

Chapter 7

CONCLUSION: TOWARDS A GOVERNANCE PATTERN FOR AUSTRALIAN COURTS

Introduction

This chapter brings together the threads of the preceding analysis. It begins with an overview of the current patterns of court governance across different jurisdictions, summarises the problems of the most common pattern – the traditional departmental model – then puts forward an approach to court governance based on our analyses, and discusses some of its implications.

Overview of current court governance patterns

In Chapter 2 we put forward the idea of the court as a system: with primary ‘resources’ such as money being provided at one end; key outputs such as hearings and decisions at the other; in between exist the inputs and processes of court administration. It is well established in all the governments under review that the basic resources are provided by the Executive and the outputs are under the authority of the judiciary. But there are varying patterns of decision-making power governing the intervening administrative activities. In Chapter 1 we categorised Australian court governance arrangements into broad models, drawing on the work of Church and Sallmann (1991). In Chapter 2 we articulated the dimensions of court governance arrangements in terms of three issues:

1. What functions are under the control of the courts on the one hand, and of the Executive (or Parliament) on the other?
2. What functions are controlled jointly by the courts within a governmental jurisdiction, and which are performed separately?
3. Who has administrative decision-making authority within the courts?


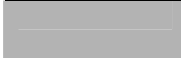

Our analysis of the distribution of decision-making authority in court administration shows that while these models are accurate in general terms, the details are more nuanced. In particular, in respect of the division of administrative authority between the Executive and the judiciary, there are at least three major patterns, within which are variations from system to system (see Table 7.1 for the major patterns). Specifically, in South Australia and the Commonwealth, there is a clear line at the point where basic resources are handed over by the Executive, with the judiciary clearly in administrative authority over the remaining activities. Among the remaining systems, New South Wales and Western Australia go further than the other States in the extent to which the Executive controls court staffing and infrastructure. In Victoria, Tasmania and Queensland, by contrast, authority over these functions, as with court operations, is shared in one form or another between the Executive and the judiciary. The major difference between, on the one hand, South Australia and the Commonwealth and the remaining States on the other, is the clarity of the line between the authority of the Executive and that of the judiciary. In the former, it is relatively clear; in the remaining States, the line is quite variable from one jurisdiction to another.

The question of whether functions are controlled jointly by the courts or performed separately is of greatest relevance in the two ‘judicially-controlled’ systems: South Australia and the Commonwealth. South Australia has joint control and the Commonwealth has separate control, notwithstanding that in the latter case, the Federal Magistrates’ Court has outsourced many of its administrative functions to the Family Court. However, it is interesting to note that in systems where the Executive has control of infrastructure and/or operations functions, this control usually entails some form of ‘jointness’ between the courts, as we saw in the cases of libraries and information systems in Chapter 5, which adds further weight to the potential of joint control in improving efficiency. Whilst this ‘jointness’ was experienced as awkward by some of the judicial officers we interviewed, such frictions were mainly to do with the perceived lack of control by the officers in question, rather than the efficacy of the service being constructed in this way.

Table 7.1: Overview of distribution of authority between Executive and Judiciary in Australia’s courts

Government	Basic resources	Specific inputs	Processes	Outputs
	Judges and money	Staff and infrastructure	Court operations	Hearings and decisions
South Australia	Controlled by Executive	Control shared between Executive and judiciary	Control shared between Executive and judiciary	Controlled by judiciary or its managerial agents
Commonwealth	Controlled by Executive	Control shared between Executive and judiciary	Control shared between Executive and judiciary	Controlled by judiciary or its managerial agents
Victoria	Controlled by Executive	Control shared between Executive and judiciary	Control shared between Executive and judiciary	Controlled by judiciary or its managerial agents
Tasmania	Controlled by Executive	Control shared between Executive and judiciary	Control shared between Executive and judiciary	Controlled by judiciary or its managerial agents
Queensland	Controlled by Executive	Control shared between Executive and judiciary	Control shared between Executive and judiciary	Controlled by judiciary or its managerial agents
Western Australia	Controlled by Executive	Control shared between Executive and judiciary	Control shared between Executive and judiciary	Controlled by judiciary or its managerial agents
New South Wales	Controlled by Executive	Control shared between Executive and judiciary	Control shared between Executive and judiciary	Controlled by judiciary or its managerial agents

Key

-  Controlled by Executive
-  Control shared between Executive and judiciary
-  Controlled by judiciary or its managerial agents

In respect of who has administrative decision-making authority within the courts, we found a variety of patterns, from one where administrative authority was vested in the CJO, through various types of committee or delegation system, to full collegial models such as councils of judges. These variations seemed to be a function of the personalities involved, the given court's established traditions, and the size of the jurisdiction.

Problems of the traditional model

The clear picture which emerges from the foregoing study, especially Chapters 4 and 5, is that the traditional departmental model is problematic both for judicial independence on the one hand and for the efficiency and effectiveness of the courts on the other.

Judicial independence has the potential to be compromised by the lack of control that courts under the traditional model have over the money, staff and infrastructure they need to carry out their work. This is especially noticeable in respect of court finances. At its most basic, it means that decisions about the allocation of money are made by public servants whose priorities diverge from those of judicial officers. Judges consequently find that in some cases they cannot do some of the things they need to do in order to act consistently with the principles of justice, such as obtain a transcript quickly or go on circuit to deal urgently with a bail case.

Some of these situations could, of course, be seen as merely the unfortunate consequences of budgetary stringency – that is, that only so much was allocated for particular categories of expenditure and when these demands arose there was not enough money left. But this argument would sit oddly with the fact that the budgetary systems of all the governments in question are avowedly based on funding *outputs* rather than inputs or processes. Even more serious is the fact that even *after* budgets have been decided, with amounts allocated to particular expenditures, the public service departments on occasion alter these amounts during the course of the financial periods to which they were supposed to apply, and shift funds from one purpose to another. Judicial officers then find that they do not have the funds they thought they had for particular purposes, as the financial goalposts are moved during play.

Underpinning this lack of control over necessary resources has been the enlargement of the organisational distance between the courts and the budgetary decision-makers, largely as a result of the creation of 'mega-departments'. Court administrative units find themselves two or three layers down from the levels at which direct input to the key budget decision-makers is possible. Consequently, the judicial arm of government does not deal as an equal with the Executive arm over these crucial resource-allocation decisions, but rather with the latter's hierarchical subordinates.

The net result is that the courts lack an adequate say at two stages of the budgetary process. Firstly, they have no direct input at the point where government as a whole determines the budget for each of its agencies and programs. And secondly, they lack authority over the management of finances *within* programs once

they have been allocated, and indeed sometimes find out after the fact that monies have been reallocated without consultation.

Similar problems occur in respect of the more specific inputs that are paid for with these funds: court staff and infrastructure. We found firstly that in the traditional model, court staff are subject on occasion to divided loyalties, to varying degrees. In these situations, they are caught between the contending obligations they have to judicial officers and public service managers. We also found that judges perceive that they have insufficient influence over the work of court staff, and over aspects of the supply, configuration and deployment of infrastructure such as accommodation, IT or libraries. These problems add up to a situation which might be described in management theory terms as a less than perfect alignment between the courts' human and physical resources on the one hand and their operational needs on the other.

Taking all these issues into account, it seems difficult to argue that the traditional departmental model is optimal for judicial independence. The governance of the courts under this model has at least the potential to indirectly influence what should be purely judicial decisions – not by seeking to impinge upon or bias their content, but rather by having the effect of constraining or directing the flow of inputs which lead up to those decisions. The fact that judicial independence in practice does not appear to have actually been undermined, even if it may be a little frayed at the edges, is due among other things to the vigilance of judges themselves, as well as the ingrained values of (departmentally employed) court staff.

But just as significantly, the traditional model is clearly problematic in terms of the efficiency and effectiveness of the courts. It sets up a misalignment of authority and responsibility, in which those who have the core operational responsibility (judges) lack clear authority over the necessary resources to carry out that responsibility. What makes this particularly strange is that it seems to be at odds with the espoused management rhetoric of all of the governments in question. All of them subscribe to the principle that those responsible for programs should be accountable for the delivery of outputs or outcomes, and should be given the freedom to manage the necessary inputs and processes. But under the traditional model, courts have to deliver outputs with some limitations on that freedom. This is a problem not only for judicial independence but also for efficiency.

A 'new' approach

Starting from a conception of the court as a system, we have considered the major categories of decisions in court administration; and analysed the impact of alternative governance arrangements for each of them on the major values of justice; expedition and efficiency. We now draw these analyses together, to consider what overall governance arrangements most effectively safeguard justice while maximising expedition and efficiency. We conclude that the most suitable arrangements are ones in which:

1. The authority of the Executive is confined to providing basic resources, namely employing judges and providing a global budget for a specified set of outputs, while the judiciary has clear control over the remainder of the

functions of court administration: staff, infrastructure, operations and outputs. This has the effect both of ensuring that judicial independence, impartiality and the rule of law are upheld, while also contributing to efficiency by better aligning authority and responsibility and optimising interdependencies.

2. In the smaller States – South Australia, Western Australia and Tasmania – court staffing and infrastructure and some operations are controlled jointly by the courts. This already enables significant economies of scale to be achieved in South Australia, and would do so in the other two States. In the larger States – New South Wales, Victoria, and Queensland – similar benefits are achievable from joint control of staff and infrastructure by two of the three courts, namely the higher courts, and in the Commonwealth, by the Federal, Family and Federal Magistrates' Courts.
3. The CJO in larger courts has formal administrative authority, but chooses to wield that authority in a delegative and/or consultative manner, while in smaller courts a greater degree of collegiate responsibility is employed.

As the quotation marks in the sub-heading for this section suggest, this approach is not entirely new for Australia. Elements of it already exist in most jurisdictions in differing respects. The system which is closest to this proposed model, of course, is the South Australian system, which we shall consider in more detail here. But as mentioned in Chapter 2, there is also a useful overseas variant in the Canadian federal model, which will also be discussed below. (The Australian Federal model is also congruent with two of the conditions of our ideal arrangement – namely, control by the judiciary of court staff, infrastructure and operations, and CJO authority structured according to the size of the court – but it does not conform to our other condition, namely that court staffing and infrastructure are controlled jointly by the courts in the same governmental jurisdiction. Accordingly, we omit it from this discussion.)

The South Australian model

In South Australia the operations of the courts are undertaken as a co-operative joint venture among the courts of that State. Each court in South Australia has at least as much autonomy as a comparable court in any other State. The Chief Justice of the Supreme Court of South Australia is the Chief Justice only of the Supreme Court; and each court is responsible for its own internal administration.

Nevertheless, the *Courts Administration Act 1993* created the Courts Administration Authority whose chief executive is responsible to the Council (s 17). The relationship between the Authority and the Council is similar to the relationship between a company and its Board of Directors. The Council comprises the three chief judicial officers of the State; but the Chief Justice has a power of veto.

The creation of the Courts Administration Council created an institution that is, in effect, a joint venture among the various courts of that State. The Council is, in effect, the board of an incorporated joint venture. The Chief Justice is the chair of the Council and the Council cannot make a decision without the support of the Chief Justice. No person can be appointed Administrator unless nominated by the Council

(s 16(2)); and the Administrator is responsible to control and direction by the Council. In particular, the Administrator is responsible to the Council for (a) the control and management of the Council's staff; and (b) the management of property that is under the Council's care, control and management (s 17(2)). The property that is managed by the Council includes all courthouses and other real and personal property of the Crown set apart for the use of the participating courts (s 15(1)).

The Council formulates a budget that is submitted to the Attorney-General. Of course, the Attorney-General does not have to support the budget that has been proposed by the Council. But the *Courts Administration Act* 1993 provides (s 29) that the Chief Justice may appear before Parliament to present the budget of the Authority. The Council presents an Annual Report that is tabled in Parliament and is therefore another avenue by which the Chief Justice can argue to Parliament for appropriate funding for the courts.

The Canadian federal model

Canada is similar to Australia in important respects relevant to this discussion, including the facts that it has a federal system of government and that its judicial institutions are based on English origins. The governance arrangements recently adopted for its federal courts, however, are not found in any Australian jurisdiction. Nevertheless, some of their features are worth consideration for the Australian context.

Canada's federal courts include the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court and the Tax Court of Canada. Sitting above them is Canada's highest court, the Supreme Court. There are also courts of various jurisdictions in the provinces. In 2002 the federal government legislated to reform the governance structure for the federal courts. It established a Courts Administration Service, the proposed structure of which was designed to 'ensure that the Service is independent from the Executive while also ensuring improved accountability for the administration of the Courts.'¹²⁷ The Service came into being in July 2003.

The role of the Courts Administration Service is to provide administrative support to the courts. It is headed by a Chief Administrator (CA), who is appointed by the Governor in Council, at the level of a deputy minister (department head) and holds office 'at pleasure'. The CA is accountable to Parliament through an annual report and appears before parliamentary committees on court administration matters. The service is responsible for common management of facilities, registries and real property and for common corporate services such as finance, human resources, material, information technology and related management systems.

Each Chief Justice can also appoint a 'judicial administrator' from among the Service's employees, reflecting positions which existed prior to 2003. Specific functions listed in the Act (Clause 8) spell out those matters over which each Chief Justice has authority, handled by the judicial administrators. They are very similar to those listed in Chapter 2 under 'court operations', including functions such as

¹²⁷ Overview provided to Members of the Canadian House of Commons, 2002.

determining court sittings, assigning judges to sittings, assigning cases and other duties to judges, scheduling, determining work loads and preparing hearing lists. Most significantly, in what is described as being in order to ‘ensure a co-operative and co-ordinated administration that serves all Courts and clearly recognises the authority of the judiciary’¹²⁸, each Chief Justice has the specific statutory authority to issue written directions to the CA on any matter within the latter’s authority.

In summary, the Canadian federal model is one in which the judiciary does not have the same span of control over court administrative functions as in South Australia. Instead, beyond the functions we have identified as court operations, it only has that control to the extent that each Chief Justice claims it by issuing directives to the CA. At the same time, court administration is clearly independent of the Executive. The rationale for this model is that having the judiciary directly responsible for court administration (through the Chief Justice having direct authority over the Courts Administration Service) raises difficulties of accountability. It would mean that judicial officers, such as Chief Justices, would be accountable to Parliament for the funding and administration of the courts, which would be incompatible with the principle of judicial independence. To the extent that the Canadian model overcomes this problem, it addresses one of the potential difficulties of the South Australian model. At the same time, the Canadian model has potential difficulties of its own. The respective advantages and shortcomings of the two models are considered in the next section.

Issues with the court-controlled models

Both the South Australian and Canadian models have two fundamental advantages over alternative governance arrangements discussed in this study, especially the traditional model. Firstly, both are more likely to bolster judicial independence, in that court administration is not under the direction of the Executive. Once the court administration has received its budget, it can manage its resources and operations independently of politicians or State bureaucrats and therefore is less likely to be subject to unwarranted influence from those quarters. This is also an advantage of the models prevailing in Australia for the High Court, the Federal Court, the Family Court and the Federal Magistrates’ Court.

Secondly, the South Australian and Canadian federal models have the potential to enhance the efficiency and effectiveness of court administration, for two reasons. One is that they better align authority with responsibility. Those responsible for achieving the courts’ outputs – such as hearing and determining a certain number of cases – or for upholding certain values – such as ensuring that cases are conducted with full observance of the principles of judicial independence, impartiality and the rule of law – have authority over the necessary staff, infrastructure and operating functions for achieving them. This is also true of the Australian federal courts.

The other reason is that by being *jointly* responsible for the staff and infrastructure of several courts (which does not apply in the Australian federal courts), the court administration body in these models is better able to optimise economies of scale or scope. The two models vary somewhat in the extent to which

¹²⁸ *ibid.*

they do this. In South Australia, the Courts Administration Authority covers all of the relevant functions for all of the State's courts, whereas in Canada the Court Administration Service does not have a direct role in the judicial operations which are explicitly the responsibility of 'judicial administrators' under the Chief Justices. The Canadian model is also confined only to what we have termed the federal courts, and does not cover the Supreme Court.

That a joint court-controlled model has advantages was clear from views expressed during our interviews, in which we found widespread interest in and support for the South Australian model – more than for any other single set of arrangements. This backing was most prominent among the judicial officers, but it also attracted support from a number of court administrators, even some in Executive-controlled systems. Many of these comments would also apply to the Canadian arrangements, although that model was not discussed in the interviews.¹²⁹

However, there were also some potential objections or other issues raised, some of which would be relevant to the Canadian model as well. Moreover, the two models have respective advantages and disadvantages compared to each other, arising from the partial differences between them. The remainder of this section discusses the concerns relevant to both models, whereas the next section compares the two models.

Most of the issues raised relate to the fact that under this model, court administration would be controlled by the judiciary rather than the Executive. One is a concern, already discussed in Chapter 5, that it would be difficult to attract staff to a court authority, rather than to the public service proper, because a separate court authority would be seen as a career backwater. In fact, the 'jointness' aspect of our proposed approach offers a way of dealing with this problem, as discussed in Chapter 5. Joint administration of court personnel management will enable a larger pool of staff and therefore the creation of career paths and promotion prospects. As the former Chief Justice of SA, and presiding member of the Courts Administration Authority, has explained:

The senior officers of the department look upon themselves as court administrators and act accordingly. There is emphasis upon professional training as court administrators, both by way of in-house training and encouragement of the obtaining of relevant academic qualifications. Officers gain experience in the various courts and in various aspects of court administration and court administration is seen as capable of providing a rewarding career path. The result has been the development in court officers of an awareness of court administration as a specialised area of public administration and of a far more professional attitude to their work. In the past ten years, in consequence, we have witnessed in South Australia the development of a capable body of professional court administrators, including a number of promising young officers, who are dedicated to court administration as their professional calling.¹³⁰

¹²⁹ The Canadian federal model was not yet in existence at the time the authors conducted the interviews.

¹³⁰ King (1991), p. 12.

This study has not investigated the careers of courts administrators over time; but our casual observation during the course of this study suggests that South Australia has trained far more than its fair share of the senior administrators of the courts in Australia. It appears that South Australia has been successful in encouraging ambitious administrators to consider developing a career as specialist administrators of courts. These people seem to be in demand in other jurisdictions as court administrators, which suggests that specialisation of this kind is valuable. More generally, it should be possible to enable reciprocal transfer and promotion rights with the public service, as happens in a number of public sectors already.

Another issue was the role of the community in the court-controlled model. One CJO stated these concerns thus: 'In the SA model, to what extent does the community view find voice? Judges are not qualified to take care of service, to do what is in the public interest. It is not a matter of compromising justice but achieving proper public service.' This issue relates in particular to the quality of court services, as evidenced by factors such as the expedition of court proceedings. In fact, we found that the South Australian system was the site of some of the most innovative client service and community involvement measures in Australia. It has created separate full-time positions for community liaison, courts education and media relations, and instituted the capacity for electronic lodgment of documents, saving time and money for all parties. It has introduced regular community round tables, which are half day meetings involving judicial officers, court staff and community representatives to address particular issues. It has put in place an extensive range of changes to improve the administration of justice to indigenous Australians (CAA 2003). Its website contains a comprehensive range of useful information about topics ranging from where and when forthcoming hearings are to be held, through explanations of processes for defendants, jurors and witnesses, to payment of fines. More generally, we have argued in Chapter 5 that expedition of proceedings has the most potential to be fostered where decisions about HRM are court-controlled, since the enhancement of service quality is typically very dependent on staff behaviors, attitudes and capacities, which are crucially affected by human resource policies.

Another concern raised by more than a few judicial officers was that control by the judiciary is likely to mean, as one CJO put it, 'more administrative work for the Chief.' This is true, and reinforced as an issue by the fact that a CJO has a primary judicial responsibility. But implicit in our argument is that the role must inevitably include a significant responsibility for the administration of the courts. For the very reasons we have argued earlier in this study, it is vital that this role is performed by someone with substantial experience as a judge rather than a public servant. It also needs to be said that if the judiciary wants greater control over court administration – and that seemed to be the consistent message from our interviews – then it also has to accept some responsibility to accompany the greater authority it seeks.

Although it is a significant responsibility, this need not monopolise the CJO's time. Throughout Australia, according to responses given to us by CJOs in interviews, estimates of the proportion of time spent on administration ranged from 20 per cent in one Supreme Court to 60 per cent in one Magistrates' Court. Moreover, there are ways that the CJO can share this load. Some courts have a senior judge administrator to assist the CJO; whereas others have an Executive committee, as discussed in Chapter 6. Most importantly, a skilful CJO will establish

and maintain a working relationship with the chief court administrator that casts the former more in the role of the Chairman of the Board, and the latter in the role of the chief executive. The CJO doesn't have to *do* all of the management, but rather seek to be satisfied that the CEO is carrying out the role properly. The CJO's role should be a broad strategic one rather than one of micro-management. This has implications for the selection of CJOs.

In summary, there are significant advantages to the joint court-controlled model, while its perceived shortcomings are either misconstrued, or are issues which can be addressed or at least ameliorated.

The South Australian and Canadian models compared

However, the two models have respective disadvantages compared to each other, arising from the partial differences between them. Interestingly, each offers a solution to the other's disadvantages.

The major disadvantage of the South Australian model concerns the responsibility and accountability of the chief judicial officers for financial and management matters. One CJO raised the fact that court control could expose the court or its officers to commercial risk. Aggravating this concern is the potentially unpalatable prospect of judicial officers being involved as parties to proceedings that might arise as a result of commercial issues. As we had pointed out to us frequently, precisely this kind of issue arose in respect of an information system for the SA Courts Administration Authority under a previous Chief Justice, concerning a disagreement between the courts and an IT contractor. But the matter did not reach court. There is also a potential accountability problem in having the judicial officers acting in an analogous capacity to public service Executives in making budget bids, with the Chief Justice appearing before parliamentary committees about the budget. Although the South Australian CJOs have not encountered problems with this process, it was raised as a concern by some judges in other States.

Of course, it is incumbent on court administrators to address the risk issues by the adoption of appropriate risk management strategies. It is also important that the judiciary takes care to employ the most capable court administrators and listen to their advice. However, these are not foolproof answers to these problems. A more promising solution is offered by the Canadian model, which vests this responsibility by statute not in judicial officers but in the Chief Administrator of the Courts Administration Service, who presents an annual report to Parliament, appears before it on budgetary and other management matters, and is responsible for the financial and other management roles. At the same time, the Courts Administration Service is independent and at arm's length from the Executive, and subject to direction by the chief judicial officers.

The major possible disadvantage of the Canadian federal model is the potential for the Chief Administrator to be subject to conflicting demands from the CJOs of the different courts it serves. If each CJO can issue written directions which are binding on the CA, the latter may find himself or herself caught between contending requirements. In the Australian context, for instance, the District Court Chief Judge and the Chief Magistrate might both direct the CA to give their respective courts

priority in the scheduling of sittings at regional courthouses. If the number of hearing rooms in some regional locations was insufficient to accede to these directions simultaneously, the CA might find it difficult to comply with both.

Here it is the South Australian model which offers a way of avoiding this difficulty; the fact that the Courts Administration Authority (CAA) is governed by a Council comprising the three CJOs of the State. This ensures that the chief executive of the CAA is not subject to conflicting demands from CJOs, but instead receives a single authoritative direction determined between the CJOs.

However, the voting arrangements under which these Council determinations are made raised concerns for some of our interviewees. They pointed to the fact that in the South Australian model, the Chief Justice of the Supreme Court has a veto over the Council's decisions. It was raised that in such a system, court administration may be dominated by the highest court in the jurisdiction at the expense of the lower courts, despite the lower courts hearing the overwhelming majority of cases. This view came from outside South Australia, and reflected local relationships among courts; in one State, it was noted that 'the higher courts treat the Magistrates' Court with disdain'. One solution, of course, would be to institute more equal voting rights. However, one higher court CJO expressed a concern that the prerogatives of his jurisdiction might in some way be subject to constraints from lower courts through such an arrangement. Interestingly, in South Australia, it was generally agreed – by the three CJOs involved as well as others – that there were good relationships between the Chief Magistrate and the other courts. This issue does point up the importance of the participating courts adopting a workable set of protocols. It also points to the importance of CJOs having collaborative capabilities – also relevant to selection processes.

It seems therefore, that the potential difficulties in allocating authority between the judiciary and the Executive can be addressed by a structure similar to the Canadian model. It also seems possible to address the relationship between the judiciary as a collective entity and its chief administrator, through something like the South Australian model. We therefore advocate a model which combines the best features of both – namely, a vesting of accountability for court administration in a chief administrator who is overseen by an entity, in which each of the courts is represented by its CJO, which issues collectively determined directives to the CA.

We leave open the knottiest problem, which is that of finding a mechanism for allocating authority among the respective courts in a joint model. There is no all-purpose solution to this problem. The relative weight of each court in a joint decision-making process for judicial administration will need to be shaped specifically to suit the needs and culture of each governmental jurisdiction. To a large degree also, this issue will depend on the level of inter-personal co-operation among the CJOs, which is a function of the personalities and collaborative capacities. The experience of the South Australian model indicates that such collaboration is possible.

The importance of people

It could be inferred from our analysis that the existing systems which are more or less controlled by the Executive are performing unsatisfactorily. This would not be a valid inference. Our interviews and other evidence made it clear to us that court administration across the jurisdictions, however governed, reaches a standard which the community regards as acceptable, often in the face of difficult constraints. But we also heard that these systems are not without their problems, and that in particular they cause frustration for those who have to work in and with them. One senior judge in one of the States where the traditional model is in place summed it up thus: 'In my [many] years of experience of it, it has caused duplication, uncertainty, tension, conflict, and unnecessary work and cost.' In addition, two other points need to be made.

Firstly, even if the current arrangements seem to 'work', in the sense that they have not given rise to major catastrophes or dysfunctions, there is no reason why they could not be made to work even better. Good people can make bad structures work. But good people can work even better within good structures. It would be valuable to the community, for instance, if more or better-quality justice could be dispensed at the same cost to taxpayers, or if the currently high quality of justice could be maintained at less cost. If governance arrangements can contribute to these aims, then it is worth considering how they might be improved.

The second point is that if court administration seems to work acceptably regardless of governance structures, then some other factors must also contribute to their performance. We identified two which seemed crucial. One was the court chief administrators. Regardless of the pattern of governance, court CEOs occupy a special position at the interface between the judicial and administrative roles. Whether they sit in a court-controlled, PS-controlled or shared-authority system, their jobs inevitably involve reconciling or mediating between the imperatives of the two spheres. The reason is the interdependence between the judicial and the administrative functions, referred to above. In court-controlled systems, this usually takes the form of advocating on behalf of the courts to the Executive. In PS-controlled systems, it typically means communicating with or persuading the judiciary on behalf of the Executive, and sometimes being the bearer of bad budgetary news. In shared-authority systems, it can entail elements of both. This can at times be an uncomfortable position for the CEOs.

We interviewed every court CEO in Australia and observed that most of them were people who were particularly suited to the challenging roles they perform. In the main, they demonstrated certain abilities and personal qualities that enabled them to play a partnership or mediating role with or between the judiciary and the Executive. Specifically, they displayed manifest 'people skills', were good at collaborative problem-solving, had keen 'political' noses, and/or seemed to be capable negotiators. This was observable to such an extent that we sought insights in our interviews as to why it was the case. In part it seemed to be because those who appointed CEOs tended to look for those qualities, and in part because any who lacked those characteristics tended to find it difficult to survive in the post. (We heard of a couple of examples of past incumbents who had 'deselected' themselves by exhibiting difficulty in engaging in the requisite collaboration.)

The other non-structural factor was the set of systems, routines and understandings that each jurisdiction had developed for handling the frictions and unpredictable circumstances arising in the course of day-to-day work. For example, appointments of CEOs and other senior court staff might be under the formal authority of the department alone, but it would be standard practice to involve the CJO or other judicial officers in the selection process. The judges in another instance might have formal authority to assign duties to court staff, but in the normal run of events would leave it to departmental court CEOs to manage this. These informal processes rely to a large degree on mutual adjustment among the respective parties. They are enabled by the abovementioned capacities of CEOs to act as intermediaries and facilitators of relationships between the judiciary and the Executive.

It is our hope that better governance arrangements can capitalise on these non-structural factors, lending structural underpinning to the good people and systems which enable our courts to function.

Conclusion

The governance of the courts is a crucial contributor to the quality of justice in our society, and by extension to the health of democracy. In the past, this is an issue which has been seen by many in terms of a zero-sum conflict between justice on the one hand and efficiency on the other. We have tried to show that not only are the values at stake more complex, but also the possible solutions include the option of enhancing the latter without detracting from the former. This can be achieved by adopting some insights from a field which has traditionally been regarded with some suspicion by people in legal and judicial circles: the field of management. Adopting from this field the principles of aligning authority with responsibility, optimising interdependencies and maximising economies of scale, we have made a case for arranging the governance of the courts so that:

1. The authority of the Executive is confined to employing judges and providing a global budget for a specified set of outputs, while the judiciary has clear control over the remainder of the functions of court administration: staff, infrastructure, operations and outputs.
2. Court staffing and infrastructure and some operations are controlled jointly by all of the courts in the smaller jurisdictions, and by some of the courts in the very larger jurisdictions.
3. The CJO in larger courts has formal administrative authority, but chooses to wield that authority in a delegative and/or consultative manner, while in smaller courts a greater degree of collegiate responsibility is employed.

This model offers the prospect of Australia's courts continuing to be outstanding guardians of justice, whilst being more effective and efficient.