:[222]

(a) the management of the support services and functions of CSV in accordance with the strategy, plans, procedures and policies of the Council;

(b) the appointment and management of the members of the staff of CSV, other than the appointment of the Court Chief Executive Officers.

The Chief Executive Officer has the power to do all things that are necessary or convenient to be done to perform his or her functions.[223] Section 25(3) provides that in performing or exercising his or her functions or powers the Chief Executive Officer must comply with any directions of the Council. The Chief Executive Officer is the accountable officer for CSV for the purposes of the *Financial Management Act* 1994.[224]

Section 30(1) of the Act makes provision for the appointment of a Chief Executive Officer for each jurisdiction by the Council. The functions of each of the Chief Executive Officers include:[225]

(a) the management of the administrative support services of the relevant jurisdiction, including providing support to the head of the relevant jurisdiction; and

(b) ensuring that appropriate administration and support services are provided to the relevant jurisdiction and thereby contributing to the management and administration of the operations of CSV.

[219] *Court Services Victoria Act* s 18(1).
[220] *Court Services Victoria Act* s 18(2).
[221] *Court Services Victoria Act* s 18(3).
[222] *Court Services Victoria Act* s 25(1).
[223] *Court Services Victoria Act* s 25(2).
[224] *Court Services Victoria Act* s 27.
[225] *Court Services Victoria Act* s 33(1).

In performing his or her functions the Chief Executive Officer is responsible to and must comply with any directions given by the head of the relevant jurisdiction in relation to the operation of that jurisdiction and the Chief Executive Officer in relation to all matters.[226]

Sections 41(1) and (2) of the Act requires the Council, before the end of financial year, to prepare and submit to the Attorney General a budget for the forthcoming year and at the request of the Attorney General to prepare and submit to the Attorney General a budget for the period determined by the Attorney General. Any budget must provide estimates of receipts and expenditures for CSV together with separate estimates of receipts and expenditures for each jurisdiction and for the Judicial College of Victoria.[227]

Pursuant to s 41(4) of the Act the Attorney General may approve a budget with or without modification. Subject to s 41(6) the Council may prepare and submit to the Attorney General proposed changes to the budget approved by the Attorney General under s 41(4).[228] The Council must not propose a change to the budget that would reduce the budget of a jurisdiction or the Judicial College of Victoria without the approval of the head of that jurisdiction or the approval of the Board of the Judicial College of Victoria.[229]

The Attorney General may approve a change to an approved budget submitted to him or her under s 41(5) with or without modification.[230] Sections 41(8) and (9) oblige the Council to use its best endeavours to act consistently with the budget approved by the Attorney General from time to time, including any approved changes to the budget, and not to expend money or incur a liability unless provision for the expenditure or liability is made in the budget approved by the Attorney General.

Section 40 of the Act requires an annual report from CSV which must include:

(a) the budget allocated to each jurisdiction for the provision of administrative services and facilities, including details of any alteration to the budget allocation; and

(b) details of the administrative services and facilities provided by the CSV to the courts or VCAT.

As with the South Australian model of court governance, a distinctive feature of the Victorian model is the interposition of the CSV between the executive arm of

[226] *Court Services Victoria Act* s 33(2).
[227] *Court Services Victoria Act* s 41(3).
[228] *Court Services Victoria Act* s 41(5).
[229] *Court Services Victoria Act* s 41(6).
[230] *Court Services Victoria Act* s 41(7).

government and the courts as an institutional buffer that protects judicial independence.[231] As pointed out by Bunjevac:[232]

> In practice, this means that the individual courts will no longer have a direct institutional connection with the executive government, although CSV itself (and by extension the courts) will receive funding in accordance with an expenditure review procedure that must ultimately be approved, 'with or without' modification by the Attorney General.

Also like the South Australian judicial autonomous model, the CSV model affords the judiciary a far greater say in relation to the formulation of the courts' budget than the anachronistic public service oriented traditional executive model of court governance; and is a step in the right direction. Both the Victorian and South Australian models accommodate a distinctive courts perspective on the process of establishing budgetary priorities[233] - something which the executive model inhibits.

However, as with the South Australian model, ultimate approval of the budget rests with the Attorney General who decides what gets funded and to what extent, particularly in relation to new court initiatives. Furthermore, the institutional design of CSV has the potential to create a division of opinion within the Council as to budgetary priorities and where funding and resources is most required within the judicial hierarchy - it being noted that the Chief Justice has the casting vote, in addition to a deliberative vote, in relation to budgetary decisions made by the Council. As in the case of the South Australia model, the Victorian model requires "close collaboration between the parties and inter-personal co-operation among the Chief Justices". Members of the Judicial Council need to have a clear understanding of each other's court and its needs in terms of financial, material and human resources. It is essential that a culture of close collaboration and inter-personal co-operation be fostered among the council members so as to ensure that no court within the jurisdiction is deprived of the funding and resources that it needs to deliver quality court services in accordance with the standards set out in the International Framework of Court Excellence (IFCE). Ideally, each of the courts represented on the council should embrace the IFCE.

Although models of court governance that incorporate judicial councils of the type that exist in South Australia and Victoria are a very good start in ensuring that all courts within a particular jurisdiction are adequately funded and resourced, these models can never overcome the reality that courts necessarily rely on the political branches of government for both funding and organisational and jurisdictional arrangements[234] and the level of funding and resources that the courts ultimately receive is in the hands of the two other branches of government that control the

[231] Bunjevac n 117, p 318.
[232] Bunjevac n 117, p 300.
[233] Church and Sallman n 29, p 58.
[234] Church and Sallman n 29, p 11.

"purse-strings". This is the reality, whatever system of court administration is in operation.

Within these judicially autonomous models, the judiciary needs to ensure that courts are adequately funded and resourced and must be prepared to argue the case for more funding whenever courts lack the necessary funding and resources to enable them to perform their vital functions. The judiciary has an important role to play. It needs to develop appropriate strategies to achieve those ends. However, a model of court governance that is supported by a judicial council promises to provide a better system of court administration than the executive model within which to develop such strategies with a view to achieving such ends. Such a model has the potential to foster a better understanding, in a superior working climate, between the judiciary and the executive as to the imperative for all courts – and in particular the lower courts – to be adequately funded and resourced in response to the challenges of an ever changing social environment.

Given the input that the judiciary has under these models into the formulation of the courts' budget, the courts need to ensure that they are extracting as much as possible from the existing resources[235] without any wastage of valuable public monies and resources. As pointed out in the International Framework for Court Excellence (IFCE), "excellent courts manage all available resources properly, effectively and proactively".[236] As reinforced by Chief Justice Bathurst, because courts receive funds from the public purse, they are accountable in terms of demonstrating that those public monies are being spent efficiently.[237] This accountability ensures that "the power of the courts to spend money is not uncontrolled".[238] All courts have a fundamental obligation to utilise such funding and resources as are provided by the other two branches of government in a responsible manner, and to be accountable to the community they serve for the use of those valuable commodities in administering and delivering justice in an independent, impartial and efficient and effective manner.

To this fundamental obligation one might add the need for excellent courts to think creatively about how to perform their functions with the available resources.[239]

As mentioned earlier, models of court governance supported by a judicial council require close co-operation between the members of the council representing the various courts within the jurisdiction. Such models require members of the council to have a full understanding of how those courts operate and the needs of the individual courts. These things are essential if the judicial council is to make a

[235] Comment made by Tony Lansdell, consultant engaged by the Local Court of the Northern Territory.
[236] IFCE Section 3.1.3.
[237] Chief Justice Bathurst n 167 at [22].
[238] Chief Justice Bathurst n 167 at [22].
[239] Comment made by Tony Lansdell n 236.

valuable contribution to the formulation of the budget and to function as it is expected to.

Each of the courts represented on the council need to identify specific areas where funding and resources are required to enable the court to fulfil its critical functions. Those areas characteristically relate to the number of judicial officers required to handle the workload of the court, the need to replace retiring or resigning judicial officers, the importance of implementing court initiatives designed to improve the quality of justice delivered by the court, the provision of adequate court facilities such as court buildings, courtrooms and office space for judicial officers, the provision of court staff and other personnel, as well as office material and equipment and finally, but not least, such technology as is necessary for the proper functioning of a court in contemporary society. Funding priorities within the individual courts need to be identified.

Consistent with the level of co-operation that is required by the model, before having input into the preparation of the budget, the council needs to resolve competing priorities between the individual courts in a way that best meets the needs of the judiciary as a whole and the interests of the administration of justice.

Within the judicially autonomous model of court governance, the judiciary needs to be pro-active in its endeavour to improve the level of funding and resources provided to the courts. The International Framework of Court Excellence (IFCE) provides all courts with a valuable resource tool which they can put to effective use in pursuit of this objective.

The IFCE provides guidance as to how courts might undertake a quantitative and qualitative assessment of their own functioning:[240]

> A foundation stone of excellent planning and performance is the maintenance of accurate, comprehensive and reliable information and databases. It is essential not only to assessing the performance of a court but also assessing whether its strategies or activities for improvement are having a positive effect. In many cases courts may find their existing information systems and databases are not capturing what is truly needed to assess performance and progress.
>
> A court needs to maintain a collection of both quantitative and qualitative data. The nature and complexity of the data and data collection tools required by each individual court may need to be varied or expanded to enable new initiatives to be assessed for their effectiveness. A court should have many sources for data and information, including its case management system, financial system, registry systems and surveys of court employees, attorneys and court users.
>
> Without reliable measurement systems courts will be unable to adequately assess how they are performing or whether any of their strategies or initiatives is actually effective. What may appear to be a sensible solution of requiring greater

[240] IFCE Section 5.

pre-hearing issues disclosure could well impose unacceptable costs upon parties or add further delay to case finalisation. Measurement is vital to effective assessment of performance and progress.

It is important to distinguish between court performance measurement indicators (and tools) and court performance management policies and tools. Court performance measurement indicators and tools (Appendix C) assist in the quantitative and qualitative assessment of the functioning of courts. These indicators and tools capture both internal and external aspects of a court's performance with surveys being a good example of direct user feedback on performance.

On the other hand court performance management policies and tools (Appendix D) are part of the arsenal of levers and court processes available to a court to use to effect change. A court will adjust these levers, procedures and policies through various strategies directed to improving court performance. Whether these changes have had a positive effect will be measured by relevant court performance measurement indicator.

The IFCE states that "excellent courts systematically measure the quality as well as the efficiency and effectiveness of the services they deliver:[241]

> For the evaluation of court performance, a set of key-indicators must be used. In addition to the quantitative performance indicators, excellent courts also use quality indicators addressing such issues as access to the legal system; the presence or absence of physical, sound and linguistic barriers in court facilities; the fairness of the proceedings and comprehensibility and clarity of decisions and orders; and whether courtesy and respect was shown by court staff. Data regarding these indicators can be based on structured observations, assessments of employee and court user satisfaction (through court surveys) and expert review of forms, orders and decisions.
>
> Excellent courts use a set of key-performance indicators to measure the quality, efficiency and effectiveness of their services. Courts should, at the very least, collect and use information on the duration of proceedings and other case-related data. Excellent courts aim at shifting their data focus from simple inputs and outputs to court user satisfaction, quality of service and quality of justice.
>
> There is a world-wide tendency to measure court performance only in quantitative terms using indicators such as the duration of the litigation process, the caseload per judge, the costs per case or the number of pending cases. One of the classical views on the duration of the litigation process is the process of "justice delayed is justice denied". Courts are said to perform poorly only if the proceedings are too lengthy. Speedy litigation processes, on the other hand, are viewed positively. Courts are

[241] IFCE Section 5.1.

> considered efficient where the costs per case is low or where the clearance rates are high.
>
> However, court performance from a quantitative perspective tends to distort the full picture, as in the example of "justice hurried" being in some cases "justice buried". It is therefore important to take qualitative aspects of the functioning of courts into account as well since aspects that are not measured are aspects that are rarely fixed. The challenge is that it is easier to quantify efficiency than it is to measure the kind of quality justice that transcends pure efficiency. Measuring these quality aspects may require more innovative qualitative measurements, which may be more difficult and costly to obtain (such as surveys). The relative ease of measuring efficiency alone cannot be allowed to overcome the need for constant reflection on the broader quality of justice.
>
> The Framework by taking a "whole of court" approach seeks to ensure these broader justice issues are also captured by measuring the quality of the court as a whole. The underlying philosophy of quality management is that while the quality of the entity may be difficult to measure, if all the aspects of the entity's activities and processes are of high quality then there is strong assurance of the high quality of the entity and its outcomes. If a court is performing at a high level in all seven areas of court excellence then it is fair to conclude that the court itself is delivering a high quality of justice.
>
> Reliance on quantitative performance results alone provides a poor picture of a court's overall performance particularly the quality of its judicial decisions and court services. The Framework seeks to encourage courts to assess a wide range of aspects of the functioning of a court and to use both quantitative and qualitative measures and feedback. Not every aspect of a court's activities may be capable of measurement and a flexible approach may need to be taken to identify how best to assess the effectiveness of particular strategies, initiative or outcomes.

It is worth noting that in order to promote a consistent approach to performance measurement, the IFCE is "developing a set of internationally accepted performance measures, most recently outlined in a November 2012 Discussion Draft.[242] These are global measures of court performance, consisting of a group of 11 "focused, clear and actionable core court performance measures aligned with the values and areas of court excellence of the Framework".[243] As noted by Chief Justice Warren:[244]

> The measures reveal a strong preference for outcome measurement that gauges the impact of courts' services on the community rather than mere measurement of inputs and outputs.

[242] Chief Justice Marilyn Warren "The Aspiration of Excellence" a paper presented at the "The Judiciary of the Future" International Conference on Court Excellence, Singapore January 2016, p 15.
[243] Chief Justice Warren n 243, p 15.
[244] Chief Justice Warren n 243, p 16.

As recommended by the IFCE, courts need to embrace the methodology of "judicial resource modelling":[245]

> Excellent courts apply and continue to improve objective workload models, which describe the relationship between court case categories and the average time needed by a judge and court staff to prepare and finalise a case. In combination with the anticipated number of incoming cases and pending cases, this information is used to predict the judicial staff and staff resources needed.

Apart from their utility, court led and driven analysis/assessment processes (encouraged by the IFCE) provide a perfect response to the criticism that the courts have done little to develop worthwhile measures of workload and output, which, as previously stated, might explain the reliance of the executive on inappropriate measures of judicial performance.

The Framework provides all courts with a valuable resource and tool which they can put to effective use in explaining to governments what judicial officers do in the courts and how to more accurately measure those activities. The Framework is an invaluable tool at the disposal of the judiciary for ensuring courts are adequately funded and resourced.

The Supreme Court of Victoria uses the IFCE as "its foundational management tool and as a means of communication with Treasury departments about the improvements and successes made by the court, which are then tied to funding needs".[246] Chief Justice Warren gives the following as an example as to how the IFCE can be utilised to improve the level of funding provided to courts:[247]

> There are a number of quantitative measures and targets that have been imposed upon the Victorian courts. To take one example, timeliness has been considered a relevant performance measure, but with the primary focus on the mere duration of proceedings. Of course, to treat court proceedings as widgets is totally unsatisfactory. Let me give you the obvious illustration. In the Victorian Supreme Court we have had class or group actions that have run for between 12 and 18 months. We have had terrorist trials which have run for in the order of 9 months. The demand that these matters place on judges' time and other court resources has been substantial and significant. There are, on the other hand, those quick consent matters that are disposed of promptly and oftentimes on the papers. Allocating the same value to a matter that is signed off on the papers as to a contentious matter which may take 12 to 18 months to finalise (in the public interest) is no more than a widget counting approach. The challenge that we took up was to look for some way of measuring

[245] IFCE Section 3.1.3.

[246] Richardson Spencer and Wexler n 69 at 153 referring to Chief Justice Warren "Leadership and Culture Change: Implementing the International Framework for Court Excellence" (2015) 4 ICCE Newsletter 4 and D Hall "Report on the United States" (2014) 3 ICCE Newsletter 5.

[247] Chief Justice Warren n 243, pp 17-18.

> performance that would allow for comparisons but which would reflect and value more accurately what we do. We decided to adopt the International Framework for Court Excellence.
>
> It needs to be borne in mind that the State budget indicators cover all Victorian jurisdictions, not just the Victorian Supreme Court. Court Services Victoria advocated on behalf of the courts, explaining how the existing targets failed to distinguish between the short, sharp consent resolution of a matter and resource-intensive, time-consuming trials such as a class action or terrorist trial. The International Framework for Court Excellence was used as a basis for developing a model of revised court indicators for measuring the performance of Victorian courts. These were accepted by the Departments of Treasury and Premier and Cabinet and were incorporated into the Victorian Budget Papers for 2015-2016. This was a seismic reform. In the course of the dialogue with the relevant Ministers and the Department of Treasury it was very powerful to point out that the International Framework is just that – an international model that has been tried very successfully in other jurisdictions. Our proposed indicators did not represent anything revolutionary, but rather promised to provide a more accurate way of measuring what we do in our courts.

Chief Justice Warren goes on to make the very important point that all the data and performance indicators made available to courts through the IFCE are important reference points for courts as "advocates …in negotiations with governments for resources.[248] Furthermore, the IFCE empowers courts to adopt "judge-driven measures based on indicators cast in terms economist can comprehend".[249]

The value of the IFCE to courts cannot be overstated. As pointed out by Chief Justice Marilyn Warren, the IFCE provides a means for court accountability through self-assessment and self–improvement without compromising judicial independence,[250] which is both internally and externally effective[251] as a strategic tool in the sphere of judicial funding - in a way that respects and preserves the independence of the judiciary.

Moving forward – with the aim of enhancing the level of judicial funding - Chief Justice Bathurst makes a number of sound recommendations:[252]

1. The aim of all three branches of government should be for the courts to operate at "peak efficiency" – which occurs when the courts have "the resources to maintain their institutional independence and to perform their work fairly, quickly, and in a way that gives litigants a fair trial, at a minimum cost to the taxpayer";

[248] Chief Justice Warren n 243, p 29.
[249] Chief Justice Warren n 243, p 29.
[250] Chief Justice Warren n 243, p 13.
[251] Chief Justice Warren n 243, p 17.
[252] Chief Justice Bathurst n 167 at [64] – [68].

2. Courts should aspire to achieving that goal and should be allowed to do so by the executive branch of government;

3. The focus should be on peak efficiency, and not efficiency dividends due to the fact that budget cuts can be inefficient by undermining " the courts' ability to fulfil their functions", thereby creating "an intangible inefficiency that is far more harmful than the savings that have apparently been made";

4. There needs to be a more "consultative approach to measuring court performance and allocating budgets";

5. Courts need to be "able to justify the funding they require, demonstrate that resources are being used efficiently and show that in circumstances where their resources are diminished the inevitable prospect will be both a decline in access to, and quality of, justice";

6. As a corollary, courts should "ensure that they have an internal ability to rigorously analyse raw data and explain their operations" – in which such circumstances "courts can justifiably make the case that performance indicators by the executive branch of government are not necessary";

7. Consultations and decisions about financing should also be based on "protocols that recognise the position of the courts as an arm of government" – directed at facilitating "the attainment of peak efficiency and the maintenance of constructive relations between the Executive and an institutionally independent judiciary".

These recommendations were made against the background of the existing executive model of court governance in New South Wales and were put forward by way of an alternate and superior model of court governance. The judicially autonomous models of court administration that currently operate in Victoria and South Australia already have many of the features of court governance recommended by Chief Justice Bathurst and have the potential to develop those features they do not presently possess.

Very much to the point, the Chief Justice's recommendations place a primary focus on the need for an "evidence based" approach to judicial funding. His Honour's call for a "more consultative approach to measuring court performance and allocating budgets" implies the use of contemporary "judicial resource modelling" - ideally jointly developed and used by the courts and the executive branch of government – to determine the level of funding and resources provided to courts.[253] As stated by

[253] Tony Lansdell "Measuring Court Performance" a paper presented at the Supreme Court and Federal Courts' Judges Conference July 2014.

Lansdell such jointly developed and used modelling provides the necessary transparency between the judiciary and the executive when it comes to the funding and resourcing of the courts.[254] The Victorian and South Australian models of court governance accommodate the adoption of a jointly developed judicial resource model for funding purposes.

CONCLUSION

It is patently clear that the executive model of court governance cannot ensure that the lower courts – and for that matter all courts - are adequately funded and resourced. The judicially autonomous models of Victoria and South Australia promise to provide a model of court administration that is more conducive to ensuring adequate funding and the provision of adequate resources for the lower courts. Those models provide an appropriate structure within which the judiciary, including the lower courts, can assume a proactive role in getting the funding and resources they need by utilising the strategic tools provided by the IFCE.

[254] Tony Lansdell n 253.

CENTER FOR
SUSTAINABLE JUSTICE

Sustainable Justice Charter 1.0

Improving social harmony, quality of life, and transparency, through integration of values of social sustainability into justice

Introduction

Sustainable justice is the approach to justice that aims to improve social harmony, wellbeing, the general feeling of safety within society, and furthers personal and societal development, within a framework of human rights and principles securing legal uniformity and equality. In order to enable the justice system to intervene effectively, justice is vested with power and independence and acts in the pursuit of social sustainability of society and its members.

Consciousness of sustainability is rapidly spreading around the world and gradually improving every sector of society. Social sustainability is nowadays interconnected with ideas like love, empathy and compassion.

In the recent decades criticism has been growing that existing justice systems do not appropriately and effectively meet societal needs. Many innovations have developed in justice and legal practice and theory aiming at serving values of social sustainability, like different forms of Problem Solving Courts, Restorative Justice, Intercultural Justice, Procedural Justice and Therapeutic Jurisprudence. These innovations have proven to be effective contributors to solving societal problems and seemingly unbridgeable intercultural gaps.

A justice system which acts on principles of social sustainability to guide its remedies for conflict resolution, will have a positive impact on conflict resolution outside the legal system.

Context of Sustainable Justice

Social sustainability

The main goal of Sustainable Justice is increasing the quality of life by improving the quality of relationships and social networks. This cannot be enforced by coercion, punishment or deterrence. Mature inter-humane relationships, mutual respect, empathy and understanding, and an ability to transform negative emotions into creativity and constructive behavior are essential requirements to improve the level of social sustainability.

Sustainable Justice Charter 1.0 (2015-12-10) is an initiative of Center for Sustainable Justice, Utrecht, The Netherlands by Mr. Alexander F. de Savornin Lohman, Drs. Jaap van Straalen in close cooperation with Dr. Andrew Cannon.

Values of social sustainability complement judicial values and contribute to the effectiveness of judicial systems.

Conflicts, criminal acts, and social networks

Sustainable justice sees conflicts and criminal acts as opportunities to restore and improve social harmony. These incidents can occur easily as people and society develop and are seen in the broader context of an individual or societal problem, abuse or wrong. Conflicts and criminal acts not only affect the people directly involved, but also their relatives. They pervert and destroy more than one relationship and social network.
Socially sustainable conflict resolution solves the problem of the people directly involved in a way that benefits all the other stakeholders involved. The individual case is seen as a vehicle to reduce the individual and societal burden of these problems.

Sustainable judicial toolbox

Judicial power is given by society to the justice system on the assumption that this is beneficial to society. Judicial officers using judicial power are societal change agents, who can act as a catalyst for a better society.

Prestige, independence, and the position as ultimate decision maker drapes judges with a kind of magic that enables them to accomplish outcomes that others cannot achieve. Judges have the potency to change mindsets and behaviors that were interfering with the resolution of problems. Postponement of the judicial decision opens a rich array of opportunities for sustainable intervention by judges to effectively make use of their transformational magic. This quality grants to judges a key position to procure socially sustainable outcomes.

Socially sustainable outcomes are achieved by using a minimal, but effective, dose of power. Any unsolicited exercise of power breaks down the balance in social relationships and networks, but a well-chosen and well-directed slight corrective impulse of power can restore and heal harmony that has been disturbed.

Judicial systems and regulations, including budgeting rules can either support or impede the opportunities for the justice system and for judicial officers to achieve socially sustainable outcomes.

Application of Sustainable Justice

The general principle of sustainable judging is to turn bad into good, contributing to social harmony and personal and societal development. This asks for reconsideration of some basic principles of law and justice concerning the function of judicial decision-making and punishment.

Sustainable intervention and decision-making

Judicial decision-making often removes responsibility from a person, which does not support social sustainability. The passive decision-making judge focusing on what went wrong in the past gives perverse incentives to the litigants to play games with their responsibilities.

From the perspective of social sustainability people should not escape responsibility but rather accept personal responsibility and learn from that process. Societal wellbeing and sustainable interests of the parties are served if the judge actively confirms the parties' responsibilities, strokes up mutual respect, enhances mature behavior and the parties' capacity to deal with their problems constructively, focusing on the best sustainable future for all, including

society. Sometimes it can be useful to involve other stakeholders and social service providers in the process of conflict resolution in order to achieve socially sustainable outcomes. Restorative practices can be applied which bring the parties and other stakeholders together into a collaborative process that aims to restore harmony in affected social networks.

Sustainable punishment

Sustainable punishment aims to bring or restore harmony in socially valuable networks, including those of victims, offenders and their relatives. It enables offenders to become valuable members of society, stimulating and supporting them to develop constructive pro-social behavior, and to reduce unhealthy and anti-social behavior.

Punishments that include a form of social isolation are breaking down social networks which often causes severe, sometimes lifelong irreparable harm to relatives of the offenders who are innocent. Punishment that harms socially valuable networks should be avoided whenever possible.

Social sustainability does not reject the principles of retribution and deterrence if the results of the application of these principles support values of social sustainability for society and those involved. Great difficulties that ex-prisoners and people with a criminal record experience in getting socially accepted again contribute to their return to criminal behavior.

Judicial officers using therapeutic techniques and assisting other stakeholders to bring about constructive behavioral change in the offender make use of judicial power as a catalyst to build a socially sustainable society. This method of ‘punishing’ is sometimes honored with the nickname 'Smart sentencing'.

Accountability and Transparency

The contribution of the justice system to the quality of life and social sustainability of society should be clear, transparent and measurable from a material, social, and psychological point of view. A system for measurement with solid parameters should be scientific developed, concerning the structure of the justice system and the contribution of individual judicial officers.

The changing perspective of Justice

Social sustainability provides valuable guiding principles to justice systems encouraging them to gradual change so that they contribute to social harmony more effectively. Conflicts about material interests and criminal behavior should be used as a vehicle to foster improvement of relationships and social networks, realizing the best sustainable future for everybody involved. This can be realized by enhancing responsibility and accountability of those involved, improving their capacity to manage conflicts and problems in socially constructive ways. This way of working avoids legalization of conflicts and an adversarial attitude.

A starting point for the whole of the system should be an indissoluble interconnectedness between law and interpersonal respect. This will result in less victimization and less escalation of conflict, less imprisonment and less bankruptcy.

Justice systems based on principles of social sustainability are role models guiding people in the best ways to manage conflicts and other challenges constructively without harming others.