

LAWASIA DOWNUNDER
QUEENSLAND, AUSTRALIA - 21 and 22 March 2005

HOW DO JUDGES KEEP UP TO DATE?

THE HON JOHN DOYLE AC
CHIEF JUSTICE OF SOUTH AUSTRALIA

Programs of professional development for the Judiciary are likely to differ in their content, and be provided by different means, from country to country. The differences will be attributable to differences in legal systems, the social environment in which the legal profession and the judiciary function, how judges are chosen and the relationship between the judicial arm of Government and other arms of Government.

I can speak only about the provision of professional development programs in Australia.

The Australian environment

In the time available all I can do is sketch briefly the Australian background that influences our approach to the provision of professional development.

In Australia there is a strong and long standing principle that the judicial arm of government is independent from and separate from the legislative and executive arms of government. Our institutional arrangements are similar (although not identical) to those found in countries such as England, Canada, the United States and New Zealand. The Australian Constitution entrenches the judicial arm of government as a separate arm of government. At the State level

the separation of the judicial arm of government from the other arms of government is not so clearly spelt out, but the principle is recognised nevertheless.

Each State and Territory of Australia appoints and provides for its own judiciary. The Commonwealth Government also appoints and provides for its own judiciary. In Australia we have courts established by Commonwealth law, and courts established by the law of each State and Territory.

Members of the judiciary are appointed by the Government. In that respect we also follow English traditions. However, it is well established that appointments are made on merit.

Appointments to the judiciary are made from the legal profession. Unlike countries in the civil law tradition, we have no career judiciary that one can join from the outset, and within which one can expect to earn promotion. Usually a person will be appointed as a member of the judiciary only after about 10 years as a legal practitioner, and in many cases after 20 years or more. Most judicial officers hold their office until the statutory age for retirement.

A person appointed to the judiciary is assumed to have acquired, through professional experience, the legal knowledge and skills, and sufficient understanding of the function of a judicial officer, to be able to be appointed without undergoing any prior training. The transition from legal practitioner to judge is instantaneous. One day a lawyer, next day a judge!

The Australian judiciary is about 950 strong. Although most members of the Australian judiciary are based in the larger cities, a good number are based in

relatively small towns, and, because of the great size of the Australian continent, we are a far flung judiciary.

Finally, our makeup reflects the fact that the Australian legal profession, from which we are drawn, is organised on a State and Territory basis. There are now moves towards a single national legal profession, but that has not yet been achieved, and whether it ever will be remains to be seen.

Terminology

I have used the term “professional development” rather than “judicial education”.

I do so for two reasons. First, our system assumes that a person appointed to the judiciary has the technical and practical skills required to perform judicial work. The term “judicial education” would imply to some that we provide basic training of a type without which a person is not equipped to function as a judicial officer. That is not the case in Australia.

I therefore use the term “professional development” to indicate, that in Australia we are concerned with improving the skills, understanding and practical knowledge of judicial officers, so as to help them better perform their work. We do not aim to turn a practitioner into a judge.

Another reason for preferring not to use the term “judicial education” lies in our strong tradition of our judicial independence. The term “judicial education” might imply to some that it is permissible to train or even indoctrinate the Australian Judiciary so that its members will conform to a standard or style preferred by the Government or by some other entity.

Our tradition emphasises both the institutional independence of the Australian Judiciary, and the independence of individual members of the judiciary from each other. That being so, our programs are intended to help judicial officers to maintain and to improve their skills, and care must be taken to avoid any overtones of indoctrination.

What is embraced by “professional development”?

The expression “professional development” is not a precise one. It embraces the following.

First, programs that help judicial officers keep up to date with developments in the law. Such programs might focus on purely legal matters, or on providing information about something that the law is now regulating in a new way, such as gene technology.

Second, we have programs that are intended to improve the practical and applied skills that are involved in discharging the judicial office. For example, communication skills, efficient work methods, judgment writing.

Third, there is a considerable emphasis on programs that I will refer to as “social awareness” programs. These are programs that are intended to inform judicial officers about matters of which they may have only a limited understanding. An example of this is programs aimed at informing judicial officers about Aboriginal culture, and about the difficulties that members of the Aboriginal peoples face when they confront our legal system, a system which operates according to cultural assumptions and attitudes significantly different from theirs. We have programs on gender awareness and disability awareness.

A number of topics fall under this heading, but they are all aimed at ensuring that as far as possible judicial officers understand the people and situations that come before them.

There is also a fair bit of attention given to programs dealing with physical and mental health of judicial officers. It is not uncommon in Australia for judicial officers to hold office for 15 or 20 years or even more. We provide programs that are intended to help judicial officers recognise signs of stress or burn out should they be developing, and which provide them with strategies for dealing with these problems.

We aim to provide programs that will refresh and enthuse judicial officers. We are mindful of the fact that after holding office for many years, and performing essentially the same tasks throughout that time, staleness can set in.

Sources of professional development programs

There are a number of different bodies that provide professional development to Australia's Judiciary.

I speak today in my capacity as Chairman of the Council of the National Judicial College of Australia ("NJCA").

The NJCA was established less than three years ago. Its charter is to provide professional development programs for the whole Australian judiciary.

Its governing council has a majority who are members of the judiciary, and a minority appointed by Attorneys-General of the Commonwealth and of the States and Territories. The College is based at the Australian National University in Canberra.

At this stage it is a small organisation. It has a staff of three and an annual income of about \$350,000.

In Australia, there has been a long tradition of providing professional development programs through the work of volunteer and part-time committees established within individual courts. Such committees usually had minimal funding, and no dedicated resources. The NJCA does not intend to replace these committees, but to work with them. Our aim is, as best we can, to help them provide better programs and to supplement their efforts by providing programs that can be included in their programs.

The Judicial Commission of New South Wales is established under the law of New South Wales. It is a substantial body with substantial funding. It has been operating for a number of years. It provides professional development programs for the judiciary of New South Wales. It also assists them perform their work in various ways. Some of those programs are open to the judiciary of other jurisdictions.

The Judicial College of Victoria was established in 2003. It is established to provide professional development programs for the judiciary of Victoria, with some opportunity for members of judiciary of other places to attend.

The NJCA expects that each of these **Colleges** will be the principal provider of professional development for the judiciary of those two States. The NJCA will work closely with them, and will supplement their programs.

The Australian Institute of Judicial Administration, as its title indicates, has a charter wider than professional development. Its members include members of

the judiciary and court administrators and others. It has helped fill the void that otherwise would have existed, and has provided a number of programs that fall within the description of professional development programs for the judiciary.

Membership of the Judicial Conference of Australia is open to all members of the Australian judiciary. While its concerns are wider than professional development, its programs also include programs that answer the description of professional development programs.

The NJCA works cooperatively with these bodies as well, and anticipates that they will continue to be a source of professional development for Australia's Judiciary.

Finally, in Australia Judges frequently attend conferences and seminars run by the legal profession, and conferences such as this one. Sometimes the program includes sessions specifically intended for judicial officers.

Why is there a need for professional development programs?

I suggest that my outline of the scope of professional development in part answers this question. In the course of a judicial career, a judicial officer will perform better if helped to improve and to maintain his or her skills. Also, in a rapidly changing society, judicial officers benefit from programs that help them adjust to those changes. And, as I mentioned, we are aware of the danger of judicial officers going stale over time.

There is another factor. Legal practice is becoming increasingly specialised, and so are some aspects of judicial work. We can no longer assume that a person appointed to the judiciary will have a professional background that

will enable the person to move easily into all of the kinds of judicial work handled by the court to which the person is appointed. Australian courts are, by and large, generalist courts. The Family Court is a notable exception. Judicial officers will be expected to perform a wide range of judicial work, although within the larger courts there is an element of specialisation. And so some judicial officers will need assistance if they are to undertake judicial work of a kind that they have not experienced in practice, or have not experienced for some time.

There is another factor which is much emphasised by the NJCA. Any experienced judicial officer knows that there is a lot to be learned by experience. However, as the saying goes, experience is a good school but the fees are high. Sometimes the lessons learned through experience are learned at some pain to the individual. One of our aims is to encourage and assist the transfer of the benefits of experience, as early in the judicial career as we can, from experienced judicial officers to those who are relatively recently appointed. These benefits of experience are best identified and transferred by having judicial officers working together in groups, discussing issues that arise in the course of judicial work. While there are informal networks that help judicial officers learn from the experience of others, we aim to improve the means by which the benefits of experience are transferred.

How are programs delivered?

The independence of the judiciary requires that the delivery of programs be under the control of and managed by the judiciary itself.

In Australia participation in such programs is voluntary. Independence of the judiciary has an institutional and an individual aspect. It is generally considered that judicial independence means that a judicial officer cannot be directed to participate in programs of professional development. Whether that view should continue to prevail may be a matter for debate, but it is the prevailing view.

I have already referred to the fact that judicial independence also requires that in our programs we must avoid any element of indoctrination, or of the deliberate shaping or forming of judicial attitudes on specific issues that will fall for decision. The line that has to be drawn here can be a fine one at times.

Our methods of delivery have to recognise the fact that judicial officers are busy people, and heads of jurisdiction have a limited ability to release them from their ordinary duties to enable them to participate in programs of professional development. This is a long term problem for Australia's judiciary. We have to deliver programs in a manner that recognises that many judicial officers, indeed most, will have limited opportunities to attend such programs away from their usual workplace.

The principles upon which the NJCA operates

Most of what I have said so far applies, I believe, to the delivery of professional development generally, by all bodies that do so in Australia.

I turn now to the principles upon which the NJCA has settled to guide it in its work.

First, we recognise that we are dealing with adult professionals, most of whom are motivated to improve their skills. However, the judiciary will include some members who see no need to update or to improve their skills, and we must try to reach these people as well. Our methods must reflect the best practice in the area of adult continuing education.

As I have already mentioned, we are dealing with busy people who cannot be required to participate in our programs. So our programs must be interesting and attractive, encouraging judicial officers to participate in them.

Within its numbers the Australian judiciary has a wealth of accumulated skill and experience. The College draws on that skill and experience. Most of its programs are led by experienced judicial officers, although we readily use presenters from outside the judiciary when their skills, experience and knowledge are required having regard to the subject matter.

Our programs focus mainly on the practical skills involved in the work of a judicial officer, and on assisting judicial officers to discharge their duties efficiently and fairly. We take the view that there are many sources, in journals and other places, from which judicial officers can obtain information about changes in the law and technical legal issues. Our focus is more on those aspects of judicial work which often are not written down.

As I have emphasised, we aim to help judicial officers learn from the experience of other judicial officers. We also present programs that encourage judicial officers to reflect on their own approach to their work.

For these reasons our emphasis is on sharing and building on the experience of judicial officers who participate in our programs. Most of our programs involve groups of no more than about 25 or 30 judicial officers. The program sessions involve judicial officers working together, discussing and sharing their experience and knowledge. We use this approach in preference to lectures and formal presentations, although on occasions we use those methods as well.

The group discussions will usually focus on exercises or factual settings intended to reflect real issues that arise in daily judicial practice, presented in a realistic manner. We make use of simulations, involving the judicial officers. Sometimes we hire actors to enact courtroom situations, that are then used as a focus for discussion about the appropriate judicial method.

We aim to present programs throughout Australia, as well as the Australian National University where the College is based. We also aim to mix judicial officers from different courts and different places. For example, were we to present a program in the State of Queensland, our aim would be to ensure that at least one third of the participants came from a State other than Queensland.

I will describe very briefly our main programs. Our travelling program is a program presented over one and a half days. It comprises three modules, each half a day in length. The modules presented on any particular occasion are selected from a group of different modules that we have developed, and which we aim to refine and improve each time they are used. As its name indicates, it is a program that we present in different locations.

The Phoenix Program is a five day program. It is based on a group of about 30 judicial officers, about half of them being recently appointed and half being experienced. It has two aims. The first is for experienced judicial officers to transfer the benefit of their experience to recently appointed judicial officers. The second aim is to help the experienced officers improve the manner in which they perform their work, by giving them the opportunity, through discussion of their experience, to reflect on their own experience. Also, we encourage the recently appointed judicial officers to challenge established approaches, as they see fit. Many of the sessions in this program are led by program participants, although we also bring in outside presenters.

The NJCA has assumed responsibility from the Judicial Commission of New South Wales for the National Judicial Orientation Program, which is an orientation program intended for recently appointed judicial officers. This is a five day program, presented in Sydney in New South Wales.

This year the College will present a program on judgment writing. This is a two day program, and if it is successful the College intends to repeat the program regularly.

From time to time the College presents seminars and workshops on particular matters of interest in a particular jurisdiction.

The Council of the NJCA believes that the provision of professional development programs by way of distance education, using electronic means, will become a significant part of our programs. The use of information technology to deliver distance education programs will enable us to reach far

more judicial officers than we otherwise would be able to reach. Distance education is not intended to replace the programs to which I referred. It is intended as supplement.

The NJCA aims to develop skills in the preparation and presentation of such programs. We know that the development of high quality programs is time consuming and expensive.

The College has entered into a contractual arrangement with the Australian National University for the development of a pilot program on judgment writing. We have entered into a contractual arrangement with Monash University for the development of a pilot program on disability awareness. We hope to test these pilot programs during 2005, and then to begin offering them on a regular basis.

The NJCA has its own website, and aims to provide access through that website to an electronic library of otherwise unpublished or hard to find material that will assist judicial officers with professional development. We are also hopeful of entering into arrangements with the Commonwealth Director of Public Prosecutions, funded by the Commonwealth Attorney-General, to develop an electronic database with information about sentencing in relation to Commonwealth offences.

Other issues

It is appropriate to mention some other matters that we regard as important, at least in the Australian context, although they are not an aspect of professional development.

We need to persuade Australia's Governments that it is in the public interest that they adequately fund professional development programs for their respective judiciaries. The public make a substantial investment in the judiciary, through the public money that is used to maintain the courts and the judicial system. Appropriate professional development programs will improve the manner in which justice is administered. We want to bring Australia's Governments to the understanding that investing public money in professional development programs for the judiciary is a good use of public money.

We hope to inform the Australian community about our work and the work of other bodies providing professional development for the judiciary. We believe that public confidence in the judiciary will be enhanced if the public are informed about the programs of professional development that are provided to their judiciary.

We aim to build links with institutions in other countries that are involved in the provision of professional programs for their judiciaries. We realise that there are numbers of such bodies from which we in Australia have much to learn. As soon as we can find the time and resources to develop links with other similar organisations, we aim to do so.

As our own expertise and capacity develops, we also hope to provide assistance to neighbouring countries, to the extent that our approaches and practices may be relevant to their situation.

Conclusion

The program description correctly states that the provision of adequate programs of professional development is important if the judiciary is to remain as a truly independent institution. It is important because the independence of the judiciary is supported by public confidence. That public confidence assumes, and also depends on, a high level of competence from judicial officers. Without the assistance of appropriate professional development programs, it is difficult for judicial officers, over the course of a career, to maintain that high level.