IMPROVING JUSTICE

A HISTORY OF THE AUSTRALASIAN INSTITUTE OF JUDICIAL ADMINISTRATION

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IMPROVING JUSTICE: A HISTORY OF THE AUSTRALASIAN INSTITUTE OF JUDICIAL ADMINISTRATION (AIJA)

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The Australasian Institute of Judicial Administration Incorporated ('AIJA') is an incorporated association affiliated with Monash University. Its main functions are the conduct of professional skills courses and seminars for judicial officers and others involved in the administration of the justice system, research into various aspects of judicial administration and the collection and dissemination of information on judicial administration. Its members include judges, magistrates, legal practitioners, court administrators, academic lawyers and other individuals and organisations interested in improving the operation of the justice system.

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FOREWORD

The commissioning of a history of the AIJA by the Project and Research Committee, and then by the AIJA Council, was given very careful consideration.

There was a clear view within the Project and Research Committee that any history should not simply be seen as self-congratulatory, but should rather, in considering the establishment of and development of the activities of the AIJA, identify the challenges in judicial administration in Australia, New Zealand and the Australasian region and the debate associated with them, together with a consideration of solutions of those challenges. In other words, the history of the AIJA should not be simply a history of the AIJA as an institution, but rather provoke discussion in relation to a wide range of issues of judicial administration. The history should also look to the future.

Dr James Waghorne has worked long and tirelessly on the AIJA history, and I am confident that he has met the expectations of the Project and Research Committee and the AIJA Council.

I join with Dr Waghorne in thanking the Advisory Committee consisting of the Hon Justice Susan Kenny, the Hon Robert Nicholson AO, Professor Stuart Macintyre AO of the University of Melbourne and Professor Greg Reinhardt, executive director of the AIJA.

The Hon Justice Michelle May
President, AIJA
2014

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I should also like to thank the Hon Catherine Branson, the Hon Peter Heerey AM, the Hon Dennis Mahoney AO, Professor Stephen Parker, Professor Peter Sallmann and Professor Anne Wallace, each of whom I interviewed in the preparation of this history. I am grateful for their enthusiasm and detailed comments.

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ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ACJI	Australian Centre for Justice Innovation
ADR	alternative dispute resolution
AIJA	Australasian Institute of Judicial Administration (formerly Australian Institute of Judicial Administration)
ANU	Australian National University
ATSIC	Aboriginal and Torres Strait Islander Commission
CAWG	Court Administration Working Group
COAT	Council of Australasian Tribunals
JCA	Judicial Conference of Australia
NADRAC	National Alternative Dispute Resolution Advisory Council
NCSC	National Center for State Courts
NJCA	National Judicial College of Australia
NSWJC	New South Wales Judicial Commission
SCAG	Standing Committee of Attorneys-General (now Standing Council on Law and Justice [SCLJ])
SRL	self-represented litigant
VCAT	Victorian Civil and Administrative Tribunal

INTRODUCTION

Modern court buildings are large, open spaces constructed in glass, steel and concrete. Visitors are ushered through security checks into expansive foyers, before moving into the building for access to legal services. The contrast with traditional, ornate and crowded courts reveals more than shifting architectural tastes. It reflects the changes that have occurred in the operation of the courts and in the administration of justice that have been introduced to improve the operation of the justice system in response to public and procedural need.

Many new court buildings have been constructed to accommodate courts established to expedite or improve the delivery of justice in particular areas of law, such as the Family and Federal Courts established in 1975 and 1976 respectively, and specialist tribunals, including those involving claims for refugee status or claims for native title rights. The court buildings also accommodate a judiciary greatly expanded to meet increases in litigation. The Federal Court, for instance, was founded with 22 judges; that number has since swelled to 48.

The change reflects shifts in administration. Courts now employ a larger administrative and support staff who account in part for the size of the new buildings. The process of litigation is more controlled, managed and organised.

Modern court buildings reflect the development of professional characteristics in the judicial process, including within the judiciary. The courts are energetic, purposeful places, removed from the indifference of the older, more imposing courts. The contrast with traditional court buildings speaks to the degree to which the process of dispensing justice has quietly changed.

This is a history of the way in which the administration of justice has changed and developed with the assistance of the work of the Australasian Institute of Judicial Administration (AIJA). The Institute was established against a background of change and reform in the law in the 1970s. It is unique in that its governing body, its Council, is comprised of members of the judiciary across all levels and from all states of Australia as well as New Zealand and Papua New Guinea and a range of others involved in judicial administration. Its constitution requires that its Council consist of representatives of judicial officers, tribunal members, legal practitioners, academic lawyers, lawyers in government service and court and tribunal administrators. This allows it to identify current areas of interest and

concern in judicial administration and to draw on the experience of those who use courts and tribunals.

A motivation for the establishment of the Institute was a consideration of the way in which courts are presumed to function and the actual experience of litigation, including broader dispute resolution and the operation of the courts. Existing practices, its founders argued, were acceptable only so far as they accorded with benefits supported by empirical research. Similarly, reforms could be introduced only so far as their advantages were confirmed by discussion and analysis. The AIJA saw opportunity in understanding and improving the complex processes that comprised the justice system.

In its attempts to improve the understanding of court processes and influence change in such practices, the Institute has not engaged in law reform. It has not lobbied government nor pressured the judiciary to adopt recommendations resulting from its research or educational activities. It does not advise government, from which it derives the better part of its funding, nor does it act at the behest of government. Its structure reflects the Institute's history and its desire to harness different opportunities.

The Institute determines its own program, identifying areas it deems important and facilitates educational programs and research projects in relation to them. It serves to foster discussion among different courts and tribunals through a program of educational events that permit an exchange of ideas, often leading to research and recommendations for change. A particular example is the AIJA's early work exploring the potential for improvements through the introduction of case management, which has become a significant part of judicial administration.

This history was conceived as an institutional history with an emphasis on the imperatives that have driven changes in the administration and operation of courts and tribunals. It is arranged thematically, tracing the emergence of key issues that inform such changes. The themes overlap in places, which is to be expected having regard to the subject matter. Yet distinguishing themes is useful so as to identify areas of particular interest to the AIJA in its work. In developing these themes, the history traces the Institute's development and relates it to the other bodies with an interest in judicial education, for example, and the principal reforms in judicial administration.

The first chapter examines the foundation of the AIJA. It begins with the decision to create an organisation drawing together all of those groups with

an interest in judicial administration. It examines the Institute's development, including its decision to accept government funding and university affiliation and the debates about which groups should be included.

The second and third chapters deal with some of the main issues of judicial administration confronted by the Institute. Chapter 2 examines the Institute's first projects, which aimed at reducing unnecessary delays in court processes. The chapter recalls the revelation that few civil cases reached trial and that the great majority of criminal trials involved guilty pleas, which challenged established principles of justice that allowed parties latitude in the timing and preparation of their cases. It explores the debates over different forms of court intervention to promote more efficient, timely and less costly litigation and to promote settlement. The chapter traces the development of case management from its origins in the United States, the Australian role and its role on the development of case management in England.

Chapter 3 discusses efforts to preserve judicial independence from government interference, while promoting the accountability of the judiciary. The chapter looks at the AIJA's work in relation to courts governance. It examines the Institute's work in relation to judicial ethics and complaints against the judiciary.

The fourth and fifth chapters discuss the changes in the functions and operations of courts and tribunals. Chapter 4 discusses the development of educational programs for the judiciary. These programs were developed to assist judges in responding to the needs of particular groups in society, notably women, Indigenous Australians, ethnic minorities, and those from disadvantaged backgrounds. It discusses the implications of that education for the judicial role. A greater emphasis on professionalism brings dangers for judicial autonomy.

Chapter 5 examines the introduction of alternative means of resolving disputes and delivering alternative remedies to traditional justice.

An epilogue follows the conclusion of this history. These final reflections are those of the AIJA itself in response to the themes captured in this history of its institutional life. This reflection anticipates the direction of the AIJA's future work.

This is a history of changes that are still developing. Judicial administration continues to provide challenges to which the AIJA will respond. History can

demonstrate the order of things, the forgotten motivations, and the connections between distinct processes. This history offers an overview that reveals the way in which policies have been introduced, and allows for this understanding to inform future reform.

1. An Institute for Judicial Administration

Proposing the formation of an Institute for Judicial Administration, Australian Capital Territory Supreme Court Justice Russell Fox lamented that 'no one would suggest at this time that the systems by which justice is administered are adequate or satisfactory'.[1] Such a confronting statement, made *in camera* to a conference of Supreme Court justices, although subsequently published, might have seemed disproportionate. The basis of Fox's proposal was that the justice system fell short in its operation, rather than in its principles. In proposing an Institute focused on judicial administration, Fox urged that consideration be given to matters that went beyond legal doctrine; he argued that there was an 'urgent' need for practical issues – 'administrative or procedural matters' – to be considered. He proposed a new organisation that would consider 'the law in action'.[2]

The urgency that Fox stressed related not only to deficiencies in the justice system, but also in the proposed remedies. The second part of Fox's speech was perhaps more revolutionary. He argued that the individuals best able to understand and interpret practical questions were found within the judiciary itself. His proposed institute would be a body comprised of practising lawyers, legal academics, government lawyers, as well as judges, following the same membership model adopted by the law reform commissions. This allowed the participation of judges alongside other participants from within the justice system.[3] Since the institute would take greater control of its own program than the law reform bodies, and would also be a body with wide membership, this raised institutional challenges of how judges should interact with other members in what was traditionally a hierarchical justice system. It was also unclear how judges could be seen to be taking a stand on contentious matters, and for that reason the organisation would apply itself to practical matters. Although the development of the institute would be slow, it would usher in a new era of judicial organisations, both in Australia and internationally, particularly in countries of the common law world.

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1 R.W. Fox, 'An Institute for Judicial Administration', in R.A. Blackburn (ed.), Judicial Essays: being a selection from the papers read to the conferences of Australian Supreme Court Judges, held in 1972, 1973 and 1974, (The Law Foundation of NSW and the Victoria Law Foundation, 1975), 75.

2 Fox, 'An Institute for Judicial Administration' in Blackburn (ed.), *Judicial Essays*, 75.

3 The Law Council, Law Institutes, Law Foundations and Bar Associations are for practising lawyers, not for judges; judicial involvement in law reform predates the Commissions, but was confirmed in them: Susan Kenny, 'The relationship between the judiciary and law reform bodies', address to ALRAC, 1 September 2010, Brisbane, available at http://www.fedcourt.gov.au/publications/judges-speeches/justice-kenny

The period that Fox described was one of significant change in Australia's legal culture. The 1960s and 1970s ushered in new ideas about the role of courts and the law. The Law Council of Australia established an office that enabled greater cross-jurisdictional communication in 1963.[4] Community legal centres were established to provide free legal advice through new 'shop-front' offices, and other bodies sought to publicise individuals' legal rights in order to increase their access to the law.[5] A law reform process had been initiated, commencing with New South Wales in 1967; in 1975 the dynamic and provocative Michael Kirby was appointed the head of the newly established Australian Law Reform Commission.[6] New universities, as well as the expansion of law schools in older ones, increased the number of trained lawyers and forced the development of new pathways into law outside traditional articled clerkships.[7] Greater numbers of lawyers brought greater specialisation, and large law firms supplanted smaller family firms.[8] New provinces of law emerged with the establishment of the Family Court of Australia in 1975, and the Federal Court of Australia in 1976. Long-standing court customs, such as the wearing of wig and gown, were also challenged.

The changes were in part a response to pressures on the law that had been building since World War Two. Population increase and the development of new machinery and technology, most notably the automobile, increased the load on the court systems.[9] A new activism found test cases with which to challenge the legal controls on society, such as censorship on the grounds of obscenity, and opposition to the Vietnam War challenged the legitimacy of law and order. Fox characterised this period as one of great 'speed of change in economic, social and industrial conditions, in

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4 'Law Council of Australia Annual Report 1963–1964' (1964) 38 Australian Law Journal 294 at 294–295.

5 John Chesterman, Poverty Law and Social Change: The Story of the Fitzroy Legal Service (Carlton South, Victoria: University of Melbourne, 1996).

6 The NSW Commission was established in 1967, Queensland in 1968, Western Australia 1972, Victoria 1973, Tasmania 1974: Kenny, 'The relationship between the judiciary and law reform bodies'.

7 For example, 'Official Opening of the College of Law, New South Wales', 49 ALJ 257; compare John Waugh, *First Principles: The Melbourne Law School, 1857–2007* (Carlton: The Miegunyah Press, 2007).

8 David Weisbrot, 'The Australian Legal Profession: from Provincial Family Firms to Multinationals', in Richard L. Abel and Philip S. Lewis (eds), *Lawyers in Society*, *The Common Law World* (Berkley: University of California Press, 1988).

9 Many advocates cite technological innovation as grounds for law reform: for example, Lord Tangley, *New Law for a New World?* (Melbourne: The Law Book Co. of Australasia, 1965). On the rise of the automobile, refer to Graeme Davison, *Car Wars: How the Car Won our Hearts and Conquered our Cities* (Crows Nest, NSW: Allen & Unwin, 2004).

technology, and indeed in the whole field of knowledge'.[10] Change challenged the capacity of courts and tribunals to deliver justice, and the relative speed with which changes had been introduced was felt keenly. These problems, however, were not apparent to many beyond those who presided over the provision of justice and who witnessed the inadequacies of existing procedures.[11]

Although holding conservative instincts about the law, Fox advocated improvement in process and techniques. The conferences of Supreme Court justices were the first of Fox's initiatives in fulfilling his desire to reform the justice system to meet the new challenges. He had been inspired to do so after his attendance at the 1970 Conference of United States' Judges in Honolulu.[12] The Australian conferences were held annually from 1972, and they provided judges with a formal setting for discussing the administration of the courts. Included in the programs were sessions on managing problems in civil and criminal trials, 'fact finding' and contempt of court,[13] as well as sessions on criminology and the independence of courts from government, and the use of computers in the court system. The range of subjects raised in the conferences demonstrated the interest of the senior judiciary in discussing reforms in the court system,[14] but they remained declarations of intent and lacked the capacity to develop and advance the ideas they raised.

It was at the 1973 conference that Fox argued for the establishment of an Australian Institute of Judicial Administration, modelled on contemporaries in Britain and the United States of America.[15] He had served alongside Americans in the Pacific during World War Two and looked to the reform movements in America for inspiration, as well as to those in Britain.[16] Fox envisaged an organisation that would be responsible for investigating shortcomings and proposing solutions, and discussion between

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10 Fox, 'An Institute for Judicial Administration', in Blackburn (ed.), *Judicial Essays,* 75.

11 Interview with Dennis Mahoney, 18 August 2011.

12 'Minute of Appreciation to Mr Justice Fox on Election as a Fellow', Minutes, Annual General Meeting, 25 August 1984.

13 'Summer Judicial Conference' 1971, 45 *Australian Law Journal* 651.

14 'Third Summer Judicial Conference' 1974, 48 *Australian Law Journal* 4. Zines credits professor of law Geoffrey Sawer with striking 'the first sparks' of the Institute, which should be understood as Sawer contributing to the climate of ideas, rather than contributing directly to the Institute: Leslie Zines, *Commentaries on the Australian Constitution: a tribute to Geoffrey Sawer* (Sydney: Butterworths, 1977), xxii.

15 Later published in R.A. Blackburn (ed.), Judicial Essays: being a selection from the papers read to the conferences of Australian Supreme Court Judges, held in 1972, 1973 and 1974 (The Law Foundation of NSW and the Victoria Law Foundation, 1975).

16 Interview with Russell Fox, Sydney, 11 May 2006.

professionals at a range of levels was a key part of his plan. Australia had not developed the same kinds of legal institutions as had occurred overseas. New York University began offering courses for appellate judges in 1956; a Federal Judicial Center was established by the United States Congress in 1967,[17] and a National Center for State Courts) was established in Virginia in 1971. In Britain, judicial seminars commenced from 1964, and an Institute of Judicial Administration was set up within the University of Birmingham in 1968.[18] The American model placed a greater emphasis on the participation of judicial officers. Fox had first approached the universities in Canberra and Sydney about the idea of establishing an institute, but their limited teaching in the area of judicial administration made the idea unfeasible; his final proposal therefore followed the American model.[19]

The emphasis for Fox's institute would be on research into practical issues. Perhaps in order to garner support, he also suggested that it could provide institutional support for judges' conferences. Research would help to move debate beyond popular impressions or commonly held grievances. In Fox's view, 'judges and the professions are aware of most of the problems and have some ideas as to improvements'; however, they lack the time and facilities to conduct research 'necessary to carry the matter to finality'.[20] The institute would conduct empirical research into questions raised by the experience of its members. The emphasis on 'finality' reflected Fox's preference for practical questions that could be resolved, and his abhorrence of protracted debate and uninformed rhetoric. A dedicated institute would help to overcome differences based on tradition or custom and ensure that new ideas were assessed dispassionately.

Fox recognised that this proposal overlapped with the newly established law reform commissions, but his institute would be focused solely on administrative questions. In Fox's view, these commissions 'tend to deal with relatively few major matters and to be principally concerned with substantive law'.[21] This mild rebuke reflected the law reform movement's emphasis on redrafting substantive law and not the administrative changes that Fox believed to be more profound because the changes he sought to introduce concerned the overriding structure and operation of the legal system. It also hinted at the limitations faced by the other law reform

17 'Summer Judicial Conference' 1971, 45 *Australian Law Journal* 651.

18 'Summer Judicial Conference' 1971, 45 *Australian Law Journal* 651.

19 Julia Pullen, 'Telephone Conversation with Mr Justice Fox re. AIJA Sept 1982', Box 30, AIJA Papers.

20 Fox, 'An Institute for Judicial Administration', in Blackburn (ed.), *Judicial Essays,* 80.

21 Fox, 'An Institute for Judicial Administration', in Blackburn (ed.), *Judicial Essays,* 75.

agencies: as instruments of governments, they waited on ministerial references to define their projects and legislative support for their implementation. Administrative problems tended to be visible mostly to those within the system and required changes in policy beneath the level of the law, and were therefore less likely to be advanced by governments. The AIJA would be an organisation responsive to these problems, and it would complement the law reform commissions.

Fox's ambitious proposal relied upon finding a sufficient base of support for reforming the operation of the law. Around him, he found a small group of active members of the senior judiciary, including Chief Justice of the High Court Sir Harry Gibbs and Victorian Supreme Court Justice Richard McGarvie. This group set about establishing a structure for the AIJA, and a Sydney solicitor and friend of Fox, James Creer, drafted the rules.[22] Members were to be elected annually to a Council of 24 composed of representatives of distinct groups: judges, government lawyers, practitioners and academics. Each of these groups would have equal representation on the committee. A Board of Management of five would handle the finances and deal with business arising between Council meetings. The chair and deputy chair would be elected biennially. In 1976, the AIJA was incorporated in the ACT – signalling its federal character and independence of the legal centres of Sydney and Melbourne. The creation of such a clear organisational structure preceded the enlistment of members to fill the roles, but it was necessary to indicate clearly to potential members the nature of their work in the organisation. Members would begin with knowledge of the nature of their involvement. In other organisations, these structures might have stifled development, but in the Institute they allowed for the participation of even senior judges and granted the AIJA latitude to explore difficult topics.

The AIJA invited participation from the most senior legal figures, heads of the courts, professors, and where possible, the heads of the legal associations.[23] The participation of such senior figures was essential to establish the reputation of the AIJA and to provide it with first-hand knowledge of the developments in judicial thinking. Membership also served the interests of those who were invited to participate as it demonstrated their engagement in measures to improve the judiciary. Beginning with upper ranks of the court system, the AIJA gradually broadened its membership. It would come to encompass the full range of officers within the judicial arm of government, including members from

22 'Interview of Master David Clement Darold Harper OAM', Canberra, 18 April 2006.

23 Minutes, 12 November 1979.

legal professions, legal academics as well as judges and tribunal members. In this, the AIJA extended beyond the strict limits of its appellation 'judicial administration'. Fox had considered naming the institute for the 'administration of justice' – to avoid giving the impression that the AIJA was a judges' organisation – but decided that 'judicial administration' was the term most often used overseas for the activity the AIJA would pursue.[24] Magistrates were invited to join in 1982 (although McGarvie had raised the question of their eligibility at the first meeting).[25] Other court administrators, 'industrial tribunal members', articled law clerks, law librarians, and clerks of courts, 'local courts', and petty sessions became eligible in 1983.[26] The expanded membership allowed for issues concerning administration to be raised from a wide range of perspectives. The AIJA thus had the credibility of participation by senior judges as well as the enhanced relevance of a broad membership. The membership also came from each state; and its membership networks enabled research to be shared across jurisdictional boundaries that had previously separated the judiciary. Broad membership also helped to avoid parochial adherence to norms established in Melbourne or Sydney.

The first Council was formed in 1976. Among the judicial members were Fox, Gibbs, McGarvie, Justice Daryl Davies (President of the AAT), Justice Charles Meares of the New South Wales Supreme Court, and Judge James Staunton, Chief Judge of the New South Wales District Court. Among the academics were Zelman Cowen, Vice-Chancellor at the University of Queensland and Law Reform Commissioner, Mary Bleechmore (a South Australian academic) and Alice Tay, Challis Professor of Jurisprudence at the University of Sydney. Among the government lawyers was Frank Mahony of the federal Attorney-General's department; and the legal practitioners included the president of the New South Wales Bar Association, D.G. McGregor QC, and solicitors Alan H. Loxton and David A.K. Ferguson. The Canberra barrister David Harper was appointed the first public officer – the figure who maintained the membership list and handled correspondence with members – and Davies the founding secretary. Gibbs was elected chairman and Fox his deputy. A board was elected to manage the AIJA's affairs between Council meetings and to develop research projects comprised of the chair and deputy-chair, Staunton and Davies. Walter B.

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24 Julia Pullen, 'Telephone Conversation with Mr Justice Fox re. AIJA Sept 1982', Box 30, AIJA Papers.

25 Minutes, 4 November 1976; compare McGarvie to D.J. Cook, Chief Stipendiary Magistrate Melbourne, and C.L. Hermes, Chief Magistrate, Court of Petty Sessions of ACT, 26 May 1982, Box 15, AIJA Papers.

26 Minutes, 19 March 1983.

Campbell, a Queensland Supreme Court judge, would be approached to join.[27]

Although it had incorporated itself and formed a Council, the AIJA chose not to publicise its existence more widely than in legal journals.[28] It was felt that a public launch would not be prudent without a reliable source of income. Stability was essential to an organisation that hoped to attract so senior a membership. Fox felt that a substantial grant was required to launch the AIJA, which could then be sustained by membership fees, university or even government funding, although he had not initially favoured the latter source.[29] At the first meeting, Cowen advised that any attempt at fundraising would depend on the AIJA having a clearly defined program for research, and to that end the new AIJA committed itself to discussing possible projects.[30] A suitable project would need to avoid the controversy that might undermine its status, yet it also had to be one that dealt with an obvious and significant problem. Such a project would demonstrate that the organisation was active and relevant, and it also had taxation implications. With the status of an 'approved research institute', the AIJA would be free from tax and all donations and membership fees would be tax deductable; it obtained this status in 1979.[31] Preliminary work was also undertaken with the Research School of Social Sciences at the Australian National University (ANU) on ways of investigating the efficiency of court processes in different jurisdictions with an emphasis on the issue of delays in the justice system, and a researcher, Dr Ross Cranston, was chosen to undertake the study.[32]

Up to this point, the AIJA had been occupied by discussion and the formation of its organisational structure; meetings had been held only intermittently. The year 1982 would be one of action. In this year Gibbs ended his term as Chair, stating that he did not believe that he could remain in the position while the AIJA was fundraising – although he was persuaded to remain on the committee in a non-active capacity. The AIJA would subsequently appoint the Australian chief justice as 'patron', beginning with Gibbs.[33] Fox succeeded Gibbs as chair, and McGarvie was elected deputy chair. The two men brought different and complementary

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27 Minutes, 4 November 1976.

28 'Fifth Summer Judicial Conference, Canberra 1976' 50 *Australian Law Journal* 155.

29 Fox, 'An Institute for Judicial Administration', in Blackburn (ed.), *Judicial Essays*, 81.

30 Minutes, 4 November 1976.

31 Minutes, 12 November 1979.

32 Refer to Chapter 2 for background to the delays project. Minutes, 12 November 1979.

33 McGarvie to Board of Management, 4 April 1984; compare Minutes, AGM, 25 July 1980.

qualities: Fox was a visionary and later, on his retirement, acknowledged as 'the architect, planner and initiator of the Institute'.[34] McGarvie was disciplined and conscientious with a great capacity for committee work and managing projects. It was largely McGarvie's contribution that ensured that the organisation could, nine years after it was first mooted, and six years since its incorporation, at last commence operations.[35]

The launch of the AIJA was a risky venture. As an organisation with a membership of senior judicial members, it needed to establish itself very quickly. It required separate funding for administration and research, yet the two were dependent on one another. To mitigate the risk, McGarvie took three steps. First, he hired a public relations consultant, Gordon Rumph, to advise on promotional material. Secondly, he sought to contact eligible members through the heads of their organisations. Thirdly, he divided the funding required for research by seeking grants from four organisations, thereby reducing the amount sought from each and using support gained from the first as leverage for the others.

With Rumph, McGarvie drafted a package of documents that contained a brochure entitled 'Information for prospective members', a list of Council members and officers, including their occupation and the jurisdiction in which they worked, and registration forms for an Inaugural Seminar. Rumph's influence was obvious, not least in his insistence on printing a photograph of Cranston to personalise the otherwise dry description of the project on delays.[36] Rumph also recommended a designer, Tony Constantino, who prepared a logo. Of the alternative designs he submitted, which all used the four-letter acronym 'AIJA', some were more ornate and traditional, others more rounded and contemporary. The Council voted for a broad typeface marked with horizontal striations, which suggested a bold and dynamic organisation.[37] The AIJA would also have a clear slogan: 'Dedicated to bringing modern management techniques and research to judicial administration'.[38] The pamphlet gave only a limited sense of what

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34 'Minute of Appreciation to Justice Fox on Election as a Fellow', AGM, 25 August 1984. The fellows were subsequently redesignated 'Life Members', and by 2011 there were 24 appointed, 'AIJA Life Members, available at http://www.aija.org.au/AIJALifeMembers/LifeMembers.pdf.

35 Fox to McGarvie, 27 August 1984, Box 16, AIJA Papers.

36 McGarvie to Cranston, 16 June 1982, Box 15, AIJA Papers.

37 The logo was redrawn in 1998 by Hayley Rowland, a student at the University of South Australia Design School. The new logo was a schematic map of Australia, marked out by italicised strokes, representing similar dynamic themes, but with a lighter imprint: Board Minutes, 31 July 1998, 23 October 1998, Box G3; Council Minutes, 27 February 1999, Box G4, AIJA Papers.

38 Information for Prospective Members of the Australian Institute of Judicial Administration (Melbourne: AIJA, 1982).

'modern management techniques' meant, although the slogan was intended to show that the AIJA was reformist and professionally orientated.

If the content reflected the intervention of a public relations expert, their distribution reflected McGarvie's technique. With the assistance of typists from the Law Council of Australia,[39] he wrote personal letters, often using first names, to the heads of government law departments, chief judges, the Law Council, the Law Foundations and Institutes in all of the states and Papua New Guinea. His letter invited the recipient to join and also asked how many copies of a package of documents introducing the AIJA would be required for distribution to the eligible members of their organisation. In order to reduce postage, he asked whether this number could be posted as a bundle and distributed locally within the correspondent's organisation. The replies were universally in the affirmative, and as McGarvie explained to Fox, 'an advantage of doing it this way is that it tends to involve the head of the tribunal or organisation who might be expected to persuade the other members to look favourably upon the Institute and become members'.[40] A remarkable 23,000 of these packages were distributed nationwide. Simultaneously, 50 corporations in Sydney and Melbourne were approached to become 'corporate' members. McGarvie and Fox paid out of their own pockets the consultants' fees, as well as the secretarial and postage costs. The total amount was $13,783.52 – a sum that reflected their commitment to the AIJA. The large number of packages underscored McGarvie's belief that the AIJA could support itself on membership fees, supplemented by external research grants.

While McGarvie solicited new members, the AIJA succeeded in raising $60,000 for the civil delays project from four organisations – the Commonwealth Research Grants Committee ($15,000), the Utah Foundation ($20,000), and the Law Societies of New South Wales and Victoria ($12,500 respectively). The Victoria Law Foundation would also subsequently contribute a further $20,000.[41] The support of the legal organisations in particular demonstrated the legitimacy of the new AIJA within the legal sphere. These applications again drew on the material prepared by McGarvie and Rumph, and the research justification was the need for empirical research to support legal theories or, as the AIJA put it,

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39 McGarvie to Rosemary Howell, Secretary-General, Law Council of Australia, 12 May 1982.

40 McGarvie to Fox, 17 May 1982.

41 Minutes of AGM, 26 August 1983, Minute Books.

the 'combination of hunch and experience', which typically informed changes.[42]

Another project that complemented Cranston's project soon emerged. The Victorian Bar Association had formed a committee to investigate measures to 'shorten the duration of committals and trials, and lessening the expense of such procedures'. Funding was obtained from the Victoria Law Foundation and the Commonwealth Attorney-General.[43] Dr Peter Sallmann, a researcher in criminal law at La Trobe University in Melbourne, was selected to conduct the research. McGarvie was chair of this committee, and he convinced the AIJA to coopt it as a subcommittee of the AIJA. The AIJA thereby had two major projects under way when it was launched.

The overwhelming majority of responses to the launch were encouraging. One who was cautious in his response was the Chairman of the Australian Law Reform Commission, Michael Kirby. He agreed to join, but could not resist making three recommendations: that the AIJA broaden its membership beyond lawyers (inferring that it was a 'lawyers' club' preoccupied with 'congeniality'), work on cost-benefit analysis (without which he feared that lawyers would not be sufficiently 'adventurous') and that it should consult other professions in its research.[44] The suggestions were in line with Kirby's own vision for law reform, which encouraged 'broad consultation' in the hope that laws should reflect changing social values.[45] Fox felt that Kirby's response had 'a bite', but argued that he had misconstrued the vision for the AIJA. Fox had discussed his proposal with Kirby '5 or 6 years' earlier. 'I am responsive', he wrote to McGarvie,

> to the idea of inviting some public comment and a measure of select public participation, but fundamentally our exercise is to see what lawyers themselves can do and do successfully. At some point or points in the formulation of plans some outside consultation will be necessary. Our activities, however, differ in

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42 Peter Heerey, draft letter to Executive Officer, Utah Foundation, 24 May 1982, Box 15, AIJA Papers.

43 Other members of the committee included Judge Kelly (deputy chair), P.D. Cummins QC, F.H.R. Vincent QC, J.T. Hassett, (Crown Prosecutor), M. Rozenes (Bar), T.J. Ginnane (Bar), L.W. Flanagan (crown counsel and acting Solicitor-General), R.J. Galbally (nominee of Victorian Law Institute), and Julian Gardner (Director, Victorian Legal Aid Commission): 'Report to Council Members', Minutes, 14 August 1982.

44 Kirby to McGarvie, 18 June 1982, Box 15, AIJA Papers.

45 Michael Kirby, *Reform the Law: Essay on the Renewal of the Australian Legal System* (Melbourne: Oxford University Press, 1983); compare Michael Tilbury, 'A History of Law Reform in Australia', in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Sydney: Federation Press, 2005).

some fundamental respects from Kirby's.[46]

While the AIJA's structures encouraged cooperation and allowed for wider participation, Fox bristled at Kirby's imputation that its collegiality would limit its ability to investigate difficult issues.

An inaugural seminar was held at the University of Sydney on 14 August 1982. It featured speakers from top judicial offices and experts from overseas. Gibbs and the New South Wales,[47] Australian Capital Territory[48] and Victorian[49] chief justices gave welcoming addresses in support of the AIJA before Cranston presented a paper on 'Approaches to the AIJA Delay Project', in which he set out the various theories for the causes of delay. Following the main speaker, Professor Ian Scott, executive director of the Victoria Law Foundation and formerly director of the Institute of Judicial Administration at Birmingham, spoke on 'court control' and delay. Professor Peter Haynes of the Center for Criminal Justice, Arizona State University and visiting professor of law at the University of Sydney, discussed research into delays, and New South Wales Court of Appeal Justice Dennis Mahoney, a member of the AIJA Council, gave a judge's perspective on delay.[50] By misfortune and poor planning, the seminar clashed with the annual seminar of the Australian Universities Law Schools' Association in Hobart, which prevented legal scholars from attending (the AIJA's academic members had been absent from the planning meetings).[51] Nevertheless, 173 attended the seminar, which generated some press coverage.[52]

After the seminar, the Council claimed 588 members, an increase of 27 from the previous year. While this was only a tiny fraction of the 23,000 solicited, it indicated an interest in the judiciary. Its members included the chief justices of Australia, Queensland and South Australia, eight other Supreme Court justices, a magistrate, barristers, solicitors, academics and public servants.[53] A larger membership required the addition of a greater

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46 Fox Memorandum to McGarvie J., 1 July 1982, Box 15, AIJA Papers.

47 Justice Sir Laurence Street.

48 Justice Sir Richard Blackburn.

49 Justice Sir John Young.

50 'The Inaugural Seminar of the Australian Institute of Judicial Administration Incorporated, Sydney University, 14 August 1982', Australian Institute for Judicial Administration, 1982, Box 15, AIJA Papers.

51 R. Baxt, Dean of Law, Monash University, to McGarvie, 14 July 1982, Box 16, AIJA Papers.

52 AGM, August 1982, AIJA Minute Books.

53 McGarvie listed members to be named on the 1982 Annual Report as Fox J., McGarvie J., Gibbs CJ, Campbell CJ, King CJ, Dawson J., Mahoney J., Davies J., McGregor J., Carter J., Neave J., Mr Briese, Mr Creer, Mr Meagher QC, Mr Harper, Mr Nicholson, Mr Murphy, Mr Prior, Mr Wise,

proportion of barristers and solicitors. The membership drive also attracted interest from New Zealand and the Pacific Islands, and these groups were granted the right to join in 1985, once it had been confirmed that this would not affect the AIJA's taxation status.[54] Justice Thomas Eichelbaum of the New Zealand High Court joined the Council in 1987; the Chief Justice of Papua New Guinea, Sir Arnold K. Amet, would become a Councillor in 1996 after attending meetings for two years. Now launched with research funding for its project on civil delays, the AIJA also had income from membership subscriptions. With this money, McGarvie and Fox were reimbursed, and the AIJA took steps to appoint a part-time administrative officer. This would relieve McGarvie, David Harper and Peter Heerey, who was then secretary, of some of their voluntary work. Dr Richard Tracey, a lecturer in law at the University of Melbourne, was appointed one day per week, on the recommendation of a senior lecturer, Dr Robin Sharwood, who had declined to take the position.[55] Office space was rented at the Victoria Law Foundation at a 'token' rate of $30 per month.[56]

After the inaugural seminar, the AIJA moved to engage its members by convening a three-day 'Workshop on court administration', drawing in international experts and local registrars, magistrates and court administrators. The workshop was organised by Haynes and Scott and hosted by the University of Melbourne. It featured 10 overseas experts and was supported by a grant for $3200 from the Victoria Law Foundation.[57] The funds supported the participants to travel to Sydney and then Melbourne in order to familiarise themselves with Australian procedures.[58] The workshop format was chosen to allow for wide-ranging discussion drawing on the experience of administering local courts. The event demonstrated the

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Professor Tay, Professor Zines, Mr Blackwood, Sir Frederick Deer; McGarvie to Peter Heerey, 8 June 1983, Box 15, AIJA Papers.

54 Minutes, 15 June 1985.

55 Sharwood declined to take the position for health reasons. He had transcribed the 1984 Workshop on Court Administration: Sharwood to McGarvie, 22 February 1983.

56 Tracey to McGarvie, 9 June 1983.

57 Including Ernest Friesen (Dean California Western School of Law, San Diego and Director of the Justice Institute there), John Wood (Principle Assistant Director of Public Prosecutions in England and Wales), Sir Wilfrid Bourne QC (Clerk of the Crown in Chancery and Permanent Secretary to the Lord Chancellor's Office), Philip Dodd (Clerk to the Manchester City Justices), Michael McKenzie (Courts Administrator at the Centre Criminal Court in London), Michael Birks (Registrar at West London County Court and a Recorder of the Crown Court), Peter Haynes (Professor of Justice Studies at Center for the Study of Justice Arizona State University, Visiting Professor of Law at the University of Sydney), Ian Scott (Sir Henry Barber Professor of Law and Chairman of the Board of Management of the Institute of Judicial Administration at the University of Birmingham 1982, 3 Executive Director of Victoria Law Foundation, 1976–1982 Director IJA), Philip Murray (Technical Director of Site Programs for Court Delay Reduction Program), Edward Infante (US Magistrate).

58 'Report to Council Members', Minutes, 14 August 1982.

complexities of local conditions, which made directing the discussion challenging, and also the degree to which court administrators were interested in exploring reforms. The workshop uncovered considerable opportunity for practical reforms in judicial administration.[59]

This opportunity was developed in a series of smaller research projects that were managed by subcommittees of the Council. Sir Guy Green, the Tasmanian Supreme Court Judge, headed a subcommittee investigating 'the independence and autonomy of the judiciary'. In 1984, the AIJA organised a conference featuring experts on the use of computers by judges and another concerning the role of judges as royal commissioners. A project was drafted on the Hawke Government's call for improvements in the integration of state and federal courts.[60] In 1985, the AIJA cooperated with the Victorian Bar Association on a project on delays in criminal cases in the Victorian Supreme Court. Clarrie Briese, the chief stipendiary magistrate of New South Wales, and the AIJA's first magistrate member, led a wide-ranging project investigating the independence of the Magistrates' Court, an interest that flowed from his involvement with the complaints against High Court Justice Lionel Murphy.[61] These projects did not always lead to lengthy reports; Green's and Briese's projects were channelled into articles in law journals.[62] The others resulted in conferences, which drew together the interstate members and maintained cohesion. The computers conference also generated a profit of $2856.89.[63]

During these early years, the AIJA grappled with the difficulty of making its research meaningful and practical, while not being seen as an advocate in a controversy and thereby alienating potential supporters. Advocacy of this kind was taken to threaten judicial independence by involving members of the judiciary in public disputes and commenting on matters more properly handled within the legislative arm of government. The question had great implications for the type of organisation that the AIJA would become. The project on integrating state and federal court systems provoked the ACT Chief Justice Blackburn to caution the AIJA against being seen to be

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59 *Workshop on Court Administration, 10–12 November 1982* (Melbourne: Australian Institute of Judicial Administration with Victoria Law Foundation, 1982).

60 This led to the 1987 Jurisdiction of Courts (Cross-Vesting) Acts of the various states, of which the Institute subsequently conducted a review: Garrie Maloney and Susan McMaster, *Cross-vesting of Jurisdiction: a Review of the Operation of the National Scheme* (Melbourne: AIJA, 1992).

61 Discussed in Chapter 3.

62 C.R. Briese, 'Future Directions in Local Courts of New South Wales' (1987) 10 *UNSW Law Journal* 127; Sir Guy Green, 'The Rationale and Some Aspects of Judicial Independence' (1988) 59 *Australian Law Journal* 135.

63 Minutes, 25 August 1984.

lobbying for a cause, particularly one associated so closely with the incumbent government. Considering this objection, the Council refused to rule out taking a position on issues, although it aimed to be 'basically a research body';[64] the pamphlet at issue emerged as only a 'collection of views'. This avoided alienating members of the judiciary who might have disagreed with its contents; however, it also limited the strength of the AIJA's work. The seminar on judges as royal commissioners managed this difficulty by presenting two competing arguments.[65] A similar debate emerged with the publication of the Cranston report on civil delays, which provided tentative conclusions and declined to recommend a course of action, at the request of the Council.[66] These issues mostly abated as the AIJA grew more established, and as the culture of open discussion extended into the judicial role.

The early caution about advocacy was related to the precariousness of the AIJA's position. The expanding program had overwhelmed the part-time administrative support, which was then only one day per week. Meeting documents were not being forwarded with sufficient notice, and 'follow-up' from the administrators with those councillors who had volunteered to undertake tasks was inadequate.[67] Membership subscriptions fell short of supporting a full-time officer: for example, in 1984–1985 membership subscriptions amounted to $25,891;[68] there was a need to uncover new funding.

The most obvious source for this funding was the government, but this involved the AIJA accepting a different role. The AIJA had good relations with the Commonwealth Attorney-General, Gareth Evans, who welcomed the AIJA as an ally in his own reform program.[69] A proposal was tabled at the first meeting for 1984 for composite funding, half to be supplied by the Commonwealth, and the other half by the states in proportion to their respective populations – the same model adopted by the NCSC in the United States. The composite nature of the funding would preserve the independence of the AIJA; nevertheless, the minutes record that a 'wide-

64 Minutes, 19 March 1983.

65 Murray V. McInerney et al., 'Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals: Two Views Presented at the Fourth Annual Seminar of the Australian Institute of Judicial Administration', 31 August 1985, Adelaide (Canberra: Australian Institute of Judicial Administration, 1986).

66 Refer to Chapter 2 for discussion of Cranston's project.

67 Minutes, 19 November 1983.

68 'Statement of income and expenditure, 1 July 1984 to 31 March 1985', Box 15, AIJA Papers.

69 Gareth Evans to McGarvie, 27 May 1982, Box 15, AIJA Papers; on Evans generally compare Keith Scott, *Gareth Evans* (St Leonards, NSW: Allen & Unwin, 1999).

ranging discussion' took place before the proposal was carried. The funding would cover the administrative and accommodation costs of an Executive Director, with research projects requiring separate grants. A condition of any funding received would be that selection of projects remained the decision of Council.[70] In order to obtain federal funds, the AIJA approached the Standing Committee of Attorneys-General (SCAG), which provided grants on a triennial basis. By August 1984, a submission had been prepared seeking $195,000, including a city office in Melbourne, and the salaries of the Director and two administrative staff.[71]

The city office was ultimately unnecessary after a further dramatic modification of the original vision, which drew the AIJA to include an educational function and affiliation with the University of Melbourne. At the same time as the AIJA was developing its proposals for government funding, Sir Harry Gibbs had approached Dennis Mahoney privately to draft a proposal for a separate organisation, a 'National Institute of the Australian Courts', a government body that would provide educational courses in the technical needs of the courts, as well as research improvements. The draft proposal indicated that judges would control it, with assistance from nominees of the Commonwealth Attorney-General and the Law Council. It would be based in a university with a director at the level of professor in a non-teaching role. Mahoney had canvassed the idea confidentially with Chief Justice of New South Wales Sir Laurence Street and also Pat Brazil, the secretary of the Commonwealth Attorney-General's Department.[72] The proposal appeared to have originated with Ian Scott, the former director of the Birmingham institute.[73]

McGarvie, now the AIJA's chair, was alarmed by the proposal and its support by such senior judicial figures. He was irritated that he had not been consulted earlier and that Mahoney, who was the AIJA's Deputy Chair, had gone first to Brazil. He wrote to Mahoney that the AIJA's own proposal had been circulated to all chief justices 'and received their support', and that new proposals should be undertaken only through 'careful organisational planning'.[74] McGarvie stressed the importance of the AIJA's representation of the full range of interested parties, suggesting that the proposal for the new AIJA would lead to an organisation that was an

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70 Minutes, 25 August 1984.

71 'The Need for Composite Government Funding for AIJA Administration, 13 August 1984', Box 17, AIJA Papers. Alternatives considered were the Elder's building or office space in the Victoria Law Foundation: McGarvie to Sir John Young, 4 December 1984, Box 17, AIJA Papers.

72 Mahoney to McGarvie, 29 July 1985, Box 17, AIJA Papers.

73 Scott to McGarvie, 27 August 1985, Box 17, AIJA Papers.

74 McGarvie to Mahoney, 30 August 1985, Box 17, AIJA Papers.

instrument of government dominated by the judicial elite, and in practice its activity would devolve to the public service.[75] In typical style, he then proceeded to organise a series of informal discussions with Mahoney and Brazil – Scott had returned to Birmingham – in order to form a consensus on the best alternative. He invited Brazil to join the Council of the AIJA.[76] A compromise was reached, whereby the AIJA would continue, but with its Executive Director operating within a university. The AIJA would therefore retain its representative character, but gain from a closer connection with academia and its research activities. The affiliation also presented the AIJA with the opportunity of influencing the legal academy, which was moving beyond a narrow curriculum designed to teach the law and instruct students in the techniques and values useful for practising lawyers to a wide-ranging and critical analysis of the law in operation.[77]

McGarvie had already written to law schools around the country suggesting courses in judicial administration,[78] and the University of Melbourne's new Graduate School of Management emerged as being particularly well suited for the purposes of judicial training as it was accessible to non-academic groups.[79] He began discussions with Mark Weinberg, Dean of Law at the University of Melbourne. With the Vice-Chancellor, David Caro, Weinberg, the former Dean of Law, Sandford Clark, and the Dean-elect, Harold Luntz, McGarvie now drew up a contract that would see the Executive Director holding a professorial post at the University of Melbourne.[80] The position would be appointed jointly by the AIJA and the University of Melbourne and be held for a period of 'up to five years'; the Victoria Law Foundation agreed to underwrite the position in case one of the states withdrew funding. With these adjustments made, SCAG endorsed the proposal, and the payments began from 1 July 1986. The position of Executive Director was advertised internationally on 8 April 1986.[81] Peter Sallmann, who had worked with McGarvie on the Shorter Trials Committee, was the successful applicant. The AIJA moved into terrace houses at 105 Barry Street, south of the main campus of the University.

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75 McGarvie to Scott, 25 September 1985, Box 17, AIJA Papers.

76 McGarvie to Scott, 25 September 1985, Box 17, AIJA Papers.

77 Waugh, First Principles: The Melbourne Law School, Chapter 6.

78 McGarvie to Weinberg, July 1984.

79 Carolyn Rasmussen and John Poynter, *A Place Apart: The University of Melbourne: Decades of Challenge* (Carlton South: Melbourne University Press, 1996), 453–454.

80 'Board of Management Report to Council Meeting: Permanent Secretariat', Minutes, 16 November 1985.

81 'AIJA/University of Melbourne Executive Director/Professional Associate with the title of Professor', Position Description, 8 April 1986, Box 17, AIJA Papers.

Composite government funding, accommodation at the University of Melbourne and administrative leadership of an Executive Director provided the infrastructure for the AIJA and allowed it to develop its educational and research activities. Further funding supported the appointment of Anne Wallace as deputy executive director in 1992, as well as office support staff and a librarian for the AIJA's collection. Such stability was unimagined when the AIJA was formed, although it was dependent on the continuing support of government and the university. The AIJA's modified role also meant that it needed to clarify its priorities. Its federal character, for example, was preserved by retaining an active interstate membership, pursuing research projects from interstate, and holding the annual conference in a different state capital each year, despite its base being in Melbourne.

There was also the need for the AIJA to define itself in relation to other organisations with an interest in the administration of the justice system. The proposed national institute was a precursor of a number of other judicial organisations that emerged in the decades after the AIJA was launched. These organisations duplicated parts of the AIJA's function and established their own sources of funding and legitimacy. A New South Wales Judicial Commission (NSWJC) was formed in 1986 to conduct research and collect statistics on judicial activities, manage complaints against judicial officers, and like the AIJA, provide educational courses. In 1993, a Judicial Conference of Australia (JCA) was formed to represent the interests of the judiciary. Some of the Law Reform Commissions also remained, although some state commissions were in reduced forms.[82] A council of chief justices of Australia and New Zealand was established upon the recommendation of a 1994 report by the Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary*.[83] This increasing number of judicial bodies showed a weakening of the old taboos about judicial participation in organisations and a desire for greater participation from members of the judiciary in the governance of the judicial arm. The change also followed a reduced formality of the judicial

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82 The NSW Commission suffered budget cuts after 1988; in Victoria it was abolished in 1992 before it was re-established in 2000; the South Australia Commission was abolished in 1992; the Tasmanian Commission was replaced by an individual commissioner in 1992, and both Queensland and Western Australian were also cut during the 1990s: Marcia Neave, 'Law Reform in the Age of Managerialism', Australasian Law Reform Agencies Conference, 20 June 2002, available at http://www.lawreform.vic.gov.au/publications-and-media/speeches/law-reform-age-managerialism..

83 Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary* (Canberra: The Committee, 1994). Murray Gleeson CJ records that by 1998 it met annually, although it had no secretariat or official documentation. It worked with the AIJA to prepare a *Guide to Judicial Conduct*, 1998 (refer to Chapter 3): Murray Gleeson, 'Reflections': Speech to Australian Academy of Law, 25 July 2008, available at http://www.academyoflaw.org.au/events/GleesonJ_speech.pdf.

role that revealed itself in even the most trivial aspects of the culture; for instance, 1994 was the first year in which first names were used for judges in the Annual Report.[84] The AIJA mostly welcomed the emergence of the new legal organisations, and indeed members of the AIJA had advocated the formation of the Judicial Conference in particular.[85] But they prompted the AIJA to refine its role so as to confirm its continuing relevance and ensure its survival.

One response was to adopt a more public footing. In 1995, the position of chair of the Council was converted to President of the AIJA – providing greater public intelligibility. Launching a new 'President's page' in the 1995 Annual Report, Trevor Olsson emphasised the AIJA's role in fostering communication between different parts of the judiciary:

> The Institute sees its role as serving as an information provider, as assisting courts and tribunals, and others involved in the field of judicial information, in their tasks, and in facilitating the exchange of valuable knowledge and experience in relation to developments taking place in this area. The Institute's very practically orientated research programme aims to devote resources to the study of areas of particular concern and to suggest improvements to aid the effective functioning of the justice system.[86]

The AIJA thus sought to fulfill a role connecting the various organisations and the courts in different jurisdictions, its research serving tangible and immediate needs.

In this role, the AIJA was extremely busy, including launching its own journal with the Law Book Company Limited in 1991, the *Journal of Judicial Administration*, and developing in 1994 an educational orientation program for new judges in association with the NSWJC. But there were also inefficiencies. In 1998, the AIJA conducted a major 'Forward Planning Exercise', coinciding with the departure after 10 years of Peter Sallmann and the appointment of Greg Reinhardt, a former partner in a Melbourne law firm and lecturer in civil procedure at the University of Melbourne and a long-term AIJA member. The planning exercise sought to determine ways in which the AIJA could continue to develop.[87] The review urged the AIJA to adopt 'a more strategic approach' to its engagement with other judicial

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84 Annual Report, 1994.

85 Refer to Chapter 3 for wider discussion of the Judicial Conference of Australia (JCA).

86 Annual Report, 1995.

87 Anne Wallace, 'AIJA Forward Planning Exercise: The AIJA – Overview' (Melbourne: AIJA, 1998); President's Report to Council Meeting, 24 October 1998, Box G3, AIJA Papers.

organisations.[88] It also urged greater involvement of the wider Council membership, rather than direction from the senior figures, citing 'a degree of tension' between its objective for wide participation of 'all levels of membership' and 'the way in which the Council elections had operated' with senior officers chosen by their predecessors.[89] Wider participation in the governing roles was facilitated at times with the role of deputy president, a position originally created to ensure continuity by the deputy succeeding the president.[90]

The review's recommendations were taken up in structural changes that delegated authority down from the Board to a new layer of subcommittees; the Board now managed business between meetings and supervised the Secretariat. The Council made policy on topics investigated by the subcommittees, with written proposals circulated in advance of meetings. The subcommittees divided into areas of responsibility in membership, research, education and practice – the latter committee considered the practical operation of courts and tribunals. All members of Council would be urged to serve on at least one of these committees.[91] A judicial body with additional members thus developed into a more representative body, at least in its ambition: the role of president has continued to be filled by a judicial officer. The following year, the AIJA limited its publicity to areas on which it had established policy, avoiding commentary on topical issues;[92] constraints of this kind remained necessary.

With these organisational changes, the AIJA reaffirmed its federal character – as opposed to state organisations such as the NSWJC – as well as the breadth of its membership, including court administrators, lawyers and members from across Australia – which differentiated it from the Council of Chief Justices and the JCA. The AIJA's particular interest in the practice of courts and tribunals was emphasised in the designation of subcommittees. The AIJA's role in pioneering education for the judiciary also came into focus at this time, and the orientation programs were taken up by a new organisation, the National Judicial College of Australia (NJCA), from 2003.[93]

In addition, the AIJA was distinguished by its academic affiliation, which it took steps to confirm. The original agreement, extended in 1991 and 1996,

88 Wallace, 'AIJA Forward Planning Exercise', 10.

89 Wallace, 'AIJA Forward Planning Exercise', 16.

90 Minutes, 18 March 2000, Box G4, AIJA Papers.

91 Minutes, 24 October 1998, Box G3, AIJA Papers.

92 Minutes Board, 3 December 1999 (in the form of an Actions table summary), Box G3, AIJA Papers.

93 Refer to Chapter 4.

came up for renewal. The Executive Director had contributed to the teaching program from 1992 with the creation of the Graduate Diploma of Dispute Resolution and Judicial Administration,[94] but in 1999 the Dean of Law, Michael Crommelin, reported that a new University of Melbourne policy required programs to justify their costs against the benefits to the Faculty on a competitive basis, and that programs would need to rent office space at commercial rates. With the University's blessing, the AIJA put its academic affiliation out to tender, considering a rival bid from Monash University, and independent facilities with an academic connection through the Executive Director.[95] Delays in the construction of a new Law building allowed the AIJA to continue at University of Melbourne premises until 2002, when a new affiliation or association with Monash University was confirmed with the acquisition by Monash of the Equity Chambers at 472 Bourke Street, Melbourne – chambers in the heart of the legal district.[96] The commitment of the Monash Dean of Law, Stephen Parker, and his 2003 successor, Arie Freiberg, persuaded the AIJA Board to an association with Monash University, which offered the further possibility of technologically advanced court training facilities.[97] Crommelin duly resigned from the Council in 2002, expressing his 'personal disappointment' but stressing the mutual benefits of the affiliation and the 'cordial and constructive' relationship that had been established.[98]

The remaining distinction between the AIJA and the other judicial organisations was its international activity. Its Council included members from New Zealand and Papua New Guinea, and from 1998 it sought to establish connections with other parts of the Asia-Pacific. Following an Asia-Pacific Courts conference in Singapore, it conducted a highly successful Asia-Pacific Courts conference in Sydney in 1997. It sent representatives to the subsequent 1998 Asia-Pacific Law Conference in Shanghai. In 2000, it provided 'training and support' to the new courts in Timor-Leste under the United Nations Transitional Administration, and judges were supported by the government of the Northern Territory and the Family Court, to attend the AIJA's Judicial Orientation Program.[99] It assisted with the development of judicial training programs for Indonesian judges, and on two occasions Greg Reinhardt and the President of the Victorian Civil and Administrative

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94 Annual Report, 1992.

95 Minutes, 27 February 1999, Box G4, AIJA Papers.

96 Board Minutes, 27 August 1999, Box G3, AIJA Papers; President's Report to Council Meeting, 9 October 1999, Box G4, AIJA Papers; Board Minutes, 10 October 2002, Box G3, AIJA Papers.

97 Board Minutes, 30 April 1999, Box G3, AIJA Papers.

98 Crommelin to Murray Kellam, 19 June 2002, Box G3, AIJA Papers.

99 The Northern Territory supported the travel of three judges; the Family Court the travel of an 'interpreter and legal guide': Minutes, 18 March, 17 June, 7 October 2000, Box G4, AIJA Papers.

Tribunal (VCAT), Murray Kellam, conducted a course in Alternative Dispute Resolution (ADR) in Papua New Guinea.[100] ADR programs were also offered in Palau and in Samoa. The AIJA's work outside Australia, particularly with the Subordinate Courts of Singapore, led it to become a consortium member in the development and launch of the 2009 International Framework for Court Excellence, setting out the elements required to improve courts, drawing on the work of the AIJA and similar international organisations.[101]

The AIJA's influence, explored further in the chapters that follow, extended beyond its research endeavours and formed an important part in providing new understandings of the justice system. The participation of judicial officers helped to build cohesion in the judicial arm of government. The AIJA's development has traced changes in Fox's original vision for an Institute – notably in the inclusion of a wider range of figures, and in their participation, yet the original vision remains significant. It has confirmed the influence of organisations comprised of judicial officers, tribunal members, academics and court administrators.

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100 Minutes, 7 October 2000, Box G4, AIJA Papers.

101 Other signatories were the National Center for State Courts (NCSC) (USA)), the Federal Judicial Center, the Subordinate Courts of Singapore, the European Commission for the Efficiency of Justice, Spring Singapore, a general interest public organisation whose object is 'the enhancement of productivity in both the private and public sectors', and the World Bank: International Framework for Court Excellence, available at http://www.courtexcellence.com/Resources/The-Framework.aspx.

2. Delays and Efficiencies

Reflecting on the development of new measures intended to improve the efficiency of the justice system at the 1990 annual conference of the Australasian Institute for Administration (AIJA), Queensland Supreme Court Justice Martin Moynihan stated:

> It seems to be inarguable that the court system is moving (or is being dragged – it depends on your perspective) from an isolated and monolithic litigation process, postulated on a stately, sequential progress through largely ritualised steps which culminate in the cataclysmic showpiece of the oral hearing which we call a trial, towards a more diffuse approach to the resolution of disputes or difference.[102]

The 'more diffuse approach' to which Moynihan referred was embodied in new administrative methods that sought to remove congestion and inefficiencies from the judicial system, chiefly for the purpose of reducing delays. As Moynihan suggested, the new emphasis on administration prioritised the functional over the ceremonial aspects of judicial activity and challenged the existing order.

The reforms raised questions about just which parts of judicial processes were essential and how changing them might affect the delivery of justice. Moynihan provided a functional definition for a trial, common to reformers at this time, as 'search for the proof of those issues which divide the contenders in the litigation' to which the law was applied. Efficient litigation therefore depended on the free exchange of information and 'aggressive' early clarification of issues in dispute, which would serve to reduce avoidable labour and expense later at trial, expending the 'minimum necessary resources'.[103] Such a model relied on the development of methods for information-sharing that would be agreeable to adversarial parties. There was also the thorny issue of the court's role in enabling and even compelling this communication, as well as in setting time constraints on legal processes. Early intervention by court officers before trial risked the apprehension of bias and could be viewed as challenging the autonomy of the parties in adversarial processes.[104] This early intervention also imposed an administrative function on the judiciary cautious to remain

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102 Martin Moynihan, 'Towards a more efficient trial process', Papers presented at the 10th Annual AIJA conference, 7–8 September 1991 (Melbourne: AIJA, 1992), 1.

103 Moynihan, 'Towards a more efficient trial process', 2.

104 Andrew Ligertwood, 'Towards a more efficient trial – evidence and the judicial role: Commentary', Papers presented at the 10th Annual AIJA Conference, 7–8 September 1991 (Melbourne: AIJA, 1992), 35–37.

disinterested in the conduct of litigation. The changes had profound implications, and the AIJA took a central role in informing the discussion.

The impetus to improve the efficiency of court processes was created by the public concern about the high costs and long delays in the judicial system. Criticism of 'the law's delay' was ancient,[105] but there was a discernible increase in such complaints after World War Two. In the decades preceding the AIJA's formation, newspapers published accounts of long waits for trial in criminal and civil cases. The courts were presented as conservative and unchanging institutions resistant to change and failing to deliver justice in a timely fashion at a reasonable cost.[106] In Victoria and New South Wales – the states with the largest courts – the issue became politicised. In 1975, the Victorian ALP Opposition adopted a policy to waive criminal charges where there was 'unreasonable delay', citing statistics that 750 trials had been held over for between 12 and 15 months; defended divorces faced a two- or three-year wait.[107] In 1976, the Victorian Government appointed a retired army officer, Colonel Matthew Murphy, as Director of Court Administration with an advisory role on improving efficiency in court processes – which indicated the complexity of the problem and the desire to control it.[108]

There were various attempts to deal with the problem. Some sought to enlarge the capacity of courts by appointing temporary judges or increasing the number of permanent judges, as happened in Victoria. The formation of the Federal Court of Australia also greatly expanded the capacity of the court system to hear federal cases. Others took up the problem of judges' workload. An Australian Law Council working paper on judicial time in the Queensland courts recommended that judges specialise to create greater efficiencies and called for the creation of an appellate division of the Queensland Supreme Court.[109] The working paper also recommended divesting more administrative tasks to Masters and others. Other reports recommended that Magistrate's Courts be decentralised to reduce delays caused by the need to bring witnesses to Melbourne on an uncertain

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105 William Shakespeare, *Hamlet*, Act 3, Scene 1.

106 Kevin Childs, 'Our slow justice', *The Age*, 15–17 December 1971; John Slee, 'Justice, delay and Bilbao', *The Sydney Morning Herald*, 19 March 1980, 4.

107 'Delayed justice rapped', *The Age*, 24 March 1975, 3; Graham Williams, 'Divorce is still a long, painful operation', *Sydney Morning Herald*, 20 December 1977, 4. John Cain led the ALP on this issue, but it was also pursued by John Galbally MLC, and his brother, the criminal lawyer, Frank Galbally: 'Trial delay unjust, court told', *The Age*, 1 April 1976; 'Delay on trials up by half: Galbally', *The Age*, 4 June 1976, 8.

108 *The Age*, 23 January 1980.

109 R.D. Nicholson to Scott, 9 March 1976, Ian Scott papers, AIJA Papers. A court of appeal was not established in Queensland until 1991: *Supreme Court of Queensland Act 1991* (Qld).

timetable. Another approach to the problem sought to improve procedure in the justice system; for instance, the streamlining of criminal justice at the level of the police to ensure that criminal charges were more effectively framed, and that only those likely to succeed were pursued. Another sought to change the Rules of Court to encourage earlier settlement; this initiative followed the revelation of the 1975 report of the Victorian Law Reform Commissioner that an astonishing 95 per cent of Victorian civil cases settled before judgment. The high figure suggested considerable potential for removing cases from lists, improving scheduling and allocating resources more effectively.[110]

Each of these reforms identified an aspect of the judicial process that caused problems and suggested remedies. Yet they were discrete reforms that different governments and law reform commissions introduced, with uneven results. There was a need for a more comprehensive attempt to understand judicial processes, taking into account all parts of the judicial process in order to show how the various parts interacted. There was opportunity, too, for the AIJA to present the perspective of those with experience in operating courts at all levels and to explain the underlying logic that operated at each stage of litigation. Drawing on the practical experience of its members, the AIJA sought to design research projects that stood a greater chance of improving judicial efficiency. Members of the AIJA appreciated that the public criticisms of delays were often misplaced. Legal cases were often properly lengthy processes, and not all delays were undesirable. The costs of litigation reflected complexities that critics did not acknowledge.[111] It was the inefficiencies in the system that most exercised the AIJA, and it explored administrative solutions to impose order on the otherwise unwieldy judicial processes. In so doing, it considered the whole of the process of litigation, including the rules that governed trials and pre-trial procedures, which were either unnecessary or cumbrous.

Many of the inefficiencies in the justice system arose from the adversarial processes. In the administration of trials, there were many features that appeared to be unnecessary, notably the 'cataclysmic showpiece of the oral hearing' that Moynihan had described. There were inefficiencies in the sharing of information, so that witnesses had to be present and be available for cross-examination, even for uncontentious evidence. The period before trial had perhaps more obvious shortcomings, particularly in the frequency

110 Law Reform Commissioner, *Delays in Supreme Court Actions*, Report no. 4 (Melbourne, 1976); compare Law Reform Commissioner, *Delays in Supreme Court Actions*, Working Paper no. 3 (Melbourne, 1975).

111 Dennis Mahoney, 'Delay in the Courts: The Responsibility of the Lawyers' (1983) 59 ALJ 494; compare Dennis Mahoney, 'Delay … A Judge's Perspective'(1983) 57 *Australian Law Journal* 30.

of extensions and the practice of busy lawyers deferring serious development of a case until trial. Pre-trial procedures were not centrally managed; the scheduling of events and interlocutory procedures was deferred variously to the legal representatives of the parties, government prosecutors, and the government departments charged with court administration. Each of these parties operated according to their own needs and had only an indirect interest in the wider efficiency of justice. Individual litigants or their representatives, for instance, might not have an interest in the speedy resolution of particular kinds of disputes. This loose and disjointed medley of interests was incompatible with efficient management, yet these adversarial processes were the foundations of the justice system.

In the view of the AIJA, it was unhelpful to begin from the perspective of defending adversarial process, as this placed an abstract concept before the actual operation of courts. The process of marshalling the range of cases brought to court was inherently administrative, as was the conduct of a trial; the misapprehension that courts remained aloof from administrative functions was therefore false. The question was therefore better expressed as how the existing adversarial processes could be made more efficient, without undermining procedural fairness, or creating the apprehension of a biased, overbearing court system. Moreover, it was necessary to proceed in this manner to refute the public and political criticism that courts were unresponsive and needed to be reformed.

The AIJA's perspective followed international examples. There was a substantial body of international research into delays, and more recent studies had emphasised the importance of administrative reform. In the United States, this research was particularly well developed. After increases in the number of judges and courtrooms had succeeded only in increasing the volume of litigation, researchers developed the idea that the processes could be made more efficient by changes in the court rules. An American researcher, Tom Church, proposed a novel solution that the 'local legal culture' was a primary cause of delays. This culture, he argued, was overly generous to the demands of lawyers for extensions and the desire of judges not to overload their schedules. Church suggested that if this culture could be changed to emphasise efficiency, then much of the problem would be solved.[112]

[112] Thomas W. Church, 'The "Old and the New" Conventional Wisdom of Court Delay' (1982) 7(3) *The Justice System Journal*; compare Thomas W. Church et al., *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (Williamsburg, Virginia: National Center for State Courts, 1978); Thomas W.

Church's research project, *Justice Delayed*, administered by the National Center for State Courts (NCSC), was particularly relevant because of its statistical analysis of the progress of cases through 21 urban trial courts from across the United States. This method served to identify the contribution of the various stages of litigation to the overall delays.[113] This had the advantage of presenting an aggregate analysis of all cases, removing the distractions of the particulars of individual cases; it also had the effect of revealing how the courts handled the bulk of litigation, rather than highlighting those cases that took a particularly long time to be resolved. The AIJA decided to apply the same methodology to its own research project for the Australian courts. Such a project would serve as a solid foundation for future projects by directing the research endeavours to those parts of the legal process most responsible for delay, based on what actually took place in the justice system. Through the Research School of Social Sciences at the Australian National University (ANU), the AIJA obtained Dr Ross Cranston, a researcher in commercial law, to prepare a proposal for a project to examine 'procedures adopted in the various courts throughout Australia with particular emphasis on the effectiveness, time and cost of such procedures'.[114]

As with the NCSC project, Cranston planned to apply statistical analysis to court records in order to determine the parts of the judicial process most responsible for delay and cost and to recommend changes. The project would examine 'the process of litigation as a whole', giving an account of how the procedure operated in practice, tracing the rules that governed the procedures in different jurisdictions, the time taken by each of these steps, and the views of judges and lawyers on them. The investigation of 'effectiveness, time and cost' was narrowed in 1981 to exclude analysis of cost, and then to concentrate on civil cases. These refinements were practical ones, since the task of examining the range and variety of civil cases was itself ambitious and had the potential to yield great benefits. The project would survey the two largest courts, the Supreme Courts of New South Wales and Victoria, and the smallest, that of the ACT. The Supreme Courts were chosen for their unlimited jurisdiction, which meant that they engaged with diverse case lists. The research could therefore uncover

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Church et al., *Pretrial Delay: A Review and Bibliography* (Williamsburg, Virginia: National Center for State Courts, 1978).

113 Church et al., *Justice Delayed*; compare Church et al., *Pretrial Delay*.

114 Minutes, 12 November 1979; Ross Cranston, *Regulating Business: Law and Consumer Agencies* (London: Macmillan, 1979); compare Ross Cranston and Anne Schick, *Law and Economics* (Canberra: Department of Law, Research and Social Studies, Australian National University, 1982). Cranston would later publish his history of welfare reforms: Ross Cranston, *Legal Foundations of the Welfare State* (London: Weidenfeld and Nicolson, 1985).

causes of delay in particular kinds of litigation, such as workplace accident litigation, and test the effect of structural elements such as the effect of legal aid. The information gained from statistical analysis would be informed by questionnaires filled out by court officers, thus including a qualitative element to complement the quantitative one.

The research design, using statistical analysis of the full extent of court processes from their inception, was intended to identify those parts of the legal process responsible for delays. By measuring the caseload across all areas, it also guarded against the tendency for reforms to shift congestion from one area into another.[115] The methodology confronted the problem of determining where to take samples along the litigation process; it sought to improve on the NCSC study, which had used a less differentiated sample.[116] Increasing the number of data points, however, taxed the incomplete records kept by the courts. Drawing comparisons between the mismatched processes in different jurisdictions was also difficult; for instance, the ratio between judges in the Supreme and intermediate courts was different in Victoria and New South Wales . New South Wales had more Supreme Court judges than Victoria, and Victoria had more judges in the intermediate courts.[117] Computing support was obtained from Professor Ernest Friesen at the University of Arizona, and the task was also facilitated by cooperation with a parallel study undertaken by the Victoria Civil Justice Committee, which provided the data for the Victorian courts.[118] That project was led by Professor Ian Scott, then in Australia in the capacity of Executive Director of the Victorian Law Foundation.

The coincidence of two similar empirical studies of the problem of delays, drawing on the same statistical data, demonstrated the urgency of the issue. Scott's report was published in 1984, and Cranston's report, *Delays and Efficiency in Civil Litigation*, was published in a review format in 1984 and then formally with minor corrections in 1985.[119] Although based on similar data, the two projects drew different conclusions about the court

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115 Ross Cranston, 'Approaches to the AIJA Delay Project and Plans for the Future', Address to the Australian Institute of Judicial Administration Inaugural Seminar, Sydney, 14 August 1982.

116 The survey primarily measured the duration from filing to disposition, or in the case of criminal trials filing to judgment or dismissal – with the exception of jury trials, which were measured to their commencement. Cranston sought to identify and measure a range of other waypoints in litigation.

117 Ross Cranston, *Delays and Efficiency in Civil Litigation* (Melbourne: AIJA, 1985) 176

118 Civil Justice Committee, *Civil Justice Project: Preliminary Study, July 1982* (Melbourne: F.D. Atkinson, 1984).

119 Ross Cranston, *Delays and Efficiency in Civil Litigation* (Melbourne: AIJA, 1985); Ross Cranston, *Delays and Efficiency in Civil Litigation* (Melbourne: AIJA, 1984).

control of cases; the differences revealed that there was no one solution to the problem of delays.

Both of the projects found that the process of civil litigation was weighted heavily towards the earliest stages, both in the time required and the volume of cases. As cases progressed through the hierarchy, their number and total effect on delays in the justice system diminished. Legal process could be visualised in the form of a pyramid. The base of the pyramid included all grievances that could be brought to the courts; the 'caseload' (number of cases) reduced in each successive layer until only very few cases reached trial at the apex. Delays occurred at all stages as litigants determined whether and then how to proceed with an action, through interlocutory stages to the setting down for trial, and ultimately to the trial itself and judgment.[120] Attention to these earlier stages was essential to reduce delays and improve the efficiency of the civil justice system, but the two projects differed over the best response. Cranston's research found that the legal system was complex and its stages interdependent. Changes in one part of the process necessarily affected all others, and often in unforeseeable ways. The reformer's task was therefore a delicate one and required systemic consideration. Scott had been influenced by the United States projects, and he was committed to the introduction of proactive management techniques to the Victorian justice system.

Of the two, Cranston's report was more generalised, owing to its cross-jurisdictional coverage, which prevented detailed conclusions. Instead, Cranston's empirical observations uncovered a variety of obscure yet significant inefficiencies in the day-to-day operation of the justice system. This was particularly useful in identifying where commonplace activities created delay, not all of which was unreasonable. Clients might be slow to bring an action, particularly in personal injury cases where launching proceedings would cut off worker's compensation payments,[121] or where the full extent of the injuries took time to develop.[122] Cranston also attributed inefficiencies to the provision of legal services. Well-regarded lawyers were overworked, which reduced the potential for early settlement because case files would remain unopened until nearer to the trial date.[123] Barristers needlessly undertook some work that solicitors could do more

120 Ross Cranston, 'What Courts Do?' (1986) 5 *Civil Justice Quarterly*. These arguments began before the completion of his project, for example, in Ross Cranston, 'Review of Court Reform on Trial: Why Simple Solutions Fail', by Malcolm M. Feeley, (1984) 9(6) *Legal Services Bulletin* 293–294.

121 Cranston, Delays and Efficiency in Civil Litigation, 137–138.

122 Clients waited an average 200 days to contact a lawyer: Cranston, *Delays and Efficiency in Civil Litigation*, 48.

123 Cranston, Delays and Efficiency in Civil Litigation, 54–56.

efficiently, such as the drafting of statements of claim in workplace injury claims.[124] The habits of some lawyers also created inefficiencies, such as the practice of solicitors to list personal injury cases immediately to serve as a means of pressuring for a higher settlement – secure in the knowledge that extensions would be granted if cases came to trial, despite the effect of such extensions on the court's time.[125] There were also inefficiencies created by the tactic of launching proceedings in courts with higher jurisdictions in order to increase the potential remedies, which shifted the caseload to different courts.[126] These were characteristics of the mixed motivations of the agents that worked in the justice system; the effects were difficult to measure, and the degree to which these activities were embedded in custom made them resistant to reform.

In light of these complexities, Cranston's report warned that attempts to impose efficiencies on the system could have unforeseen consequences. Reforms aimed at promoting earlier settlement of disputes could be frustrated by the resistance of the parties. These attempts might become protracted because of the practice of granting extensions to time limits. The additional cost of more assertive pre-trial procedures could even be unnecessary, resolving cases that would otherwise have settled. Even if a more efficient system could be developed that resolved disputes more swiftly, the gains could be overwhelmed by encouraging still more litigation or drawing litigation into the more efficient court. New procedures also created new roles for court officers in which consistency and fairness would need to be ensured.

In his analysis, Cranston applied Tom Church's insight that much of what was derided as delay was attributable to the 'local legal culture'. Culture is a vogue term for all manner of habits and attitudes, but Cranston conceived of it as 'expectations and practices'; he also acknowledged the effect of material influences that shaped it, in particular the endemic inertia of the 'court and lawyer backlog'.[127] Cranston identified two main ways whereby inefficiencies created by this culture could be 'overcome': 'professional educational training and discipline', which he did not discuss in detail, and 'court control'.[128] The latter sought to change the 'local legal culture' by establishing a new order directed by the courts themselves. It called for the

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124 Cranston, Delays and Efficiency in Civil Litigation, 57.

125 Cranston, Delays and Efficiency in Civil Litigation, 72–73.

126 Cranston, Delays and Efficiency in Civil Litigation, 187–188.

127 Cranston, Delays and Efficiency in Civil Litigation, 63.

128 Cranston, *Delays and Efficiency in Civil Litigation*, 63. Refer to Chapter 4 for discussion of educational schemes.

development of specialist lists administered by judges with expertise in particular areas, and procedures in which courts could intervene through pre-trial hearings and settlement conferences, to press the parties to develop or even settle their cases in advance of trial. The concept even extended to proposals for courts to provide their own expert witnesses in order to reduce costs and ensure that evidence was available when required. These changes would allow for more efficient planning in the allocation of resources and the scheduling of cases, and the development of a more managed justice system would change expectations.

Cranston presented court control as the 'modern trend' among reformers,[129] but argued that his study provided an insufficient basis for making definitive claims about its effectiveness. This required careful planning based on full and constantly updated statistical information – which no court possessed – and additional funding, so that resources were not stripped away from other already stretched sections. Cranston also identified the absence of firm data on the allocation of government resources to the courts, a shortcoming that undermined the ability of courts to plan reforms.[130] Existing measures of court resources, beyond the number of judges, were crude measures such as 'judge days' – accrued for each new case – even when cases were settled at the courtroom door.[131] While court-controlled cases 'appear to go faster', and the 'unanimous opinion' of the judiciary whom he interviewed stated that they did in fact proceed faster, Cranston declined to recommend the introduction of new processes that might themselves contribute to delay, be costly and not in fact have any beneficial effect.[132]

Perhaps attempting to dampen misplaced enthusiasm, Cranston cited three 'failed attempts' to introduce court control drawn from the three jurisdictions. In 1975, the New South Wales Supreme Court had introduced a scheme for personal injury claims requiring the plaintiff to serve a 'schedule setting out details in relation to liability, injuries, out-of-pocket expenses, continuing disabilities and loss of income'. The new requirements had not succeeded in changing the practices of lawyers, and the scheme was abandoned after only 10 months. Victoria had introduced a court summons scheme in which judges gave directions to the parties about the progress of their case. In 1980, the scheme was limited to personal injury claims and then abandoned in 1983 for reasons that parties were found to

129 Cranston, Delays and Efficiency in Civil Litigation, 165.

130 Cranston, Delays and Efficiency in Civil Litigation, 165–171.

131 Cranston, Delays and Efficiency in Civil Litigation, 165, 176–177.

132 Cranston, Delays and Efficiency in Civil Litigation, 166–167.

be unequal in the extent to which they shared information, as well as 'non-uniform judge practice'. Adjournments were often granted for reasons of overwork. In the ACT, a similar summons court scheme was 'defunct before its formal repeal' and failed because it placed too great a responsibility on individual judges. As a counterpoint, Cranston cited the Federal Court, which required proceedings to commence with dates for directions hearing and an agreed timetable for the progress of the case.[133] Court control was 'a matter of considerable debate', and research results in the United States were 'not unequivocal'.[134]

Cranston's ambivalence towards 'court control' was perhaps the most surprising feature of his report, particularly since his interviews had uncovered such strong support for the idea. It was still more surprising when contrasted to Ian Scott's report for the Victorian Civil Justice Committee. Scott's report was based on a similar emphasis of legal practices rather than the application of court rules. It made a long series of tangible recommendations, included extending the jurisdiction of the County Court to relieve the Supreme Court of its burden, new requirements that expert evidence be disclosed, and the appointment of a Legal Fees Commission to set the rate at which courts impose costs. Most significantly, it proposed that a system of case management be implemented. Under that scheme, a judge from each court would be nominated as being responsible for managing cases from their initial listing to eventual disposition. New court officers should be appointed to manage this.[135]

Scott was committed to case management, a narrower concept than Cranston's court control. He had spoken at the AIJA's inaugural seminar on the topic, emphasising those schemes that had succeeded.[136] Case management required early judicial control over the progress of a case and monitoring thereafter, as well as measures for ensuring that deadlines were met, including 'short scheduling' deadlines before they were required, a crack-down on unreasonable extensions of time, and fostering of the 'expectation' that events would take place at the time when they are scheduled, rather than deferred.[137]

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133 Cranston, Delays and Efficiency in Civil Litigation, 166–168.

134 Cranston, Delays and Efficiency in Civil Litigation, 169.

135 Civil Justice Committee, Report to the Honourable Attorney-General Concerning the Administration of Civil Justice in Victoria, Volume One (Melbourne: Government Printer, 1984).

136 I.R. Scott, 'Is Court Control the Key to Reduction in Delays?' (1983) 57 *Australian Law Journal* 16.

137 Scott, 'Is Court Control the Key to Reduction in Delays?', 22.

By contrast, Cranston was circumspect about the potential for his own project to assist in reducing delays. He was aware of a number of 'approaches' to the problem, but convinced that each was insufficient on its own. Previous schemes had allocated greater resources (either additional judges, administrators or facilities) and sought improvements in court procedures so that they were uniform across jurisdictions, tailored to particular types of cases. Other schemes provided incentives for early settlement, or sanctioned lawyers where they were found to be responsible for undue delay or 'defective pleading'. Some also argued that legislation was at fault and new laws could free courts of onerous, yet often rudimentary types of cases that could be transferred to administrative bodies or specialised tribunals, such as accident compensation. Finally, additional training might be required of judges and lawyers to improve their understanding of the best practice for using courts, and also to inculcate the need for greater efficiency in processing cases.[138]

Cranston's fastidious report emphasised the complexities inherent in the system. It also stressed the importance of accommodating the different interests that comprised judicial processes. Cranston and Scott diverged over how best to allow latitude to individual litigants to bring their actions, while meeting the need for greater efficiency. Cranston chose to survey the ways in which attempts at governing the justice system could be frustrated. He grappled with the problem that intervention in court processes had consequences both for the integrity of those processes and their cost. Scott, in contrast, favoured simplification and setting boundaries to shape the judicial system without deferring to the special interests of the parties.[139]

The AIJA strongly endorsed Cranston's report and did so against criticism from Scott, who alleged that the AIJA had 'lost its nerve' in not advocating more forcefully for change.[140] As Cranston neared completion of his project, the AIJA had discussed whether or not his report ought to make specific recommendations. McGarvie strongly opposed this idea; in favour of it were Ian Scott and Professor Terry Purcell, Director of the New South Wales Law Foundation, and Cranston himself. The argument they made was that it would be more engaging and useful than a merely descriptive paper. Scott went further, stating that 'there should be a polemical and aggressive

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138 'Approaches to the AIJA Delay Project and Plans for the Future', Address to the Australian Institute of Judicial Administration Inaugural Seminar, Sydney, 14 August 1982.

139 See, for instance, Scott's reference to 'Queuing Theory': Scott, 'Is Court Control the Key to Reduction in Delays?', 20–21.

140 Scott to McGarvie, 27 September 1984, Box 16, AIJA Papers.

discussion' on changes which could be made. McGarvie won the argument by arguing that the paper should be a 'stepping-stone' for future work and generating interest in the topic, thus assisting the AIJA's development.[141] The report was useful for the AIJA for the way it established a methodology for interpreting administrative judicial activities; its statistical overview also revealed potential inefficiencies, which led to subsequent research projects. Scott's Civil Justice Committee Report contrasted with Cranston's in its identification of clear recommendations, yet Scott had the comparative freedom of dealing with just one state. His project was also commissioned by the established Victoria Law Foundation, whereas the AIJA sought to avoid controversy while it secured funding.

The introduction of case management was a significant change in the courts' role, and the AIJA's caution was not unreasonable. The responsibility of taking control over the earlier parts of legal proceedings would impose a substantial burden. Courts had to find ways of ensuring compliance, lest they be made responsible for delays. Participation in earlier stages of court actions also suggested inquisitorial methods; judges could be accused of fostering an outcome if they were seen to be commenting on the quality of evidence.[142] While case management sought to lay down a timetable for litigation, it also had the effect of prioritising the courts' time and the interests of other litigants waiting for trial over the autonomy of the parties currently in litigation. The proponents of the new schemes tended to emphasise the common interest of the parties in resolving a dispute and underplay the competitive nature of negotiations over settlements, or even the adversarial nature of litigation.[143] It remained an open question whether a wholesale transformation of legal culture was necessary, or whether minor amendment of the Rules of Court to introduce sanctions against dilatory litigation would suffice.[144]

Whatever objections might be raised, case management pilot programs were already underway in the Victorian County and Supreme Courts, and similar proposals were under investigation in New South Wales. The implementation of these pilots in local courts was outside the AIJA's scope. State organisations such as the Victorian Courts Advisory Council and its New South Wales counterpart, the Civil Justice Research Centre, conducted

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141 Minutes, 26 June 1983.

142 Peter Sallmann, 'Musings on the Judicial Role in Caseflow Management' (1989) 63 *ALJ* 98.

143 Austin Sarat, 'Understanding Courts: A Critique of Social Science Approaches' (1978) 61 *Judicature* 318.

144 Sallmann cited a debate between United States academics E.D. Elliot and J. Renwick in 'Musings' at 100–102.

their own surveys to determine how they should be implemented.[145] The AIJA contributed to their studies and also participated in the visit of the Canadian case management experts, Professors Carl Baar and Maureen Solomon. These seminars, funded by the Victoria Law Foundation, expounded the best overseas examples and the theory that underpinned case management, and also served to develop understanding of the importance of administration in the judicial role.[146] The AIJA followed these seminars by convening annual forums from 1991 for local courts to describe and compare their experience of implementing case management. The conferences were carefully structured: the court administrator and head of the court would speak, and there was detailed consideration of the difficulties they encountered in implementing the changes. The conferences also provided statistical comparison, so that courts could compare their own processes against interstate benchmarks.[147]

The rapid adoption of case management that was reported in these conferences indicated an acceptance of the need for more efficient court administration. This was apparent in the AIJA's educational program, which prioritised administrative skills. The AIJA also incorporated discussion of case management into its early educational programs. Its inaugural course, convened by Scott and Friesen, used case management as its concluding practical exercise.[148] These courses urged participants to reflect on their own administrative roles, as Peter Sallmann wrote to the New South Wales Deputy Chief Magistrate, Ian Pike, about the 1987 course for magistrates: 'the penny dropped with all participants that they are all administrators because they manage their own courts and lists'.[149] The discussion of case

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145 Deborah Worthington, *The Pace of Litigation in New South Wales* (Civil Justice Research Centre, 1991); Tina Matruglio and Joanne Baker, *An Implementation Evaluation of Differential Case Management* (Civil Justice Research Centre, 1995); Chris Guest, *Economic Evaluation of Differential Case Management* (Civil Justice Research Centre, 1995); compare a predecessor to the Civil Justice Research Centre, Tim McGrath, *Caseflow Management* (Law Foundation of New South Wales, 1989).

146 Keith Akers, with Maureen Solomon and Peter Sallmann (eds), *Report of Proceedings of Workshops and Seminars Conducted by Maureen Solomon* in Melbourne, April–May 1987, (Courts Advisory Council, November 1988); Carl Baar, *Caseflow Management Policy Options for Victorian Courts* (Courts Advisory Council, 1988).

147 Case management and delay reduction in the higher courts: Stock-take and Future Directions (Melbourne: AIJA, 1991); Case management and delay reduction in the Higher Courts: Papers from the Second Annual AIJA Meeting of Australian Higher Courts on Case Management and Delay Reduction, Melbourne, 29–30 November 1992 (Melbourne: AIJA, 1993); Case management and delay reduction in the higher courts: Papers from the Third Annual AIJA Conference of Australian Higher Courts on Case Management and Delay Reduction, Melbourne, 3–4 December 1993 (Melbourne: AIJA, 1994).

148 Refer to Chapter 4 for detailed discussion of the educational programs.

149 Sallmann to Ian Pike, Deputy Chief Magistrate NSW, 5 July 1988, Box 30, AIJA Papers.

management fostered a greater appreciation of the administrative component of judicial activities.

The AIJA turned its research program to developing more efficient administrative processes, which kept pace with the developing reforms. One of the key advantages of improved court administration was revealed in the AIJA's research project into delays in criminal trials, conducted by Peter Sallmann as the Researcher for the Shorter Trials Committee of the Victorian Bar and prior to his appointment as Executive Director. Sallmann's study showed that improved court administration enabled the development of better practices in the processes that led to trial – in this case the procedures of police and prosecutors. As in civil cases where early settlement relieved civil case lists, the aim in criminal prosecutions was to establish processes that increased the proportion of trials that ended with guilty pleas. The project recommended that prosecutors consider which cases should be pursued [150] and identified procedures that were most frequently challenged in court and thus increased the likelihood of a plea of not guilty. The recording of police interviews of suspects, for example, would reduce the probability that confessions would be challenged, as they might be if the prosecution relied upon written confessions that were written by police and signed by the accused.[151] Also considered were mechanisms for improving the sharing of information with the accused, and transferring the listing of trials to an external Directorate to ensure that trials took place in the best order. These recommendations showed that small administrative changes could improve the efficiency of trials while preserving the liberties of those accused and the justice system.

Each research project demonstrated this same point: that measures to improve the efficiency of pre-trial procedures helped to reduce delay. They were also cost-effective, a concern that Cranston had raised in his report on civil delays. Cranston suggested that the benefits of discovery and interrogatories – the formal processes whereby material was shared and challenged before the hearing – were mixed. They could at times assist in achieving early settlements, but they were also 'time-consuming and costly' and could be used as a 'tactic to delay, obfuscate and harass', particularly by well-resourced legal teams.[152] Funding in the sum of $30,000 was accordingly obtained from the Queensland Law Society to determine whether these processes should be continued and precisely how they failed

150 Peter Sallmann, *Report on Criminal Trials* (Melbourne: Victorian Bar Council and AIJA, 1985), 42–44.

151 Ibid., 51-57

152 Cranston, Delays and Efficiency in Civil Litigation, 76–89.

to contribute to the efficiency of trials.[153] Bernard Cairns, Senior Lecturer in Law at the Queensland Institute of Technology, undertook to analyse a random sample of cases in the Queensland and New South Wales Supreme Courts and the Federal Court.

Cairns's report dismissed the concern that these processes were inherently excessive on the grounds that, although the cost and time required were 'significant', this was 'not high as a proportion of total legal costs'.[154] Indeed, when used effectively they could allow for great improvements in the efficiency of subsequent trial processes. Cairns concluded that effective pleadings could improve the efficiency of trials if they could be used to provide a 'plan for litigation'. The full and open sharing of information at this early stage in the process had clear advantages in ensuring that the pleadings 'fully and accurately' revealed the issues at hand, and which questions would need to be determined at the trial. He advocated allowing cross-examination in subsequent interlocutory proceedings before a Master because the advantages of the early exposition of issues outweighed the additional costs and time. This clarity about which matters were relevant would assist the courts to determine how to allocate resources to the trial and ensure that the subsequent trial could be structured appropriately. The pre-trial hearings might even prompt early settlement.[155] But they were not suitable for every type of case. The personal injury cases that comprised such a high proportion of civil litigation, he found, were better served by automatic sharing of documents than by intricate pre-trial hearings, and Cairns recommended that discovery and interrogatories should be prevented in personal injury cases except by special leave.[156]

The same concern for early intervention could be seen in a parallel report on committal proceedings in the criminal court, conducted by Dr David Brereton and John Willis from La Trobe University. As with the early civil intervention, Brereton and Willis found that properly conceived committal proceedings could help to expedite judicial proceedings. Weak cases could be struck out, and early guilty pleas identified. The processes could 'perform a useful management function by clarifying and refining issues and so shortening, if not eliminating, the need for a trial'. With clear

153 Peter Sallmann, 'The AIJA: Past, Present and Future: Address delivered to 1987 Annual Conference of New South Wales Magistrates, 1 July 1987', Box 30, AIJA Papers.

154 Bernard Cairns, 'The Use of Discovery and Interrogatories in Civil Litigation' (Melbourne: AIJA, 1990), 2.

155 Cairns, 'The Use of Discovery and Interrogatories in Civil Litigation', 2.

156 Cairns, 'The Use of Discovery and Interrogatories in Civil Litigation', 35.

timetables for sharing information, resources could be allocated more effectively. These advantages were more pronounced in complex trials.[157]

These new processes also had the advantage of allowing the development of non-traditional methods to expedite processes, especially in the sharing of information. Brereton and Willis, for instance, recommended that 'paper committals' be mandated except in special circumstances, obviating the need for the presence of all parties at short hearings. This insight was developed in a subsequent project that examined the sharing of information in the trial. It was conducted jointly by Andrew Mowbray, Senior Lecturer in Law at the University of Technology Sydney, and Graham Greenleaf, Senior Lecturer in Law at the University of New South Wales. The project explored the way in which new technology could be used to simplify and clarify the presentation of information at the trial.[158]

The effectiveness of these procedures stood and fell on the willingness of litigants to see the advantages of clarity in the sharing of information. Cairns pointed out the difficulty that these matters were 'substantially matters of practice for practitioners',[159] and advocated certain sanctions against the abuse of the processes, such as new rules that made undisclosed documents inadmissible at trial (except by special leave), or for clients to be informed of any breaches of time limits by their legal representatives. Despite these rules, Cairns stressed the need to 'persuade' the profession of the advantages of effective pre-trial and relied on the advantages being self-evident, not only for the system as a whole but also for the needs of individual clients. Brereton and Willis also identified this difficulty, arguing that incentives in the form of 'an explicit statutory acknowledgement' should be drafted so that guilty pleas would earn the defendant a sentence discount, and that earlier pleas should attract greater discounts. The willingness to countenance incentives of this kind demonstrated just how important efficiency was held to be.

After these earlier reports, there was a discernable strengthening of the view of researchers about the need for litigants to share information. A new series of projects followed efforts by the Federal Government to combat complex fraud, in particular through the formation of the National Crime Authority in 1984. Complex trials were those that raised complex issues and required a significant number of sitting days; although there

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157 David Brereton and John Willis, *The Committal in Australia* (Melbourne: AIJA, 1990), ix–x.

158 Graham Greenleaf and Andrew Mowbray, *Information Technology in Complex Criminal Trials* (Melbourne: AIJA, 1993).

159 Cairns, 'The Use of Discovery and Interrogatories in Civil Litigation', 1.

were comparatively few of these, they were costly and affected court schedules. The defences were often complex, relied on a great deal of paperwork and tested the limits of court administration. For these cases, the researchers advocated constraints on the latitude granted to the parties and measures to enforce the sharing of information.

The first of these projects was conducted by the Associate Professor of Law at the University of New South Wales, Mark Aronson, who recommended the requirement that the prosecution prepare a detailed 'case statement', to which the defence would be 'under a duty' to respond and to show which points would be challenged.[160] This early preparation was presented as a means of simplifying complex trials as much as possible, but also as means of assisting the prosecution and defence to develop their respective cases. His argument also considered the difficulties that had begun to emerge from attempts in achieving this cooperation in pre-trial methods introduced in England.[161] One example was the expectation that the Crown would minimise the number of charges to be tried, and the early procedures could help in this task.[162] Court officers, too, could use these methods to 'anticipate' questions of law that might arise in trial and be empowered to 'give directions' to the defence and prosecution in the preparation of their cases so as to eliminate unnecessary matters.[163] The Crown shared the courts' interest in the efficient operation of the justice system, and Aronson acknowledged that the defence did not always share that interest.

There was an awareness of the tension between encouraging the defence to cooperate by disclosing its case in pre-trial procedures and the right of the accused to avoid self-incrimination; the burden of proof rested on the Crown. In a detailed analysis, Aronson argued that a response to the prosecution case statement did not contravene the right to silence, and the sharing of technical details, such as expert witness statements, before trial was also not a threat to civil liberties.[164] Of greater controversy was the use of compelled answers in trials. Provision for compelling answers from suspects in fraud trials existed across a range of commercial law, but there were restrictions on the use of such testimony in trial. Some legislation rested on a 'use immunity' preventing the admission in court of answers,

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160 Mark Aronson, 'Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure' (Melbourne: AIJA, 1992), xi.

161 Aronson, 'Managing Complex Criminal Trials', 5.

162 Aronson, 'Managing Complex Criminal Trials', xi.

163 Aronson, 'Managing Complex Criminal Trials', xi.

164 Aronson, 'Managing Complex Criminal Trials', xi, 3.

whereas others invoked a 'derivative use', which also excluded matters uncovered in consequence of the compelled answers.[165] Aronson recommended the widespread adoption of the changes introduced in the *Corporations Legislation (Evidence) Amendment Act 1992* (Cth), which allowed for compelled statements to be used in trial if they were contradicted at trial.[166] Aronson stressed that this change as well as his others were 'modest' and should be uncontroversial.[167]

The increasing support for assertive means for ensuring compliance in pre-trial processes was taken still further by the last of the studies around this time on complex trials conducted by the La Trobe Researcher and barrister, Dr Chris Corns. This report, funded by SCAG, again examined complex criminal litigation from the perspective of efficiency. Where Aronson had analysed the existing Rules of Court and legislation, Corns's analysis was based on the detailed observation of five long trials in Victoria, two very long trials, two 'typical' trials and a typical white-collar crime. This limited sample made wider generalisation difficult, yet in the close observation of these cases, and in particular the frustration created by the longer ones, Corns was able to identify common causes of delay.[168]

Corns found that the pre-trial mechanisms introduced in 1993 'do not function', largely owing to the 'combative mindset' of the lawyers[169] and the latitude judges were prepared to offer the parties in the conduct of cases. It followed that the judiciary must be prepared to be more interventionist in controlling criminal trials.[170] For this to work, cases needed to be overseen by a single judge who could preside over all the pre-trial processes. Corns's report urged the introduction of new powers to impose sanctions against parties who did not comply with proper pre-trial disclosure. These sanctions extended beyond the direction of adverse inference for failure to comply, including weight to be given to trial conduct in sentencing, and in 'allowing the judge to exclude a previously undisclosed line of defence, analogous to the judicial power to exclude an undisclosed alibi'.[171] He also

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165 Aronson cited for 'use immunity' the Trade Practices Act 1974; Health Insurance Act 1973; Minerals (Submerged Lands) Act 1981; Royal Commissions Act 1902; Complaints (Australian Federal Police) Act 1981; Dried Sultana Production Underwriting Act 1982; and the Australian Meat and Live-stock Corporation Act 1977. For 'derivative use', he cited the Disability Services Act 1986 and the Proceeds of Crime Act 1987. See Aronson, Managing Complex Criminal Trials, 14.

166 Aronson, 'Managing Complex Criminal Trials', xi, 14–15.

167 Aronson, 'Managing Complex Criminal Trials', 3.

168 Chris Corns, 'Anatomy of Long Criminal Trials' (Melbourne: AIJA, 1997), 12–13.

169 Corns, 'Anatomy of Long Criminal Trials', 105–106.

170 Corns, 'Anatomy of Long Criminal Trials', 118.

171 Corns, 'Anatomy of Long Criminal Trials', 113.

recommended that judges not be required to supply written reasons for their decisions, thereby reducing the time in which decisions could be taken.[172]

Corns's report was the final research project on delays and the culmination of the AIJA's work on the subject. It revealed the developing confidence about the advantages of court administration and the need to remove obstructions. Yet as Corns published his report, itself delayed by his observation of the lengthy proceedings, the AIJA had largely moved away from its concern with efficiency. It still pursued these ideas in its educational programs, but since administrative reforms had been introduced into most courts, it turned to more ground-breaking areas of research. With this shift, the AIJA changed its slogan from an interest in 'efficiency' to one that sought 'excellence' in court administration. The semantic shift revealed the AIJA's new interest in courts and its concern for the broader needs of litigants beyond the swift resolution of cases.

The shift can be illustrated in the second-last of these projects on process, *Pleading Guilty: Issues and Practices*, conducted by Kathy Mack and Dr Sharyn Roach Anleu from the University of Adelaide Law School.[173] This study examined the informal plea negotiations – as distinct from plea 'bargains' struck in parts of the United States – by which guilty pleas were encouraged. These negotiations took place outside the framework of the more formal pre-trial procedures, and they did not involve court administration, yet Mack and Anleu found them to be legitimate and very effective. The report pointed to the dangers of heavy-handed administration smothering earlier, informal processes.

The shift in the central issues that interested the AIJA was illustrated by the retrospective conference on efficiency in the justice system convened by the AIJA in 2005. This conference created the opportunity for reflection on the 'successes and failures' of case management.[174] The program demonstrated that some questions remained, such as how to ensure that interlocutory measures were focused, time limits were met, and witness statements were presented in the most streamlined manner. The program also showed the development of judicial thinking, with papers considering the advantages of judges managing wider lists over specialists, and discussing with candour, which the AIJA would not previously have found

172 Corns, 'Anatomy of Long Criminal Trials', 115.

173 Kathy Mack and Sharyn Roach Anleu, *Pleading Guilty: Issues and Practices* (Melbourne: AIJA, 1995).

174 Case Management Seminar: Report (Melbourne: AIJA, 2005).

possible, the competing interests of barristers and solicitors. The greatest shift concerned the development of methods of ADR, which were increasingly seen as challenging traditional forms of justice. There was also the inexorable rise of the self-represented litigant (SRL), who changed the balance between the courts and the parties that had underpinned the implementation of case management. These issues raised completely different sets of problems unimagined when the AIJA was established.

The pace of change that Moynihan identified has only increased in the intervening years.

3. Independence and Accountability

Introducing new legislation that delegated responsibility for the administration of funding to the Federal and Family Courts and the Administrative Appeals Tribunal, the federal Attorney-General Lionel Bowen drew a distinction between what he termed 'administrative and management independence' and 'judicial independence'.[175] Bowen's claim drew on a traditional view that judicial independence was ensured by security of tenure and fair remuneration, including that judicial salaries not be reduced. The judiciary was not accountable except for its adherence to the rules of the court and correct interpretation of the law, which was checked by appeals processes. Wider administrative issues accordingly had no meaningful effect on judicial independence, but the delegation of administrative authority to courts had advantages in establishing clear lines of authority over budgets, improving the allocation of resources, and facilitating reform.

By distinguishing administrative independence from judicial independence, Bowen sought to avoid Parliament entering into a difficult debate. Yet the proposals posed questions about the way in which courts could be held accountable in the spending of public moneys while also retaining the independence from political or commercial pressures necessary for the unbiased appraisal of cases. Greater administrative autonomy risked increased responsibility for outcomes, which could expose the courts to public criticism. The challenge was to determine how courts responsible for their own administration could be made accountable while preserving the essential nature of judicial independence.

The focus of the Australasian Institute of Judicial Administration (AIJA) on the administrative aspects of judicial independence revealed new ways of examining practical questions arising from judicial independence. This would challenge federal Attorney-General Lionel Bowen's distinction between administrative and judicial independence and demonstrate that independence was facilitated by administrative accountability.

Before Bowen's changes to the federal courts and tribunals, the AIJA had explored the ways in which the administration of the courts system affected judicial independence. One of the AIJA's first projects, conducted by Tasmanian Chief Justice Sir Guy Green, examined this question and was published in an influential 1985 article. Green argued that judicial independence in effect required more than security of tenure; it required

[175] Lionel Bowen, *Commonwealth Parliamentary Debates*, 1 November 1989, 2265; *Courts and Tribunals Administration Amendment Act 1989* (Cth).

judicial control over court facilities and resources to prevent the possibility that government policies could undermine the effective operation of the courts and their capacity to deliver justice. Green included protections of essential court activities – he cited the production of court transcripts or travelling costs for attending seminars as examples – and staffing levels against government budget reductions. Control of the quality of court buildings was also an essential for the preservation of independence, because the accessibility and suitability of court facilities were important for the practical delivery of justice.[176] This conclusion was 'derived' from the AIJA's interest in court functions, and Green defined independence as the

> capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.

Independence was necessary only to the extent that it allowed the judicial arm of government to perform its primary functions: 'decide cases and to exercise sole responsibility for declaring what the law is in respect of any particular situation'. The judiciary was the 'custodian of the body of laws and values by which society is regulated and governed', and thereby served to ensure the rule of law as a check on the legislature and executive.[177] The fulfillment of these roles ensured 'public confidence' and preserved the rule of law against vigilantism. The definition established that the need for independence was not 'an a priori principle of self-evident validity'.

This raised the difficulty that courts were not self-funding and that court costs charged to the parties could not be sufficient to support the courts; therefore the preservation of independence required negotiation with government. Whereas judicial officers controlled those aspects considered important to the judicial process, including the hearing of cases, public servants employed by the executive provided administrative services. With the exception of the High Court of Australia, which was delegated responsibility for its own facilities in 1979, and the other federal courts and tribunals covered by Bowen's Courts and Tribunals Administration Amendment Act 1989 (Cth), the executive branch governed court buildings and facilities. Financial support was provided by a combination of fees paid by litigants and government outlays. Green criticised the existing means of

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176 Guy Green, 'The rationale and some aspects of judicial independence' (1985) 59 *Australian Law Journal* 135 at 144–146.

177 Green, 'The rationale and some aspects of judicial independence', 135–136.

communication between the judiciary and other arms of government. They depended heavily on the effectiveness of discussion between the chief justice and the Attorney-General, and then on the 'willingness and … capacity' of the Attorney to advance judicial objectives.[178] Such arrangements had attracted little attention before, but the new perspective of judicial administration brought them to the fore.[179]

In these observations, Green was cautious to stress his view that courts could not be made accountable for their own budgets, even if they were granted responsibility for their administration. The need for accountability in the spending of public money had traditionally required that the money be appropriated by the legislature and controlled by ministers answerable to the electorate. Green accepted that governments were themselves accountable to their electorate, and therefore open reporting was essential; however, he warned that the courts must not be obliged to report on their activities to Parliament because this 'could give rise to the belief in the minds of the public, and probably in due course, in the minds of Members of Parliament and the government, that the judiciary was accountable and responsible to the government for its actions'.[180] For Green, the accountability of the judicial arm could not be to Parliament; it was to the public directly and extended only to the extent of delivering justice.[181]

The AIJA launched two projects to pursue the issues raised by Green and to explore the actual administrative arrangements in Australian jurisdictions. The first, conducted by the economists Alan Barnard and Glenn Withers at the Australian National University (ANU), surveyed the funding levels of courts as a means of quantifying their financial dependencies – the first such Australian study. The second compared the administrative arrangements in three different jurisdictions.

Barnard and Withers presented a complicated picture. Allowing for population increases and inflation, average government funding had increased two and a half times since 1950.[182] This funding amounted to roughly half the total operating costs in 1985, with the remainder recovered from costs, although this amount varied across jurisdictions

178 Green, 'The rationale and some aspects of judicial independence', 142–143.

179 For an earlier example, see I.R. Scott, 'Court administration' (1976) 50 *Australian Law Journal* 30 at 31.

180 Green, 'The rationale and some aspects of judicial independence', 143.

181 Green, 'The rationale and some aspects of judicial independence', 136.

182 Alan Barnard and Glenn Withers, *Financing the Australian Judiciary* (Melbourne: AIJA, 1989), 69.

according to the type of action most often undertaken – the Federal and Family courts together recovered only 12 per cent of their costs. The 'recovery rate' had also changed over time, with as much as 79 per cent recovery of costs in 1967, although 50 per cent rate was normal and had been the rate in 1950.[183] Barnard and Withers criticised the public accounts data as being a 'great morass' of almost impenetrable and inconsistent information, which had prevented meaningful analysis or appreciation of courts' budgets.[184] The authors recommended the wider introduction of program budgeting, in which the full costs of each unit were apportioned separately and connected to stated objectives and outcomes, as a means of supporting reform. The governments of the Commonwealth, New South Wales and South Australia were undertaking initiatives in this area; Barnard and Withers urged improvements in these to allow for more precise identification of the full costs.[185]

The second project, which compared the different models adopted by Australian jurisdictions, was conducted by Peter Sallmann and the visiting American researcher, Tom Church. *Governing the Australian courts* studied administrative systems in Victoria, South Australia and the Family Court of Australia. In Victoria, courts were governed by a 'partnership model', in which the state Attorney-General's Department controlled the operation of the courts, in consultation with the courts. This was the 'traditional' model for administering the courts, although Victoria was notable for its Courts Advisory Council, created on the recommendation of Ian Scott's Civil Justice Committee report of 1984. The Council allowed consultation through its membership, comprising the heads of jurisdiction and representatives from the Attorney-General's Department, Treasury and the legal profession. South Australia differed by having a dedicated government department of specialist court administrators to govern the courts. The third example was that of the Family Court of Australia, which had become autonomous from government in the administration of its facilities and staff (they had became the responsibility of the chief justice), with the executive retaining power to approve budgets and to administer the accommodation.

Church and Sallmann criticised the Victorian model for the complexity of its processes and for some ambiguity in lines of authority (the Registrar administered scheduling, although he or she was a member of the Attorney-General's Department under the direction of the chief executive officer of the court). South Australia's arrangement was acknowledged for

183 Barnard and Withers, *Financing the Australian Judiciary*, 75–76.

184 Barnard and Withers, Financing the Australian Judiciary, 90.

185 Barnard and Withers, Financing the Australian Judiciary, 86.

its comparative simplicity, and the report remarked on the 'unalloyed enthusiasm' for increased specialisation of court administrators made possible by this separate department. Of the three models investigated, the report nevertheless 'leaned heavily' towards the federal model, in which the same kinds of simplification and specialisation were possible.[186] The federal model had advantages for the efficient allocation of resources. Independence could be preserved by a layer of administrative staff within the courts, who would answer for funding decisions while acting only in the interests of courts, thus avoiding Green's concerns about budget cuts undermining essential judicial activities and the spectre of judges answering to Parliament – the court administrator could answer such questions.[187]

These developments offered the potential for improvements to be made, but there remained the issue of how improper expenditures could be controlled and what sanctions could be imposed on courts for misuse of funds. Governments could not easily criticise courts. There was also the concern that the new methods unduly delegated authority to the heads of jurisdictions without formal structures for ensuring representation. Careful planning was necessary before one model was adopted.

Church and Sallmann's report was influential in the South Australian court system, where the separate courts administration department was replaced by a State Courts Administration Council, comprising representatives of courts and tribunals, and with a State Court Administrator reporting to it and managing staff and resources.[188] Queensland also granted administrative responsibility to the President of the Court of Appeal in 1991.[189] New South Wales, Victoria and Western Australia retained the central administration, although with some changes. New South Wales created a separate department for court administration in 1991.[190] In 1992, Western Australia introduced a Courts Planning Committee along similar lines to that of Victoria. Victoria held back from adopting a special department: the unwillingness of judges in the Victorian superior courts to accept the creation of a Courts Commission to administer all of the Victorian courts led in 1995 to a 'pilot' program that delegated

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186 Tom Church and Peter Sallmann, *Governing the Australian Courts* (Melbourne: AIJA, 1991), 63, 65.

187 Church and Sallmann, *Governing the Australian Courts*, 50.

188 *Courts Administration Act 2003* (SA). The change also had the support of the chief justice, Leonard King: Leonard King, 'A Judiciary-based State Courts Administration – the South Australian Experience' (1993) 3 *Journal of Judicial Administration* 133.

189 Supreme Court Act 1991 (Qld), ss 46–57.

190 Laurie Glanfield, 'Governing the Courts – Issues of Governance Beyond Structure', Paper delivered to AIJA Conference, 2000, 4, available at http://www.aija.org.au/2000ac/Papers/Glanfield.pdf.

administrative functions to an executive officer located in the Magistrate's Courts.[191]

Although these new schemes were improvements of judicial administration, in their introduction governments stressed the need for the judiciary to be accountable. The introduction of these changes mostly occurred within the public service during the 1980s and sought efficiencies in public service processes.[192] The administrative structures created lines of responsibility for the allocation of resources, thereby creating a system of accountability.

In 2004, the AIJA published research commissioned from Professor Philip Williams, Foundation Professor (Law and Economics), Professor John Alford and Dr Royston Gustavson, both of the Melbourne Business School at the University of Melbourne, entitled 'The Governance of Australia's Courts: A Managerial Perspective'. In their report, the researchers examined the various models of court governance against a background of empirical research including interviews with judicial officers and others involved in judicial administration. Justice Tim Smith of the Victorian Supreme Court was an important contributor to the publication of this research. Further reference to this research appears later. A seminar in 2008 on courts governance drawing largely on the 2004 report continued the AIJA's interest in and promotion of ideas relating to courts governance, the independence of the judiciary and judicial accountability.

More recently and significantly for Victoria, the Courts Services Bill 2013 (Vic), which was introduced into the Victorian Parliament in the spring session of 2013, draws upon the work and research initiated by the AIJA in relation to courts governance. Importantly, Marilyn Warren, the current Victorian Chief Justice and a member of the AIJA Council, strongly supported this important reform.

The desire to reign in the judiciary was strongest in New South Wales, where a series of scandals concerning members of the magistracy and judiciary provoked the government to create a new instrument for scrutinising the conduct of court officers – the New South Wales Judicial

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191 Peter Sallmann and Richard T. Wright, 'Extract on Courts' Governance from Going to Court, A Discussion Paper on Civil Justice in Victoria' (Melbourne: Department of Justice, April 2000), The Eighteenth Annual AIJA Conference, Darwin, 14–16 July 2000, 6–7, available at http://www.aija.org.au/2000ac/Papers/Sallmann.pdf; compare Lou Hill, 'Constitutional and Managerial Principles of Judicial Court Governance: Implementation in the State of Victoria', Minor Thesis, Master of Laws, University of Melbourne, 1995, 128–9

192 Glyn Davis, 'Public Sector Reform', in Brian Galligan and Winsome Roberts (eds), *Oxford Companion to Australian Politics* (Oxford: Oxford University Press, 2007).

Commission (NSWJC). The establishment of the Commission altered the relationship between the courts and the government, creating a new area of accountability. Some of the events motivating the New South Wales Government to introduce reform involved political figures and even the former premier, Neville Wran. Most of the allegations of corruption were subsequently rejected on closer examination, but their weight of numbers and political pressure from the Opposition proved difficult to resist. The issues that led to the formation of the judicial commission became a focal point for existing tensions between government and the judiciary.

In April 1983, the television program 'Four Corners' aired allegations that Wran had attempted to influence a magistrate, Kevin Jones, not to proceed with charges of misappropriating funds against the Balmain Leagues Club secretary, Kevin Humphreys. Chief Magistrate Murray Farquhar had told Jones that Wran wanted the charges dropped; Jones had done so, but he denied being influenced. A subsequent Royal Commission led by Sir Laurence Street into the case found that Farquhar had attempted to influence the trial, but found no link to Wran, who had stepped down while the allegations were investigated.[193] A review of cases heard before Farquhar undertaken by the Solicitor-General, Mary Gaudron, found irregularities in those involving solicitor Morgan Ryan, including attempts to have the potential sentences reduced by having lesser charges laid. That inquiry led to the resignation of the New South Wales police commissioner, and Farquhar was replaced by Clarrie Briese and subsequently gaoled.

In February 1984 the *Age* newspaper published extracts from police telephone intercepts, which hinted at more substantial links between members of the judiciary, the government and organised crime. It later emerged in parliamentary debates that High Court Justice Lionel Murphy was one of those recorded having discussions with the solicitor Morgan Ryan – although the *Age* misidentified his voice. The authenticity of the tapes was questioned and transcripts made of them were inaccurate; they were also inadmissible in court as they had been recorded unlawfully.[194] Yet a political standoff ensued, enflamed by a series of tawdry media revelations.

A common theme in many of the scandals was allegations about the corrupt handling of committal proceedings, particularly involving judges pressuring magistrates. These elements exercised Briese in particular, who

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193 Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (Crawey, Western Australia: UWA Publishing, 2010), 214–216; Mike Steketee and Milton Cockburn, *Wran: An Unauthorised Biography* (Sydney: Allen & Unwin, 1986), 314–325.

194 Burton, From Moree to Mabo, 219.

was on the AIJA Council and inspired to develop a project on the independence of the magistracy. While undertaking this work, Briese had become a key source of allegations against judges. In July 1984, Briese informed Barrie Unsworth – then Minister for Transport but who would succeed Wran as premier and launch the Judicial Commission in 1986 – that a District Court judge, acting for Premier Neville Wran, had sought to influence the magistrate presiding over a case involving Morgan Ryan.[195] As with the *Age* tapes, the evidence was vague: Briese had not considered it necessary to report the misconduct at the time, and he only revealed that the judge was John Foord 12 months later. The dates he gave for events also did not appear to fit the timeline of the case.[196] Foord was subsequently acquitted of other charges of irregularities in offering lighter sentences to defendants represented by a particular solicitor – irregularities revealed by a statistical study published by Tony Vinson in 1986.[197]

Meanwhile, the Federal Parliament had appointed a Senate Select Committee to investigate Murphy's conduct arising out of the evidence in the *Age* tapes.[198] Briese gave evidence that Murphy had asked Briese over the telephone: '[A]nd now what about my little mate?', referring to Ryan. With the testimony of another witness, Briese's allegation prompted the appointment of a second Senate Committee, which found against Murphy on the balance of probabilities. The Director of Public Prosecutions charged Murphy with attempting to pervert the course of justice, and in June 1985 he was convicted on the charge arising from Briese's evidence. This was overturned on appeal, and Murphy was finally acquitted at a retrial in April 1986. After his acquittal and following the discovery of further evidence, a Special Parliamentary Commission of former judges was appointed to determine whether or not his actions amounted to 'misbehaviour' and were therefore sufficient for his removal from the High Court, but Murphy succumbed to cancer before the Commission made its finding.[199]

Briese pursued questions of the independence of magistrates through the AIJA, which had formed a subcommittee in 1983 to develop the issue. But

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195 Burton, From Moree to Mabo, 224.

196 Burton, *From Moree to Mabo,* 223–225.

197 Andrew Keenan, 'Judge acted leniently in solicitor's cases: report', 'New South Wales justice system neither systematic nor just', and Editorial, 'Calling judges to account', *Sydney Morning Herald*, 8 September 1986. Foord was known for offering lighter sentences: Robert Thomson, *The Judges* (Sydney: Allen & Unwin, 1986), 162–166.

198 Parliamentary Commission of Inquiry Act 1986 (Cth).

199 *Parliamentary Commission of Inquiry Act 1986* (Cth). On Lionel Murphy, see Burton, *From Moree to Mabo*, 226, 243–246; Jenny Hocking, *Lionel Murphy: A political biography* (Melbourne: Cambridge University Press, 1997), 288–310.

the AIJA declined to include the topic in its third annual seminar in 1984, perhaps seeking to avoid involvement in political scandal. Instead, Briese was encouraged to investigate measures to improve the efficiency of procedures in Magistrate's Courts – a task for which he was unsuited, particularly in the context of the AIJA's other detailed studies.[200] He pursued his interest in an article that recommended the adoption of the United States' model in which the magistracy was incorporated into the equivalent of the intermediate court system, in this way offering them protections unavailable to magistrates. He argued that the professional development of magistrates in the preceding decades warranted such an elevation.[201]

The rolling corruption scandals placed the state government under unprecedented scrutiny. The New South Wales Attorney-General, Terry Sheahan, described the 'depressing lack of community confidence in the justice system … totally at odds with the excellent manner in which the vast preponderance of the work of the courts has been, and is being, carried out'.[202] The judicial commission he proposed was thus prophylactic not only for his own government, but also for the justice system, which had become embroiled in the issue.[203] It would perform a number of roles: it sought to improve the consistency of sentencing, guard against irregularities by educational programs and improved statistics collected by the Bureau of Crime Statistics and Research (that bureau previously collected statistics only for Magistrate's Courts). It would also serve as an authority able to respond to complaints about judicial conduct and so avoid the need for ad hoc inquiries.

The decision to establish a commission followed the example of the State of California Commission on Judicial Performance, which Sheahan and his staff had visited.[204] The Californian Commission included lay members and government-appointed attorneys. The New South Wales Judicial Commission was constituted by the heads of the various jurisdictions, including the chief stipendiary magistrate, with the addition of four appointments by the governor, one of whom was a legal practitioner. It

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200 Minutes, Board, 2 March 1983; Minutes, Council, 19 November 1983 and 16 November 1985.

201 C.R. Briese, 'Future Directions in the Local Courts in New South Wales' (1987) 10 *UNSW Law Journal* 127.

202 Tony Sheahan, New South Wales Legislative Assembly Parliamentary Debates, 24 September 1986, 3873.

203 The Opposition leader, Nick Greiner, was a particularly strong critic of the government's handling of the scandals: see, for example, his censure motion in *New South Wales Legislative Assembly Parliamentary Debates*, 23 September 1986.

204 Sheahan, New South Wales Debates, 3873.

employed a chief executive officer and other staff to manage its activities.[205] The Conduct Division, which saw to judicial complaints, was separately constituted with three members, two of whom were a judicial officer, although one could be a retired judicial officer, and one of whom was a lay member.[206] The presence of lay members testing accusations against judicial officers was a novelty in Australia.[207]

The Commission was authorised to investigate even minor complaints not likely to lead to the removal of judicial officers under section 53 of the New South Wales Constitution. This meant that the Commission could rule on a wide range of judicial conduct and greatly widened the scope of its powers.[208] Sheahan's original plan allowed the Commission to act on its findings against a judge, but conflicted with state constitutional protections that judges were able to be removed only by the governor on the address of both houses of parliament and only on the ground of 'proved misconduct or incapacity'.[209] This feature led to the spectacle of a public dispute between Sheahan and Chief Justice of the Supreme Court Sir Laurence Street.[210] The Bar Association and Law Society also called for the establishment of the Commission to be deferred until 'proper consultation' could be undertaken.[211] Street quickly came around to endorse the Commission after the Attorney agreed to changes that restored the prerogative of a joint sitting of parliament in the dismissal of judges. Sheahan acknowledged that the decision to allow investigation of a wide range of complaints was 'perhaps the clause that will attract the most interest'.[212]

After the public dispute had abated, Sheahan approached the AIJA through the Standing Committee of the Attorneys-General (SCAG) to investigate mechanisms for ensuring judicial accountability. The emphasis on

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205 Judicial Officers Act 1986 (NSW), ss. 5–6.

206 Judicial Officers Act 1986 (NSW), s. 22.

207 The Special Parliamentary Commission appointed to investigate Murphy was constituted of former judges, Sir George Lush, Sir Richard Blackburn and Andrew Wells.

208 Constitution Act 1902 (NSW), s. 53.

209 Shimon Shetreet, 'The limits of judicial accountability: a hard look at the Judicial Officers Act 1986' (1987) 10 *UNSW Law Journal* 4.

210 Mark Coultan, 'Attorney-General, Chief Justice brawl publicly', *Sydney Morning Herald*, 19 September 1986, 1; compare Pilita Clark, 'How government and judiciary came into conflict', *SydneyMorning Herald*, 19 September 1986. See also Street's previous criticism of the NSW and Federal governments about the appointment of NSW Justice Stewart to head the National Crime Authority: Thomson, *The Judges*, Chapter 4.

211 Jenny Cooke, 'Lawyer groups ask Government to defer "revolutionary" scheme', *Sydney Morning Herald*, 19 September 1986.

212 Sheahan, New South Wales Debates, 3876.

accountability in place of independence was intended to move away from measures designed to shield the judiciary towards means by which they should accept responsibility. The AIJA reluctantly met Sheahan's request by convening a seminar, for which it chose as speakers Justice Racanelli from the Court of Appeal division of the Californian Supreme Court and chairperson of the State of California Commission on Judicial Performance, and two of its retired chairs, McGarvie and Dennis Mahoney. Racanelli outlined the experience of the California Commission, while McGarvie discussed the ways in which accountability was achieved in Australia. Mahoney drew on his own private research undertaken while on vacation in the United States to survey the various schemes operating federally in the United States, as well as those of England and Wales.[213]

Mahoney revealed that, while federal courts in the United States had adopted public complaints mechanisms, in England and Wales complaints were handled 'in house'. He contrasted the small number of Australian judges and magistrates with the respective sizes of the judiciary overseas, and argued that the number of complaints was 'the most important factor in deciding whether formal procedures' through a judicial commission 'were necessary'.[214] Although statistics were unavailable in Australian courts, those that existed in United States courts revealed that the likelihood of complaints prompting action was very small.[215] McGarvie shared Mahoney's concern that the complaints mechanism in the new Commission would be superfluous – at that stage no Australian judge had been dismissed for misbehaviour or because of incapacity since Federation.[216] The Commission would nevertheless create a new bureaucracy for overseeing judges with its own internal logic, a development he considered not only unwarranted but also likely to be detrimental to the quality of justice.[217] This argument might have been

213 Racanelli's contribution, which was not worked up formally for publication, was not published: *The accountability of the Australian judiciary: Procedures for dealing with complaints concerning judicial officers* (Melbourne: AIJA, 1989).

214 Dennis Mahoney, 'Procedures for dealing with complaints concerning judges' in *The accountability of the Australian justice system* (Melbourne: AIJA, 1989), 2.

215 In the US federal court, eight of 277 complaints resulted in 'corrective action', or 2.9 per cent; in California the 185 complaints produced one 'public censure' and six 'admonishments': Mahoney, 'Procedures for dealing with complaints concerning judges', 6–7.

216 Richard McGarvie, 'The operation of the new proposals in Australia' in *The accountability of the Australian justice system* (Melbourne: AIJA, 1989), 23. The conference took place on 22 May 1987, before the removal of the Queensland Supreme Court Justice Angelo Vasta on 8 June 1989: Enid Campbell and H.P. Lee, *The Australian Judiciary* (Melbourne: Cambridge University Press, 2001), 105–106.

217 Richard McGarvie, 'The operation of the new proposals in Australia' in *The accountability of the Australian justice system* (Melbourne: AIJA, 1989).

technically correct, but it rejected the political imperative to demonstrate that public institutions were transparent and untainted by corruption.

Despite McGarvie and Mahoney's criticisms, other jurisdictions adopted similar organisations for judicial oversight. The ACT established a commission, which, unlike New South Wales, was comprised entirely of active or retired judges, with no provision for lay members; for matters which, in the Commission's view, warranted dismissal, the Attorney-General was to place the report of the Commission, based on its inquiries, before the Legislative Assembly.[218] Victoria established a similar commission in 2005, and in 2012 the federal government proposed an equivalent model for the federal courts.[219]

The model, first introduced to New South Wales, achieved acceptance for creating a non-political arbiter that separated judicial misconduct from political imperatives. The model was also adopted in a number of international jurisdictions. New Zealand adopted a 'judicial complaints scheme' in 2001, before appointing a judicial conduct commissioner, who sorted complaints and referred them to a judicial conduct panel. In 2005, Britain appointed a conduct ombudsman as the head of an office of judicial complaints. Ireland appointed a committee on judicial conduct and ethics in 2000; South Africa appointed a judicial commission; and Hong Kong introduced a judicial conduct code.[220]

Chief Justice Anthony Mason had been among those who criticised the measures used to investigate the Murphy allegations and those that led in 1989 to the dismissal of Queensland Supreme Court Justice Angelo Vasta.[221] Mason's concerns reflected wider interests in developing institutions that would separate judicial from political processes and provide 'better means of defending the judiciary from baseless and unfair attacks'.[222] This process

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218 Judicial Commissions Act 1994 (ACT).

219 *Courts Legislation (Judicial Conduct) Act* 2005 (Vic); Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 (Cth).

220 Peter Sallmann, 'Judicial Conduct: Still a live issue?' Judicial Conference of Australia, 2005 Colloquium Papers, 3 September 2005, 1–5.

221 Sir Anthony Mason, 'The Appointment and Removal of Judges', in *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (NSWJC, 1997); The Australian Law Reform report on civil justice procedure recommended that procedures for handling complaints should be determined in advance of crises to avoid political manoeuvrings. Another reason for the wider application of this model was the growing size of the judiciary in Australia, which had been accompanied with a larger rate of misconduct ranging from minor felonies to tax avoidance or even sex offences: Sallmann, 'Judicial Conduct', 9.

222 Sir Anthony Mason, 'The courts and their relationship with government: an address to the Bicentennial Australian Legal Convention, 29 August 1988, Canberra' (1989) 15 *Commonwealth Law Bulletin* 297 at 297–298.

could be risky, particularly if new instruments were introduced as swiftly as the NSWJC.

This issue exercised McGarvie, who in the article that launched the *Journal of Judicial Administration,* urged the judiciary to avoid 'complacency' and develop means of reinforcing independence.[223] McGarvie argued that traditional judicial processes required defence amid the competing interests of 'modern pluralist democracy'. New institutions were required to respond to political and public pressures, creating a 'new accountability' in which courts would respond to the wider public and to government, in order to defend their administrative independence. McGarvie became a leading advocate for two new bodies to represent the judiciary: an Australian courts committee comprised of representative judicial officers, and a federal judicial conference. The Courts Committee shared many of the features of the Victorian Courts Council – a body comprised of representatives from the different jurisdictions, facilitating discussion about matters affecting the courts, including administration and judicial independence.[224] McGarvie's Courts Committee would comprise judges from jurisdictions across Australia and would serve to advise and make representations to government. It would help to focus discussion on the government of the courts and convey to governments the judicial consensus on issues.[225] The Judicial Conference, modelled on American examples, would advance judicial interests in public debates. The conference membership would have a similar composition drawn from the different parts of the judiciary to that of the AIJA. The two organisations would go some way to meeting McGarvie's concerns about judicial passivity in the face of government action.[226] At the 1993 Supreme Court Judges Conference, both proposals were adopted and the two new bodies were established, with federal funding, in 1993. These new organisations acted to support the interests of the judiciary.[227] The Judicial Conference of

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223 Sallmann, 'Judicial Conduct', 9.

224 Richard McGarvie, 'The Foundations of Judicial Independence in a Modern Democracy' (1991) *Journal of Judicial Administration* 24.

225 Richard McGarvie, 'The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence' (1992) 1 *Journal of Judicial Administration* 236 at 261–262.

226 McGarvie, 'The Ways Available to the Judicial Arm of Government', 261–262; compare R.D. Nicholson, 'Judicial independence and judicial organisation: a judicial conference for Australia?' (1993) 2 *Journal of Judicial Administration* 143.

227 Richard McGarvie, 'Judicial responsibility for the operation of the court system' (1989) 63 *Australian Law Journal* 79.

Australia provided a mechanism by which judicial members could defend judicial independence.[228]

From a similar motivation to protect courts from external interference or attack, courts also moved to develop their own structures for liaising with the media, and appointed media liaison officers to improve media reporting, by providing an official presentation of issues. As a product of the wider criticism of the courts, traditional court reporting that summarised the proceedings had fallen away and in its place had emerged a style of reporting that was at times sceptical and sensationalist. This reporting had called out the courts for their inefficiencies or sentencing in individual cases; the *Age* tapes were an example of reporting based on hearsay and unsupported allegations. The representation of judges in the media was outside of a court's own control, and traditionally only heads of jurisdiction spoke for the court. Assessing the risks in 1987, Daryl Dawson, then on the AIJA's Council, argued against court officers engaging in public debate: much better for misreporting to be corrected officially or endured in stoical silence.[229] Even Michael Kirby, who had so effectively lobbied governments during his period as Law Reform Commissioner, concluded that the media operated on its own terms, with 'mischievous' reporters enflaming debate in order to generate controversy.[230] This earlier caution fell away as other institutions, such as the police force, established their own media offices. In 1994, Bob Nicholson argued that courts must adapt to improve communication between courts and the public, including making use of the media, however imperfect it might be, by recognising and accommodating the 'fundamental difference of method employed' by courts and the media respectively.[231] Other methods could include televising court sessions and supplying factual information or facilities to the media in order to encourage a more accurate treatment.[232] In New South Wales, a media liaison officer was appointed in 1993, funded initially by a partnership between the judiciary and the Law Institute, but later supported by the state Attorney-General's Department. The Federal Court and Victorian Supreme Court followed in the same year by appointing a courts media information officer, and courts in other states followed thereafter. The Federal Court officer had a special role to respond to issues

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228 Daryl Williams, 'Federal Government Initiatives', in *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Sydney: NSWJC, 1997), 82.

229 Daryl Dawson, 'Judges and the media' (1987) 10 *UNSW Law Journal* 17.

230 Michael Kirby, 'Judges, media and government' (1993) 3 *Journal of Judicial Administration* 63.

231 R.D. Nicholson, 'The courts, the media and the community' (1995) 4 *Journal of Judicial Administration* 4 at 5.

232 Nicholson, 'The courts, the media and the community', 18.

arising from Native Title legislation.[233] Victoria also published a short guide for journalists, while Western Australia adopted the practice of publishing 'sentencing summaries' providing an 'accurate summary of the Judge's remarks in sentencing'.[234] These media liaison areas were associated with the head of jurisdiction and served the dual function of providing accurate information on court activities while also publicising when suppression orders had been made that might affect reporting. Their creation necessarily imposed some changes on the judicial role in order to integrate with the publication schedule of media outlets; they also required courts to provide clear advice in formats comprehensible to the media.[235]

The new instruments provided another means of communication between the executive and judicial arms of government and allowed for more robust forms of discourse. There were shifts in the relationship, too, from the executive side. The former Shadow Attorney-General and Minister for Constitutional Reform, Daryl Williams, in particular, welcomed the new judicial bodies, and he announced to the 1995 AIJA conference that in future coalition governments the Attorney-General would not take on the customary role of speaking on behalf of the courts. This function of the Attorney-General originated in the British Parliament, where the equivalent, the Lord Chancellor, was also the chief judicial officer. In the Australian Parliament, the Attorney-General was a politician and Williams argued that it was inappropriate for a political figure to defend even the failings of the court system. Such a defence, particularly where Opposition parties criticised the courts, would identify them with one party over another.[236] Williams's claim was that courts were not apolitical institutions that could expect bipartisan support. Instead they were imperfect bodies subject to the same level of scrutiny and criticism as the other parts of government. Williams urged the judiciary to represent itself in the public sphere through the creation of new entities, such as the Judicial Conference of Australia (JCA), and direct court media liaison.[237]

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233 Federal Court of Australia, Senior Public Affairs Officer, Duty Statement (1994), quoted in Nicholson, 'The courts, the media, and the community', 10.

234 *Covering the courts: a basic guide for journalists*, vol. 7, (Melbourne: Supreme Court of Victoria, 2006); The Hon David K. Malcolm, 'Independence and Accountability', Paper delivered to the 17th Annual AIJA Conference, 6–8 August 1999.

235 New South Wales Law Reform Commission, *Contempt by publication*, Report no. 100 (2003), 15.9–15.10

236 Bernard Lane, 'High Court on trial', *The Australian*, 22 March 1997, 22.

237 Daryl Williams, 'Who speaks for the courts?', in *Courts in a representative democracy* (Melbourne: AIJA 1995), 183; compare Daryl Williams, 'The Role of the Attorney-General' (2000) 13 Public Law Review 252.

This arrangement allowed governments greater latitude in criticising the judiciary and helped to disentangle judicial accountability for the operation of courts from that of the executive. In withdrawing the Attorney-General's traditional support for the courts, Williams did not perhaps consider that this change would usher in a period of unprecedented antagonism between the courts and the government. Governments felt that courts overextended their proper function and imposed excessive review of government activities.[238] Attacks on the courts were seldom characterised by rational debate of the kind contemplated by reformers. The attacks from politicians went undefended by the government, and the judiciary were called upon to respond to uninformed invective, while being limited to methods appropriate to the judicial branch. The uneven debate prompted an outcry from sections of the judiciary and indicated that the issue was unresolved.

The withdrawal of the Attorney-General as a public defender of the courts allowed governments to be more critical of the court system and even court judgments. Williams had spoken on his belief that courts were administratively backward and unresponsive to new developments. Government criticism of judgments was more difficult. Williams's omission of the 1992 *Mabo* ruling,[239] of which his party was among the most powerful critics, was notable: this unstated context was not missed by the discussant of his paper, the journalist David Solomon.[240] Kirby described receiving an 'unrelenting barrage of criticism and denigration' that was unleashed by politicians following the 1996 *Wik* majority judgment.[241] This, he argued, was not properly described as debate, since the attacks did not deal with the substance of the judgment. Kirby worried that the changes in the Attorney-General's role undermined the bipartisan support for the institution of the courts, thus making them the subject of political debate, and 'would, if unabated, undermine the community's confidence in the courts and acceptance of court decisions'.[242] The Native Title issues were

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238 The Hon David K Malcolm AC, *Independence and Accountability*', Paper delivered at '17th AIJA Annual Conference ;Justice Delivery – Meeting New Challenges'. 1999.

239 Mabo v. Queensland (No 2) (1992) 175 CLR 1.

240 David Solomon, 'Commentary', in Courts in a representative democracy (Melbourne: AIJA 1995), 195; Gary D. Meyers and Simone C. Muller, Through the eyes of the media (Part I): A brief history of the political and social responses to Mabo v Queensland (Murdoch, WA: Murdoch University Environmental Law & Policy Centre, 1995); Mabo v. Queensland (No 2) (1992) 175 CLR 1; The Hon David K. Malcolm, 'Independence and Accountability', Paper delivered to the 17th Annual AIJA Conference, 6–8 August 1999.

241 Wik Peoples v The State of Queensland (1996) 187 CLR 1.

242 Michael Kirby, 'Attacks on Judges – A Universal Phenomenon', Address to the American Bar Association Winter Leadership Meeting, Maui, Hawaii, 5 January 1998, available at http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_maui.htm; compare David McKenzie and Christopher Niesche, 'PM backs Fischer over court attacks', *The Australian*, 1 March 1997.

echoed in subsequent disputes over refugee immigration from 2002, following the Federal Court's disallowance of aspects of the transportation of refugees aboard the *Tampa* to Nauru, when the Immigration Minister Philip Ruddock accused the courts of 'involv[ing] themselves in the political process', drawing a rebuke from the chief justice of the Federal Court.[243]

The attacks could also be personal. In 2002, Liberal Senator Bill Heffernan accused Kirby of using a government vehicle to procure young male prostitutes. Heffernan made his statements under parliamentary privilege and quickly recanted when the documents he cited proved to be forgeries.[244] Heffernan had spoken under parliamentary privilege and was demoted from his position as parliamentary secretary, but his right to criticise the courts was defended by the prime minister, John Howard, and Williams refused to censure Heffernan, arguing that the comments had not damaged the standing of the High Court. The Judicial Conference and other judicial organisations – although not the AIJA – criticised Heffernan and Williams.[245] But the issue revealed the uneven means available to the respective parties. While government ministers could present *ad hominem* and other populist arguments, the court representatives were limited to the substance of matters and arguments about due process.[246]

Although in many of these examples the government attacks were answered, it was not clear whether or not they undermined the standing of the judiciary. The AIJA's contribution to the debate was to develop an ethical framework for judicial officers in order to clarify those aspects of the judicial role unspecified in the rules of court. Clear definitions would serve to overcome some of the unfounded criticism and offer judicial officers confidence in their role. The AIJA's work built on the work of Queensland Justice J.B. Thomas, who published a study of Australian judicial ethics in 1988.[247] The first edition was idiosyncratic, but it sought to build on the work of British theorists, notably Shimon Shetreet's analysis of judicial

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243 Darrin Farrant with Kerry Taylor, 'Judges Hit Back at Ruddock', *The Age*, 4 June 2002; Darrin Farrant with Kerry Taylor, 'Ruddock's Regret over Court Remarks', *The Age*, 5 June 2002; compare James Waghorne and Stuart Macintyre, *Liberty: A History of Civil Liberties in Australia* (Sydney: UNSW Press, 2011), 178–179.

244 *Commonwealth Parliamentary Debates*: Senate, 12 March 2002, 573; 19 March 2002, 944.

245 Louise Dodson and Kerry Taylor, 'Heffernan Hangs Up The "Gone Fishing" Sign As Colleagues Have Their Say', *The Age*, 23 March 2002; Benjamin Haslem, 'Howard and Williams not yet off hook', *The Australian*, 20 March 2002, 4.

246 Michael McHugh, 'Tensions between the Executive of the Judiciary' (2002) 76 *Australian Law Journal* 567 at 572.

247 J.B. Thomas, *Judicial ethics in Australia* (Sydney: Law Book Co., 1988).

discipline *Judges on Trial*.[248] Thomas's work drew on case histories to explore examples of judicial indiscretion. Subsequent editions significantly expanded the text.[249]

The AIJA first appointed a University of Melbourne philosopher, David Wood, to examine issues that arose from ethics. Wood's study was based on an extensive survey of secondary material, but it produced discussion rather than conclusions at a time when practical advice was needed.[250] The AIJA remedied this shortcoming by commissioning a second publication, undertaken by South Australian Justice Sam Jacobs and New South Wales Court of Appeal Justice John Clarke, rather than an academic. This pair developed a practical guidebook, informed by surveys of experienced judicial figures, thus presenting the behaviour generally held to be appropriate and when and with whom concerns should be discussed. The guide adopted a worldly approach to judicial activities. Although liaison with other arms of government and formal publicity were properly reserved for the head of jurisdiction, it argued that court officers should not isolate themselves from public engagement and comment in areas of their own speciality.[251] An important function of the judicial office was to help to foster 'public confidence' in the judicial system, 'enhance public respect for the judiciary', and to 'protect the reputation of the judiciary – although the second edition was more conservative, delegating responsibility for publicity on the topic of judicial independence to the head of jurisdiction.[252]

The guide sought to be 'positive and constructive' and to provide general advice to new judges.[253] An editorial in the *Australian* newspaper criticised the lack of firm requirements, but it was welcomed within the judiciary.[254] In a review, Thomas praised the skill in weighing emphases with which it was compiled.[255] The guide's innovation was in its offering of plain-speaking

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248 Shimon Shetreet, Judges on trial: a study of the appointment and accountability of the English judiciary (Amsterdam: North-Holland Pub. Co.,1976).

249 J.B. Thomas, *Judicial ethics in Australia,* 2nd ed. (Sydney: LBC Information Services, 1997); J.B. Thomas, *Judicial Ethics in Australia*, 3rd ed. (Chatswood, NSW: LexisNexis Butterworths, 2009).

250 David Wood, *Judicial Ethics: A Discussion Paper* (Melbourne: AIJA, 1996).

251 Sam Jacobs and John Clarke, *Guide to Judicial Conduct* (Melbourne: AIJA, 2002), 4.

252 Jacobs and Clarke, *Guide to Judicial Conduct,* 3. The second edition removed the paragraph 'Judges may take advantage of appropriate opportunities to inform the public about the concept of judicial independence and its importance, and to raise issues of legitimate and serious concern. Prior consultation with the head of the jurisdiction is desirable'.

253 Jacobs and Clarke, Guide to Judicial Conduct, 1.

254 The Hon Chief Justice Murray Gleeson AC, 'State of the Judicature' 77 *Australian Law Journal* (2003) 77 ALJ 505.

255 The Hon J.B. Thomas, '"Guide to Judicial Conduct": A new handbook for judges' (2003) 77 ALJ 240 at 240–245.

advice. Among its guidelines were examples for when an approach to colleagues or the chief justice was necessary or when to withdraw from sitting on a case. It argued that judges should not necessarily be considered 'model' citizens: judges 'should be, and be seen to be, involved in the community in which they live', but should 'accept' that their role exposed them to greater 'scrutiny', and imposed 'constraints on their behaviour that others may not experience'.[256] This definition of ethics extended only to judicial officers, and its practical advice could perhaps have extended into other areas.

The ethics project developed a system of personal accountability for members of the judiciary that extended beyond the AIJA's earlier concerns, which had focused on court processes as a whole. Some of the earlier advances made in court administration had come under criticism as ineffective. There remained concerns about accountability within the newly established Courts Administrative Councils, particularly as to how sanctions could be applied against the misdirection of funds.[257] There were also concerns about the practical difficulty of courts providing their own administration. Judicial officers had not been chosen for their management skills; how, then, were they to manage large judicial offices? Would the additional burden that administrative tasks required from senior judges detract from their primary role?[258] Thus, New South Wales restored courts administration to the executive branch in 1995, citing efficiency concerns.[259]

As the New South Wales change revealed, the processes could be unwieldy and slow to adapt to changes in the circumstances of courts and tribunals. A key critic was the secretary of the New South Wales Attorney-General's department, Laurie Glanfield. In a bracing address to the AIJA conference in Darwin in 2000, Glanfield argued that the concept of independence had 'extended beyond its legitimate ambit' and had in fact served to impede administrative reform.[260] Glanfield argued that the courts needed to determine their priorities and suggested that the judicial system existed to serve the needs of the community, both in the application of the rule of law but also in a number of other ways, including their 'open accountability,

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256 Jacobs and Clarke, *Guide to Judicial Conduct*, 1, 6.

257 Murray Gleeson, 'Judicial Accountability' in *Courts in a representative democracy* (Melbourne: AIJA, 1995), 175.

258 Peter Sallmann, 'Extract on Courts' Governance from *Going to Court*, a Discussion Paper on Civil Justice in Victoria', Paper presented at the 18th Annual AIJA Conference, Darwin, 14–16 July 2000.

259 Laurie Glanfield, 'Governing the Courts – Issues of Governance Beyond Structure', Paper presented at the 18th Annual AIJA Conference, Darwin, 14–16 July 2000.

260 Glanfield, 'Governing the Courts', 2.

responsiveness, accessibility and improved performance and efficiency'. This was the 'yardstick by which the community will measure the performance of the courts'. Independence was important only insofar as it enabled these outputs.[261] Glanfield argued that courts had not undertaken sufficient work to identify the most important outcomes of the judicial process, particularly on the needs of court users, and that arguments framed in terms of independence were often self-serving.

Glanfield's commentary responded to shifts in public administration, notably the introduction of accrual budgeting – a form of program budgeting in which funding is provided only for agreed outputs – which had been absent, although under discussion when Church and Sallmann had conducted their research in 1991.[262] This form of budgeting required the disaggregation of funding for different court activities. It was introduced in 1999 in by the coalition Federal Government and earlier in some of the states. Glanfield also responded to work undertaken by the AIJA on court users, *Courts and the Public*. That report's author, the legal academic and secretary to the JCA, Stephen Parker, argued that the judiciary should reorientate itself to serve the needs of consumers – from the trivial 'suggestions box', to new measures for the growing number of self-represented litigants (SRLs) following the *Dietrich* ruling, which stipulated that cases against litigants without the means to support legal counsel in criminal trials could not be heard and had forced an extension of legal aid.[263] Parker characterised these users in the plural form 'publics' to indicate that different users had a range of different needs.[264] His suggestions were practical and achievable and offered the AIJA a program of activities, but it was a large step to redefine these issues as the courts' central priorities.

Critics of program budgeting argued that they amounted to a reduction in the activities of the courts by the imposition of mandated efficiency requirements. These were imposed indirectly through the budget allocations and in effect forced courts to achieve standards in order to retain their funding allocation. Meeting such targets was inimical to the fair allocation of resources on each case's merit, even for complex trials, and one that could introduce influences that would undermine judicial independence.[265] The most vociferous of the critics, Federal Court Judge

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261 Glanfield, 'Governing the Courts', 6.

262 Church and Sallmann, Governing the Australian Courts.

263 *Dietrich v R.* (1992) 177 CLR 292 (13 November 1992).

264 Stephen Parker, *Courts and the Public* (Melbourne: AIJA, 1998); compare Thomas W. Church, *A Consumer's Perspective* (Melbourne: AIJA, 1991).

265 Douglas Drummond, 'Towards a more compliant judiciary – parts I and II' (2001) 75 *Australian Law Journal* 304 and 356.

Douglas Drummond, attacked the proponents of judicial administration as seeking efficiency at the expense of justice.[266]

Drummond provoked a reaction from the defenders of the new mechanisms, including the Chief Justice of the Family Court, Alastair Nicholson, who countered that performance standards were not the villains that Drummond stated they were.[267] The observation of performance levels was not intended for disciplining judges or constraining courts' capacity; rather, they served as a 'tool' for recommending improvements and allocating resources. Performance measurement through statistical means provided a clearer picture of court administration. The statistics collected would also be aggregated for the whole of the court, rather than singled out for individual judges.[268]

Insofar as this debate considered judicial independence, the two sides divided over Bowen's distinction between 'administrative' and 'judicial' independence in the introduction of the *Courts and Tribunals Administration Amendment Act 1989* (Cth). While Bowen had argued that the two concepts should not be combined, in the intervening years measures for creating accountability in the judicial process, including the conduct commissions and the new court institutions informing public opinion, such as the Judicial Conference and media liaison units, modified the definitions of these terms. Glanfield argued that the courts could no longer afford to cling to principled defences of judicial independence, but that there could be advantages in embracing greater accountability.

The development of such measures was supported by the researchers Alford, Gustavson and Williams, in the report referred to earlier entitled 'The Governance of Australia's Courts: A Managerial Perspective', which traced the organisational responsibilities of court officers and their lines of authority in the same way as might be undertaken by a business. The focus was on the 'outputs' of courts, rather than their bureaucratic or traditional roles, and the project defined in a more detailed sense the physical activity of courts. In this way their analysis developed the objectives of accruals budgeting – both efficiency in the use of resources and effectiveness in meeting community expectations. The project's organisational analysis

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266 Drummond, 'Towards a more compliant judiciary – part I', 305.

267 Alastair Nicholson, 'In response to "Towards a more compliant judiciary"' (2002) 76 *Australian Law Journal* 231.

268 Stephen Colbran, 'Judicial performance evaluation: accountability without compliance' (2002) 76 *Australian Law Journal* 231.

sought to define structures that would offer means of preserving judicial independence while allowing managerial accountability.[269]

Among the study's main critiques was that the changes that had been made to foster increased responsibility in the judiciary were inadequate. The traditional structure of a government department providing facilities and services to the courts was both inefficient and ineffective. Such a system set up a misalignment of authority and responsibility, in which those who have the core operational responsibility (judges) lacked clear authority over the necessary resources to carry out that responsibility.[270] Incidental changes in government administration also undermined this system. The enlargement of government departments meant that judicial requests to ministers competed against a wide range of alternatives, with the result that judicial projects might be overlooked. Complicated accounting practices meant that budgets could change even within a single year, so that ancillary but essential services – for instance, the production of transcripts – might not be provided. Court staff employed by the government would be subject to divided loyalties.[271]

In order to bring courts into line with the administrative systems, the report recommended a model similar to the federal model, in which government provided an overall budget for specified outcomes and employing judges, while judges took responsibility for facilities and staff, with responsibility for providing the outcomes. The model produced a system, following the analysis of Church and Sallmann, best suited to safeguarding judicial independence, which would also 'contribut[e] to efficiency by better aligning authority and responsibility and optimising interdependencies'.[272]

From the perspective of this final report, the earlier caution about accountability in the judicial role appeared reactionary. Yet Green's derivation of independence from administrative necessity could be traced in Alford, Gustavson and Williams's report. In the context of these changes, Alford, Gustavson and Williams argued that courts could not afford to look back to an earlier simpler time when judicial independence could be invoked to avoid engaging with difficult issues. Rather, courts must recognise their administrative function and incorporate it into their activities. Unlike Bowen's distinction between administrative and judicial

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269 John Alford, Royston Gustavson and Philip Williams, *The governance of Australia's courts: a managerial perspective* (Melbourne, AIJA, 2004), 2.

270 Alford, Gustavson and Williams, *The governance of Australia's courts*, 86.

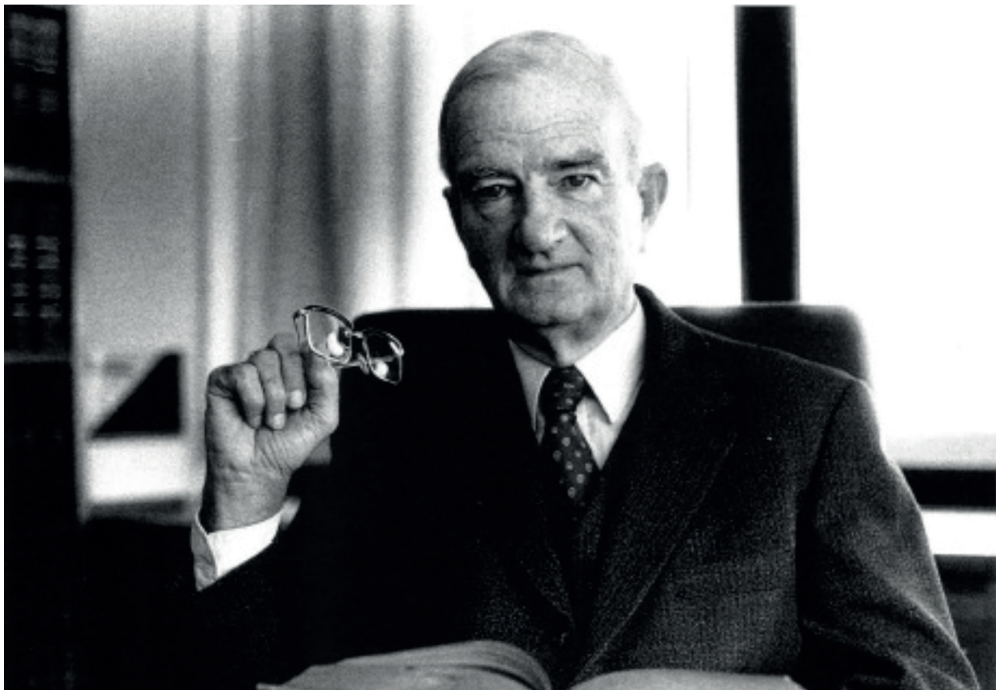
271 Alford, Gustavson and Williams, *The governance of Australia's courts*, 85–86.

272 Alford, Gustavson and Williams, *The governance of Australia's courts*, 86.

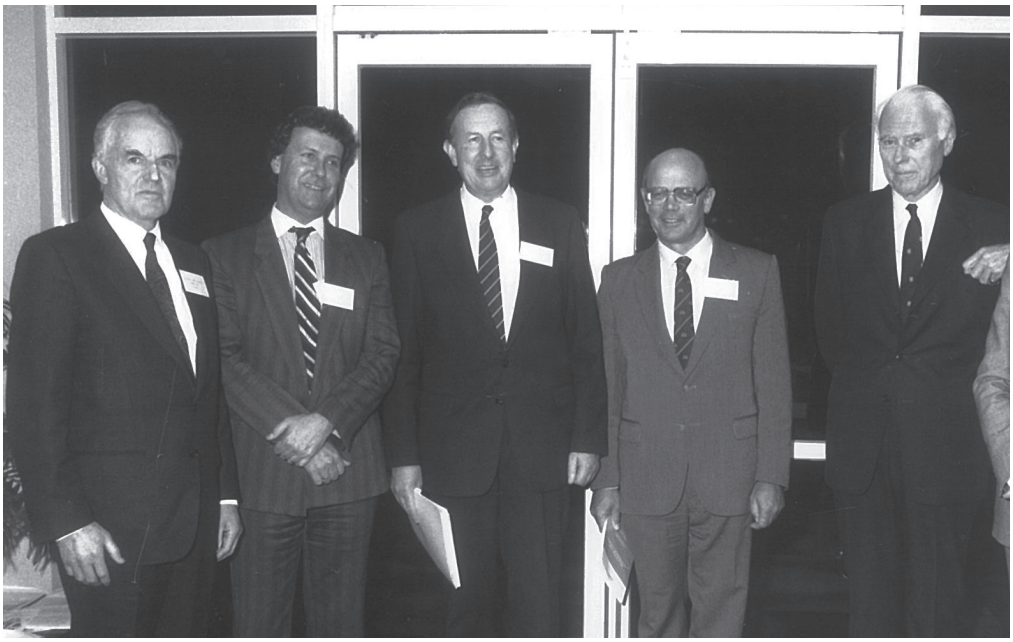
independence, judicial accountability assured independence against public and political pressures.

AIJA Council, June 1986, Melbourne

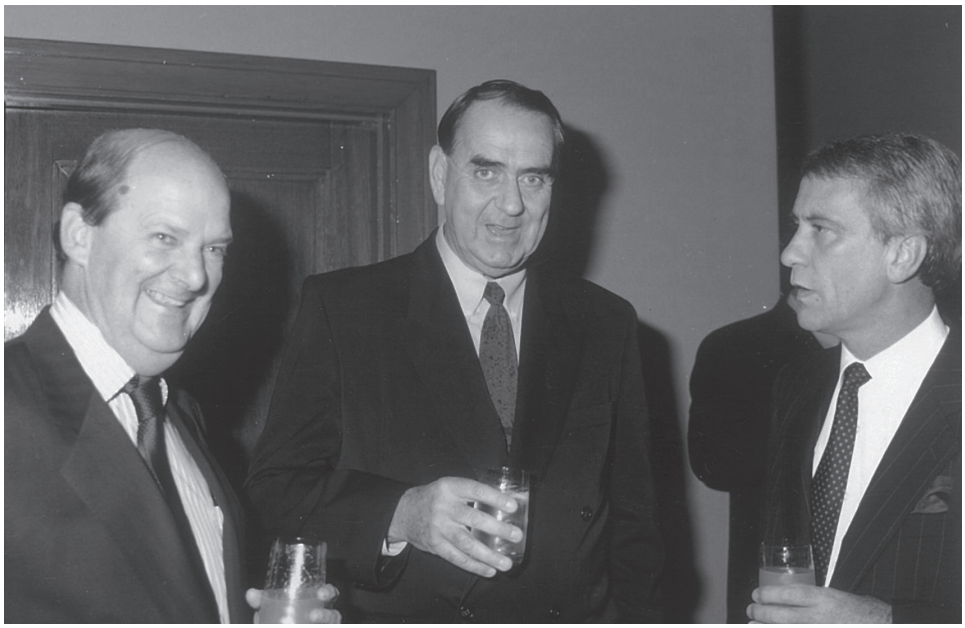
Front Row: L to R: The Hon Xavier Connor AC QC, the Hon Mr Justice Daryl Davies, the Hon Mr Justice Dennis Mahoney (Deputy Chairman), the Hon Mr Justice Richard McGarvie (Chairman), the Hon Sir Guy Green, Chief Justice of Tasmania, the Hon Mr Justice Glen N Williams.
Second Row: The Hon Mr Justice Graham Prior, Mr Deputy President Robert Nicholson, Mr Kevin Parker QC, Mr Clarrie R Briese SM, Mr Lindsay Collins, Mr John Mackinolty, Mr Graham Kenny, Mr Peter Cranswick QC, Professor David Lanham.
Back Row: Mr James D Merralls QC, Mr Michael Gill, Mr Bill Robinson, Mr Peter Heerey QC (Hon Secretary), Mr Lindsay Curtis.
Absent: The Hon Mr Justice Elliott, the Hon James Kennan A-G, His Honour Judge O'Shea, Mr R P Meagher QC, Mr Patrick Brazil, Mr Richard Tracey (Hon Executive Officer), Mr Steven Rares (Hon Assistant Secretary).



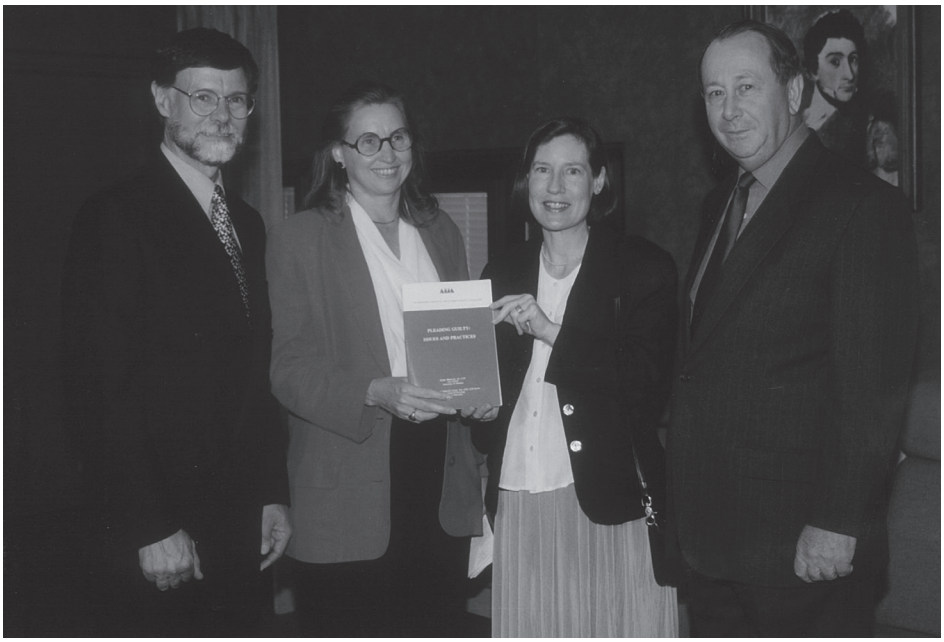
The Hon Russell Walter Fox AC QC, AIJA Principal Founder



L to R: The Hon Justice Richard McGarvie, Professor Peter A Sallmann (Executive Director AIJA), Sir Guy Green, the Hon Justice Glen N Williams, Sir John Young and Professor Glenn Withers



L to R: The Hon Justice Bryan Beaumont, AIJA Chairman, the Hon Michael Duffy, Commonwealth Attorney-General and Mr David Miles, President, Law Council of Australia



L to R: The Hon Trevor Griffin, South Australian Attorney-General, Ms Kathy Mack, Dr Sharon Roach Anleu and the Hon Justice Trevor L Olsson, AIJA President

L to R: Professor Stephen Parker, the Hon Jan L Wade, Victorian Attorney General, the Hon Neil Buckley, AIJA President and Professor Greg Reinhardt, AIJA Executive Director

L to R: The Hon Justice Richard McGarvie, the Hon Justice Sally Brown, the Hon Madam Justice Rosalie Silberman Abella, Court of Appeal for Ontario,
the Hon Justice Catherine Branson, AIJA President

L to R: The Hon Justice Murray Kellam, The Rt Hon Dame Sian Elias GNZM, the Hon Justice Catherine Branson

L to R: The Rt Hon Dame Sian Elias GNZM, the Hon Justice Virginia Bell, Her Honour Judge Mary Ann Yeats, the Hon Justice Tony Randerson and the Hon Justice Linda Dessau

L to R: His Excellency The Honourable Peter Underwood AC, Governor of Tasmania, Professor Greg J Reinhardt and the Hon Justice John Byrne AO RFD

4. Professionalism and Education

In a speech opening the National Judicial College of Australia (NJCA) in 2002, High Court Chief Justice Murray Gleeson strongly endorsed the value of judicial education. It was important, he argued, for raising the standards of judicial officers, particularly during a period of expansion in their number and also for ensuring 'public confidence'. This confidence depended upon 'satisfaction that the justice system is based upon values of independence, impartiality, integrity, and professionalism'.[273] Notwithstanding the first three qualities, which were traditionally ascribed to the judiciary, Gleeson's endorsement of 'professionalism' was striking. In an earlier era, its inclusion might have struck like a bombshell, but in 2002 Gleeson's intervention had more of the quality of the sound of a distant explosion, which reaches the ear only after the shockwave has passed. Gleeson described a profound shift, in part revealed in the self-regulation that developed as a means of achieving accountability while preserving independence discussed previously in Chapter 3, but also in the conduct, manner and outlook of the judiciary. The NJCA confirmed the place of education in the judicial role, working with educational bodies, including the Australasian Institute of Judicial Administration (AIJA), to help to improve the techniques and capacities of judicial officers. Yet the concept of professionalism also had another meaning, requiring the setting aside of individual judgment for an agreed set of standards. The provision of educational programs in this sense brought fundamental change to the administration of justice.

The NJCA was set up in Canberra at the Australian National University (ANU) as the primary educational body for the Australian judiciary. The college's syllabus provided a basis for judicial education in the skills that all judges and magistrates required. A central part of its role was in its orientation courses for new appointments and ongoing training for serving members of the judiciary. The NJCA's program owes much to the courses pioneered over the preceding decades by the AIJA. Indeed, its establishment resulted from a report commissioned by the AIJA from Christopher Roper presented to the Council of Chief Justices. The NJCA was established initially in 1998 as a shelf company within the AIJA, a culmination of more than a decade's planning.[274] Over that time, education had moved from an activity pressed forward by reformers such as Michael Kirby, or discussed privately by senior jurists, into one of the AIJA's main activities.[275] The AIJA commenced education programs in 1986 and was

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273 Murray Gleeson, 'Public confidence in the judiciary' (2002) 76 *Australian Law Journal* 558 at 561.

274 Its directors were Catherine Branson and Jim Wood, respectively president and deputy-president. Stephen Skehill to Greg Reinhardt, 28 October 1998, Box G1, AIJA Papers.

275 Michael Kirby, *The Judges* (Sydney: ABC, 1983).

joined by the New South Wales Judicial Commission (NSWJC) the following year. These early courses were conceived as professional development and operated alongside the means of ensuring accountability through professional self-regulation and ethics programs discussed previously in Chapter 3.

The educational programs developed from a desire to improve the way in which courts operated. The formerly passive, supervisory role of the judiciary was undergoing increasing change in response to pressures to reduce delays and improve efficiency. Cases brought to courts were increasingly complex and required greater specialisation in judicial activities. There was also a reduced reliance on trial by jury. The result was to increase the challenge of judicial work.[276] Judicial education served to assist judges to adjust to these changes and provided a means for improving the operation of courts at a time of increasing public scrutiny.[277]

Yet the provision of education to judges was controversial, raising concerns about improper influence over this independent and autonomous arm of government. The earliest proponents of the AIJA had not contemplated judicial education. Speaking in 1973, Fox considered a role for the AIJA in supporting the education of law students in universities, but the possibility of direct education for the judiciary emerged only in the 1980s.[278] The idea gained momentum from Michael Kirby's 1983 Boyer Lecture series and was incorporated into the AIJA's 1984 proposals for composite government funding.[279] Dennis Mahoney was an important proponent of education within the AIJA. He had interrupted skiing holidays in the United States to tour judicial centres and believed that education was essential if the judiciary were to remain modern and relevant. He conceived of education programs that would provide essential 'support', as distinct from guidance or alternative functions that might have impinged on independence.[280] Mahoney chaired a subcommittee of senior figures that explored the alternatives; the other members were Judge Joseph O'Shea (Victorian

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276 Devlin identifies the reduction in the role of the jury as a particular structural change in the judicial process in England: Patrick Devlin, *The Judge* (Oxford: Oxford University Press, 1979), 18–22.

277 Livingston Armytage, *Educating Judges: Towards a New Model of Continuing Judicial Learning* (The Hague: Kluwer Law International, 1996), 4–6.

278 Fox, 'An Institute for Judicial Administration', in Blackburn (ed.), *Judicial Essays.*

279 'The Need for Composite Government Funding for AIJA Administration', 13 August 1984, Box 17, AIJA Papers; McGarvie to Hon Sir John Young, Chief J, Supreme Court Melbourne, 4 December 1984, Box 17, AIJA Papers. McGarvie, in particular, cites Kirby as an influence: M.D. Kirby, *The Judges* (Sydney: Australian Broadcasting Corporation), 1983.

280 Interview with Dennis Mahoney, 18 August 2011.

County Court), Bob Nicholson (Secretary-General of the Law Council of Australia) and Bill Robinson (Director of Legal Aid in New South Wales).[281]

In 1985, the subcommittee proposed a National Institute of the Australian Courts 'on a confidential basis'. Many aspects needed to be worked out. This proposal concerned the chair, McGarvie, who worried that a new Institute would 'supplant' the existing one, just at the moment when it was establishing itself.[282] His consultations with Ian Scott, formerly director of the Institute of Judicial Administration at Birmingham only confirmed these fears, as Scott shared Mahoney's belief in the need for a new organisation modelled on the British Institute for Judicial Studies, or the American National Center for State Courts (NCSC).[283] Meanwhile, Mahoney lobbied Sir Harry Gibbs and Laurence Street in New South Wales and convinced McGarvie to lobby John Young in Victoria to obtain their endorsement for the scheme.[284] The proposal was in truth quite modest, with Mahoney presenting it as providing:

> ongoing assistance to the judges in the work which they have to do. The problem with which Australian judges have to cope on their initial appointment and in the course of their judicial work, are substantial. The workload of judges is growing and the assistance given to them is not growing, or not growing apace, with the work they must do.[285]

The final proposal incorporated the educational role within the AIJA.

The idea of judicial education raised the concern that education could become a kind of training, implanting rigid processes in place of greater flexibility. This concern particularly involved examples where this training was initiated by governments. The introduction of professionalism was also controversial, with concerns raised that professionalism could creep into areas such as appointment and dismissal. There was a concern that the bench could be opened to professionally trained judges, instead of the pathway through the Bar.

Modesty was perhaps the most prudent approach at the outset. In public, the AIJA was cautious more to avoid causing alarm than to generate

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281 Annual Report, 1985; Mahoney was a Supreme Court judge of 12 years' standing, O'Shea of 15 years. On O'Shea, see Andrew Scott, 'Farewell and welcome to judges' (1999) 73(6) *The Law Institute Journal* 46.

282 McGarvie to Mahoney, 30 August 1985, Box 15, AIJA Papers.

283 Ian Scott to McGarvie, 27 August 1985; McGarvie to Scott, 25 September 1985; Scott to McGarvie, 4 October 1985; McGarvie to Scott, 12 November 1985, Box 15, AIJA Papers.

284 Mahoney to McGarvie, 29 July 1985, Box 15, AIJA Papers.

285 Mahoney to 'Chief Justice', DRAFT, 16 August 1985, Box 15, AIJA Papers.

enthusiasm. Raising the prospect in an address to the 1988 biennial conference of Chief Stipendiary Magistrates, Peter Sallmann sought to reassure the audience of the limits of the AIJA's proposals. The AIJA's education programs would be approached 'with a great deal of care, circumspection and also tact', he stated. Courses would, at least at the outset, avoid theoretical or academically minded content and would not deal with matters of substantive law. The programs would be practically orientated and subject to regular review.

Sallmann's strongest argument for the introduction of education programs was the experience of common law countries overseas – notably the United States of America and Canada, but also England and even New Zealand. Civil law states such as France had long supplied education to their judges, who under inquisitorial processes intervene much more fully in procedures, but educational programs were increasingly a feature of common law systems.[286] In the United States, the network of judicial support organisations was mature. The National Judicial College for federal courts had been established in 1964, and the NCSC had offered state judiciary education programs from its establishment in 1971. In Britain, annual sentencing conferences led by the Lord Chief Justice commenced in 1963, and a judicial studies board was established in 1979 to provide annual induction programs for new judges. These programs were initially limited to Crown Court judges, but were extended to civil and family courts, as well as magistrate's courts and tribunals.[287]

The overseas examples suggested that local programs would not be objectionable. They also raised the troubling suggestion that Australia was a laggard in this area, in need of catching up, and it was this point that allowed AIJA to be so cautious at the outset. The change appeared to be inevitable. The AIJA therefore sought to offer assurance that programs would be organised appropriately. The fact that they would be launched by the AIJA also ensured that programs would be judicial in origin. Sallmann stressed that the development would be 'gradual', 'incremental' and not rushed.[288]

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286 James S. Douglas and Charles Tellier, 'Judicial Training in Australia', Role of Practice in Legal Education for the International Academy of Comparative Laws, 18th International Congress of Comparative Law at Washington DC, July 2010, (QSC) [2010] QldJSchol 29, available at http://www.austlii.edu.au/au/journals/QldJSchol/2010/29.html.

287 Peter Sallmann, 'Judicial education: some information and observations' (1988) 62 *Australian Law Journal* 981 at 985–987.

288 Sallmann, 'Judicial education', 1005.

The careful introduction was also undertaken with painstaking consultation. The AIJA provided regular updates to the Consultative Council of Chief Justices,[289] while Mahoney continued to lobby judges personally to ensure the program would be endorsed.[290] The programs were presented in these contexts as a means of supporting, rather than directing, the judiciary, always with a view to practical application in raising the 'efficiency, economy and effectiveness' of the courts system.[291] The AIJA also retained the advice of experienced overseas educators. In this earliest period, the AIJA hosted Ian Scott, Ernest Friesen, founding director of Institute of Court Management in Denver, director of administration in the Office of United States Courts, the first dean of the National Judicial College, Reno, and dean of California Western School of Law and director of the Justice Institute there,[292] and Judge John W. Kern, the sitting dean of the college, to open a discussion about the potential format for judicial education. Kern's visit was sponsored by the Law Foundations of New South Wales and Victoria.[283]

The inaugural course was offered to court administrators, and its careful planning involved an Implementation Group of Australian Court Administrators, chaired by Bill Robinson, the former Assistant Under Secretary responsible for the courts in the Department of the Attorney-General and Justice in New South Wales.[284] The program was compiled by Scott and Friesen, who assessed the educational needs after visiting courts in Brisbane, Sydney and Melbourne from July to August 1986. Scott then returned to facilitate the course, held over a week in November at the Graduate School of Management at the University of Melbourne. Thirty-five participants attended, drawn from the larger states and the Federal Court (four participants each), the Family Court (three), Tasmania and the Northern Territory (two each), and one from the ACT. Places were also offered to Papua New Guinean and New Zealand administrators.[285]

The course was structured in a way that encouraged discussion. The plan provided for short expositions of concepts, followed by extended and facilitated small-group discussion of case studies. This model of an

289 McGarvie to Professor P.J. Rose, 12 May 1986, Box 15, AIJA Papers.

290 McGarvie to Professor P.J. Rose, 12 May 1986, Box 15, AIJA Papers; compare Interview with Dennis Mahoney, 18 August 2011.

291 McGarvie to Laurence Street, 16 May 1986, Box 15, AIJA Papers.

292 AIJA Annual Report, 1986; compare Ernest Friesen, Edward C. Gallas, and Nesta M. Gallas, *Managing the Courts* (Indianapolis: Bobbs-Merrill, 1971).

283 Annual Report, 1987.

284 McGarvie to Laurence Street, 16 May 1986; McGarvie to Trevor W. Haines, 13 May 1986, Box 15, AIJA Papers.

285 McGarvie to T. Konilio, Secretary, Department of Justice, Papua New Guinea, 8 August 1986.

education program sought to preserve judicial independence: where possible, facilitators would be drawn from within the judiciary, and the 'workshop' model encouraged participants to learn from the experiences of their peers, particularly from the different approaches of other jurisdictions. The format also aimed to embed the educational programs in courts practice rather than management theory.[286] McGarvie described the intention as providing 'a fusion of the skills and knowledge of court administrators and experts in management and teaching'.[287]

That the inaugural course was for court administrators reflected the AIJA's reach across the judiciary. Scott was used to launch a series of education programs across the respective parts of the judiciary. Scott met with magistrates on the day preceding the court administrator's course and delivered a paper to the AIJA's annual meeting, which was held on the day after. His paper, 'The concept of Judicial Education: the need and the response to it', publicised his educational beliefs.

The first course for judges followed in August 1987, with a course held in Sydney on the subject of complex civil litigation. There followed in Melbourne in September a course on sentencing, and in late May 1988 one on complex criminal litigation. The papers from the criminal course were published in 1989,[288] and in his foreword, Sallmann reiterated the 'emphasis … on practical relevance to judicial functions'.[289] The papers conveyed the difficulties experienced by individual judges in the course of their work, and some of the solutions that they had found. The first course for magistrates was held in November 1987, providing opportunity for discussion of issues related to administration, the handling of evidence, and sentencing. Another course for court administrators was held in 1990, and in that year the first biennial course for court librarians was held in Melbourne, covering management principles, as well as specialist sessions on indexing unreported judgments, and collection development.[290]

The AIJA made it a priority to hold these courses outside Victoria, as well as in Melbourne, in order to reinforce its federal character.[291] One area of

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286 AIJA Report to Standing Committee of Attorneys-General for its meeting in Adelaide, 5–6 March 1987, Box 17, AIJA Papers; also drawing on Interview with Dennis Mahoney, 18 August 2011.

287 McGarvie to Professor P.J. Rose, 12 May 1986, Box 15, AIJA Papers.

288 'The conduct of complex criminal trials: Papers presented at an AIJA seminar and discussion programme for judges on conduct of complex criminal trials', held at the Graduate School of Management, University of Melbourne, on 1–2 June 1988 (Melbourne: AIJA, 1989).

289 Peter Sallmann, 'Foreword', in 'The conduct of complex criminal trials'.

290 Annual Report, 1991.

291 Council Minutes, 21 November 1987, Box 30, AIJA Papers.

tension was in the relationship between the AIJA and the NSWJC, which also included an educational function. After the NSWJC commenced operations in 1987, Mahoney, now chair, encouraged the AIJA to work with it in courses held in New South Wales.[292] The Sydney leg of the AIJA's 1988 sentencing course, which was also held in Brisbane and Adelaide, was organised in conjunction with the NSWJC.[293] In November 1990, the sentencing course was offered to the New Zealand judiciary in Christchurch, Wellington and Auckland, funded by the New Zealand Justice Department at the recommendation of Sir Thomas Eichelbaum and Dame Silvia Cartwright. Australian presenters were sent and local judicial facilitators identified.

The programs fell into a pattern of annual conferences for magistrates and court librarians and a biennial course for court administrators. The magistrates and court administrator courses became annual events, and a biennial higher court administrator conference commenced in May 1990. Other judicial officers had irregular courses, such as a course for masters in 1991. Alongside courses tailored to particular groups of this kind, one-off courses in areas of particular interest were developed. Short courses were offered in computing in Sydney and Melbourne in October 1988 and May 1989 respectively. In 1991, the AIJA convened a two-day course for judges on the interpretation of economics.

An orientation program was a natural extension of these early training programs. The AIJA established a committee chaired by Jim Wood to investigate the feasibility of and then to develop a syllabus for an orientation scheme. The committee settled on 15 areas: judicial conduct and ethics, issues of contempt of court and the press, as well as more general court craft, such as managing personnel (counsel, juries, unrepresented litigants, and 'court staff'), and the skills of judging (judgment writing, assessing evidence or damages, managing adjournment and delays, case management and skills for handling complex cases). Additional sessions would be provided for criminal cases, including sentencing, bail and parole, questions relating to forensic evidence, as well as some of the social issues that might arise relating to child witnesses, the mentally ill, drugs and alcohol.[294]

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292 Armytage, Educating Judges, 17; Kate Lumley, From controversy to credibility: 20 years of the Judicial Commission of New South Wales (Sydney: NSWJC, 2008).

293 Sallmann to Mahoney, 12 February 1988, Box 30, AIJA Papers; compare Sallmann to Barrie Thorley, chief executive, NSWJC, 6 May 1988, Box 30, AIJA Papers.

294 James Wood, 'The prospects for a national judicial orientation programme in (1993) 3 *Journal of Judicial Administration* 75 at 90–91.

These courses, with their regularity, and perhaps the potential to influence new judges in a way that courses for established judges might not, involved a significant escalation of the educational program. In an address to the 1992 AIJA annual conference, Wood expanded on the reasons. He argued that, although the AIJA had introduced some courses, Australia had 'been left behind' by the programs offered overseas.[295] He promoted the establishment of an Australian orientation program as essential because of changes in the judicial profession, the need for public accountability in the expenditure of public funds and the need to support judges to prevent mistakes and to avert burnout. The changes in the justice system that he identified included increased specialisation of legal work, which meant that judges and magistrates could be appointed without generalist experience, and growing judicial workloads, complexity in procedure and reliance on technology, each of which indicated the need for new skills.[296] Wood argued that the AIJA, in cooperation with the NSWJC, would have the capacity to introduce a scheme if proper government funding was obtained.

With the ground so well prepared before the launch, the inaugural orientation program followed relatively quickly in October 1994.[297] The program was held in Sydney, convened in partnership with the NSWJC and funded by the Federal and New South Wales governments. Over five days, the 27 participants drawn from across Australia and Papua New Guinea attended sessions on 'court craft and communication skills', decision-making, sentencing and assessment of damages, conduct and ethics, judicial mentoring and leadership, 'advanced criminal justice' and stress management.

There were also sessions on race and cultural awareness, two new topics not considered by Wood in his earlier plan. These subjects were notable because of their difference from the more technical issues that had been raised previously. At least in their presentation here, they drew on theoretical understandings and the work of legal academics, instead of experienced judicial facilitators. Their inclusion marked an attempt to broaden programs and push for change in the judiciary to reflect social changes. The areas were notable, too, for their connection with progressive politics under the Keating Government, with their emphasis on 'equity' and recognition of the rights of women, ethnic minorities and indigenous peoples.

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295 Wood, 'The prospects for a national judicial orientation programme', 77.

296 Wood, 'The prospects for a national judicial orientation programme', 75.

297 Annual Report, 1996.

The inclusion of academic content had been discussed in other contexts and generally rejected. The early courses had found advantages in disseminating the best practices as had been found from experience, while the participation of members from different jurisdictions helped to harmonise processes. The debate about academic content had at its heart an argument about experience. An underlying motivation for the foundation of the AIJA had been the belief that the notional operation of courts and tribunals, and processes of the law, differed markedly from actual court activities and judicial work. A full understanding of the courts could be attained only by experience, and the educational programs aimed to help to disseminate that experience. Although the AIJA favoured this practical approach, some within the AIJA argued that experience could provide an imperfect vision of court activities, particularly in the way in which different litigants experienced justice.

Some participants in the early courses also reacted against the over-reliance on '"war stories" about how one court does a particular thing in dealing with particular kinds of cases, while another takes a different approach and so on'.[298] Yet an attempt by Victorian magistrates Daryl Duggan and Sally Brown to make management theory the focus of the second magistrates' course was resisted by New South Wales. After consultation with Clarrie Briese, the secretary of the New South Wales Attorney-General's department, Trevor Haines, stated his government's reluctance to support the travel of his state's magistrates to attend such a course. Management theory, he wrote, was offered by 'a wealth' of courses in Sydney. A 'well-balanced programme' required 'some significant proportion of the general exchange of ideas', with 'an appropriate proportion of professional teaching'.[299] Haines's arguments won out, in part because of the threat that New South Wales would not participate. The question of theoretical content would wait on the social context programs.

The pressure for the inclusion of theoretical content emerged less from the within the judiciary than from the wider public. In particular, this occurred where groups alleged that judges were 'out of touch' with changes in wider culture and society and unsympathetic to the circumstances facing sections of the community. Two issues, in particular, drew attacks on the justice system. The first related to the relatively high rate of deaths of Indigenous people in custody, and the second related to the judicial treatment of cases of sexual assault. In these cases, the AIJA's training programs became powerful tools for managing these crises.

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298 Sallmann to T.W. Haines, 14 April 1988, Box 30, AIJA Papers.

299 Haines to Sallmann, 9 May 1988, Box 30, AIJA Papers.

The first of these social context courses emerged out of the Royal Commission into Aboriginal Deaths in Custody. The commission was appointed after a campaign by Aboriginal groups, including the 'Committee to Defend Black Rights', the Aboriginal Legal Services, the families of those who had died in custody and their supporters, who argued that Aboriginal people were disadvantaged by the justice system.[300] The commission revealed that the rate of death in incarceration for Aboriginal people was more than four times that of non-Indigenous people. This problem was compounded by the 'disproportionate' rate of incarceration of Aboriginal people, which was much higher than that of non-Indigenous people.[301] The wide-ranging commission surveyed the role played by socio-economic and historical factors in creating these problems. It directed most of its attention at policing, but it also made recommendations for the courts. It acknowledged the damaging misconception among Aboriginal people that they 'attracted heavier penalties', but also criticised the 'intimidating atmosphere of courts' and the conduct towards them who, with the exception of the Aboriginal Legal Service, invariably appeared in court as defendants. In this way, the commission questioned the assertion that the experience of judicial officers presented a full picture of Aboriginal justice problems. It recommended greater community sentencing, consultation with local communities in sentencing and that prison sentences should be 'the option of last resort'.[302]

The commission recommended that the establishment of cultural awareness programs to 'explain contemporary Aboriginal society, customs and traditions', including 'historical and social factors which contribute to' Aboriginal disadvantage and the contemporary relationships between Indigenous and non-Indigenous Australia.[303] In its evidence, the South Australian Court Services Department recommended the AIJA as an 'appropriate medium' for the courses.[304]

The Keating Government adopted the recommendations as part of its Reconciliation agenda, and Stephen Skehill offered the AIJA an annual sum of $50,000 over five years to develop the program. The AIJA was initially

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300 Chris Cunneen, 'Aboriginal Deaths in Custody: a Continuing Systematic Abuse (report)' (2006) 33(4) *Social Justice* 37.

301 *Royal Commission into Aboriginal Deaths in Custody, National Report* (Canberra: AGPS, 1991), vol. 1, 1.3; compare Don Weatherburn, Jackie Fitzgerald and Jiuzhao Hua, 'Reducing Aboriginal Over-representation in Prison' (2003) 62(3) *Australian Journal of Public Administration* 65.

302 Royal Commission into Aboriginal Deaths in Custody, National Report, vol. 3, 22.4.1, 15, 22 23.

303 Royal Commission into Aboriginal Deaths in Custody, National Report, vol. 3, ch. 22, Recommendation 96.

304 Royal Commission into Aboriginal Deaths in Custody, National Report, vol. 3, 22.4.4.

reluctant to take on this additional project, as it was already fully engaged on other training programs. The level of funding was considered modest given the broad objectives for the funding. Nevertheless, it agreed to a pilot program in Western Australia to determine the practicability of a wider project.

The AIJA's organisational committee was notable for its inclusion of more progressive members. It included Western Australian Supreme Court Justice Paul Seaman, Victorian Chief Magistrate Sally Brown, Undersecretary of the Crown Law Department of Western Australia Don Doig, South Australian Federal Court Judge Catherine Branson, three Aboriginal members: John Mozely-Williams of the Commonwealth Attorney-General's department, and Alf Bamblett, and Brett Hill of the peak Indigenous representative body, the Aboriginal and Torres Strait Islander Commission (ATSIC).[305]

The pilot program was deliberately organised without a fixed agenda to encourage broad discussion. It included members of the local judiciary and experts on Aboriginal matters, as well as representatives from Indigenous organisations, whose inclusion was important to reduce the friction between Aboriginal people and the courts.[306] The courses might have produced heated antagonism; alternatively, they might have rested on platitudes. The surprising outcome of the discussions was the revelation of the degree to which cultural and historical factors had practical effects on the participation of Indigenous people in court processes. The discussions revealed the way in which local Aboriginal cultural norms and taboos could be incompatible with court processes. This was particularly marked between different generations and genders, but extended to body language, which could give a false impression of recalcitrance.[307] The course also conveyed the extent to which the history of Indigenous policies, such as child removal, had fostered a mistrust of government institutions. This better-informed understanding showed that behaviour and statements in court could be misconstrued, sometimes spectacularly, for cultural reasons that had no counterpart in western mores and values. At the same time, these courses challenged the assumption that judicial education could always rely primarily on the personal experience of judicial facilitators. The

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305 John Mozely-Williams, 'Overview Report on the National Aboriginal Cultural Awareness Program, 1993–2000' (Melbourne: AIJA, 1999), 6.

306 Mozely-Williams, 'Overview Report on the National Aboriginal Cultural Awareness Program, 12; compare Diana Eades, '"I don't think it's an answer to the question": Silencing Aboriginal witnesses in court' (2000) 29(2) *Language in Society* 161.

307 Elena Marchetti, 'Intersectional Race and Gender Analysis: Why Legal Processes Just Don't Get It' (2008) 17 *Social and Legal Studies* 161.

perspective of other court users, and knowledge of historical and other theoretical elements, were emerging as essential considerations for the provision of justice.

The pilot program was sufficiently productive that it was agreed to pursue a larger project, with courses in each state planned locally and with Aboriginal participation. Because courts had funded the attendance of their own representatives, the initial allocation was made to stretch to support a pilot course, and the first education program followed in Perth in May 1993.[308] The larger program would be supported by $445,000, including $100,000 from ATSIC and an additional $75,000 from the New South Wales Government allocated after the NSWJC declined to participate.[309] The expanded budget allowed the AIJA to employ a deputy executive-director, Anne Wallace, to undertake the project from 1 June 1993, as well as to engage on another new area – that of gender awareness. The delegation of this task to a new and less senior figure reflected the relative importance of this aspect of the AIJA's educational program, yet the dedicated officer ensured that it would succeed. This was a new venture, and the AIJA was careful to maintain its core activities.[310]

Following Western Australia, programs took place in Queensland and then the other states and territories. Under the funding agreement with the Attorney-General, each of the state jurisdictions had separate committees, each chaired by Supreme Court or Federal Court judges, and with membership of the local Aboriginal Justice Advisory Committee, an ATSIC regional commissioner, and a representative of the regional legal service.[311] A general committee was chaired by Paul Seaman.

The concern with the way the courts handled questions of gender emerged first in Victoria[312] after the judgment of a County Court judge in a case involving the rape of a prostitute. The judge sentenced the perpetrator to three years gaol with a minimum of 16 months. In handing down this relatively lenient sentence, the judge applied a 1981 precedent that stated that the rape of a prostitute was less traumatic than that of a 'chaste'

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308 Mozely-Williams, 'Overview Report on the National Aboriginal Cultural Awareness Program', 13.

309 Mozely-Williams, 'Overview Report on the National Aboriginal Cultural Awareness Program', 13–14.

310 Annual Report, 1993.

311 Aboriginal Cultural Awareness Project Overview Report as at 21 September 1998, Box G3, AIJA Papers.

312 In the controversy, Laurence Street was quick to point out that a different precedent operated in NSW: Catharine Lumby, 'Rape is the ultimate trespass', *The Age*, 24 January 1992, 12.

woman.[313] On appeal, the Supreme Court increased the minimum sentence to two-and-a-half years, but upheld the legitimacy of the 1981 precedent. The decision attracted censure from the Victorian premier, Joan Kirner, and the State Attorney-General referred the case to the Victorian Law Reform Commission.[315] The case was also brought before the United Nations Committee on Discrimination against Women. The president of the Australian Law Reform Commission, Justice Elizabeth Evatt, described the ruling as an 'upsetting' product of an exclusively male bench.[316]

The issue gained federal exposure after a South Australian Supreme Court judge, Derek Bollen, instructed the jury that 'experience has taught the judges that there are cases where women have manufactured, or invented, false allegations of rape and sexual attack', and he gave examples. He then proceeded to state that there was:

> nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind. And that may involve a measure of rougher than usual handling.[317]

Bollen appeared to suggest that judges had learned to doubt allegations from victims of sexual assault and that violence was a legitimate means of forcing consent.

This produced a hail of criticism from public figures, politicians from both major parties, the Anglican Church and academics. The South Australian director of public prosecutions, Dr Paul Rolfe, appealed the verdict. The South Australian Democrats launched a campaign for Bollen to be sacked. The judiciary was lambasted for the predominance of male judges and for the perception that many judges failed to accept the spirit of reforms, such as the *Sex Discrimination Act 1984* (Cth). The federal Sex Discrimination Commissioner, Quentin Bryce, stated her 'terrible suspicion that there is no lack of judges who also think [that] women are pieces of property' owned

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313 Jocelynne Scutt, 'The incredible woman: a recurring character in criminal law' (1992) 15(4) *Women's Studies International Forum* 441; Jocelynne Scutt, 'Judicial vision: rape, prostitution and the 'chaste woman', in Patricia Weiser Easteal (ed.), *Without consent: confronting adult sexual violence: proceedings of a conference held 27–29 October 1992* (Canberra: Australian Institute of Criminology, 1993); Jocelynne Scutt, 'Going backwards: law "reform" and women bashing' (1986) 9(1) *Women's Studies International Forum* 495.

315 David Bruce and Michael Magazanik, 'Kirner at odds with judge's comments on rape trauma', *The Age*, 10 August 1991, 1; compare 'Sentencing of sexual offenders when their victims are prostitutes and other issues arising out of *Hakopian*' (1992) 18(3) *Monash University Law Review* 683.

316 Michael Magazanik, 'Rape case ruling to be referred to UN Committee', *The Age*, 8 January 1992.

317 Derek Bollen, quoted in Peter Hughes, 'Judge was at fault in rape hearing, court told', *The Age*, 9 January 1993, 17.

by their husbands.[318] Bollen's lawyer, Michael Barnett, helped to support this view by declaring the case to have become a 'pony to lead the feminist bandwagon'.[319]

Nevertheless, the public outcry did take on features of a witch-hunt as activists targeted Bollen with T-shirts stating 'What part of NO don't you understand?'.[320] The publicity demonstrated the differences between public controversies, with their political interpretation of words, and judicial structures, which put a legal interpretation upon them. The chief justice's attempt to calm the debate, by stating the constitutional limits on his power of comment while the case was under appeal, appeared inadequate.

The AIJA joined the debate by publicising its plans for a program of gender awareness education, which commenced in November 1992 in the wake of the Victorian controversy. The deputy chair of the AIJA, Trevor Olsson, who was also a South Australian Supreme Court judge, although not on the appeal panel, volunteered a judicial perspective. He pointed out that Bollen's directions to the jury related to an important detail in the law as it then stood – that evidence of violence was an essential caveat in rape in marriage cases – and implied that Bollen's attempt to help the jury to differentiate violence from 'rougher than usual handling' had been misconstrued. Nevertheless, Olsson suggested that Bollen's comments were poorly phrased and reflected underlying assumptions about women. He presented the education programs as a means of helping to overcome these shortcomings and assist judges whose comments in court were subjected to increased public exposure.[321]

The AIJA's program received federal funding of $100,000, which was sufficient to support a two-year program in Victoria to develop a course capable of application in other jurisdictions. The AIJA's committee was chaired by Deidre O'Connor, the president of the Administrative Appeals Tribunal (AAT). Sally Brown became the spokesperson for the program, clarifying that it would avoid questions of legal interpretation but emphasise 'subtle behavioural things': 'attitudes and perceptions', possibly made 'unconsciously', that could influence the treatment of women or the

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318 Helen Signy and Mary Ann Stenberg, 'Rape in marriage – women's anger grows', *The Age*, 12 January 1993, 1.

319 Len King, quoted in Peter Hughes, 'Lawyer blames feminist push', *The Age*, 14 January 1993, 3.

320 Andrew Darby, 'Gift-bearing women fail to see judge', *The Age*, 22 January 1993.

321 Prue Innes, 'Judge in SA rape-in-marriage case has been wronged, says a colleague', *The Age*, 15 January 1993, 5; on unconscious bias, see also Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676.

way in which decisions were made.[322] Even 'simple courtesies' could 'reduce the credit' of women when not applied equally to men, Brown argued.[323] In this way, the program emphasised court craft. Participation was voluntary.

Despite these assurances, the proposal raised opposition among more traditional lawyers. In announcing the scheme, the prime minister, Paul Keating, could not resist chiding that 'it's back to school for magistrates and judges'. The Victorian Bar Council chair, Dr Chris Jessup, described the courses as 'just a little offensive', and the president of the Victorian Law Institute, Dr Gordon Hughes, professed to 'be surprised if the judiciary required any formal training in order to be capable of dispensing justice in an equitable fashion'.[324] Victorian County Court Judge John Hanlon, presiding over another rape case, stated his refusal to 'attend any retraining camps on this sort of matter'.[325]

Yet the pressure for the courses was maintained by three further scandals. Victorian County Court Judge John Bland was quoted by court reporters as stating in a case in which a youth had already pleaded guilty of rape that 'in the common experience of those who have been in the law as long as I have anyway, no often subsequently means yes'.[326] Supreme Court Justice Norman O'Bryan justified a relatively lenient sentence for an aggravated rape by the fact that the victim had first been knocked unconscious, which he took to mean that she had not been 'traumatised'.[327] In New South Wales, District Court Judge John Sinclair rejected an appeal to increase damages awarded by the Victims Compensation Tribunal on the basis of his belief that the victim had suffered no 'substantial psychological effects' from her rape.[328] New South Wales Magistrate Pat O'Shane characterised the reaction as a 'new wave of misogyny' and of 'boys … trying to close ranks'.[329]

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322 Prue Innes and Karen Middleton, 'Judges face retraining on sex bias', *The Age*, 11 February 1993, 1.

323 Prue Innes, 'Law to tackle an attitude problem', *The Age*, 11 February 1993, 8.

324 Innes and Middleton, 'Judges face retraining on sex bias', 1.

325 Philip Johnson, 'Judge rejects retraining on crimes against women', *The Age*, 20 February 1993, 3.

326 Michael Magazanik, 'No to sex can often mean yes, says judge', *The Age*, 6 May 1993, 1.

327 Michael Magazanik, 'Appeal court raps judge's rape comments', *The Age*, 13 May 1993, 1.

328 Elizabeth Jurman, 'Judge doubts rape trauma', *The Age*, 19 May 1993, 6. Note that the NSW Attorney-General, J.P. Hannaford, challenged this reading of Sinclair's judgment, after he was asked about it in parliament: *New South Wales Parliamentary Debates*, 19 May 1993, 2257, available at http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC19930519008#.

329 Karen Middleton and Michael Magazanik, 'Rape remarks a backlash against women – Magistrate', *The Age*, 14 May 1993, 4.

These judges appealed to their experience of hearing cases as giving them greater understanding of issues and considered the public backlash to be based on a uniformed understanding of the justice system. An example was a letter to the *Age* newspaper from the wife of County Court Judge Thomas Neesham. Michele Neesham argued that the gender awareness programs were 'absolute nonsense' because judges had experience with women: 'Judges have mothers and sisters, many have wives and children'.[330] There was some truth in this, as the shrill public denunciations mostly failed to acknowledge the role of law and of judges. Yet in so doing, judges overstated the value of their own observations in understanding sexual assault.

The furore over the treatment of women by the judiciary arrived at the same time as research was uncovering new information about sexual assault. The October 1992 report of the National Committee on Violence Against Women, a federal body established under the Hawke Government, challenged perceptions about sexual assault with statistics that showed the very high proportion of sexual assault within the home or involving close friends.[331] These revelations hinted at the difficulties faced by victims in giving evidence and at the need for systematic differences in the way in which courts handled these cases.

The AIJA pressed ahead with its plans. Its committee included O'Connor, Brown, Family Court Justice Neil Buckley, the Victorian Director of Public Prosecutions, Bernard Bongiorno QC, and the deputy-secretary of the Attorney-General's Department, Stephen Skehill. Anne Wallace took charge of this part of the AIJA's work.[332] With its new funding, the committee mounted a public campaign to promote gender awareness. Well-attended events were staged at which these issues could be developed, including a presentation by Kathleen Mahoney, a professor of law from the University of Calgary, Canada. Mahoney delivered a seminar on gender equality in the legal system to an audience of more than 200 at the Reception Hall, Sydney Opera House, in June 1993.[333]

The program culminated in a three-day conference, 'Eureka 95: Equality and Justice', held in Ballarat in October 1995. The choice of location, with its associations with the popular uprising, set the tone for a conference

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330 Michele Neesham, 'Wife of a judge – for the defence', letter, *The Age*, 27 May 1993.

331 National Committee on Violence Against Women, *National Strategy on Violence Against Women*, October 1992; compare revised ed., July 1993.

332 Annual Report, 1993.

333 Annual Report, 1993.

intended to mark a sharp break with past practice. One hundred and fifty people attended to hear a program of 17 presenters drawn from the judiciary, academy, police and social work. Much of the contribution from the judicial participants concerned the need to ensure public confidence in the courts in an embattled climate. The means of achieving this confidence lay in a greater understanding and in a more considerate approach. The conference also applied feminist theory to the activities of the courts. It presented the best research on sexual assault and domestic violence more generally, which extended beyond the relatively limited contact these issues had with court processes. The effect of taboo, omission and body language on testimony echoed the AIJA's work on Aboriginal cultural awareness.

The effect of the gender awareness and Indigenous programs was the introduction of judicial members into perspectives of the court systems different, perhaps, from their own. 'Judges must view justice,' stated the conference opener, McGarvie, 'not through their own eyes but through the eyes of the people it affects'.[334] In practical terms, the change introduced an authoritative framework of values, based on research, in place of judgments based on views grounded in personal experience. This new standard was not embodied in written law or even included explicitly in the rules of the court, but was a set of understandings that the judiciary would carry into its work. Educational programs would serve as a means to convince, not compel, the judiciary to amend its conduct.

Sally Brown had prepared this claim at another conference held earlier in 1995. She challenged the assertion of the High Court Chief Justice, Anthony Mason, that judges' 'personal values' had no effect upon their decisions on legal questions. For Mason, one of the primary responsibilities of an effective judge was to set aside personal prejudices. Brown countered that 'judicial decision-making is a personal and psychological process as well as an intellectual one'. Since these psychological processes were at least in part conditioned by society, judges 'have always expressed and relied on their notions of community values'.[335] The belief that judges could isolate legal questions from subconscious biases was, for Brown, illusory. She argued that judges erred when they assumed that their 'personal values' were the same as 'community values'.[336] The professional judge required

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334 AIJA, 'Eureka 1995 Equality and Justice Conference, 18–20 October 1995, Ballarat', Paper summaries.

335 Sally Brown, 'The courts, legal and community standards', *Courts in a representative democracy* (Melbourne: AIJA, 1995), 81.

336 Brown, 'The courts, legal and community standards', 83.

education in order to understand the difference between their personal values and those of the community, and thereby minimise the influence of the former.

These assertions were controversial in the way in which they deconstructed the judicial role. Another source for the controversy lay in the political character of the programs. The Aboriginal and gender awareness projects were established in part because they served the objectives of the Federal Labor Government. A third project on cultural awareness, particularly as it related to ethnic minorities, followed. It emerged after the publication of the 1995 report *Access to Justice: An Action Plan*. That report adopted the same emphasis on courts meeting community expectations. The study was commissioned by the federal Attorney-General, Michael Lavarch, and the Minister for Justice, Duncan Kerr. Kerr had launched the project in 1993, stating his belief that there was a 'crisis of confidence' in the judiciary, which operated at times in ways similar to a 'pre-industrial craft guild'.[337] Lavarch launched the report in 1995 by saying that, if adopted by the judicial system, it could become 'a landmark for rebuilding confidence in Australia's legal institutions'.[338]

The AIJA adopted the report's recommendation that more work be done to foster understanding of gender and cultural issues, as well as particular concerns such as the use of interpreters in legal actions. The cultural awareness program would cover much of the same territory: a briefing in different cultures, their perceptions and experiences that might bear on their connection with the justice system, as a means of ensuring that people from these backgrounds were not unwittingly disadvantaged. Emphasis would again be placed on the language used in the courts, as well as the different religious beliefs and gender and familial relations of those who came before the courts. In particular, the new course included the effect of migration on those who have arrived from places with radically different legal systems. The project aimed to connect the judiciary with the government policy of multiculturalism and to show that courts must respond to the special needs of such groups.

Neil Buckley took up this project for the AIJA. A 1995 funding agreement with the Federal Office of Multicultural Affairs allocated $350,000 to support a four-stage project to be undertaken over 27 months. The four

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337 Duncan Kerr, quoted in 'Access to Justice: An Action Plan' *Research Note*, no. 30, 9 May 1995.

338 'Speech to launch "Access to justice: an action plan", a report by the Access to Justice Advisory Committee, Parramatta Town Hall', available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FZHQ10%22.

stages comprised a literature review, a program of consultation with ethnic communities and members of the judiciary, the development and production of materials based on these elements, and a pilot program.

The literature review was undertaken by the Multicultural Centre and Institute of Criminology at the University of Sydney. Its report, published in 1996, outlined some practical considerations to be discussed in the subsequent phases of the operation, such as the role played by cultural assumptions in the making of law and operation of legal actions. It raised technical issues arising from the use of interpreters and the potential for injustice arising out of culturally accepted communication. Although primarily a survey, the document embraced progressive interpretations of the judicial role. It justified the need for cultural understanding by the statement that judges 'made law', and therefore their activities did not lie merely in the interpretation of law.[339] The document also endorsed the policy of multiculturalism as a contingent part of 'social cohesion', as well as the ideals of non-discrimination by recognition and accommodation of social minorities.[340]

The project encountered difficulties with the election of the Howard Government in the 1996 federal election. The new government closed the Office of Multicultural Affairs, and the role of the minister assisting the prime minister for multicultural affairs was incorporated into the portfolio of a minister for immigration and multicultural affairs, Philip Ruddock. Funding was withdrawn from existing projects, and the AIJA returned the unspent money – $310,000 since the literature review had been produced below budget at $40,000. Buckley hoped that the project would go ahead and believed that he had secured Ruddock's support in informal discussions, but Ruddock ultimately determined not to support it.[341] The AIJA attempted unsuccessfully to find funding for the project in a reduced format through the anti-racism initiative of the department of the Attorney-General, Daryl Williams.[342] The AIJA's Indigenous project was not affected by the change of government, partly because it was funded by the states as well as the Federal Government.

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339 Julie Stubbs, Chris Cunneen, Janet Chan, Joanne Travaglia and Lici Inge, Cross Cultural Awareness for the Judiciary: Final Report to the Australian Institute of Judicial Administration (Melbourne: AIJA, 1996), 3.

340 Stubbs, Cunneen, Chan, Travaglia and Inge, *Cross Cultural Awareness for the Judiciary*, 4.

341 Neil Buckley to Philip Ruddock, 5 September 1997; Ruddock to Buckley, 14 October 1997; Buckley to Ruddock, 7 November 1997, Box G3, AIJA Papers.

342 Neil Buckley to AIJA Council, 'Memorandum: Cross Cultural Awareness project', September 24 1998, Box G1, AIJA Papers; compare Anne Wallace to Tony Blunn, 23 June 1998, Box G3, AIJA Papers.

The Howard Government shared an interest in courts being responsive to the public, but it rejected the emphasis on minorities. This was the impetus for the influential *Courts and the Public* project, which, with its emphasis on courts meeting the needs of court users generally, was a retreat from the gender and cultural awareness projects, since it no longer paid attention to specific groups of society. It nevertheless retained the belief that the courts must be responsive to the public and that reliance on the old methods was unacceptable. The AIJA's work on gender and cultural awareness was incorporated into its other educational programs.

The setback of the cultural programs came at a time when the AIJA was reassessing its programs in any event. The orientation project, co-convened by the AIJA and the NSWJC, had grown increasingly significant, after it was held for a second time in 1994. It was held annually until 2002. These courses were substantial undertakings with a large program of speakers, and their organisation consumed a considerable portion of the executive director's activities.[343] Yet they were constrained by the need to present basic content to a peer group without specialist knowledge. Although the AIJA incorporated its new work into the courses, for example in 1997 including 'Aboriginal awareness' and 'migrants, interpreters [and] multiculturalism', the feedback surveys showed a preference for the more traditional topics.[344] The orientation programs had become the staple of the AIJA's program, but it offered little room for more variety, particularly in line with the AIJA's ongoing research activities.

The idea of creating a separate judicial college emerged for these reasons. The AIJA had secured the name National Judicial College of Australia (NJCA) in 1998 by creating a shelf company,[345] but the process of creating the college took five years of consultation within the judiciary, and debate between the various judicial bodies. Although the AIJA was prepared to surrender the orientation program, it was not clear that its partner, the NSWJC, could afford to be so generous. To set out the full range of options for the program, it commissioned the criminologist Christopher Roper. In a detailed report, Roper described the education facilities in the United States, Britain, Canada and New Zealand, before presenting in detail the considerations for the naming, funding and housing of an Australian equivalent. His report raised questions about its relationship to the existing judicial bodies, whether it should be judicially governed and its potential

343 Olsson to Mason, 6 May 1995, Box G1, AIJA Papers.

344 Ruth Windeler, 'Evaluation Report: National Judicial Orientation Programme', 9–14 November 1997, Box G3, AIJA Papers.

345 Skehill to Reinhardt, 28 October 1998, Box G1, AIJA Papers.

affiliation with a university.[346] A 2000 Australian Law Reform Commission report also recommended the formation of a college.[347] The AIJA formed a joint committee with the Judicial Conference and sought support from the chief justices and the federal Attorney-General. It then proceeded to SCAG. Negotiations ensued over a number of years before support was obtained from all parties.

The working group proposed an ambitious syllabus for the NJCA, including new administrative techniques to improve efficiency and cross-cultural awareness programs and to keep judges up-to-date with changes in legislative and litigating culture.[348] Ultimately, the college adopted a more moderate position, owing in part to its limited budget.[349] The first object of the college was to offer opportunities to 'share lessons learned from experience, leading to identification and adoption of best professional practices'. The college's other objects were more extensive than this, included assisting judicial officers to 'broaden' their level of education and understanding of change in society, and to develop expertise and 'skills'.[350]

For its part, the AIJA established a clear new policy at its 2000 Annual Conference. The president, Catherine Branson, argued that the task of providing courses limited the AIJA's capacity to fulfil the other roles specified in its constitution. Branson suggested that the NJCA could serve usefully to provide the orientation and fundamental education programs, releasing the AIJA to proceed with more advanced educational programs based on its research.[351] The break between the AIJA and the NJCA was made clean after the AIJA's bid for the NJCA to be located at the University of Melbourne was rejected in preference for the neutral territory of

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346 Christopher Roper, 'Proposed Australian Judicial College: Discussion Paper' (Melbourne: AIJA, 1999), 36–56.

347 Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, Report No 89, January 2000, Chapter 2, Recommendation 9.

348 'Options for the Establishment of a National Judicial College: Report of the National Judicial College Working Group to the Standing Committee of the Attorneys-General, May 2001', 7–10.

349 Chief Justice Murray Gleeson compared the budget for the NJCA with the NSWJC: the former had a budget of $318,000 and the latter $4.2 million: Hon Chief Justice Murray Gleeson, 'State of the Judicature' (2003) 77 ALJ 505 at 510.

350 Constitution of the National Judicial College of Australia, available at http://njca.com.au/wp-content/uploads/2013/01/NJCA-Constitution-.pdf.

351 Catherine Branson, 'Judicial Education: The Proposal for the Australian Judicial College', Paper delivered to the 2000 Annual AIJA Conference, 1, 4, available at http://www.aija.org.au/2000ac/Papers/Branson.pdf .

Canberra and ANU,[352] and then the new chair of the college's council, John Doyle, asserted full college control over its programs.[353]

The establishment of the judicial college confirmed the place of professional education programs for the judiciary. The AIJA, meanwhile, launched an enlarged program of expert conferences, complementing those of the NJCA, on juries, Indigenous courts, family violence, court technology, child witnesses, and interpreters. Similarly, its benchbook for Indigenous courts in Western Australia provided clear advice covering many of the elements that might have been included in a course.[354] The AIJA ceased to offer courses for magistrates in 2000 and for court administrators in 2003.[355] Nevertheless, it continued to provide courses aimed at specialist groups within the judiciary, providing conferences for masters, sheriffs, tribunal members and appellate judges. These conferences emphasised the specialisation of judicial members as a key component in their professionalism and confirmed the place of academic research in educational programs.

352 Minutes Board, 20 December 2001, Box G3, AIJA Papers.

353 Council Minutes, 4 October 2003, Box G4, AIJA Papers.

354 Stephanie Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: AIJA, 2002); compare 2nd ed., 2002.

355 Council Minutes, 17 June 2000, Box G4, AIJA Papers; Council Minutes, 26 July 2003, Box G3, AIJA Papers.

5. Alternative Processes

To mark the arrival of the year 2000, the Australasian Institute of Judicial Administration (AIJA) organised a conference on the ambitious subject of the '17th AIJA Annual Conference, 'Justice Delivery – Meeting New Challenges' in August 1999. The program covered a range of topics, including a notable address on the 'Future of Adversarial Justice' by the former High Court Chief Justice, Sir Anthony Mason. It was telling that Mason sought to defend adversarial processes against the development of new methods for resolving disputes. The new methods, encompassed under the umbrella term alternative dispute resolution (ADR), including processes such as mediation or conciliation, were being used to resolve a wider range of disputes. Mason lamented the way in which proponents of these methods 'downplayed' the 'virtues of court adjudication'.[356] Mason feared that the array of alternatives, and the spectre of 'multi-door' courts' with variations introduced to meet the needs of 'consumers', would ultimately diminish the standing of the traditional courts and depreciate rather than improve the delivery of justice.[357] Mason was not alone in his view. The New South Wales Chief Justice James Spigelman expressed similar sentiments in 1999 about the Supreme Court in his state. His court, he stated emphatically, was not a provider of 'a service to litigants as consumers; it administered "justice according to the law"'.[358]

The comments of these two senior jurists must be understood at least partly as a reaction against the rapid pace of change in the operation of courts. Case management had pressed the judiciary to intervene in cases earlier than the trial, and the pre-trial discovery and conferences had already altered traditional adversarial processes. The changes introduced by new governance structures and education programs had similarly altered the judicial role, requiring more of judges and forcing greater response to public pressure. Yet these reforms worked within existing judicial structures and sought to improve their efficiency, as well as the quality of justice that they were able to deliver. The new challenges were of a different order, deriving from Technologydebates about how courts might best improve access to the law and extended to attempts to improve the delivery of justice through the courts. New ideas now called into question

356 Sir Anthony Mason, 'The Future of Adversarial Justice', Paper delivered at '17th AIJA Annual Conference, 'Justice Delivery – Meeting New Challenges', 1999.

357 Mason, 'The Future of Adversarial Justice'.

358 James Spigelman, quoted in Hilary Astor, 'Quality in Court Connected Mediation Programs' (Melbourne: AIJA 2001), 3.

established common law procedures in the belief that justice could be improved by the development of new processes.

Mason himself had inadvertently been important in advancing the debate. Only eight years earlier, Mason was part of the majority in a High Court ruling that committed criminal procedure firmly to the traditional structures of adversarial process. The split decision to grant Olaf Dietrich special leave to appeal created an extraordinary precedent. Dietrich had been convicted by the Victorian County Court of trafficking heroin, and the High Court decision rested on the belief that his lack of defence counsel had likely undermined his defence. The High Court accepted the submission that the Supreme Court should have granted Dietrich an adjournment in order to obtain legal representation, which he had failed to secure from the government's legal service, and that he was unable to afford alternative representation. The majority decision upheld the centrality of legal representation in the definition of a 'fair' trial.[359]

The decision had immediate ramifications for litigants unable to afford legal representation and threatened to overwhelm the existing legal aid and community legal programs,[360] or else to allow indigent litigants to avoid trial. This was particularly pertinent since Dietrich had tried unsuccessfully to attain legal representation through official channels.[361] It was a striking paradox that a ruling in favour of legal representation in the interests of a fair trial threatened seriously to restrict the availability of representation.

The predictions of grave effects on the judicial system proved to be unfounded, but the question of how best to obtain a fair trial was brought to public notice at a time when the courts were responding both to reforms in administration and new public pressures. Dietrich was not an isolated case: increasing numbers of litigants sought to represent themselves without legal counsel. The ruling prompted not an increase in budgets for legal aid and a firming of the role of counsel in all cases, but rather a reappraisal of the judicial role in the legal process and a determination that courts themselves had a central role in ensuring fair trials.

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359 *Dietrich v. The Queen* (1992) 177 CLR 292.

360 The legal aid budget had increased with inflation: Access to Justice Committee, *Access to Justice: An Action Plan* (Commonwealth of Australia, 1994), 232–234.

361 Large increases in legal aid did not eventuate. Only Victoria legislated against future ramifications of the Dietrich judgment; see s. 260A(2) of the *Crimes Act 1958* (Vic); Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System, Second Report* (Commonwealth of Australia, 1997), ch. 4, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/1996-99/legalaid/report/index

The questions of accessibility raised by the Dietrich case were discussed more often in civil jurisdictions, where the costs associated with bringing claims were described as prohibitive and underpinned populist criticisms of the justice system. The issues were immediately pertinent to judicial administration, and questions about the costs of justice were put to Sallmann upon his appointment as executive director of the AIJA. He hedged by acknowledging the public interest in the issue. He pointed to the AIJA's work on the reduction of delays as a way of containing costs. But he also acknowledged the scale of the problem and its potential to force significant reforms on the justice system. Solutions were required, he told reporters, 'otherwise the system as we know it might turn on its head'.[362]

Despite Sallmann's public statements, the question of the cost of litigation was one the AIJA had been reluctant to pursue. This was partly because of its desire to avoid divisive subjects during its early period. The Sydney solicitor James Creer raised the issue repeatedly during the 1980s, only for it to be deferred for other matters accorded higher priority.[363] In 1990, the AIJA took up the issue at its annual conference, responding to two inquiries then underway. The first was a Senate Standing Committee on Legal and Constitutional Affairs inquiry into the cost of legal services chaired by Senator Barney Cooney,[364] to which the AIJA had contributed submissions. That review stressed the difficulties created by the increasing complexity and detail of legislation, as well as the need for greater public education and to achieve efficiencies in court processes.[365] The second inquiry, undertaken by the Victorian Law Reform Commission, recommended changes to the provision of legal services to encourage market competition and hence to reduce legal costs.[366]

Other attempts to reduce costs in the courts involved the increased use of mediation and arbitration, notably in cases before the Family Court of

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362 'People sure of judicial system, says professor', *The Age*, 9 February 1987, 4.

363 AIJA Annual General Meeting, 1985.

364 Cooney's committee recommended measures for improving the drafting of new legislation, improved reporting of court costs to parliament and greater public education about the law: see *The Cost of Justice: Second Report by the Senate Standing Committee on Legal and Constitutional Affairs* (Commonwealth of Australia, 1993).

365 'Cost of Justice', 'Alternative Dispute Resolution', 'Electronic Recording of Police Interviews with Crime Suspects', Papers presented at the Ninth Annual AIJA Conference, 18–19 August 1990 (Melbourne: AIJA, 1991).

366 Law Reform Commission of Victoria, 'Access to the Law: restrictions on legal practice', (Melbourne: VLRC, 1992); compare 'Cost of Justice', 'Alternative Dispute Resolution', 'Electronic Recording of Police Interviews with Crime Suspects', Papers presented at the Ninth Annual AIJA Conference, 18–19 August 1990 (Melbourne: AIJA, 1991).

Australia. These processes were not themselves new,[367] but were being extended into a much wider range of civil disputes. The AIJA was originally sceptical about these new methods and did not consider them to be a priority. In 1988, Sallmann declined a suggestion from Bryan Beaumont QC that the AIJA feature ADR in a research paper or conference, because there were 'too many aspects and features' open for consideration.[368]

Nevertheless, ADR was adopted by the Federal Court of Australia in 1988 in its implementation of case management, and it was in this context that the AIJA first took up the questions it raised. The AIJA commissioned a senior lecturer in law at the University of Melbourne, Dr Richard Ingleby, to prepare a major discussion paper based on observation of these processes. The secretary of the Attorney-General's Department, Stephen Skehill, had arranged for $18,000 funding from the Federal Government for the purpose.[369] Ingleby's paper, *In the Ball Park*, observed the range of approaches to mediation or arbitration conferences in the Victorian Small Claims Tribunal, Family Court and Federal Court.[370] His interviews traced the differences in the procedures and identified areas of particular concern. In particular, Ingleby worried that these alternative schemes created uncertainty about the full implications of participation and the mediator's ultimate power to enforce an agreement.[371]

Ingleby was particularly concerned that the mediation schemes he had observed operated under assumptions profoundly different from the procedures followed in courts. He worried that the resolution processes failed to consider the complex and overlapping nature of the disputes they sought to resolve. Instead, discussion was tailored to achieve the desired agreement. The alternative mechanisms differed from conventional ones in the underlying presumption that 'individuals have common interests which can be accommodated to the benefit of both if a third party can enable the individuals to reveal and respect each other's interests'.[371] The 'resolution' in alternative processes differed from those reached in conventional processes. Courts therefore faced difficult decisions about when to refer cases to mediation, and how in the process of making such a referral to

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367 Commonwealth of Australia Constitution Act 1901 (Cth), s. 51.

368 Peter Sallmann to Bryan Beaumont, 4 May 1988, Box 30, AIJA Papers.

369 Annual Report, 1990.

370 Richard Ingleby, 'In the Ball Park: Alternative Dispute Resolution and the Courts' (Melbourne: AIJA, 1991).

371 Ingleby, 'In the Ball Park', 22–24.

371 Ingleby, 'In the Ball Park', 13.

consider the 'bilateral (at least) nature of disputes' when mediation necessarily involved only a portion of the interested parties.[372]

In this way, Ingleby's analysis engaged with definitions of judicial process and criticised the pragmatic motives that underpinned the new alternatives. Yet there were parallels here with the arguments made by early proponents of court reform, who had justified efficiency gains and case management with a functionalist assumption that courts existed to resolve disputes rather than to preserve the old ways. Here, a new mechanism was being developed with a different method of resolving disputes, one without the rigidities of court processes and even at times without the objectivity enabled by legal representation. The opposition to the new methods was primarily on the grounds that, without strict rules of evidence, clear definition of law, and ultimately the judgment of the court, disputes might not be resolved fairly. Resolving cases in this non-judicial manner challenged assumptions about the status of judicial process in the provision of a fair trial.

The proliferation of ADR techniques, as well as the changes in the range and nature of disputes brought before the courts, caused the AIJA to take a closer interest. In 1993, it held a seminar on self-represented litigants (SRLs). Both papers that were presented to the seminar noted the difficulties occasioned by their increasing prevalence. Introducing the seminar, the AIJA's chair, Bryan Beaumont, lamented the effect of unrepresented litigants on the speed with which courts could resolve disputes (since unrepresented litigants often struggled to distinguish the points that were at issue from ancillary grievances outside legal remedy), and the resulting increased burden on the justice system in cost and the additional support courts required to deliver justice.[373]

While mainstream judicial opinion upheld the status quo against experimentation with new legal processes, the Federal Labor Government took a more adventurous approach. The Attorney-General, Michael Lavarch, appointed Ron Sackville to chair a panel of senior jurists to investigate problems in the accessibility of justice. The Access to Justice Committee, as it styled itself, took up the broad-ranging brief and prepared an extensive report that transformed arguments about accessibility. As the report indicated, budgets for legal aid were limited, and alternative methods were required to ensure access. Sackville's report adopted a

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372 Ingleby, 'In the Ball Park', 103–104.

373 B.A. Beaumont, 'Foreword', 'Discussion papers by Ms Helen Powles and Mr Vince Bruce QC and a commentary upon the two papers by Mr Frank Jones' (Melbourne: AIJA, 1992).

pragmatic stance and argued that a reform of processes was not only unavoidable but also, in certain ways, desirable. The research that arose from the Access to Justice project proceeded from the assumption that access should be an overriding priority and that systemic changes would need to be developed.

The report covered the work on the legal services sector, legislative reforms to improve the clarity of legislation, and previous efficiency reforms, including those made possible by the work of the AIJA. It considered ADR in a major section. Sackville's *Action Plan* was optimistic about the potential for greater use of ADR schemes, but cautioned that ADR must not be allowed to 'privatise' justice. Cases with the potential to establish 'precedents for the development of the common law', or when the issues at stake had wider community importance, were also better tried in court. He noted the potential for ADR to favour parties with greater resources who could achieve settlements in cases they might otherwise have lost. Parties with lesser resources might also choose to undertake ADR instead of pursuing their rights in the courts because of fear of high court costs. Governments might seek to pressure parties to undertake ADR in order to reduce costs.[374] His *Action Plan* recommended the formation of a new organisation to develop standards for these processes, a proposal implemented with the formation of the National Alternative Dispute Resolution Advisory Council (NADRAC) in 1995.[375]

Lavarch adopted the *Action Plan* and followed this in 1995 with a reference to the Australian Law Reform Commission to undertake a similarly broad-ranging review of civil litigation. That review was undertaken predominantly under the Howard Government, elected in 1996. The process of reform established by Lavarch was taken up more strongly by his successor as Attorney-General, Daryl Williams QC. Williams grasped the nettle with a determination to confront entrenched interests. He argued that a 'new culture that recognises the public interest in expeditious trials' was necessary.[376] Williams presented the Dietrich ruling as a challenge to the legitimacy of existing court processes. He would not increase legal aid budgets and argued that courts could use their existing funding more effectively. Judicial resistance was out of touch with budgetary requirements, and equally with the interests of the public. For Williams,

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374 Ronald Sackville, *Access to Justice: An Action Plan* (Canberra: AGPS, 1994), 279.

375 NADRAC, 'Annual Report 1995–96', available at http://www.nadrac.gov.au/publications/AnnualReports/Documents/1995-1996AnnualReport.pdf.

376 'Top judges slate Attorney-General on reform criticism', *The Australian*, 25 March 1998.

defence of the status quo reflected self-interest. To overcome this obstacle, he proposed a research project into the public experience of the courts.

The AIJA's *Courts and the Public* project that followed was undertaken by the legal academic Stephen Parker and proved influential in changing perceptions of the judicial process within the AIJA. The decision to frame the project in terms of the courts and the public was notable in the way that it reduced the significance of the role played by legal representation. In the conventional justice system, lawyers facilitate the process by clarifying the objectives of their clients, placing their case before the appropriate court and presenting it in the best manner possible. Parker's project emphasised the courts themselves over the lawyers who worked in them, and advocated a direct interface between court and litigant. The courts themselves had a responsibility to the public to make their programs accessible, as well as in the delivery of a fair trial.

Parker paid particular attention to the experience of SRLs. His report showed that courts could often be confusing places for the general public and recommended that courts provide information to the general public about their processes and operating structures. Courts should also develop ways of allowing the public to give feedback and to raise complaints. Clear plans should be developed for handling SRLs.

The *Access to Justice* report raised the possibility that schemes of mediation could achieve good results; the *Courts and the Public* report highlighted the shortcomings of courts for those without legal representation. Together, the reports challenged existing attitudes with the imperative of making economies, while also hinting that adversarial processes of justice often fell short of needs and expectations. This brought two related developments: greater responsibility on the part of judges for the progression of cases through the courts where representation was not provided, and recourse to alternative processes that did not necessarily involve courts at all. The two reports were striking for the way that they cut through the theoretical operation of the justice system to recognise the actual experience of courts in practice.[377] This shift encouraged the AIJA to adopt a more pragmatic approach.

The positive reception with which the AIJA greeted these reports also indicated a shift in its membership. New members accepted the need for practical action. Greg Reinhardt brought with his appointment as executive

[377] Interview with Stephen Parker, 23 August 2011. For Parker's intellectual background, refer to Stephen Bottomley and Stephen Parker, *Law in Context*, 2nd ed. (Sydney: Federation Press, 1997). Previous editions were published in 1990 and 1994.

director in 1998 expertise in civil procedure in its many different forms. The academic Marcia Neave, also a member of the Access to Justice Committee, had joined in 1994. Western Australian Federal Court Judge Bob Nicholson would join in 1999, and other important figures with special interest in different forms of justice included academics Andrew Cannon in 2001, and Arie Freiberg in 2004.

Following the *Courts and the Public* report, the AIJA established a committee, chaired by Bob Nicholson, to examine and implement the specific recommendations made by Parker. These included work on making courtrooms more accessible and public education into the legal process and the roles of the judicial officers. The Courts and the Public Committee took the initiative in applying the recommendations in Parker's report, introducing recommendations for complaints mechanisms, as well as developing a plan for SRLs.

Its Litigants in Person Management Plan, published in 2001, clearly demonstrated the shift. Whereas the AIJA's earlier consideration of SRLs had lamented the burden these individuals placed on the courts and called for increases in legal aid funding, the new plan accepted that these individuals would continue to come before courts, perhaps even in greater numbers, and that courts must acknowledge this reality and mitigate the problem. Avoidance would only create further problems.

The plan stressed the need for judicial discretion in determining how best to intervene in order to ensure a fair trial. Court staff had a duty to ensure that the litigant was not unduly disadvantaged by his or her decision to represent him or herself, while simultaneously remaining neutral in the midst of an adversarial trial. The plan suggested that the 'extent of the obligation on the court to assist litigants in person is contextual' and at the court's discretion.[378] It suggested improving access to existing services and recommended simplifications of court procedures. Existing services could be made more accessible through improved processes for providing representation or legal advice on the day of trial, and in particular by publicising these programs more effectively. Better publicity would also help to overcome the misconception about the proper role of court staff – and specifically on the inability to offer legal advice – which had created tensions.[379] The decision to simplify court procedures was the plan's more radical suggestion, but its recommendations were indeterminate. Changes would be justified by reducing the burden of misfiled forms or witnesses

[378] 'Litigants in Person Management Plan: Issues for Courts and Tribunals' (Melbourne: AIJA, 2001).

[379] 'Litigants in Person Management Plan', 11–13, 14, 18.

called inappropriately. The authors were quick to stress that any changes that might be introduced in procedure should be no simpler than necessary: 'The fact is that civil litigation is a complex process requiring the skills of professionals', the report concluded.[380] The plan also stressed the need for further research into the experience of SRLs.[381]

Pragmatic suggestions to amend court processes were also made in connection with technology, again motivated by the twin objectives of improving the accessibility and efficiency of justice. In 1998, the AIJA convened a Technology for Justice conference, which identified technology as a means of improving the justice system. The AIJA had convened a conference as early as 1984 on the potential for computers to be used and invited computer manufacturers to present their equipment. This conference revealed the potential of digital technology, but came too early to invite subsequent investigations. A range of companies, most since defunct, offered large and expensive systems.[382] The rise of personal computers allayed many of these concerns, and the new emphasis lay in providing networks able to operate on a range of compatible machines. The 1998 Technology for Justice conference occurred just as home computer ownership became more accessible. Daryl Williams stated of the 1998 conference that it was 'obvious … that the ongoing associations, discussions and developments arising from the conference will ensure that it is seen as a defining event in the Australian justice system'.[383]

The interest in information technology arose out of the earlier work done on court efficiency. The major fraud and corruption trials of the late 1980s and 1990s, including the materials developed by the organised crime investigator, the National Crime Authority, and the Wood Royal Commission into New South Wales police corruption, generated large volumes of evidence. In order to improve the operation of these activities, the Standing Committee of Attorneys-General (SCAG) provided $120,000 for a major research project conducted by Graham Greenleaf and Andrew Mowbray, pioneers in the use of technology in the law and founders of the AustLII database, which made the text of a range of legal documents accessible on the internet. The report made a special recommendation for

380 'Litigants in Person Management Plan', 15–18.

381 'Litigants in Person Management Plan', 10.

382 'The Use of Computers in Court Management', Seminar Papers (Melbourne: AIJA, 1984).

383 Daryl Williams, 'Address to the AIJA Technology for Justice Conference', 23 March 1998, 12.

the development of compatible systems that would enable open access for all parties to a case.[384]

New technology offered new ways of improving the accessibility of the courts. The keynote speaker, Jim Lederer, discussed the Courtroom 21 Project, a demonstration electronic court of which he was director at the College of William and Mary in the United States Law School. Other speakers discussed the ways in which technology had been implemented in Australia, with video-links for interviewing witnesses, bail applications, remand hearings and case management conferences', which allowed a reduction in costs.[385] Computing offered the potential for improvements in the operation of courts, including methods for filing documents electronically, rather than the laborious and time-consuming paper-filing techniques. It offered new means for sharing information and great opportunities for legal research. It also made the presentation of large amounts of data in tables or charts much more straightforward.

The AIJA embraced the new technology. The 1998 conference discussed the potential for 'virtual' courtrooms to be developed and provided a demonstration of 'video-link' technology by transmitting the addresses of the Attorney-General and Chief Justice Sir Gerard Brennan from Canberra, as well that of Judge Foo Chee Hock, deputy registrar of the Singapore State Courts, to the waiting delegates at the Sofitel Hotel in Melbourne. Conference materials were distributed on CD-ROM. A competition for the court with the best website was staged for the 2000 conference (won by the Western Australian Ministry of Justice).[386] The conferences also had trade shows, both at the venue and online, which featured American heavyweights in computer technology such as IBM, Lotus and Sun, as well as Australian firms such as the transcription companies Auscript and Court Recording Services, and the videoconferencing firm Network Visions Systems.[387] The conferences generated significant profit and received favourable press coverage.[388]

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384 Graham Greenleaf and Andrew Mowbray, *Information Technology in Complex Criminal Trials* (Melbourne: AIJA, 1993).

385 Sir Gerard Brennan, 'Opening Address: AIJA Technology for Justice Conference', 23 March 1998, 5.

386 Jeff Leeuwenberg and Anne Wallace, *Technology for Justice: 2000* (Melbourne: AIJA, 2001), 9–13, 17–18.

387 'Technology for Justice: Trade Show', available at http://www.aija.org.au/conference98/trade.htm.

388 See, for instance, James Riley, 'Technology in the dock as law looks for change', *The Australian*, 14 April 1998.

Despite the generally enthusiastic approach, the conferences brought rigorous debate. A critic, Brennan, argued that while these technological changes were inevitable, they also posed 'the risk of information overload, the risk of substituting information for analysis'. Brennan remained cautious about implementation, particularly in the need for courts to make use of technology where it assisted in court processes and not to amend court practices to serve computers. In particular, Brennan urged caution against the hasty introduction of new technologies. The Conference's title, 'Technology for Justice', provided an instructive means of determining when to introduce technology, with the emphasis on the preposition 'for', and the syntactic relationship it expressed – that technology must be the servant of justice.[389] Despite the belief in this axiom, the enormous potential of information technology made its introduction inevitable, and with it an openness to new processes in sharing information, listing cases, courtroom structures including virtual courts – all of which altered court processes.

It was in the context of these changes in the administration of justice, and the AIJA's approach to them, that Mason had sought to defend adversarial process at the AIJA's 17th Annual Conference held in August 1999. Despite his defence of adversarial processes for ensuring that courts dispensed justice, the thrust of the conference left him in the 20th century. Janet Fife-Yeomans, commenting on Mason's address, implied that his defence of the judicial process adopted arcane and unchallenged conceptions of it. The general public or a neutral observer would find strange Mason's conception of the judicial role as 'not to pursue the truth but to decide on the cases presented by the parties'. She argued that judges must have the 'confidence' to overrule the parties in the interests of justice. The courts' procedures required simplification; they had become 'captives to the requirements of procedural fairness and natural justice and … lost sight of other considerations which are at least equally as important'.[390] Fife-Yeomans reminded members of the judiciary that the responsibilities of the judicial system were broader than the core range of activities. Her speech also opened the way to a broadening of the accepted judicial role, engaging directly with the process of determining truth and delivering justice. The second commentator, Brian Withers, shared Fife-Yeomans's stance on the changes, with the qualification that adversarial procedures, trial by jury and rights to natural justice were more suited to criminal cases, since these

389 Gerard Brennan, 'Opening Address: AIJA Technology for Justice Conference', 23 March 1998, 5.

390 Janet Fife-Yeomans, 'The Future of Adversarial Justice: Commentary', *The Challenges of Justice in the New Millennium* (Adelaide: AIJA, 1999).

cases involved 'the might of the community … pitched against the individual'.[391]

In part, these sharp divisions reflected the instructions to participants that they should seek to be 'provocative' and challenge comfortable assertions.[392] As with information technology, the formulation stressed the centrality of 'justice', for the title of the conference was the 'Justice Delivery – Meeting New Challenges'. The proponents were therefore called upon to consider how courts might develop, rather than to focus on current difficulties. Presenters covered the full scope of the AIJA's activities, including an assessment of case management, issues of accountability and independence, and educational programs, as well as an investigation of ADR drawing on the testimony of participants in these processes. The degree to which the presenters challenged existing process was striking and reflected the degree to which case management had been accepted,[393] but whereas earlier reforms drew on the imperatives for efficiency across the judicial system, the new movements sought to improve the administration of justice.

The 2003 Strategic Plan placed technological changes in court process, SRLs and court-referred ADR at the forefront of its interests, demonstrating the extent to which these new concepts offered potential for new insights into the justice system.[394] The AIJA had also substituted 'efficiency' for 'excellence' in its stated objective, reflecting a desire to move beyond attempts to streamline cases. The justification for the AIJA's activity now extended into seeking improvements in the judicial processes themselves. These stretched across criminal and civil jurisdictions. For the civil cases, the AIJA took up ADR directly, with the objective of improving operation and consistency. Even greater changes were contemplated in the structures of the criminal courts. Across all levels of justice, the AIJA's activities explored radical changes in the administration of justice and the judicial role.

The AIJA's interest in ADR ran counter to the views of traditionalists. Sessions on ADR had been included in the AIJA's orientation program, but participant feedback stated that such processes were not 'wholly relevant

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391 Brian Withers, 'The Future of Adversarial Justice: Commentary', *17th AIJA Annual Conference - Justice Delivery – Meeting New Challenges* (Adelaide: AIJA 1999).

392 John Hansen, 'Facing new challenges', *17th AIJA Annual Conference - Justice Delivery – Meeting New Challenges* (Adelaide: AIJA, 1999).

393 See, for instance, Greg Reinhardt, 'The Changing Face of Adversarial Justice' (2000) 12(3) *Legaldat*e 1.

394 Peter Underwood, Memorandum to AIJA Council, 13 February 2003, Box G4, AIJA Papers.

to the work of a judge' and the sessions should be 'either dropped or made non-compulsory'.[395] Such a view missed the broader shifts taking place in the administration of justice, and in particular those areas that the AIJA wished to advance. The work on ADR followed from the recommendations of the Access to Justice report. The AIJA had pursued an interest in developing the earlier Ingleby report to 'define the terms, guidelines and requirements necessary to make court annexed mediation efficiency'.[396] The proposal was not pursued in this form, but taken up after 2000, with Hilary Astor, professor of litigation and dispute resolution at the University of Sydney, preparing an 'issues paper'. Astor's report sought to raise various considerations for understanding ADR programs and for framing policy. Astor drew in particular on the experience of the United States, where many of these programs had originated.

In contrast to Ingleby, Astor acknowledged that mediation and conciliation had become intrinsic parts of the justice system, motivated by the desire to reduce delay and clear backlogs and reduce costs, as well as to 'assist with identifying issues' pertinent to the case, to achieve equitable and enduring outcomes and even to 'change legal culture'.[397] Recent law graduates had already achieved some proficiency in mediation and conciliation through their studies.[398] The paper narrowed its ambit to mediation and conciliation, examining the qualifications of facilitators, how they might be accredited and monitored and their affiliation with the courts, as well as the factors that should be considered when referring cases to mediation.[399]

Astor had included at the bottom of a long list of potential justifications for mediation the objective to 'change legal culture'. This revealing inclusion uncovered an important advantage of research into these new methods. These processes were often experimental, aimed at replacing parts of the judicial process, and were largely removed from the constraints of legal procedure so important to conventional judicial procedure. The new methods offered an opportunity to uncover potential new advances in the delivery of justice.

Astor's case shifted the AIJA's footing on mediation and conciliation but, as she acknowledged, the questions raised by these new processes were

395 Ruth Windeler, 'Evaluation Report: National Judicial Orientation Programme', 8–14 November 1997, Box G3, AIJA Papers.

396 Minutes of the AIJA Research Committee, 1 April 1998, Box G3, AIJA Papers.

397 Hilary Astor, 'Quality in Court Connected Mediation Programs' (Melbourne: AIJA, 2001), 5.

398 Astor, 'Quality in Court Connected Mediation Programs', 19.

399 Astor, 'Quality in Court Connected Mediation Programs', 8–14, 21, 31, 33.

complicated and additional research would be required. A follow-up project was organised by the AIJA in cooperation with NADRAC,[400] and undertaken by Kathy Mack, an associate professor in law at Flinders University. This project aimed to conduct a more empirical study on the question of when courts should refer cases to ADR, broadly defined to include not only mediation and conciliation but also other means by which disputes could be discussed outside courts, such as neutral evaluation or assisted negotiation.[401] The added layers of complexity revealed the challenge for research into these operations, each with their own assumptions and forms of resolution.

Mack's research found that ADR was a very complicated process with a 'wide variety' of different programs across Australia attempting to resolve a range of different types of cases.[402] In these circumstances, Mack found that evidence was often 'inconclusive': while mediation in family law cases was generally a more positive experience, whereas for 'general civil litigation and small claims processes' the experience was 'either mixed or contradictory'.[403] Her report called for more detailed research embedded in local programs, which would help to overcome the existing vague and subjective evidence she had uncovered. Nevertheless, Mack was able to show that early referral to ADR programs did not hinder the chance of successful resolution, and indeed would be received favourably if faster resolution resulted in lower costs. Mack also revealed that compulsory referral, or referral against a fixed set of criteria, could undermine the programs. In ADR, matters external to the disputes at hand could be extremely influential and should be taken into account. Cases in which parties were intensely and emotionally opposed, or where parties had intractable differences in values, would be less likely to succeed, whereas cases in which the parties shared common objectives – such as in custody cases where they prioritised the effect of disputes on children – were more likely to be resolved.[404] Mack argued that the effect of emotional differences was more effectively corralled and contained in traditional litigation. She also found that the expertise of ADR facilitators should be publicised more effectively.[405]

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400 The AIJA's share of the research cost was $6000: Council Minutes, 4 October 2003, Box G4, AIJA Papers.

401 Kathy Mack, 'Court Referral to ADR: Criteria and Research' (Melbourne: NADRAC and AIJA, 2003), 1.

402 Mack, 'Court Referral to ADR', 7.

403 Mack, 'Court Referral to ADR', 28.

404 Mack, 'Court Referral to ADR', 6.

405 Mack, 'Court Referral to ADR', 8.

Mack's report also contained a particularly acute observation – that the effectiveness of programs depended a great deal on the initiative of the facilitators. Where the practitioners adopted a 'problem-solving' approach, Mack contended, they achieved better results.[406] Mack did not define the term clearly, but it implied a form of well-resourced mediation with practitioners motivated better to understand the problems of those who participated.[407] By stressing the initiative and capacity of courts to intervene in cases by 'matching' the best processes to types of disputes to facilitate the delivery of justice, Mack's research connected with the wider developments in the administration of justice, and her research contributed to the process by which these changes occurred.

Mack's analysis also pointed to developments in the criminal jurisdiction. During the first decade of the new millennium, new specialist courts and tribunals had been established to streamline processes for particular kinds of offenders. Included in this category were courts specialising in family violence, drug addiction and Indigenous cases. These new forums differed from the established courts and tribunals in their adoption of new processes. They sought to assist individuals whose crimes were connected with particular kinds of social disadvantage, whom it was argued required assistance to reform, instead of ordinary justice. The new specialist courts were often integrated into social services and tailored their processes and structures to the needs of their participants.

As Arie Freiberg explained in a series of expository articles in the *Journal of Judicial Administration*, these courts marked 'a move away from a focus on individuals and their criminal conduct to an examination of offenders' problems and their solutions'.[408] Freiberg argued that the motivation for the development of these courts was 'pragmatic', emerging from

> the realisation that recidivism, where caused by underlying physical, psychological, social or economic circumstances, is better, and probably more economically, dealt with by effective social intervention than by harsher sentences.[409]

He also highlighted the importance in these programs of achieving just outcomes, which took precedence over cost or efficiency considerations and over principled considerations about the judicial role.

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406 John Wade, 'Current Trends and Model in Dispute Resolution Part II' (1998) 9 *Australasian Dispute Resolution Journal* 115, quoted in Mack, 'Court Referral to ADR', 3.

407 Wade does not provide a clear definition either: Mack, 'Court Referral to ADR', 26–27.

408 Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8 at 9.

409 Freiberg, 'Problem-Oriented Courts', 10, 11.

The judges in these courts adopted non-judicial roles, organising community services and supervising recovery programs. Such courts developed special procedures and arranged their courtrooms in particular ways. The South Australian Aboriginal Court operated without a judicial bench and in the presence of an Aboriginal elder. Family members were able to be present and were given an opportunity to speak. These procedures aimed to avoid the formal procedures, which could serve to alienate participants and to undermine the prospect of recovery.

Such programs were controversial. Victims' organisations viewed them as allowing offenders to avoid harsh penalties. Domestic Violence Courts, for instance, were criticised for extenuating domestic violence, yet, as Freiberg argued, the programs recognised the reality for many victims who sought support to enable family life to continue.[410] The courts were also criticised for arbitrarily dividing particular types of social disadvantage that were often linked with others, such as drug and domestic abuse, posing questions about selection in diverting an individual to a program.[411] Others argued that the courts would distract judges with non-judicial issues, or else the specialist knowledge that judges in these courts would acquire might lead them to adjudicate from their own experience rather than the evidence placed before them. The courts also threatened to collapse a distinction between courts and social services, threatening judicial independence.

Reconsidering the experiments in 2005, Freiberg wondered whether the methods introduced in these small courts ought not to be extended into mainstream courts. The question was open, he argued, owing to the way in which traditional adversarial processes were the exceptions, while most cases settled or involved guilty pleas. There was potential for restorative methods, involving the convicted party acknowledging the harm his or her actions have caused, to be incorporated into trials. Judges, he argued, could also adopt, as one of a number of tools, the kinds of therapeutic methods pioneered in these specialist courts.

The AIJA demonstrated its interest in the new experiments by granting its 2002 Award for Excellence in Judicial Administration to the South Australian Diversion Court handling mental illness.[412] It also convened the 3rd Annual International Conference on Therapeutic Jurisprudence in Perth, under the

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410 Freiberg, 'Problem-Oriented Courts', 18–19.

411 Andrew Cannon, 'Therapeutic jurisprudence in courts: Some issues of practice and principle' (2007) 16 *Journal of Judicial Administration* 256 at 259–260.

412 Arie Freiberg, 'Problem-Oriented Courts: an Update' (2005) 14 *Journal of Judicial Administration* 196 at 199. For an explanation of the award, refer to Chapter 1.

revealing title 'Transforming Legal Processes in Court and Beyond'.[413] Several of the conference papers subsequently appeared in the *Journal of Judicial Administration*, exploring the extraordinary array of programs being undertaken in different jurisdictions across Australia. Papers featured analysis of ways of measuring the performance of these specialist courts.[414] Others discussed the ways in which therapeutic concepts could be applied more broadly.[415] In its investigation of these programs, the AIJA explored new limits in the extent to which the judiciary could engage with those on trial.

The fertile debate prompted the AIJA to commission Dr Michael King to produce a *Solution-focused Judging Bench Book* for therapeutic justice that would explain the concepts to judges.[416] The *Benchbook* substituted the term 'problem-solving' with 'solution-focused', indicating its intention to foster 'positive behavioural change'.[417] The therapeutic method described the accused as 'participants' in the trial and aimed to create 'shared respect' between judge and participant. Trials become a form of guided negotiation between the judge and the participant, with the ultimate aim of achieving agreement from the participant and compliance with the outcomes.[418] Features of the conventional justice system, including punishment, coercion and even paternalism, were deprecated on the grounds that they rendered the participant 'passive' or, worse, fostered

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413 Other partners included the Magistrate's Court of Western Australia; the International Network on Therapeutic Jurisprudence; the University of Miami Institute of Law, Psychiatry & Psychology; the School of Psychology, Faculty of Business and Law and School of Law and Justice, Edith Cowan University; the International Association of Drug Treatment Courts; the University of William & Mary Law School's Therapeutic Jurisprudence Program; and the Association of Australian Magistrates.

414 Terry Carney, David Tait, Duncan Chappell and Fleur Beaupert, 'Mental health tribunals: TJ implications of weighing fairness, freedom, protection and treatment', (2007) 17 *Journal of Judicial Administration* 46; compare Lynne Roberts and David Indermaur, 'Key challenges in evaluating therapeutic jurisprudence initiatives' (2007) 17 *Journal of Judicial Administration* 60.

415 Michael S. King, 'Problem-solving court judging, therapeutic jurisprudence and transformational leadership' (2008) 17 *Journal of Judicial Administration* 155; compare Andrew Cannon, 'Smoke and mirrors or meaningful change: The way forward for therapeutic jurisprudence' (2008) 17 *Journal of Judicial Administration* 217; compare Michael King and Robert Guthrie, 'Using alternative therapeutic intervention strategies to reduce the costs and anti-therapeutic effects of work stress and litigation' (2007) 17 *Journal of Judicial Administration* 30; compare Diana Bryant and John Faulks, 'The helping court comes full circle: The application and use of therapeutic jurisprudence in the Family Court of Australia' (2007) 17 *Journal of Judicial Administration* 93.

416 See also legal texts, such as Michael King, Arie Freiberg, Becky Batagol, and Ross Hyams, *Non-Adversarial Justice*, (Annandale, NSW: The Federation Press, 2009).

417 Michael S. King, *Solution-focused Judging Bench Book* (Melbourne: AIJA, 2009), 3.

418 King, *Solution-focused Judging Bench Book*, 2; compare Michael S. King, 'The therapeutic dimension of judging: The example of sentencing' (2006) 16 *Journal of Judicial Administration* 92, 98.

'resistance'.[419] The methods sought to apply the best understandings based in behavioural science.

The *Benchbook's* 'solution-focused' approach illustrated a broader shift in the approach to the delivery of justice. An earlier approach sought to protect the justice system against encroachments, which was exemplified by the Dietrich ruling's upholding of the importance of legal counsel for the delivery of justice. The period since then has been marked by greater pragmatism and experimentation. While legal representation remains a central feature of the justice system, the new schemes have increased the role of courts. New methods involving collaboration between the participant and the court require greater intervention from courts, but also allowed a more direct connection with court users. The effect of the latter might yet prompt further change. Good judgment, and the proper administration of justice, is now more responsive where once it was more passive.

[419] King, Solution-focused Judging Bench Book', 27.

CONCLUSION

The move in 2003 to redefine the central objective of the Australasian Institute of Judicial Administration (AIJA) to 'promoting excellence in courts and tribunals' from the earlier 'bringing modern management techniques and research to judicial administration' revealed a transition that had occurred in its work.[420] The concept of 'modern management' was developed in 1982 for the AIJA's launch.[421] It had the advantage of providing a new objective with which to approach the judicial system, one that promised greater control and precision and perhaps above all – uniformity – in the administration of a system dominated by local customs resistant to improvement. This concept also offered a new way of interpreting the justice system that emphasised its functions, and in so doing enabled the development of programs of research and education. Through its lens, the underlying administrative functions of courts became apparent, creating opportunities for reform that preserved the principles essential to the delivery of justice. Making 'modern management' the AIJA's objective gave it a clear purpose immediately comprehensible both to its own members and the wider remit of interested parties.

Accordingly, the AIJA's move away from 'modern management' indicated the waning of the lustre of that concept. In the new century, it proved increasingly less challenging to custom, and even became itself conventional, with chief justices invoking management principles in their addresses.[422] The more innovative challenges to improving justice have changed, and the AIJA has contributed to this change. The transition to 'excellence' relaunched the AIJA, giving it more freedom to pursue a range of different issues. It has therefore taken up programs such as gender and cultural awareness programs and alternative dispute resolution (ADR), in so doing broadening the definition of judicial administration.

But the promotion of 'excellence' in court administration has also had consequences. In this shift, the AIJA has lost a clear definition of its role. At the same time, it has had to determine its role in the context of increasing emphasis on research in the university law schools, including into areas of judicial administration, and the emergence of other education providers with clearer remits such as the National Judicial College of Australia (NJCA).

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420 Information for Prospective Members of the Australian Institute of Judicial Administration (Melbourne: AIJA, 1982); AIJA, 'Strategic Plan, 2003–2006', Box G3, AIJA Papers.

421 In his proposal for an Institute for Judicial Administration, Russell Fox had not contemplated 'modern management': Fox, 'An Institute for Judicial Administration' in Blackburn (ed.), *Judicial Essays*, 75.

422 See, for instance, Sir Anthony Mason in Chapter 4, and Sir Gerard Brennan in Chapter 5.

The AIJA has attempted to ensure that its work complements that of these bodies, mostly by developing more advanced research and education programs. To date, the AIJA has generally succeeded in maintaining connections between peripheral programs.

Amid these changes in emphasis, the AIJA's methodological foundation is unchanged. Its unique structure, comprised of the constituent parts of the judicial system across jurisdictional boundaries, has lent its work unique authority. It has ensured that its projects have been directly relevant, and the presence of different stakeholders in the process of justice has meant that its projects have considered the whole of the justice system. This has made its work, such as that in fostering the introduction of case management, more comprehensive than it might have been and encouraged legislators, law reform bodies and other interested parties to take these aspects into consideration. It has also allowed it to draw heavily on the experience of its members and those active in the judicial arm of government, ensuring that wider debates about law reform incorporate existing practical knowledge. As it has developed, the AIJA has become an outlet for would-be reformers from within the justice system to pursue their interests. Structural features such as the mandated turnover of executive officers have meant that presidents are appointed with purpose and a clear timeframe for pursuing their objectives. In this way, the AIJA continues to represent the interests of those within the judicial arm of government, and its activities provide a guide for reform based on the best knowledge of those within the government. Its vitality, then, derives from its methodology and structures and the initiative of its members.

EPILOGUE: THE AIJA TODAY

In his introduction to this book, James Waghorne conceived of this history as an institutional history with an emphasis on the imperatives that have driven changes in the administration and operation of our courts and tribunals. As the director of the Australasian Institute of Judicial Administration (AIJA) today, it is clear that the life of the AIJA remains one driven by a willingness to respond and contribute to the changing landscape within which courts and tribunals must operate. On behalf of the AIJA, I have endeavoured to identify the challenges in judicial administration affecting the work of the AIJA today, and which are the subject of ongoing strategic planning. It is perhaps unsurprising that many of the key issues that have historically informed the AIJA's work continue to do so and will, we expect, remain meaningful imperatives for some time.

Technological change continues to transform the way courts and tribunals work. As the Hon Chief Justice Marilyn Warren (and also a member of the AIJA Council) recognised with great clarity in her 2013 Redmond Barry Lecture, social media in particular presents contemporary judicial officers with new opportunities and challenges in the protection of 'fundamental aspects of the judicial system: namely, openness, public confidence in the judiciary, and the right to a fair trial'.[423] Each of these aspects is, as we have seen, critical to the health of courts and tribunals. In recent years, the AIJA has worked closely with public information officers appointed by courts and tribunals to engage in discussion with the press and other media, as well as the public at large as the boundaries between citizen and journalist are being redrawn, or at least reconsidered. The impact of social media on courts with juries is particularly significant, as is becoming increasingly well recognised.

In addition, accountability remains an important objective. Case management, addressed fully in this history, has significantly improved timeliness and efficiency in courts. There continues to be pressure to improve the timeliness with which courts and tribunals finalise cases. The AIJA remains concerned to improve existing case management systems and to simplify court rules and procedures further. In May 2014, the AIJA will convene and promote, with the Australian Centre for Justice Innovation (ACJI), a seminar on timeliness in litigation. The AIJA has also been closely involved from the outset in the Harmonisation of Court Rules

[423] Chief Justice Marilyn Warren, 'Open Justice in the technological age', Speech delivered at the 2013 Redmond Barry Lecture, Melbourne, 21 October 2013, available at https://assets.justice.vic.gov.au/scv/resources/6e0f8cb1-4d47-4700-a6e2-a472d85704e0/redmond_barry_lecture.pdf.

Subcommittee (a subcommittee of the Council of Chief Justices), which has been responsible for the harmonisation of a number of rules of practice across jurisdictions. Our current work concerns the harmonisation of commercial arbitration rules and the rules for the service of proceedings out of the jurisdiction.

The AIJA continues to take an active interest in alternative dispute resolution (ADR) in civil and criminal cases and the development and use of pre-proceeding protocols. In September 2012, speaking at the 18th AIJA Oration, the Hon Chief Justice Wayne Martin AC reminded us that, despite the mainstreaming of ADR processes in civil litigation over the period of the last 20 years, most courts continue to 'operate on the basis that all cases will be prepared on the assumption that they are proceeding to trial' when in truth 'only a fraction will'.[424] In his Honour's view, this disconnect poses 'perhaps the greatest management challenge for the hybrid system of civil dispute resolution'.[425] In response, the AIJA's current research proposals include research on the identification of those cases that almost certainly will be litigated and how those cases ought to be treated by the courts. Through better identification and treatment of the fraction of cases that will 'only' resolve with adjudication, it is hoped that the majority of other cases can be more confidently managed without the present attendant trial assumption. Also, in 2012, the AIJA published a report by Professor Tania Sourdin entitled *Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts*.[426] Professor Sourdin's research explores the effectiveness of dispute resolution strategies that precede even the filing or commencement of a proceeding in a court or tribunal.

Since convening the first national conference for tribunals in 1998, the AIJA's work with tribunals continues to evolve. In 2013, the AIJA will publish a report on tribunal independence in conjunction with the Council of Australasian Tribunals (COAT), a body that is itself the product of the AIJA's earlier collaborative work on tribunals with Murray Kellam, then president of the Victorian Civil and Administrative Tribunal (VCAT). The preparation of the tribunal independence report represents another significant development in the AIJA's work with tribunals, alongside the publication of

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424 Chief Justice Wayne Martin AC, 'Managing Change in the Justice System', Speech delivered at the 18th AIJA Oration, Brisbane, 14 September 2013, available at http://www.supremecourt.wa.gov.au/_files/AIJA_Oration_%20Managing_Change_in_the_Justice_System_Martin_CJ_Sept_2012.pdf.

425 Martin, 'Managing Change in the Justice System'.

426 T. Sourdin, *Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, Melbourne, November 2012), available at http://www.civiljustice.info/access/26/.

the tribunals benchbook and the AIJA's continued involvement in the planning of the tribunals national conference.

As a member of the Consortium for the International Framework for Court Excellence, the AIJA continues to engage with global efforts to assess and improve judicial administration. The Framework was first launched by the Consortium at a conference held in Sydney in September 2008 and has been the subject of subsequent conferences in Singapore in 2010, and most recently in Auckland, New Zealand in 2013. A new edition of the Framework was launched at the Auckland conference in March that year. The goal of the Framework is 'the development and maintenance of a framework of values, concepts and tools by which courts world-wide can voluntarily assess and improve the quality of justice and court administration they deliver'. By the Framework, the Consortium aims to 'provide a path for improvement in the quality of court services'.

In recent years, the Framework has begun to function as the Consortium hoped. Significantly, the Framework has been adopted in a number of Australian jurisdictions, in New Zealand and in a wide range of courts (and tribunals) throughout the world. At last count, the Framework was being used in over 30 countries. A secretariat for the Framework will be established in 2014, to be located at the AIJA's office. The secretariat will be responsible for noting and reporting regularly on developments in the use of the Framework. At the same time, the AIJA will continue to work closely with its Consortium partners, principally the National Center for State Courts (NCSC) in the United States and the Subordinate Courts of Singapore (with which the AIJA has had a long relationship) in the Framework's evolution.

The Framework's adoption in some Australian jurisdictions identified problems in the existing statistical records kept by the Federal Government and, in particular, by the Productivity Commission and published in its Annual Report on Government Services. As a result, the AIJA's Report on Government Services Working Group, chaired by Chief Justice Marilyn Warren, produced a paper and made recommendations to the Productivity Commission in relation to its data collection and recording measures.[427] These recommendations proposed better indicators for measuring quality in court administration. There is ongoing liaison between the AIJA and the Productivity Commission's Court Administration Working Group (CAWG) in

[427] Report on Government Services Working Group, *Report on Government Services Working Group Report* (Melbourne: AIJA, 2010).

relation to statistics kept on courts. Today, this engagement is an important part of the AIJA's work.

The cost of justice is one of the greatest challenges to contemporary judicial administration. This is particularly so in the case of civil litigation. Discovery in civil litigation often poses a genuine hurdle to the cost-efficient conduct of litigation. The AIJA has been involved (and will continue to be involved) in educational programs and research to explore how these hurdles can be removed or significantly lowered. The AIJA has, moreover, been involved in research concerning expert evidence in courts and tribunals as well as in the work of interpreters in the legal system. As recently as May 2013, a number of recommendations were made to heads of courts and tribunals in Australia and New Zealand based upon the outcomes of a workshop on interpreters held in April that year in Sydney.

As this history of the AIJA relates, with the establishment of the National Judicial College of Australia (NJCA) , there has been a change in the nature of the AIJA's education activities. For example, much of the educational work previously performed by the AIJA with respect to Indigenous justice is now performed by the NJCA, although the AIJA continues to offer some programs covering Indigenous justice issues, the most recent of which was an Indigenous justice conference held in Adelaide in July 2013. Further, the last annual conference offered by the AIJA took place in 2008. Thereafter, the AIJA Council resolved that AIJA conferences should give way to a series of thematic education events. Today, research and education remain very much interlinked. Many of AIJA education activities highlight important areas for future research. Equally, AIJA research outcomes inform our future education program planning. A good example is the conference 'Assisting Unrepresented Litigants – A Challenge for Courts and Tribunals', which the AIJA is organising for April 2014. It is confidently anticipated that, in response to issues raised at the conference, the AIJA's future research agenda will include consideration of the statistical information that should be maintained by courts and tribunals in relation to unrepresented persons appearing before them.

Through its thematic approach, the AIJA has also developed an ongoing focus on certain issues. In particular, the AIJA has taken a significant interest in therapeutic jurisprudence, with major conferences taking place in Perth in September 2006 and in Melbourne in May 2010; and a seminar on sexual assault and restorative justice in late November 2013. This seminar was designed to discuss restorative justice-style alternatives to the criminal justice system for certain types of sexual assault cases. It took the

form of a Q & A style panel discussion that was telecast to remote locations throughout Australia.

Ultimately, however, the work of the AIJA today very much echoes our institutional past and the ongoing imperatives that drive changes to judicial administration. To this end, the AIJA will continue to promote alternatives to traditional adversarial justice where it can be seen that there is a benefit to courts and tribunals in the improving their efficiency, timeliness and cost-effectiveness in dispute resolution, without sacrificing fairness. In this work, the AIJA is pleased to be associated with the ACJI: this relationship provides mutual benefits in both education and research activities.

In 2006, the AIJA became the Australasian Institute of Judicial Administration in recognition of the considerable and ongoing contribution by judicial officers and others involved in judicial administration in New Zealand in the AIJA's activities. The AIJA has conducted conferences in New Zealand, most recently, as noted above, in March 2013 and for the first time has had as its president a New Zealander, Justice Mark O'Regan. The chief justice of New Zealand and the chief justice of Australia are co-patrons of the AIJA.

Much has been accomplished by the AIJA over a relatively short period of time. There is still much to do, and the enthusiasm to do it remains as strong as ever.

Professor Greg Reinhardt
Executive Director, AIJA

APPENDIX A: AIJA CHAIRMEN/PRESIDENTS

The Hon Russell Fox AC QC, Principal Founder	
1976	The Rt Hon Sir Harry Gibbs KBE
1979	The Hon Mr Justice Daryl Davies
1981	The Hon Mr Justice Russell Fox
1984	The Hon Mr Justice Richard McGarvie
1986	The Hon Mr Justice Dennis Mahoney AO
1988	The Hon Mr Justice Glen N. Williams
1990	The Hon Mr Justice Bryan Beaumont
1992	The Hon Mr Justice John Clarke
1994	The Hon Mr Justice Trevor L. Olsson
1996	The Hon Justice Neil Buckley
1998	The Hon Justice Catherine Branson
2000	The Hon Justice Murray Kellam
2002	The Hon Justice Peter Underwood AO
2004	The Hon Justice John Byrne
2006	The Hon Justice Virginia Bell
2008	The Hon Justice Christine Wheeler
2010	The Hon Justice Patrick Keane
2011	The Hon Justice Mark O'Regan KNZM
2013	The Hon Justice Michelle May

APPENDIX B: AIJA LIFE MEMBERS

1984	The Hon Russell Fox AC, Principal Founder
1986	The Hon Sir Walter Campbell AC
1986	Mr James N. Creer
1986	The Hon Daryl Davies
1986	Mr David Harper OAM
1986	The Hon Peter Heerey AM
1986	The Hon Douglas McGregor
1987	The Hon Richard McGarvie AC
1990	The Hon Dennis Mahoney AO
1991	Mr Gary Byron AM
1991	Mr Lindsay Collins
1991	Professor Ian Scott
1991	The Hon Glen N. Williams AO
1991	The Hon Sir John Young AC KCMG
1994	The Hon Brian Beaumont AO
1996	The Hon John Clarke QC
1996	The Hon Sir Anthony Mason AC KBE
1996	Ms Lynn F. Pollack
1997	Professor Peter Sallmann
1998	The Hon Sir Gerard Brennan AC KBE
1998	The Hon Trevor Olsson AO
2000	The Hon Sally Brown AM
2001	The Hon Neil Buckley
2001	Mr David Jones AM *(former judge, County Court, Victoria)*
2001	Mr Warwick Soden OAM
2003	Mr Stephen Skehill
2004	The Hon Bernie Teague AO
2006	The Hon Justice Marcia Neave AO
2007	The Hon Geoff Davies AO
2007	The Hon Robert Nicholson AO
2008	The Hon Geoffrey Eames AO
2009	The Hon Murray Kellam AO
2009	His Excellency the Hon Peter Underwood AC
2010	Magistrate Megan Greenwood
2011	Mrs Mary Ann Yeats *(former judge, District Court, Western Australia)*
2012	The Hon Justice John Byrne AO RFD
2013	Deputy Chief Magistrate Andrew Cannon AM
2014	The Hon Justice Virginia Bell AC

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