

KEYNOTE ADDRESS TO THE 31ST AUSTRALIAN LEGAL CONVENTION
CANBERRA 9 OCTOBER 1999

BY THE HONOURABLE J J SPIGELMAN
CHIEF JUSTICE OF NEW SOUTH WALES

SEEN TO BE DONE: THE PRINCIPLE OF OPEN JUSTICE

All lawyers will recognise the often cited aphorism of Lord Hewart from *Rex v Sussex Justices; Ex parte McCarthy*:

“... it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”¹

Lord Hewart was encapsulating a principle that had been long known and often expressed². Another pithy articulation of part of the scope of the principle is that of Lord Bowen:

“... Judges, like Caesar’s wife, should be above suspicion ...”.³

And Lord Atkin said:

“Justice is not a cloistered virtue.”⁴

The High Court has expressly applied Lord Hewart’s aphorism a number of times,⁵ as have other Australian courts. It appears in the Oxford Dictionary of Quotations.

Must we attribute the aphorism to Lord Hewart? If we do, the proposition that “justice must be seen to be done”, could hardly have a less auspicious provenance.

¹ *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

² A comprehensive historical treatment is given by Chief Justice Burger in *Richmond Newspapers Inc v Virginia* 448 US 555 (1980) at 564-575; See also Nettheim “The Principle of Open Justice” (1984-1986) 8 *University of Tasmania Law Rev* 28; Baylis “Justice Done and Justice Seen to be Done” (1991) 21 *Victoria University Law Rev* 177; Kelly “Reviewing the Observer of Bias” (1993) 67 *ALJ* 340 at 346.

³ *Leeson v The General Medical Council* (1889) 59 LJChNS 233 at 241.

⁴ *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 at 335.

⁵ See eg *Stollery v Greyhound Racing Control Board* (1973) 128 CLR 509 at 518-519; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 351-352; *Webb & Hay v R* (1993-94) 181 CLR 41 at 47.

Even the English Dictionary of National Biography, which usually confines its entries to the bland list of facts customarily found in a *Who's Who*, could not contain itself in the case of Lord Hewart. It described him as:

“Brilliant advocate; less successful as judge through tendency to forget he was no longer an advocate”.⁶

Can this be the author of the aphorism “justice must be seen to be done”?

Lord Hewart was the Solicitor General in Lloyd George’s government and, when F. E. Smith became Lord Chancellor, was promoted to Attorney General. The British practice was that an Attorney General had a right to be appointed Lord Chief Justice of England, if the office fell vacant during his term of office. When that occurred in 1921, Lloyd George refused to dispense with Hewart’s services, or at least refused to risk a by-election, but promised to appoint him as soon as he could. Accordingly, a High Court Judge aged 78 was appointed in his stead. The very next year that new Lord Chief Justice was astonished to read of his own resignation in *The Times*. Hewart was Lord Chief Justice from 1922 to 1940.

Professor R M Jackson in his book on *The Machinery of Justice in England*, referred to the system by which an Attorney General had a right of appointment as Lord Chief Justice in the following way:

“In 1922 this system landed the country with Lord Hewart as Lord Chief Justice, who proved to be a judge so biased and incompetent that he seems to have caused a reaction against it.”⁷

In the seventh edition of his book published in 1977, Professor Jackson had referred to Hewart as “the worst English judge in living memory”.⁸ This reference was deleted from the eighth edition of 1989. Perhaps in the intervening decade, other contenders had emerged for the title.

Lord Devlin, however, displayed no doubt when he wrote in 1985:

“Hewart ... has been called the worst Chief Justice since Scroggs and Jeffries in the seventeenth century. I do not think that this is quite fair. When one considers the enormous improvement in judicial standards between the seventeenth

⁶ *The Concise Dictionary of National Biography*, Vol II, Oxford University Press (1992) p1413; see also Simpson *Biographical Dictionary of the Common Law* London, Butterworths (1984) pp237-238.

⁷ *Jackson's Machinery of Justice*, Cambridge University Press, Cambridge (8th ed, 1989) p375.

⁸ *Ibid* (7th ed, 1977) p475.

and twentieth centuries, I should say that, comparatively speaking, he was the worst Chief Justice ever.”⁹

Again I ask, must we continue to attribute this important aphorism to such a judge?

Lord Hewart may very well have presided over the worst conducted defamation trial in legal history:¹⁰ one Hobbs suing the Nottingham Journal. Of the litany of misconduct found by the Court of Appeal to have been committed by Lord Hewart during the course of this trial, it is sufficient to note the following:

- Rulings were made against the Plaintiff without calling for submissions from Counsel for the Plaintiff.
- His Lordship accused the Plaintiff, in front of the jury, of fraudulently concealing documents and failed to withdraw the accusation when informed that the document had in fact been disclosed.
- He permitted two days of cross-examination on matters of bad reputation, including allegations of criminal conduct, of a character which had never been particularised.
- His Lordship received communications from the jury which were not disclosed to counsel.
- When the jury indicated a tentative view in favour of the Defendant, his Lordship orchestrated an early end to the trial.
- He failed to give the jury any summing up or any directions as to the limited use they could make of the cross-examination and he failed to leave issues to the jury.
- He refused to permit an adjournment of a second defamation trial against the same Defendant - suggesting the same jury should hear the second case immediately - and entered judgment for the Defendant in the absence of counsel for the Plaintiff.

The apparent author of the aphorism “justice must be seen to be done”, never indicated to the jury that they were entitled to ignore his Lordship’s numerous expressions of opinion on the facts or his adverse comments about the veracity of the Plaintiff, upon which the Court of Appeal found it unnecessary to rule, being content with the observation of Lord Justice Scrutton, in accordance with the demure standards of the time, that:

“I regret that, with much better grounds available, it was thought right to insist on them.”¹¹

Many would wish that appellate courts were still so reticent.

⁹ Lord Devlin *Easing the Passing: the Trial of Dr John Bodkin Adams*, Bodly London (1985).

¹⁰ *Hobbs v Tinling and Company Limited* [1929] 2 KB 1.

¹¹ *Hobbs v Tinling* at 33.

The last word from this case belongs to Lord Sankey. In his judgment, his Lordship said, with reference to the false accusation of non disclosure, that it was “unfortunate that the Lord Chief Justice did not appreciate” the correctness of certain submissions made to him and, Lord Sankey concluded:

“The Bar is just as important as the Bench in the administration of justice, and misunderstandings between the Bar and the Bench are regrettable, for they prevent the attainment of that which all of us desire - namely, that justice should not only be done, but should appear to have been done.”¹²

His Lordship cited no authority for this proposition. Perhaps he was indulging in a little whimsy. Alternatively, perhaps Lord Sankey, who six years earlier had merely concurred with Lord Hewart’s judgment in *Rex v Sussex Justices*, was giving us a hint as to the true origins of the aphorism. For myself, I am content for the future, to quote Lord Sankey.

The Principle of Open Justice

The principle that justice must be seen to be done - to which I will refer as the principle of open justice - is one of the most pervasive axioms of the administration of justice in our legal system. It informs and energises the most fundamental aspects of our procedure and is the origin, in whole or in part, of numerous substantive rules. It operates subject only to the overriding obligation of a court to deliver justice according to law.

Australian public debate has a tendency to ignore such fundamental principles, in the same way as we fail to appreciate the skill embedded in the engineering infrastructure which ensures that if you flick a switch, the lights go on or, if you turn a tap, water pours out. No-one thinks about it. We take it for granted.

In this address I wish to emphasise the vital role that the principle of open justice plays in our institutional arrangements. I will then make some observations about how the principle should inform contemporary debate about judicial accountability.

I use the word “justice” to mean fair outcomes arrived at by fair procedures. To whom must justice, in this sense, appear to be done? The observer is not a party, not even the accused in a criminal trial.¹³ The relevant observer is always the “fair minded observer”, acting “reasonably”.¹⁴

¹² At 48.

¹³ *R v Racz* [1961] NZLR 227 at 232.

¹⁴ See the list of synonymous expressions in *Webb & Hay* at 51.

Acceptance by such an observer, should also demand acceptance by a fair minded party.

The principle of open justice is reinforced by Australia's ratification of the *International Covenant on Civil and Political Rights* 1966 (ICCPR), Article 14 of which relevantly provides as follows:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interests of private lives of parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. [Emphasis added]

Australia is a party to the Covenant. It is also scheduled and annexed to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth). As such, the Covenant is not made a part of Australian law. However, this method of 'quasi-incorporation' of international human rights instruments - with their national reporting requirements and forums, established for the discussion of those reports - renders the Covenant a powerful influence on courts in developing the common law.

As Sir Gerard Brennan said in *Mabo*:

"The opening up of international remedies to individuals pursuant to Australia's accession to the [First] Optional Protocol to the ICCPR brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."¹⁵

As a principle of customary international law, the right to a fair and public hearing, enshrined in Article 14 of the *ICCPR*, bears on the interpretation of statutory rights and obligations. Statutes will be interpreted

¹⁵ *Mabo v Queensland (No2)*(1992) 175 CLR 1 at 42.

and applied, if possible, in conformity with established rules of international law.¹⁶

We have not, however, incorporated this, or many other international human rights covenants, in our own law. I have on an earlier occasion referred to the long term significance of the *British Human Rights Act* of 1998 which incorporates the European Convention on Human Rights. The law of Britain will increasingly develop in the light of international jurisprudence on human rights. So will the law of Canada under the Canadian Charter of Rights and Freedoms and, to a lesser extent, the law of New Zealand under the *Bill of Rights Act* of 1990.¹⁷

I repeat my comments of last year:

“We have ahead of us a transition of great significance for Australian lawyers. At the present time, for the vast majority of Australian lawyers, American Constitutional Bill of Rights jurisprudence is virtually incomprehensible. Within a decade it is quite likely that in substantial areas of the law, British cases will be equally incomprehensible to Australian lawyers. Indeed, it is already the case that the common law in England is developing, on a pre-emptive basis, in the shadow of the jurisprudence of the European Court to an extent that limits the use of British cases as precedents for the development of Australian common law.

This is an important turning point for Australian lawyers. One of the great strengths of Australian common law is that it has been able to draw on a vast body of experience from other common law jurisdictions. Now, both Canada and England, and to a lesser extent New Zealand, may progressively be removed as sources of influence and inspiration. Australian common law is threatened with a degree of intellectual isolation that many would find disturbing.”¹⁸

¹⁶ See *Chu Kheng Lim v The Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 38; *Minister for Immigration and Ethnic Affairs v Teoh* (1994-95) 183 CLR 273 at 287-288; *Jumbunna Coal Mines NL v Victorian Coal Mines Association* (1908) 6 CLR 309 at 363; *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Zachariassen v The Commonwealth* (1917) 24 CLR 166 at 181; *Minister for Foreign Affairs v Magno* (1992) 37 FCR 298 at 303-305; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1423-1425; *Kartinyeri v Commonwealth of Australia* (1998) 72 ALJR 722 at [97]; Sir Anthony Mason “International Law as a Source of Domestic Law” in Opeskin & Rothwell (eds) *International Law and Australian Federalism* (1997) pp220-222.

¹⁷ The significant impact of the Charter on the principle of open justice is considered in Leopfsky *Open Justice: The Constitutional Right to Abort Criminal Proceedings* Butterworths, Toronto (1985).

¹⁸ “Rule of Law Human Rights Protection” (1999) 18 *Australian Bar Rev* 29 at 32-33.

The English Courts will have frequent occasion to change their procedures and substantive rules to bring them into alignment with the requirement in Article 6 of the European Covenant that:

“... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The principle of open justice, should be understood as so fundamental an axiom of Australian law, as to be of constitutional significance. Indeed in the basic House of Lords decision on open courts, *Scott v Scott* decided in 1913, Lord Shaw described the principle as “a sound and very sacred part of the constitution of the country and the administration of justice”.¹⁹ His Lordship went on to say:

“To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.”²⁰

In 1913 a unanimous High Court followed the House of Lords and declared:

“... there is no inherent power in a Court of justice to exclude the public in as much as one of the normal attributes of a Court is publicity, that is the admission to the public to attend proceedings.”²¹

The subject of constitutional law should not be identified solely with exegesis of the terminology of the written document called “the Constitution”.²² Our Constitution, like the British Constitution, includes a number of statutes which, theoretically, can be amended by Parliament. Similarly, it includes principles of the common law, which can also be amended by Parliament. Nevertheless, the fundamental nature of some of these laws and principles, and the improbability of modifying legislation, is such as to justify treating such laws as part of constitutional law.²³

¹⁹ *Scott v Scott* [1913] AC 417 at 473.

²⁰ *Ibid* at 477.

²¹ *Dickason v Dickason* (1913) 17 CLR 50 at 51.

²² See my address “Foundations of Administrative Law” (1999) 58 *Australian Journal of Public Administration* 3; (1999) 4 *The Judicial Review* 69; *Egan v Chadwick* [1999] NSWCA 176 at [7].

²³ Even in the absence of a written Constitution as in the United Kingdom, a principle such as the right of access to the courts has been described as a “constitutional right”. *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corporation Limited* [1981] AC 909 at 977 per Lord Diplock; *R v Secretary of State for the Home Department; Ex parte Leech* (No2) [1994] QB 198 at 210 per Steyn LJ; *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 at 585 per Laws J.

The protection of the integrity of the judicial process for federal courts under Chapter III of the Constitution, which has a derivative application to State Courts,²⁴ does not, according to the recent decision in *Nicholas v The Queen*, prevent legislation which may have an adverse effect on the reputation of courts.²⁵

In *Nicholas*, by majority, the High Court refused to strike down a statute which modified the common law principle that a court could, in its discretion, exclude evidence of a crime in which police had participated.²⁶ In words reminiscent of the principles expressed by Lord Shaw in *Scott v Scott* with respect to the alleged discretion to close a court, Sir Gerard Brennan said:

“To suggest that the statutory will of the Parliament ... is to be held invalid because its application would impair the integrity of the court’s processes or bring the administration of criminal justice into disrepute is, in my respectful opinion, to misconceive both the duty of a court and the factors which contribute to public confidence in the administration of criminal justice by the courts. It is for the Parliament to prescribe the law to be applied by a court and, if the law is otherwise valid, the court’s opinion as to the justice, propriety or utility of the law is immaterial. Integrity is the fidelity to legal duty, not a refusal to accept as binding a law which the court takes to be contrary to its opinion as to the proper balance to be struck between competing interests. To hold that a court’s opinion as to the effect of a law on the public perception of the court is a criterion of the constitutional validity of the law, would be to assert an uncontrolled and uncontrollable power of judicial veto over the exercise of legislative power. It would elevate the court’s opinion about its own repute to the level of a constitutional imperative. It is the faithful adherence of the courts to the laws enacted by the Parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the integrity of the judicial process and the protection of the courts’ repute as the administrator of criminal justice.”²⁷

As has frequently been asserted, public confidence in the courts is a critical aspect of the open justice principle. Some aspects of judicial procedure and practice which ensure open justice are likely to be held to be so essential an aspect of the character of a court, that any infringement will be

²⁴ *Kable v Director of Public Prosecutions (NSW)* (1997) 189 CLR 15

²⁵ *Nicholas v R* (1998) 193 CLR 173.

²⁶ *Ridgeway v R* (1995) 184 CLR 19.

²⁷ *Nicholas* at 197, and esp at 275-276 per Hayne J.

struck down as invalid. The High Court has held that legislation may not permissibly:

“... extend to the making of a law which requires and authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial powers.”²⁸

The “appearance of impartiality” has been identified by Justice Gaudron as an essential characteristic.²⁹ The fundamental rule that judicial proceedings must be conducted in open court has often been referred to in such terms.³⁰

In *Russell v Russell*, the High Court, by majority, struck down a provision in the *Family Law Act 1975*, which required State Courts exercising that jurisdiction to sit in camera. It was found that this impinged on an essential characteristic of the Court and was, accordingly, beyond the power to invest State Courts with federal jurisdiction under s77(iii) of the Constitution. It may be difficult to resist the conclusion that a statute which required a federal court to sit in camera would infringe Chapter III.

Whilst it appears that some aspects of open justice will be found to be constitutionally protected, there is as yet no agreement on what they might be. One hopes that the occasion for doing so will not arise. However, no-one who has witnessed what a Schumpeterian would call the “gales of creative destruction” wreaked, over recent decades, on our universities, should have any confidence that the contemporary belief in the universal applicability of market solutions, will not pose fundamental challenges to our legal institutions.

Accordingly, it is timely to recognise the principle of open justice as one of the most fundamental rules of our legal system. It is reflected in a wide range of characteristics of the judicial process and in specific rules:

- (i) The fundamental rule is that judicial proceedings must be conducted in an open court, to which the public and the press have access.³¹ The exceptions to this fundamental rule are few and are “strictly defined”.³²

²⁸ *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* at 27, also at 53.

²⁹ *Ibid* at 208-209 per Gaudron J.

³⁰ See eg *Daubney v Cooper* (1829) 109 ER 438 at 440; *Dickason v Dickason* at 51; *Russell v Russell* (1976) 134 CLR 495 at 520; *Richmond Newspaper v Virginia* at 573.

³¹ *Scott v Scott*; *Dickason v Dickason* at 51; *Russell v Russell* at 520; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 41 at 50-53. A court may not even agree to hear a case in camera by consent (*Scott v Scott* at 436, 481).

As the Privy Council put it:

“Publicity is the authentic hallmark of judicial as distinct from administrative procedure.”³³

As Jeremy Bentham said:

“Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial.”³⁴

This rule requires that a court should do nothing to discourage the making of fair and accurate reports of what occurs in a courtroom.³⁵ This has important implications for the law of contempt. The courts are not as fearful of publicity as they once may have been. So in the case of pre-trial publicity, juries are trusted more often than previously to be true to their oath to determine the case on the basis of the evidence in the court and in accordance with the judge’s directions.³⁶

- (ii) The obligation of a court is to publish reasons for its decision, not merely to provide reasons to the parties.³⁷ This has its “foundation” as Justice McHugh said, in “the principle that justice must not only be done but it must be seen to be done”.³⁸

Judges can no longer rely on the advice which Lord Mansfield gave to a general who, as governor of an island in the West Indies, had also to sit as a judge:

³² See eg Wright “The Open Court: The Hallmark of Judicial Proceedings” (1947) 25 *Canadian Bar Rev* 721 at 74-75; *McPherson v McPherson* [1936] AC 177 at 200; *R v Tait* (1979) 46 FLR 386 at 402.

³³ *McPherson v McPherson*.

³⁴ Quoted in Nettheim *ibid* at 28.

³⁵ *Attorney-General v Leveller Magazine* [1979] AC 440 at 449-450; *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 476-479; *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056 esp at 1068-1073; *Ambard v Attorney-General* at 335.

³⁶ *Hinch v Attorney General (Vic) (No 2)* (1987-88) 164 CLR 15 at 74; *Murphy v R* (1988-89) 167 CLR 94 at 99; *R v Yuill* (1993) 69 A Crim R 450 at 453-454; *R v VPH*, unreported, NSW Court of Criminal Appeal, 4 March 1994; *R v Bell*, unreported, NSW Court of Criminal Appeal, 8 October 1998.

³⁷ Kitto “Why Write Judgments?” (1992) 66 ALJ 787; *Pettit v Dunkley* (1971) 1 NSWLR 377 at 382; *Housing Commission of NSW v Tatmar Pastoral Co. Pty Ltd* (1983) 3 NSWLR 378 at 385-386; *Public Service Board v Osmond* (1986) 159 CLR 656 at 666-557; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 273, 277-281.

³⁸ *Soulemezis* at 278E, and see 279B-C.

“Lord Mansfield said to him, ‘Be of good cheer - take my advice, and you will be reckoned a great judge as well as a great commander-in-chief. Nothing is more easy; only hear both sides patiently - then consider what you think justice requires, and decide accordingly. But never give your reasons; - for your judgment will probably be right, but your reasons will certainly be wrong.’”³⁹

- (iii) The principle informs the determination of whether a function conferred on a judicial officer is incompatible with the office, under the separation of powers in the Constitution.⁴⁰
- (iv) The guarantee of judicial impartiality by the disqualification for bias of a judicial officer, is determined by a test of what fair minded people - not just the parties, but the public - might reasonably apprehend or suspect.⁴¹ The High Court has expressly rejected the less strict “real likelihood of bias” test. It has also applied the reasonable apprehension test to the conduct of a juror.⁴²
- (v) The rule of natural justice - the obligation to accord procedural fairness by way of a hearing - is in part based on the importance of appearances.⁴³

English juries would appear, however, to be made of stern stuff. The English Court of Appeal once held that a trial did not miscarry despite the fact that during the accused’s counsel’s address to the jury, the chairman of Quarter Sessions kept sighing and groaning and was heard to say “Oh God” a number of times.⁴⁴

On another occasion, the Court of Appeal rejected an allegation that a murder trial miscarried when the judge appeared to be asleep for 15 minutes. The Court was satisfied by a perusal of his summing up that he must have been awake and that the mere appearance of being asleep was not enough.

³⁹ Quoted in Jackson *Natural Justice* (2nd ed, 1979) p97.

⁴⁰ *Grollo v Palmer* (1995) 184 CLR 348 at 365; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17, 23; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 107, 116-117, 134-135.

⁴¹ See *Webb & Hay* at 47 and especially the list of cases set out at footnote 36.

⁴² *Webb & Hay*, refusing to follow the House of Lords in *R v Gough* [1993] AC 646.

⁴³ *Murray v Legal Services Commission* [1999] NSWCA 70; 46 NSWLR 224 at [68]. See Jackson *ibid* Chp 4.

⁴⁴ *R v Hircock* [1970] 1 QB 67.

The Court referred to the principle that “justice must be seen to be done” as a “hallowed phrase” and described the appearance of the judge as inattentive or asleep as a “facile” application of the principle. Their Lordships concluded:

“It was not wholly without relevance that none of the experienced counsel present found it necessary to take steps to awaken the judge or to acquaint him with the fact that his appearance seemed to be less alert than it should have been.”⁴⁵

English counsel are made of the same stern stuff as English juries.

Perhaps this is an application of a principle of waiver, which the High Court has accepted to be applicable to the right to object on the grounds of bias.⁴⁶

- (vi) The power of a court to prevent abuse of process is also based in part on the need to maintain public confidence in the administration of justice.⁴⁷
- (vii) The operation of various principles designed to ensure the fairness of a trial is based on appearances: for example, the prohibition of undue interference by a judge and of improper conduct by a court officer; or the obligation of a judge when sitting without a jury to enunciate any warning that he or she would have to give to a jury.⁴⁸
- (viii) Open justice also serves the important function that victims of crime, and the community generally, may understand the reasons for criminal sentences.⁴⁹ The significance of this function was well expressed by Warren Burger, the Chief Justice of the United States:

⁴⁵ *R v Langham* (1972) CrimLR 459.

⁴⁶ *Vakauta v Kelly* (1989) 167 CLR 568 at 587; cf *Goktas v Government Insurance Office of NSW* (1993) 31 NSWLR 184 at 687.

⁴⁷ *Moevao v Department of Labour* [1980] NZLR 464 at 481; *Jago v District Court of New South Wales* at 300; *Williams v Spautz* (1992) 174 CLR 509 at 520; *Walton v Gardiner* (1992-93) 177 CLR 328 at 393-394. As to the effects of illegal conduct by police see *R v Ireland* (1970) 126 CLR 321 at 334-335; *Bunning v Cross* (1977-1978) 141 CLR 54 at 74-75 and “the courts should not be seen to be acquiescent” at 78; *Cleland v R* (1982) 151 CLR 1 at 20; *Pollard v R* (1992) 176 CLR 177 at 201-203; *Ridgeway v R* (1994-95) 184 CLR 19 at 74-75, 77; cf *Nicholas v R* (1998) 193 CLR 173 at 196-197 and 208-209, 210, 272, 274-276.

⁴⁸ (Undue interruption by judge) *Clever* (1953) 37 Cr App R 37 at 39-40; *R v Racz* at 232; *Yuill v Yuill* (1945) 1 All ER 183 at 185; *GIO (NSW) v Glasscock* (1991) 13 MVR 521 at 529-530, 532, 538-539; Ipp “Judicial Intervention Trial Process” (1995) 69 ALJ 365 esp at 371-373. (Conduct by court officer) *R v Barney* [1989] 1 NZLR 732; *Re JRL*; *Ex parte CJL* at 349-350, 352. (Judicial officer warning him or herself) *Fleming v R* [1999] HCA 68; 73 ALJR 1 at [37].

⁴⁹ *Jago v District Court of New South Wales* at 49-50; *Pearce v R* (1998) 194 CLR 610 at [39]; *R v Jurisic* (1998) 45 NSWLR 209 at 221.

“Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people’s consciousness the fundamental, natural yearning to see justice done - or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is “done in a corner [or] in any covert manner.” It is not enough to say that results alone will satiate the natural community desire for “satisfaction.” A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society’s criminal process “satisfy the appearance of justice.” *Offutt v United States*, 348 U.S. 11, 14 (1954), and the appearance of justice can best be provided by allowing people to observe it.

.....

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case.”⁵⁰

- (ix) Open justice affects the weight to be given to the public interest in the determination of claims of privilege.⁵¹
- (x) The public interest in the appearance of justice in part explains the reluctance to order a stay of criminal proceedings.⁵²
- (xi) The role of legal practitioners as officers of the Court creates a public interest to restrain a legal practitioner from acting against a former client, which is also reflected in scepticism about the efficacy of ‘Chinese walls’.⁵³

⁵⁰ *Richmond Newspapers Inc v Virginia* at 571-572.

⁵¹ *Australian National Airlines Commission v The Commonwealth* (1975) 132 CLR 582 at 593-594; *Alister v R* (1983-84) 154 CLR 404 at 415; *Ellis v Home Office* [1953] 2 QB 135 at 147.

⁵² *Jago v District Court of New South Wales* at 50.

⁵³ *D & J Construction Pty Ltd v Head* (1987) 9 NSWLR 118 at 122-123; *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357 at 362-363, 374; *Fruehauf Finance Corporation Pty Ltd v Feez Ruthning* [1991] 1 Qd R 558 at 565-566; *Ocean Lite Ltd v HIH Casualty and General Insurance Ltd* [1999] NSWSC 292 at [48]; *Lincoln v Holmesglen Institute of TAFE* [1999] FCA 601. See also *R v Winston Smith* (1975) 61 Cr App R 128;

As Justice Bryson put it, in a frequently cited case:

“Cautious conduct by the court is appropriate because the spectacle or the appearance that a lawyer can readily change sides is very subversive of the appearance that justice is being done. The appearance which matters is the appearance presented to a reasonable observer who knows and is prepared to understand the facts.”⁵⁴

Judicial Accountability

The central significance of public confidence in the administration of justice is mentioned in virtually every case which refers to the principle of open justice. Public confidence is primarily maintained by the practical operation on a daily basis of the principles of open justice. As Justice Gummow has said, the maintenance of public confidence in the administration of justice “in present times, is the meaning of the ancient phrase ‘the majesty of the law’.”⁵⁵

The principle of open justice, in its various manifestations, is the basic mechanism of ensuring judicial accountability. The cumulative effect of the requirements to sit in open court, to publish reasons, to accord procedural fairness, to avoid perceived bias and to ensure the fairness of a trial, is the way the judiciary is held accountable to the public.

The “public” which, in a democracy, the judiciary serves, must not be understood in any immediate populist sense. The judiciary serves the “public” understood as a historical continuum: acknowledging debts to previous generations and obligations to future generations.

The relationship between the principle of open justice and judicial accountability has been emphasised by Chief Justice Gleeson, who said:

“The corollary of the obligation of judges to conduct their business in public, and to give reasons for their decisions, is that they are exposed and are regularly subjected, to public

MacDonald Estate v Martin (1991) 77 DLR (4th) 249 at 255-256; *Re Everingham et al v Ontario* (1992) 88 DLR (4th) 755 at 761-763. The public interest in avoiding conflict situations of lawyers was also accepted in New Zealand until recently. See *Black v Taylor* [1993] 3 NZLR 403 at 408. This seems to have been reversed in the most recent case. See *Russell McVeagh McKenzie Bartleet & Co v Tower Corp*, unreported, New Zealand Court of Appeal, 25 August 1998. See Coull “Conflicts of Interest and Chinese Walls” (1998) *NZLJ* 347 at 349. The English law also omits reference to a public interest dimension (*Rakusen v Ellis Munday & Clarke* [1912] 1 Ch 831; *Bolkiah (Prince Jefri) v KPMG (a firm)* [1999] 2 WLR 215).

⁵⁴ *D & J Constructions Pty Ltd v Head* at 123

⁵⁵ *Mann v O’Neill* (1996-97) 191 CLR 204 at 245.

comment and criticism. The practical importance of this should not be underestimated, especially in an age when attitudes towards authority are no longer deferential, and are frequently the opposite. Being a judge is not a suitable occupation for the thin skinned.”⁵⁶

His Honour said with respect to the obligation to give reasons:

“This form of accountability is not to be taken lightly. The requirement of giving a fully reasoned explanation for all decisions has profound importance in the performance of the judicial function. Apart from judges, how many other decision makers are obliged, as a matter of routine, to state, in public, the reasons for all their decisions? Most decisions, other than those made by judges, are made by people who may choose whether or not to give their reasons.”⁵⁷

The principle of open justice is an important aspect of the quality of judicial decision-making. The openness of the process and the necessity for reasons ensures that judicial conduct is subject to the spur of close scrutiny, particularly by the legal community, but also by the general community.

As Sir Harry Gibbs put it:

“It is the ordinary rule of the Supreme Court ... that their proceedings shall be conducted ‘publicly and in full view’ (*Scott v Scott* at 200). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected.”⁵⁸

Lord Diplock expressed similar sentiments when he said:

“If the way courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy”⁵⁹

Impartiality, it has truly been said, is the supreme judicial virtue.⁶⁰ By the judicial oath, judges undertake to act “without fear or favour, affection or ill

⁵⁶ The Honourable Murray Gleeson “Judicial Accountability” (1995) 2 *The Judicial Review* 117 at 123-124.

⁵⁷ *Ibid* at 122.

⁵⁸ *Russell v Russell* at 520.

⁵⁹ *A-G v Leveller Magazine* at 450.

⁶⁰ Lord Devlin *The Judge* Oxford University Press (1979) p4; Sir Gerard Brennan “Why be a Judge?” (1996) 14 *Australian Bar Review* 89 at 91.

will". However, impartiality must not only exist, it must be palpable. The High Court has made it quite clear that in Australia the test for determining that a judge has been or might be actuated by bias is whether or not fair-minded people might reasonably apprehend or suspect that the judge has pre-judged or might pre-judge the case.⁶¹

The test of bias based on appearance is a crucial manifestation of the principle of open justice. The maintenance of impartiality, not only the actuality but the appearance thereof, is the point at which judicial independence and judicial accountability intersect. There is no incompatibility between accountability by open justice and judicial independence. Indeed they are closely intertwined principles.

Open justice is also one of the most significant guarantees of personal liberty. The principle of the separation of powers must be seen to be in operation as a practical reality. For example, a relationship between the bench and the prosecution in the criminal process which can be described as "too close", is by no means unknown in our history. However, as Viscount Dilhorne put it:

"A judge should stay out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution."⁶²

Similar principles apply in a civil trial.

There is a clear movement towards managerial judging - the direct involvement of judges in the preparation for and the conduct of proceedings. This is in part motivated by new pressures for accountability as to how courts spend public resources. Nevertheless, there are very real limits on the extent to which such involvement can be taken, consistently with the principles of open justice.

There is an inevitable tension between the contemporary pressures on courts to maximise throughput and the principle that justice must be seen to be done. In 1936 the Privy Council held that a divorce trial was voidable because the judge had sat in a room which had a sign saying "Private" on the door. The Judicial Committee said:

"Publicity goes far to prevent the trial of these actions, where one is superficially so much like another, from becoming stereotyped and standardised, so that the ability to dispose of them is even now, apparently, regarded in some quarters as the convincing test of judicial efficiency."⁶³

⁶¹ See *Webb & Hay* and authorities cited at 47 fn 36.

⁶² *Director of Public Prosecutions v Humphrys* [1977] AC 1 at 26.

⁶³ *McPherson v McPherson* at 202.

Such attitudes have returned with greater virulence. I do not mean to suggest that improvements in judicial efficiency have not been required, nor that further improvements cannot occur. My proposition is that many advocates of such measures have an inadequate understanding of the way that such steps may adversely affect other values and of the incompatibility of some such measures with fundamental principle, including the principle of open justice.

I am, of course, conscious of the fact that there are limits to the proportion of the gross national product that we can afford to expend on the legal system. That system is not immune to the effects of the substantial shift in attitude to the public sector which has had significant, and often adverse, impacts on many other areas of government. However, the process of adapting to this most recent swing of the pendulum about the proper role of government, must proceed with caution in the case of institutional arrangements which have taken centuries to develop and which can be destroyed in years.

We should not underestimate the significance - not least to our economy - of the broadly based acceptance of the institutional legitimacy of the administration of justice.

It is institutional legitimacy that explains one great marvel of our social system: why do the overwhelming majority of Australians obey the law, and refrain from taking the law into their own hands, even when the risk of detecting a breach is low and the application of a deterrent sanction even lower? The operation of open justice is an important determinant of this institutional legitimacy. This phenomenon could not be replicated by market forces.

I do not wish in any way to be understood to doubt the importance of courts accepting accountability for the use to which they put public funds of which they are the custodian. Nevertheless, there is a tendency to equate courts with bureaucracies in both the approach taken and the terminology employed with respect to these matters. This is a fundamentally pernicious development which ought be resisted.

The development of performance measurements by means of benchmarking operates under the auspices of the Council of Australian Governments (COAG). The present system continues an initiative of the Premier's Conference of July 1993 in, what was called, the Review of Government Service Provision. This Review is supervised by a Steering Committee chaired by the chair of the Productivity Commission. Each area of government activity is supported by a working group which, in the case of the legal system, is the Court Administration Working Group.

All aspects of this process are being pursued with a single ideology and a single methodology. A system of performance benchmarking is established, pursuant to which performance indicators are developed and

published. In the case of the judicial system, the terminology is misleading, perhaps dangerously so. The courts do not deliver a “service”. The courts administer justice in accordance with law. They no more deliver a “service” in the form of judgments, than the Parliaments deliver a “service” in the form of statutes.

This recent development of contemporary public administration draws heavily on an analogy with the private sector and seeks to replicate the incentives and sanctions of a market system in areas of activity in which a market does not directly operate. I do not doubt for a moment that this approach can supply valuable insights and lead to important reforms. There is, however, a tendency amongst the practitioners of this new approach to public administration to regard the focus of their own activities as in some respects more important than the activities which they supervise.

More significantly, there is a marked tendency to devalue aspects of these activities of others which are incapable of measurement. With respect to the legal system these deficiencies are capable of causing significant distortions. The tendency to regard the courts as providing some kind of “service” has crept into the terminology of all aspects of government decision-making with respect to the courts and, most particularly, with respect to decision-making about the allocation of resources. It is important that these tendencies should be counter-balanced by a broader appreciation of the functions performed by the legal system as a manifestation of government.

In particular, the tendency to give quantitative measurements a quite disproportionate influence in the making of decisions, particularly on the allocation of resources, which arises from the very concreteness of statistics against the more amorphous quality of principle, is a tendency that must be resisted.

Not all areas of government are capable of being moulded by analogy with the operation of a free market. There are important areas of government activity in which market forces have been introduced with substantial benefits to the community as a whole. However, the administration of justice is not an area in which such an analogy has much that is useful to contribute. Few advocate that commercial corporations should conduct their affairs in public, nor that they should publish reasons for their decisions, or observe any of the other principles of open justice. Nor should the dynamics of commercial corporations be seen as having any particular relevance for the administration of justice.

One characteristic of open justice is its inefficiency when compared with private or secret justice. There is no doubt that a much greater volume of cases could be handled by a specific number of judges if they could sit in camera, not be constrained by obligations of procedural fairness or the need to provide a manifestly fair trial, and not have to publish reasons for their decisions. Even greater “efficiency” would be quickly apparent if judges had made up their minds before the case began. There are places where such a mode of decision-making has been, and indeed is being, followed. We do not

regard them as role models. Open justice does not provide the most efficient mode of dispute resolution. Nor, indeed, does democracy provide the most efficient mode of government.

Yet the major pressure on the courts, like other parts of the public sector, is to increase throughput without increased resources.

I am reminded of the micro economic reformer who noted that a Mozart String Quartet takes as long to perform in 1999 as it did in 1799. In short, in two hundred years there had been no productivity improvement whatsoever. Plainly, this could only be the result of a collusive arrangement amongst professional musicians. The matter needs to be investigated by the ACCC.

Some things take time. Justice, and in particular the appearance of justice, is one of them. No doubt there is an economist somewhere who would classify this as some form of trade off between quality and quantity, but this very perspective fails to give weight to the public interest involved and, specifically, fails to understand the significance of institutional legitimacy.

I repeat, the courts do not provide a public funded dispute resolution service to litigants as consumers. The courts perform a core function of government: the administration of justice according to law.

A dispute resolution “service” can be delivered more economically in private. Indeed, privacy is frequently cited as a motive for participating in alternative dispute resolution. Although mediation and arbitration have important roles to play, we should not, however, forget the public interest that is served by open justice.

It is the qualitative dimension of open justice which requires one to treat with reserve the role of “performance indicators”, which appear to treat courts as accountable for their performance only in quantitative terms.

In the former Soviet Union, one of the few things of which they had no shortage was performance indicators. They called it a five year plan. There are a number of classic examples as to how such performance indicators distort decision-making. My favourite comes from Nikita Krushchev in one of his speeches critical of the controllers of heavy industry, whom he dismissed as “steel eaters”. He pointed out that the five year plan had for many years contained a performance indicator for nail manufacturers expressed in the form of tonnes of nails. This proved to be inadequate as every factory made a huge number of big nails and virtually no small nails. In order to overcome the shortage of small nails, a new five year plan expressed the performance indicator in terms of numbers of nails, rather than tonnes. The obvious occurred: within a few years there was a shortage of big nails.

When deploying such performance indicators in terms of accountability, we must never lose sight of the qualitative dimension. Open

justice cannot be measured. Open justice, not statistics, must continue to be regarded as the basic mechanism of judicial accountability.

I do not wish to suggest that accountability for financial expenditure is not important. However, if it provides the primary input to decisions about allocation of resources, then the fundamental function performed by the legal system may be compromised. Indeed, taken too far, it will threaten the very market system in the name of which the process has been instituted.

There is a tendency amongst economists to regard “the market” as a product of nature, as unorganised as a medieval bazaar. It is not. The “market” is a sophisticated human creation and, more than anything else, it is a creation of good government and of the law. Without the protection of property and the enforcement of contracts, no market system can operate.

In the Town Hall of Sienna there are two wonderful frescoes by Lorenzetti: Allegories of Good Government and of Bad Government. Even a cursory glance at the latter, with its depiction of decay and chaos, would convince anyone that without law, there can be no market system.

Conclusion

The principle of open justice did not emerge in our legal history by a process of deduction from an abstract ideal. Like all other important aspects of our legal system, the principle was derived from observation of the actual practice of dispute resolution over long periods of time which, once recognised as a principle, influenced further development of the practice.

The word “court”, in the sense of the judicial institution, shares a common origin with a royal or aristocratic “court” which, of its nature, involved a broader range of persons than the immediate disputants. The early use of juries as representatives of the community, also implied public access. Such are the pragmatic origins of fundamental principle in the common law.⁶⁴

During a period of this nation’s history when the pressures of global events are imposing radical change on all of our institutions, we must learn to stop taking important things for granted. We must, at least occasionally, rearticulate the rationale for our fundamental principles, so that we do not lose their benefit, without intending to do so.

I have in mind, particularly, the way in which the standards of commercialism have swept aside other values, and dominate public debate to an unprecedented degree. It is noticeable that although once our cities were dominated by public buildings - parliament, court, town hall, cathedral - now all are dwarfed by commercial office blocks, and public buildings or are now often constructed in indistinguishable form. There are dangers in such uniformity.

⁶⁴ Nettheim *ibid* at 26-27; *Raybos Australia v Jones* at 50-51; *Richmond Newspapers Inc v Virginia* at 565-566.

Diversity in the values served by social institutions is as significant for the health of our society, as bio-diversity is for our ecology. The values of truth, justice and fairness, which are served by the legal system, are not necessarily compatible with the unbridled operation of market forces.

At times the belief in the universal applicability of market forces, borders on monomania. The common law has seen off a number of monomanias. In the past they have tended to come in the form of religion. It once came in the form of the divine right of kings. It now comes in the form of the divine right of markets. No claim to universality is compatible with the pursuit of truth, open justice and fairness.

Even in economics there is proof of the significance which ordinary people attach to the perception of fairness.

Economists have created an experiment called “the ultimatum game”.⁶⁵ In the ultimatum game one person is given a sum of money which he is instructed to offer to the second player. If the second player accepts the amount he can keep what is offered and the first player gets to keep the rest. If the second player rejects the offer neither player gets anything. No bargaining is allowed. On the basis of the usual assumptions of rational behaviour and pursuit of self interest, an economist would predict that the first player will offer a minimal amount and the second player will accept it. This is not what happens. Offers usually average between 30 and 40 percent. Offers less than 20 percent are usually rejected.

An offeree feels mistreated in a contemptuous way by a minimal offer. It is not fair. He would rather get nothing. Offerors expect and understand that this will happen. They make offers likely to be perceived to be fair.

There is a great deal of wisdom deeply embedded in institutions which have grown and adapted to changing circumstances over long periods of time. It is a regrettable characteristic of much Australian public debate, that it proceeds on the basis that history is of little significance. That is reflected in some discussion of judicial accountability.

We do not often assert, indeed it seems we are sometimes reluctant to admit, that we draw on an institutional tradition of at least 800 years. More significantly we should recognise and reject the underlying assumption that ‘history’ is something that happened somewhere else.

This year, the Supreme Courts of Tasmania and of New South Wales, celebrated the 175th Anniversary of their foundation.⁶⁶ By any standards, those are old institutions. The nations that have judicial institutions of such vintage, can be numbered on the fingers of one hand.

⁶⁵ See Cass R. Sunstein *Free Markets and Social Justice* Oxford University Press (1997) p32.

⁶⁶ See (1999) 73 ALJ 561.

We Australians like to think of ourselves as a young country. However, when it comes to the basic mechanisms of governance - parliamentary democracy and the rule of law - this is not a young country, this is an old country. Our courts have a continuous institutional existence of 175 years. Representative and responsible government is almost 150 years old. We will soon celebrate the centenary of Federation. These are old traditions.

Fundamental values - like the principle of open justice - on which these successful institutions are based, have served us well. The expression of these values in actual institutional arrangements and practices will continue to adapt - as they have been adapting for centuries - to changing demands and social conditions. The preservation of those values requires continued vigilance.
