TITLE: **'Judicial Ethics in the 21st Century' – Opening Remarks delivered at the Judicial College of Victoria Forum on Judicial Ethics**

DATE: **11 February 2005**

VENUE: **Judicial College of Victoria, Melbourne**

AUTHOR: **The Hon. the Chief Justice Marilyn Warren**

Ethics can be defined as a system or theory of moral values. In turn, morality concerns itself with the distinction between 'good and evil' … between 'right and wrong'. Therefore any discussion of judicial ethics must involve a broader and deeper consideration of the nexus between law and morality. Otherwise we will find ourselves purely discussing judicial ethics in the context of the individual conduct of judges.

Of course, the conduct of individual judges is a serious and important discussion. Indeed, it was only relatively recently that Justice Thomas posed the question of whether or not judicial ethics exist 'as a recognisable set of standards much like those that apply to other professional groups such as the Bar and the medical profession'.[1]

The *Guide to Judicial Conduct*, prepared by the Australian Institute of Judicial Administration on behalf of The Council of Chief Justices of Australia,[2] clearly attempts to fill that void. Nevertheless, vexed issues remain. For instance, if a recognisable set of standards for judicial conduct does exist, then who is to enforce these standards, and what range of penalties is to be applied if these standards are breached? Unlike other professions, there is no provision for fines. Removal – either by a volunteered resignation or by dismissal brought about by a joint resolution of both houses of parliament – appears to be the one and only enforcement option, given that judges are appointed *quamdiu se bene gesserint* ['as long as they behave themselves well'].[3]

However, I do not intend to highlight the challenges inherent in any discussion of implementing a set of judicial standards; but rather, I want to emphasise the opportunities that judges have to engender public confidence, while simultaneously holding up a mirror for society to reflect upon the moral values that it aspires to.

---

[1] Justice James Thomas, *Judicial Ethics in Australia* (2nd ed, 1997) 7.
[2] Australian Institute of Judicial Administration, *Guide to Judicial Conduct* (2002).
[3] *Australian Constitution* s 72(ii); *Constitution Act 1975* (Vic) 77(i).

Therefore in this way, I am choosing to take a broader view of what judicial ethics in the 21st century might entail.

Of course, some prominent public figures today still hold the view that there should be a strict separation between law and morality. These debates have existed since the time of Plato and Aristotle and are generally regarded as having reached their zenith in the late 1950s when Herbert Hart and Lon Fuller argued these points on the pages on the *Harvard Law Review*.[4]

However, despite the theoretical duelling of legal philosophers, it is beyond dispute that many of our legal doctrines are, and have been, informed by moral considerations. Equity's origin in the Courts of Chancery is an obvious starting point. More recent examples can be found in the neighbourhood principle that heralded the modern day tort of negligence, as enunciated by Lord Atkin in *Donoghue v Stevenson*;[5] and in the evolving legal concepts such as unconscionability and good faith.[6]

Moreover, in the inter-connected global community that we now inhabit, international values (as best as they can be defined) are an increasingly relevant consideration. Of course, such values, enduring or emerging as the case may be, are more easily identified when declaring fundamental human rights. Brennan J's classic judgment in *Mabo v Queensland (No. 2)*[7] illustrates this point.[8] In holding that an 'unjust and discriminatory doctrine' that refused to recognise the rights of indigenous people had no place in Australia, his Honour recognised the emergent international values and standards that were reflected in the 'contemporary values of the Australian people'.[9]

Therefore, to try and separate the law from morality is a misguided and essentially futile exercise. In my view, law and morality must be inevitably connected. As Lord Steyn has observed (in the context of considering damages arising out of a case involving fraudulent misrepresentation):

> The law and morality are inextricably interwoven. To a large extent the law is simply formulated and declared morality.[10]

---

[4] Herbert Hart, 'Positivism and the Separation of Law and Morals' 71 *Harvard Law Review* 593; Lon Fuller, 'Positivism and Fidelity to Law: a Reply to Professor Hart' 71 *Harvard Law Review* 630. See also Sir Anthony Mason, 'Law and Morality' (1995) 2 *Griffith Law Review* 147, 147, a revised version of a speech given to the National Institute for Law, Ethics and Public Affairs/Minter Ellison Law and Ethics Forum, Brisbane, 1 November 1995.
[5] [1932] AC 562.
[6] See, eg, Mason, above n 4, 156-9; Justice Paul Finn, 'Commerce, The Common Law and Morality' (1989) 17 *Melbourne University Law Review* 87, 87-9.
[7] (1992) 175 CLR 1.
[8] Mason, above n 4, 164.
[9] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 42.
[10] *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769, 790.

However, the process of judges declaring – if not shaping – the law according to the values of society is complex. There is no guidebook available. Furthermore, especially in a climate such as now where there is increased community clamour for accountability of public figures and institutions, judges must be very careful not to consciously or unconsciously impose their own values in place of the contemporary values of society. As Sir Anthony Mason has highlighted (speaking at an ethics forum some 10 years ago), '[i]dentification of relevant values can, and should be, an objective process'.[11]

Indeed, in that same address, his Honour distinguished between what he termed 'enduring values' – as opposed to 'community standards'.[12] The latter, to quote Sir Gerard Brennan, might only be 'transient notions which emerge in relation to a particular event or which are inspired by a publicity campaign conducted by an interest group'.[13]

Therefore judges must walk a fine ethical line in shaping legal principles which they believe reflect contemporary Australian values 'of an enduring kind',[14] while resisting the temptation to impose values of their own that may run contrary to settled legal principles.

Such considerations are particularly important since public confidence in the judiciary must lie at the heart of judicial ethics in the 21st century. As Chief Justice Gleeson has observed (citing Alexander Hamilton), since the judiciary controls neither the 'sword' nor the 'purse',[15] it is public confidence in the judiciary that underpins the 'peaceful acceptance' of judicial decisions, in accord with the rule of law, even in circumstances where those decisions might be 'strongly resented'.[16]

Judges are not politicians. Our objective is not to reach some 'light on the hill';[17] whatever colour light that might be. However, hopefully, we can exude some light from the bench – not simply reflected by how we conduct ourselves personally and professionally, but also illuminated by how we shape and declare the law to assist society reflect upon the moral values that it aspires to. If we can achieve that objective, then I believe judicial ethics in the 21st century will be well served.

---

[11] Mason, above n 4, 169.
[12] Ibid 164-5.
[13] *Dietrich v The Queen* (1992) 177 CLR 292, 319.
[14] Mason, above n 4, 168.
[15] Alexander Hamilton, *The Federalist Papers No. 78* (1788).
[16] Chief Justice Murray Gleeson, 'Public Confidence in the Judiciary' (Speech delivered at the Judicial Conference of Australia, Launceston, 27 April 2002).
[17] Ben Chifley, Speech delivered at the NSW Labor Party Conference, 12 June 1949.