Judicial Conference of Australia

Public Pronouncements about Proposed Legislation: Guidelines

October 2012

1. At its meeting held on 17 March 2012, the Governing Council accepted the suggestion of Justice White that it would be desirable for the Council to develop a policy, or at least a guideline, concerning the circumstances in which it would be appropriate for it, or in more urgent cases the Executive, to make public comment on, or submissions concerning, proposed legislative changes. It was resolved that a subcommittee, comprising Justices McMurdo, Kelly, Penfold and White, together with the Secretary, be appointed to develop a draft policy for consideration at a future meeting of the Council. The Council has approved that draft and this policy.

2. The starting point is that, generally speaking, judicial officers should not be participants in the political process. That is not their constitutional role, and the due performance of that role can be compromised by straying into the political arena. This can diminish the public's confidence in courts and their officers, as independent institutions concerned only with the due exercise of judicial power according to the rule of law. If judges start to appear and sound like politicians, participating in a political debate, their standing as judicial officers can be seriously affected. More particularly, such a participation is likely to draw a response from those who *are* proper participants in the political process, such as to upset the proper balance between judicial officers and politicians.

3. That balance has been discussed recently by Lord Neuberger of Abbotsbury, President of the Supreme Court of the United Kingdom, as follows:

> "Mutual respect between the judges and the politicians is essential. But as the word 'mutual' emphasises, it is a two-way process: each must respect the other's turf and not trespass on it. If judges criticise government policy in speeches, their complaints when Ministers publicly criticise judges will inevitably ring rather hollow. A judge

> can scarcely complain about Ministers criticising him for the way he is doing his job if he criticises Ministers for the way they are doing their jobs. And if they slang each other off in public, members of the judiciary and members of the other two branches of government will undermine each other, and, inevitably, the constitution of which they are all a fundamental part, and on which democracy, the rule of law, and our whole society rests."[1]

4. There is a further concern about statements from the judiciary in this context, which is that, in some cases, the apparent independence of a judicial officer could be affected in a way which prevents him or her from deciding a case without apparent bias. In some cases at least, this will be less likely to occur where the statement is not from an individual judicial officer but from the JCA.

5. But these considerations, of course, do not always require the judiciary to remain silent. The rules expressed by Lord Kilmuir in 1955 are no longer followed. Lord Kilmuir then wrote:

> "[T]he overriding consideration, in the opinion of myself and of my colleagues, is the importance of keeping the Judiciary in this country insulated from the controversies of the day. So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism. … [A]s a general rule it is undesirable for members of the Judiciary to broadcast on the wireless or appear on television. …"[2]

If the Kilmuir Rules still applied, the role of the JCA would be a limited one indeed. In Australia, guidance about participation in matters of public debate is provided in the Guide to Judicial Conduct (2nd Ed 2007) published by the Australian Institute of Judicial Administration. The first of those guidelines is especially relevant in the present context:

> "A judge must avoid involvement in political controversy, unless the controversy itself directly affects the operation of the courts, the independence of the judiciary or aspects of the administration of justice."

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1 "Where Angels Fear to Tread": Holdsworth Club 2012 Presidential Address, 2 March 2012.

2 Letter from Lord Kilmuir to the Director-General of the BBC of 12 December 1955, reprinted in Barnett *Judges and the media – the Kilmuir Rules*, (1986) Public Law 383 at 384-385.

Although the nature and extent of the involvement of the judiciary as participants in public discussion and debate remains somewhat controversial, the exception identified in that guideline is well accepted. Thus in his paper "Should Judges Speak Out?", delivered to the JCA Colloquium at Uluru in 2001, Justice Keith Mason, then President of the New South Wales Court of Appeal, referred to the "exception to the Kilmuir principle, now widely recognised, [of] the right of judges … to speak out on matters affecting the interests of the judiciary" although "sometimes these remarks enter troubled waters of current controversy". Similarly, Lord Neuberger has said that:

> "[I]t seems to me only proper that judges, with their wisdom and experience, should be free to comment extra-judicially on a wide range of issues. In doing so they play an educative role. In areas such a constitutional principles, the role and independence of the judiciary, the functioning of the legal system, and access to justice, and even important issues of law, this role cannot be underestimated."[3]

Lord Neuberger instanced the public statements by Lord Woolf, while Master of the Rolls, opposing a provision in the Criminal Justice Bill 1997 for mandatory sentences (an example which was given by Mason P in his paper) and, more recently a speech delivered last November by Baroness Hale of the Supreme Court of the United Kingdom, in which she described some aspects of proposed legal aid reforms as "fundamentally misconceived" and some other aspects as involving a "false economy".[4] About those comments, Lord Neuberger said:

> "Such comments enter the territory of government policy, and, indeed, a particularly controversial aspect of policy. As such it might be said that, notwithstanding the caveat at the opening of her address, which was to the effect that it is not for judges to criticise government policy, such comment was inappropriate.
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> It seems to me though that .. it was not impermissible for Baroness Hale to make the points she did. Judges can, I suggest, properly comment publicly on matters which go to the heart of the functioning of this judicial branch of the State. In some circumstances, it could be said to be their duty to do so."

6. It is this context, that is to say the public discussion or debate of matters which affect the proper interests of courts and the judiciary, which is properly relevant to the JCA

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3 Ibid.

4 B. Hale, Law Centre's Federation Annual Conference Opening Address (2011).

according to its defined objects. The JCA's objects include the maintenance of a strong and independent judiciary, the maintenance, promotion and improvement of the quality of the judicial system in Australia and the achievement of the better public understanding and appreciation of the role of the judiciary in the administration of justice. That last object should not be overlooked. So when the JCA made its submission on mandatory sentencing for offences of people smuggling, its purpose was at least as much to inform both the Committee and the public as it was to persuade.

7. What is also relevant is that we are not discussing the right of an individual judicial officer to speak publicly about proposed legislation. We are concerned with the guidelines that should inform the Governing Council, or its Executive, in speaking on behalf of the JCA. Inevitably, within such a large body as the JCA, there will be some disparity of opinion upon issues which are the subject of, or related to, a political controversy. This is a further reason to be careful to avoid, if it is possible to do so whilst pursuing the objects of the JCA, participation in a discussion on matters of government policy. But it is a consideration which should not compromise the proper pursuit of the JCA's objects. It is by limiting its public statements on proposed legislation to where they are reasonably required in the pursuit of those objects, that the Council or the Executive will be able to speak authoritatively for the JCA and the Australian judiciary.

8. It is also necessary to recognise that even where it is appropriate for the JCA to speak, ultimately it is for the Parliament to decide upon the content of legislation, and to that end to resolve issues of policy. It may be noted that this was specifically recognised within the JCA's submission upon mandatory sentencing, within the concluding two paragraphs.

9. With those matters in mind, the following guidelines are suggested.

10. In the main, the public statements of the JCA will be confined/directed to:

    (a) matters affecting the independence of the judiciary;

    (b) matters affecting the operation of the courts;

(c) the maintenance, promotion and improvement of the quality of the judicial system; and

(d) matters likely to affect some aspect of the administration of justice.

11. The JCA recognises that the range of matters which may affect some aspect of the administration of justice may, on some views, be extensive. Accordingly, it will exercise particular caution when considering making a public statement on matters which affect the administration of justice. In general, it will make public statements on matters of that kind only if they bear directly on the central functions of the judiciary.

12. In making public statements, the JCA has regard to:

(a) the fact that it is Parliament which ultimately has the responsibility of resolving issues of policy affecting the content of legislation;

(b) the subject matter of the proposed legislation, and the extent to which it involves political controversy;

(c) the desirability of the judiciary avoiding entering into political controversies, but accepting that on occasions it will be inevitable;

(d) the desirability of judicial officers sharing their experience so as to inform public debate and to improve the quality of legislation;

(e) whether the making of the public statement has been invited/solicited and, if so, the source of the request, and the uses which may be made of the public statement;

(f) the potential impact of the public statement on reasonable perceptions of judicial independence and impartiality, and to the desirability of avoiding a perception that judicial officers might not consider the law in question fairly and dispassionately;

(g) the desirability of avoiding so far as practicable a circumstance in which a reasonable apprehension of bias may arise in relation to the JCA members who will have to consider the law in question;

(h) in respect of a law which has effect on or in a certain jurisdiction, the views concerning the law expressed by the members of the judiciary in that jurisdiction, particularly views expressed of a head of jurisdiction, and attempt, so far as practicable, to avoid inconsistency with those views;

(i) the desirability of avoiding the expression of public and conflicting views by judicial officers; and

(j) the extent to which the members of the JCA may themselves hold conflicting views concerning the merit or otherwise of the law in question.