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Public Reporting of Courts’ Performance – how is this best achieved?

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E nga mana, e nga iwi, e nga reo, tena koutou, tena koutou tena koutou.

Introductory

It is an honour to be invited to address you, such a distinguished judicial audience from the jurisdictions of the most dynamic region of the world, Asia Pacific.

As a Barrister, it is a daunting task to make submissions before such a large bench. I thought perhaps I should alternate between deferential and manipulative persuasion in seeking to imprint upon you my own perspective and convince you of my case. But I have no case that must prevail.

I considered trying to revert to my status as a former senior official in the New Zealand Ministry of Justice or Crown Law – But I’d probably end up trying to do pretty much the same! Which doesn’t seem appropriate.
Instead, I propose to reassume my state of mind and values as a former Dean of Law at Victoria University of Wellington, specialising in constitutional law; where I felt my job in relation to judiciary was to

- uphold and maintain the constitutional values of independence of the judiciary and separation of powers;

- while striving to provide reasoned, constructive critique that might improve performance of the courts, the three branches of government overall, and the rule of law.

I propose to try to provoke reactions from various audiences with my remarks, in this last session of your conference. The topic I am speaking to is “public reporting of court performance – how is this best achieved?” I propose to break this down into two parts:

1. How to influence public reporting – this could be very short. But it’s not.
2. Consider what IS Court Performance and, more importantly, WHO should report on it?

And I will leave time for questions at the end.

1 How to Influence Public Reporting

The question of how to influence public reporting is common to many sectors of society.

In New Zealand, and in most western countries there exists now, and has always existed at most other times in known history, the tendency to bemoan the levels of education, the cognitive ability and amount of background understanding of the subject area (and virtually everything else) possessed by journalists - present company excepted.

If you add to this the endemic focus on the superficial and the trivial, and the lack of focus on the worthwhile, and significant, it would not be difficult to conclude that we have reason to despair – and to question whether attempting to influence public reporting of the courts, or even whether to facilitate it, is at all worthwhile.
When I was Dean of the Law School in New Zealand’s capital city I was often called on, every week or two for five and a half years, to comment on legal issues of the day. Frequently, if I and others could not comment, the story (often an important story in public interest terms) died. The journalists could not analyse it themselves. And I think I was reported absolutely accurately once – in an interview with my brother in law.

Personally, I think there are serious systemic deficiencies in the system of ownership, regulation and structure of the media as an industry in New Zealand and the other jurisdictions with which I am familiar – and I say that having taught and/or visited at law schools in New Zealand, the United States, Canada, the United Kingdom and Hong Kong. I suggest that the market based profit-seeking incentives that are allowed to drive the bulk of the media in our jurisdictions pervert the sort of reporting we get so that it has exactly the characteristics and biases that I’ve just suggested we bemoan. This is not to say journalists are bad – some of my best friends are journalists, as is or was my son, sister, aunt and grandfather. It is a systemic issue. But I think it is no accident that the most “objective” reporting (if there is such a thing), that pays most attention to facts, informed opinion and deeper analysis, emanates from state owned or non-profit media.

Now, it’s not the judiciary’s job to reform the media. It is probably the job of the executive and legislative branches of government. But obviously there are risks - to democracy and free speech - if they get too enthusiastic about that job. Perhaps we should not encourage that too loudly.

And, perhaps a random emotionally driven approach to what is relevant in court performance is, in some inchoate way, a useful heuristic by which the people can judge the health of our judicial system.

In any case, I submit to you that, the media is what it is; or, perhaps, what it was.

The maturing of the world wide web from academic and military plaything to a means of individuated mass communication, and the emergence of the blogosphere are changing the face of the news media. Some of this is technological only – my son sub-edits newspapers in New South Wales, from Wellington New Zealand. But some of these changes run deeper.
News stories from conventional media sources are added to, occasionally substantively, by the “comments” sections at the bottom. Blogs by well-informed commentators attract significant followings and can influence opinion, and directly bear on political decision-making. I know of politicians’ offices in New Zealand who assiduously monitor facebook sites of their colleagues and members of the opposition and blogs of selected commentators. On one occasion I saw the comments of an academic blogger on what he would have said to a select committee on a Bill that was rushing through the New Zealand Parliament actually picked up by the Minister’s office and acted on, without formal submission, to amend the Bill – for the better.

So what do, or should, we mean by “public” “reporting” of courts’ performance? We should no longer mean by that only how newspapers or radio or TV present court judgments or court statistics. We should mean how easily can information, from judgments and about courts, be accessed and understood by anyone, including those with the attention span of a gnat (it seems to me) via the internet?

The sources of information about the world we now have and access have changed rapidly. They are much more potentially numerous and diverse. And much more global. How many people do you know who read the NY Times or the Guardian as their “paper” of choice? This poses challenges to the task of improving the reporting of court performance – that important legal topic can get lost, crowded out by the dress code for the Oscars ceremony for the year. But it also provides opportunities. Courts can put information into the public arena more easily than ever before – posting information on the web gets it directly, without media intermediary, to a far wider audience than every possible before – if they are interested in accessing it.

And that last aspect puts a premium on presentation skills. Lawyers are supposed to be good at presentation – persuasion is our job and presentation is a good part of that. A good argument can be destroyed by detracting presentation – it can be made just too difficult to access. And judges, who in many of our jurisdictions must be former lawyers, should be good at presentation too.

But our training at Law School is skewed. We are not trained to present to and persuade people at large. Our presentation skills are trained to be directed at – well, you! Judges. (Skills for presenting to juries, we largely leave to picked up by “on the job” training). At least in New Zealand, barristers spend too much time doing what they've always done – dictating or writing submissions, trying
themselves to understand the subject rather than boiling it down for the audience, and hoping to impress by length rather than clarity or quality. We don’t immediately think of graphs or diagrams, or other visual aids to make our points. I’m told I was the first counsel to present a powerpoint diagram to the New Zealand Supreme Court – in 2009. That picture was worth a thousand words; it demonstrated my point graphically - literally. But my ten year old daughter has these skills; why don’t more lawyers use them?

My point is that, as a discipline, the legal profession and the judiciary from which it is drawn, aren’t trained to make information easily accessible by ordinary people. Ironically, politicians are probably the “profession” with the incentives to be most skilled at presentation of information to the “public”. They blog, they tweet, they facebook, they Youtube, they speak in soundbites, they “spin”; they refuse to comment to kill a story, they release huge swathes of information to drown a story, they set off distractions to move along from a story, they link in apparently independent commentators to breath new life into a story.

And I recommend none of this for the judiciary. People can tell when they’re being spun a line, usually. They expect it from politicians – because that’s their job. The functions of a politician in our system of government is to bring the will of the people to bear on policy and law. To do that they must understand, identify, and lead the people. That is not judges’ function. Indeed, the performance of your function must be independent of the vicissitudes of popular affection and annoyance. You are there to do justice, and to independently uphold the rule of law without fear or favour. So I do not suggest you embrace the dark arts of spin. There is no need for a judicial version of Alistair Campbell or Malcolm Tucker.

But there is a need, in today’s internet-ridden world, for the judiciary to pay close attention to the presentation of their information – to make it accessible, in a simple, straightforward, unvarnished way. That extends to simple things about the way in which judgments are written – with numbered paragraphs and tables of contents, and summaries up front of the conclusions - that New Zealand courts have adopted in recent years. It also extends to the excellent institution in our Supreme Court of the issue of a media statement to accompany every substantive judgment. Issuing such statements aids the accurate reporting of court decisions.
I suggest that good presentation about the performance of the courts should also extend to live streaming on the web or digital TV of court hearings, at least those of the highest court, but why not others? Most people do not fully understand what goes on in any important institution. But they do make judgements about it and its value to society based on their perceptions. And if they can’t perceive it directly their perceptions are less well informed; and suspicious.

This is where I slide seamlessly from reporting to accountability. The greater potential availability of information has risen in association with the expectation and demand for exactly that: greater availability of information. Across all spheres of public life and private life, as it has become possible to make information available publicly we have witnessed a demand for that to be done. It doesn’t matter whether nothing is done with the information. The public demand is that information about performance be transparent in order to ensure that bad things are not hidden. In New Zealand now, the Chief Executives of every government department are required to publish on the web, every six months, all the details of their credit card accounts. After the first wave of revelations of these details (before they knew that was to be done – which wasn’t perhaps the best example of retrospectivity being helpful), there has been little interest in this information. But the need for it to be there is apparently generally felt.

As Dean of Law, I had experience in the academic sphere of coping with the introduction in New Zealand of a nationwide system of rating the quality of research if every academic, individually. The system involved panels of senior and experienced academics assessing the quality of research of every academic over a six year period. This was going to be the end of civilization as we knew it. One of my professors was going to sue the university. Two universities did successfully judicially review the public reporting of aspects of the results (and one if the counsel is in the room today). There were and are imperfections and biases in the system. But it wasn’t the end of civilisation and, in my view, the quality of research has appreciably improved. Every academic knows what is expected of them and knows their performance will be assessed by their peers. The system of student evaluation of lecturers’ teaching went through a similar process of introduction, resistance and now acceptance 20 years ago. Now, a consistently negative pattern of student evaluations of a lecturer’s attitude to students, for example, can stop a promotion application if there aren’t countervailing positives. And why shouldn’t it, if the survey reflects reality, or the reality of perception.
So this is my key message, or submission perhaps, to the members of the judiciaries here: making information about court decisions and court performance publicly available is not just an opportunity for enhancing the reputation of the courts. It is not an optional extra. It is a societal expectation; a demand that should be complied with as a matter of the health of the medium term institutional legitimacy of the courts. It is essential. To refuse to do so, would be to focus public suspicion on what the courts have to hide. And, in the long term, that is antithetical to the rule of law – because it weakens the power of the judiciary.

Ultimately, the continued existence of the judiciary as at least a mildly equilibrating mechanism to the political branches, depends on their long term legitimacy. The judiciary must be seen to be accountable, their information transparent, in order to sustain that legitimacy over the medium term in the twenty first century. And, as was said earlier today, if the judiciary doesn't do it, someone else will.

2 What is Court Performance and Who should Report it?

What of “Court Performance”? What is this nature of performance that should be publicly reported? I have seen the paper of Chief Judge Doogue, Judge Doherty and Mr Simpson presented this morning and applaud it. It follows from I've already said that, in particular, I agree that “It is important that sufficient information be available to the public so that the public confidence in the judiciary as a well-organised, professional, efficient and independent institution is not misplaced”. But that principle is easier to state than to apply.

One way of approaching the task is to use a well-known legal test: for example, the burden of proof. As those, who have operated under the Official Information Act in New Zealand, know – good reason for withholding information in the public interest is, in practice, the exception rather than the rule. And it involves disclosing more information than you feel comfortable disclosing. If you are not discomforted by at least some of the information disclosed under a judicial information disclosure regime, you probably aren’t disclosing enough.

I suspect that public servants, politicians and judges will all have systematically different ideas about what level of information is “sufficient” for that purpose. That is natural. Each of those three
groups has a different position in our constitutions. They perform different functions, have different incentives and speak different “languages”.

I have written about this, and I want to develop this point a little because the clash between these different perspectives can and does become a point of tension in the process of deciding what information should be reported. It would be better for all sides to understand that some of the elements of that clash derive from “culture” of the different institutions. I also want to explore it because I suggest that the question of who reports information is just as important as what information is released.

The idea is that we are all a function of our context. We think and speak in patterns, we understand the world in patterns, that are affected by the function we perform, the experiences we have, and the disciplines in which we are trained. We can make some generic and general observations about how those patterns differ between politicians, public servants and judges. They do not always hold true, but in my view there is a core of generalizable truth to them.

I’ll focus just on judges and public servants, since that’s where, in my experience, much of the misunderstandings occur on both sides:

- Law is issue focused, where precise identification of the legal issue in dispute is crucial. It is also context-regarding and rooted in particular facts of a case. That context is very important to deciding the relevance of past cases. While policy analysis is oriented to general theoretical frameworks – the assumptions of what will drive future behaviour are important. And anecdotal evidence is derided as un-empirical compared to statistically significant studies based in the social sciences.
- Related to this, law is inductive and reasons by analogy. Lawyers, and judges, tend to reason from the particular case to the general rule and like playing with analogies. Policy analysts do the opposite – they reason from the general policy to the particular application. And analogies are almost always invalid and unconvincing compared with a comparison of the

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Matthew S R Palmer, “Open the Doors and Where are the People? Constitutional Dialogue in the Shadow of the People” in Claire Charters and Dean R Knight We, The People(s): Participation in Governance (Victoria University Press, Wellington, 2011) at 50.
merits of different options.

- Law also tends to be binary and oppositional. Arguments are juxtaposed with counter-arguments. This is inadequate to a policy analyst who is trained to identify all permutations of options to be analysed and compared.
- And law looks to the past for guidance from precedent cases while policy analysts look to the future to hypothesise, or assume, what is likely to occur as a result of different policy options.

Well, so far, so academic. And you may by now be regretting my choice of an academic’s hat to put on at the beginning of this session. My point should be clearest to those of you who are in judicial positions of an administrative nature who have something to do with public servants or policy advisers and the policy adviser public servants who deal with judicial matters. My practical experience is that there can be a lot of misunderstanding in conversations between these two groups. On occasion this can degenerate into reasonably serious constitutional bickering or conflict between the branches of government. I gave evidence to a House of Lords inquiry into relationships between the judicial and political branches in what I felt to be that circumstance in Britain in 2007. And while inherent institutional functions may be core to such conflicts, they are exacerbated and made more difficult to resolve, by cross-cultural misunderstanding.

So, if judges and public servants feel like you speak different languages, that’s because, I think, you do. And recognising the differences is the first step to a better understanding of, and communication with, each other. This is my key message to both the judiciary and public servants who deal with each other.

**Accountability and Independence**

Finally, I want to say something about linking accountability and independence. And here’s my key message to the executive and legislative branches of government – both public servants and politicians: it is not constitutionally appropriate for you to decide on the disclosure of judicial information, over the wishes of the judiciary.

At one level this is basic separation of powers theory. And as this audience knows better than others – in respect of judicial independence, the separation of powers is a necessary condition to the rule of law. And it is that independent objective existence of the law, which must rule, which
provides the link to judicial independence. If the same person who makes a law also interprets what it means in a particular case, then the law itself has no independent existence – it becomes a product of the retrospective imaginary justification of the decision-maker. “I knew what I meant”. Law must be interpreted and applied by someone other than he or she who makes it for law to rule rather than the one ruler to rule. This is a core constitutional feature of New Zealand’s Westminster democracy and of other common law and Commonwealth jurisdictions. But its implications need to be appreciated by public servants and politicians, just as its limits need to be appreciated by judges.

The essence of the rule of law lies in independence of the judiciary from the other branches of government in relation to the individual case. It cannot be legitimate for executive or legislative branches of government to influence or pressure a judge deciding an individual case. That must be clear to most people. But the logic of the principle extends further, as this audience will well understand. Neither must the executive or legislature be able to exert systemic pressure on judges to decide certain classes of cases in particular ways. The setting of measures of judicial performance can become such a means of exerting pressure. For example, it would be constitutionally disturbing for the executive to be in charge of setting a target time for the resolution of judicial review cases, which will largely be against the government, relative to other types of cases, with consequent resource allocation implications.

And more generally, the ability of the executive to set performance targets for individual judges at all creates the potential for a subtle, even implicit, pressure on the judge to feel the subterranean pull of executive expectations. I already worry about the potential for such subtle pressures in a system which relies on promotion of judges from one bench to the next at the Executive’s behest. The setting of performance measures of individual judges by the Executive would make me worry much more. And it begs the question – what happens if performance targets are not met? Who follows up poor performance with the sanctions that should follow?

So this is the point that I made earlier: just as important as what information about court performance is reported, and how it is presented, is the question of who decides on the reporting of court performance. In my view, to preserve constitutional balances in a Westminster system, that must be the judges.

For example, it would be perfectly legitimate, in my view, for the judges collectively to decide that
they want to report publicly, transparently, information about the length of time that it takes individual judges to deliver judgments. And I must say I'm greatly looking forward to participating in one of the American style surveys we heard about this morning, of counsel about judges I appear before. But only if the judges themselves agree that is appropriate. Such measures could be an example of the judiciary embracing the value of transparency in the interests of accountability. It might even improve performance which is, after all, the concern of us all. And it needn't involve the disclosure of information that isn't already theoretically known to the public.

But I would have a different view of exactly the same measure being foisted on a judiciary by the executive or by the legislature. Such a move would suggest that an unhealthy power imbalance in the relationship between the branches of government. If an executive or legislature could and would do that, why would they not do more? (And, in my experience of government, that question would not take long in occurring to the politicians). So the constitutional imperative, I believe, is for the judiciary to be firmly in control of the disclosure of its own information.

But I also suggest, and this is my final “helpful” idea, that they, you, should consult in so doing. I've already been through the cultural differences between different parts of government. But in diversity there is strength. You could even argue that inherent to the value of the separation of powers itself is not only different institutions exercising different powers, but institutions with different cultures, exercising different powers. There is no point to the separation of the powers if the same decision in interpreting a law would be made by the judiciary as would be made by the executive. Differences in perspectives are valuable.

I suggest that, as a positive move to inform themselves of different perspectives, the judiciary would benefit from taking soundings, consulting, with the public service, and perhaps the odd academic or practitioner for variety – as to what information they should disclose or report. And the point is not confined just to reporting of information. I would expect there to be many aspects of judicial administration that could be seen through new eyes with the benefit of different perspectives.

The practice of how to do that in a jurisdiction will depend on the mechanisms and institutional arrangements peculiar to the jurisdiction. But I do think it is best done in a relatively small, ongoing group - where the judges and public servants, in particular, can learn each others’ languages and
develop their relationships. The value of strong and open such relationships is demonstrated when conflict arises - by reducing the risk of mis-communication and facilitating the informal ability to talk frankly. In New Zealand, heads of bench could assemble an Advisory Panel of carefully selected senior officials and some legal academics or practitioners to act as a sounding board, in a safe environment, on whatever aspects of judicial administration they consider would be useful to take soundings on.

**Conclusion**

I can best conclude by repeating my key messages:

1. The disclosure of information, probably more information than the judiciary feels comfortable disclosing, in a simple, straightforward, unvarnished way, is essential to the medium term constitutional legitimacy of the judiciary.

2. Judges, public servants and politicians speak different languages. Recognising the differences is the first step to a better understanding of, and communication with, each other and, perhaps to mitigating the potential for constitutional conflicts to get out of hand.

3. It’s not constitutionally appropriate for the executive or legislative branches of government to decide, over the wishes of the judiciary, on the disclosure of the information of the judicial branch.

4. But, the judiciary would benefit from taking soundings, in a safe environment, with public servants and academics with different perspectives, on the reporting of information and other matters of judicial administration.

Thank you.