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ASPECTS OF JUDICIAL PROFESSIONALISM IN THE AUSTRALIAN FAMILY LAW CONTEXT

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1. A Broad Introduction to Australian Family Law

Divorce law tends to be contentious in Australia. The Australian federal parliament did not enact laws relating to marriage and divorce until 1959, nearly sixty years after Australia's creation. Despite the fact that it had the constitutional power to do so it seems to have been thought politically wise to leave such a thorny issue with the States, as the original colonies became when the nation was born in 1901. English law migrated to the colonies following European settlement in 1788. Divorce had its origins in Ecclesiastical law but was secularised during the nineteenth century in both Australia and England.

The *Matrimonial Causes Act 1959* broadened existing relief but continued a largely fault based system of divorce with adultery and desertion being the most popular grounds for petitioners. This Act provided for marriage guidance to resolve, if possible, marital differences. It required the court to look at the possibility of reconciliation between the parties and there was to be no final decree unless proper arrangements had been made for the maintenance of dependent children. Jurisdiction resided in the state Supreme Courts. My fading memory of those days is that in a typical case wives received about one third of the assets held by the husband. Matrimonial behaviour was a real factor in custody cases.

There were numerous calls for divorce law reform in the 1960s and 1970s as the power of organised religion declined and lifestyles changed. This resulted in the *Family Law Act 1975*. As amended it is the current law. The Act fully embraced "no fault divorce" with the single ground of "irretrievable breakdown of marriage" established by twelve months separation. A spouse is liable to support the other spouse to the extent that the former has the capacity to do so and the latter needs to be supported. Both spouses are liable to maintain their children according to their respective financial capacities. The factors for consideration in children's cases and property matters were enumerated in the statute. Presently the law is now quite similar for married and unmarried couples.

Over the last twenty five years divorce itself has become a relatively routine procedural exercise carried out with dignity by a junior judicial officer. Where no children are involved the parties need not attend court.

Spousal maintenance has become enmeshed with matrimonial property proceedings and usually does not survive the final property settlement in the case of a healthy middle aged couple. Child maintenance is now assessed according to a statutory formula and paid through the Australian Taxation Office. Earnings and the number of children to be supported are part of the formula.

Pursuant to the Australian Constitution the 1975 Act created the Family Court of Australia, a specialist federal superior court for the determination of family cases. It has an "in house" capacity to counsel parties concerning children's issues and financial matters, all designed to promote amicable resolution of differences as early as practicable. The history of the Court has been a mixture of tragedy, controversy and achievement. Until the arrival in 2000 of a Federal Magistrates Court, which has a fairly broad federal jurisdiction in less complex matters, the Family Court had a virtual monopoly throughout the Commonwealth, except in Western Australia where a state court administers the Family Law Act at first instance. The Magistrates can now deal with children's matters and property to the value of $700,000.

The most commonly contested proceedings concern children, their residence (custody) and contact (access); and disputes relating to the division of a couple's property upon separation. In most cases parties are represented by lawyers. This may be a "general practitioner" but is often an "accredited specialist" in family law. In the larger cases specialist advocates (barristers) are briefed. The use of specialists may occur more often as the Family Court is notorious for frequently changing its procedural rules.

- Children

While some children's cases can be factually complex, with issues of proof involving serious psychiatric problems, the substantive law provides no real surprises for those familiar with the present stage of Australia's social development. There are currently areas of widespread public debate. These include the wide discretion left with the courts, judicial method and whether or not a presumption of shared residence (custody) should be the starting point for deliberations. It is accepted that decisions concerning a child's long term welfare eg

education, religion and issues relating to such things as elective surgery, usually remain a joint responsibility of parents.

The Family Law Act, in Part VII, provides that in the consideration of matters relating to residence, contact and other parenting issues the best interests of the child is the paramount consideration (Section 65E). In determining what is in the best interests of a child the Court is obliged to consider various matters set out in Section 68F of the Act. Briefly put these include the child's wishes, relationships, the effect of changes in circumstances, practical difficulties, the capacity of each parent to provide for the emotional and intellectual needs of the child, background, protection from harm, parental attitudes, family violence and other relevant circumstances.

The object of Part VII is stated in the Act to be: to ensure that children receive adequate and proper parenting to help them to achieve their full potential and to ensure that parents fulfil their duties and meet their responsibilities concerning the care, welfare and development of their children. One of the principles underlying the objects is children's right of contact on a regular basis with the non-residential parent except where this would be contrary to a child's best interests. (A typical contact order is mentioned on the next page in the property case example.)

The Court usually has the advantage of a "Family Report" prepared by a social scientist who will have seen the child and the relevant people (most likely the father and mother). The expert will be well placed to provide objective evidence on wishes, relationships and parental capacity. He or she may be cross examined by or on behalf of the parties.

- Property

In considering the competing property applications of a couple the court looks at Part VIII of the Act. It is first necessary to establish what the property is before considering whether or not it is just and equitable to make any, and if so, what alteration to the parties' holdings in the property. (It does not matter which party "owns" or controls through, say, a company, the particular items of "matrimonial property")

In broad terms, in considering these matters the Court is obliged to take into account the financial contributions made directly or indirectly by each party to the acquisition,

conservation or improvement of the property, and the contributions made by each of them to the welfare of the family, including contributions in the capacity of homemaker. Having looked at these contribution factors, the Court should then go on to consider the matters referred to in Section 75(2) of the Act, once called by some "needs" factors (these include the parties' ages, health, earning capacity, responsibility for others – including residence or custody of the parties' child or children.)

By way of example the court may find, after hearing evidence of valuations etc, that the parties have assets of $1.5m and liabilities of $500,000 resulting in net property of $1,000,000. The court would then move on to the second stage of the exercise to determine "contribution" factors.

Here giving full weight to the wife's homemaking in the particular case the court may determine that, overall the parties' contributions are equal. (There is no presumption in favour of equality.)

The third stage of the process is the consideration of the Section 75(2) factors. The court may find, with both parties in middle age and good health, that the husband has a greater earning capacity than the wife who has primary responsibility for the care of the children as they live with her. (The husband seeing them for half the school holidays; but during term from Friday afternoon until Sunday night once a fortnight and for the evening each second Wednesday.) The Court may then find it "just and equitable" to move from the 50:50 situation to 70:30 in the wife's favour by reason of the Section 75(2) factors. This means he receives $300,000 and she $700,000 of the net $1,000,000.

2. Aspects of Judicial Professionalism

The Australian Constitution provides in Chapter III for the Judicial branch of government, the so-called "continuing" branch. The Judiciary is separate from the other branches of government, the Legislature (Chapter I) and the Executive (Chapter II). Umpires are neutral. The traditional training for an Australian judge is formal legal education followed by some twenty years practise in the courts, which it is believed provides experience of both law and life, together with the opportunity to observe all kinds of decision makers at work.

In the context of Australian family law I desire to make some observations on three diverse aspects of judicial professionalism currently relevant.

The first, Method, records my views upon the role of judges, an issue which some believe is at the historical crossroads in Australia. Do we want the next generation of law students to be inculcated with the view that judges should be "philosopher kings" correcting unfocused legislators and "finding" law to justify their "opinions" in all sorts of places (a treaty here, or an American state court there) or is parliamentary democracy, with all its faults, to be the preferred path?

The second, Mode, mentions three ways in which jurisdiction may be modified to gain advantages for those who face The expense and pain of family litigation.

Finally, Court Function and Governance involves a look at some proposed pruning and maintenance for the better operation of that small mansion, the independent court.

- Method

I retain the views on this topic expressed by me in B v B (unreported 3 April 2002):

"10. It is not for me to give litigants law based on my personal views of what the law should be (and I can make it be). Nor should an Appeal Court stand between the trial judge and the clear words of the Act which is the primary source of law.

11. The duty of the Court is to attempt to discover the real intention of Parliament and to apply its law to the facts the Court finds in the particular case before it.

18. It is not for the Court to experiment with emerging ideas espoused by exciting thinkers which may or may not stand the test of time. The function of the Court is not to lead society upon new adventures for its own good but to apply values which have broad acceptance.

19. The people, through their elected representatives, in the form of legislation, inform us of their changing desires which we must then apply to all.

20. *In considering the common law (judge made law where parliament has not dealt with the topic), or when looking at old statutes which have not claimed parliament's attention for a long time, or in law concerned with the Constitution, principles are also available to assist the individual judge although there is a greater need for judicial leadership in the law's development (or modernisation) than is desirable in those areas where parliament has entered the field and maintains a continuing interest in its creation.*

21. *The individual judge is not an island but part of a legal continent. Each is part of a continuance. The way the law is developed in those areas where parliament's presence is not apparent is through a pragmatic working from experience of particular cases using a process of analogy and extension within the spirit of the prevailing law.*

22. *The judge's pressure should not tear the existing fabric, gently restoring or updating perhaps, but not undertaking groundbreaking work of a nature the democratic process leaves to the parliament or, in the case of the Constitution, to the people directly.*

24. *Those who want more activity seem to welcome an adoption by the umpire of their own philosophy but call foul ... when an opposing idea is introduced as law. "*

- Mode

It is, of course, only a rare case that reaches a judge. In the Family Jurisdiction, it is said that in about 50% of marriage breakdowns the couple approach the court for relief. Of those who come to court some 95% are able to compromise their differences. This percentage is, interestingly, very close to that found in other areas of litigation in Australia and elsewhere. There remains a small hard core of cases to be arbitrated. Debate continues concerning the respective merits of the inquisitorial system and the adversarial model.

The inquisitorial system requires a series of hearings in respect of each significant case as further argument and evidence is added to the dossier as the judges determine which line of inquiry should be followed. The adversarial system involves a fixed hearing at which each party has the responsibility of presenting their case. This is our normal method.

In the inquisitorial system the judge is active and voluble. The judge is an inquirer and a pursuer determined to find out by his or her own efforts the circumstances of the case. Traditionally the lawyers only reluctantly intruded.

The "perils of self persuasion" are obvious when an arbitrator combines the role of investigator and judge. The zeal of a group of inquisitors may cause anxiety concerning the prospect of calm and just deliberation. There is ever the risk that the court will gain an early view and thereafter seek evidence in support of it. Proving one's own theory is a pleasurable but dangerous human indulgence - particularly for scientists and judges. (A judge is in the more vulnerable position as the case must be decided now on the evidence available, whereas a scientist can defer a decision for a decade or decide not to decide.)

There has been a common law tradition that judges "shut up and listen", not allow their eyes to be blinded by the dust of conflict and remember that "an open mouth often demonstrates a closed mind." Allowing a case to unfold reduces the risk of a judge "jumping" to a conclusion - a classic judicial sin.

It is said that on the Continent of Europe, the western home of the inquisitorial system, a lawyer in pursuit of a client's interests is now more inclined to question witnesses as this is what the now better educated client expects. The adviser understands the client's ambitions and knows what material should be obtained from the witness if the case is to be advanced. For more reasons than hinted at above there would be cultural difficulties in generally transplanting an inquisitorial system into the Australian judicial system and body politic. A "day in court" contemplates a capacity to put one's case.

A change would have serious public sector resource implications. In Germany approximately 20% of lawyers are salaried judges. At least three sit to hear a case at trial at all but the very lowest level. In Australia 0.1% of the federal budget is spent on the courts.

Nonetheless, clearly much can be gained from a cross fertilisation of ideas and it is profitable to consider various features of the inquisitorial system which might be of assistance in our proceedings.

Generally it appears that their attraction lies in the area of smaller cases. Here a trade off between what has been described as our "Rolls Royce" system of justice and the need for an economy of effort may be advantageous.

In cases where the matter is of such a nature that it seems unnecessary for a lawyer to be engaged, a judicial officer, probably at the registrar or magistrate level, could lead litigants through their case in order to allow a just determination to be made. In family law smaller cases are likely to include dissolutions of marriage, alterations to contact arrangements, small property cases and enforcement measures.

The ongoing debate concerning adversarial and inquisitorial judicial methods is often sterile as the two systems are now tending to merge. Litigants do want their advocate to put their case rather than permitting the judge to pursue a narrow agenda to the detriment of the litigant's interests. Judges do question witnesses on apparently relevant matters which are not pursued by counsel. The value of strong judicial trial management is broadly accepted.

It appears to me the adversarial system operates to the general satisfaction of interested parties when people are properly represented. It works particularly well in heavy cases. Each party is able to properly prepare and then put the often complex case they want to place before the court rather than merely respond to the issues the adjudicator raises. He or she having been well informed can then pursue such further lines of inquiry as justice appears to require.

An inquisitorial approach operates to the general satisfaction of interested parties in small cases when people are not represented and the preparation load is not unwieldy. Here the court encourages the litigants to concisely tell their story and then probes them on relevant issues.

The representative for the children, for which Australian procedure provides in children's cases, often undertakes a role akin to "counsel assisting" the court. Such an arrangement, which is an intermediate measure, while not inhibiting the parties from having their "say" ensures the presentation of the basic matters necessary for an appropriate determination in the best interests of the children. The representative, who can come from the public or the private sector may introduce further witnesses and provide, or encourage parents to provide, relevant material e.g. school and medical reports.

A related issue is jurisdictional level. General experience in Australia and elsewhere suggests that the more junior the jurisdiction the more promptly and economically cases are determined. Accordingly justice suggests that cases should be determined at the lowest appropriate level. Until the creation of the Federal Magistrates Court and the extension of its jurisdiction, residence cases (custody) were only capable of being determined in the Family Court. There such cases take three or four days. Before a magistrate, and in most places where the work is dealt with in lower courts, a day or two is a more likely hearing time for a residence case. This appears to flow largely from client and professional expectations. Certainly appropriate brevity reduces financial and emotional pain for litigants (the customers the courts are there to serve).

Further, a high volume of cases is unsatisfactory in the operation of a higher trial court. It, among other things, stands in the way of judicial management of individual cases in the preparatory phase, a necessary activity for more complex cases.

Finally professional specialisation. The expertise derived from specialisation is easily recognised but overspecialisation results in staleness, a narrowing of horizons and a failure to take advantage of the cross-fertilisation a knowledge of other jurisdictions permits. This suggests that there are advantages in judges spending say sixty to seventy per cent of their time in a specialist jurisdiction but ranging into other areas for the remaining time. Litigants may be expected to reap the benefit of a lawyer's broader association with the legal world whether those lawyers be on the Bench or at the Bar table.

- Court Function and Governance

The governance of courts poses problems. This is complicated if a court is invested with functions going substantially beyond the true function of a court, which is to hear and determine cases, according to law, without fear or favour – nothing more and nothing less.

It is accepted that courts need to undertake some limited non judicial tasks closely associated with their judicial function (their constitutional function). However a court's capacity to undertake its primary role may be "swamped" if a high proportion of its work is non judicial. Certainly so far as significant non judicial work is concerned there is not the necessary requirement for independence, quite to the contrary, normally one would expect such work to be undertaken by entities responsible to the executive government.

While the creating statutes for the three operating superior federal courts – the High Court, the Federal Court and the Family Court - each say that the court consists of the judges; each operates a distinctly different form of court governance.

The Hon. R.E. McGarvie AC showed that, at Common Law the responsibility for the administration of a court is vested in the judges collectively who may exercise their power by the decision of a majority.

In the United States of America, Professor T.W. Church Jr says:
"Governance of the federal courts of appeals is vested in the judges themselves, led by "the first among equals ", the chief judge."

In the Australian states the Supreme Court of Victoria, for example, employs a collegiate system of administration with the judges forming a Council of Judges to govern the court. In the nature of things much is left to the Chief Justice who chairs an executive committee of judges, to deal with day-to-day matters. This is a delegation from the whole body of judges who retain control. The judges are the court. The imposition and acceptance of shared responsibility provides a broad range of talent for the governance of the court. It makes all judges responsible for the court's operations. It aids accountability.

In management jargon the statutory arrangements for the High Court involves co-operative co-management, in the Federal and Family Courts there is a consultative process, although in fact the Family Court tends more toward the instructive model than a truly consultative regime.

The High Court Act provides that the Court consists of the judges and the Court shall administer its affairs. The Court may appoint committees to advise it. This is a classic collegiate model which places administration in harmony with the Court's approach to its primary decision-making function: each judge has one vote.

While the Federal Court Act and the Family Court Act are in similar terms, the actual governance practice of the courts diverge. This is clearly illustrated in their respective management structure diagrams published in their Annual Reports.

The legislation in each case provides that the court consists of the judges with the Chief Justice responsible for the discharge of business subject to appropriate consultation with the judges. It also makes the Chief Justice responsible for the "administrative affairs" of the court.

The Federal Court in fact works largely in the shadow of the collegiate model with judges' meetings twice a year giving in-depth consideration to the courts affairs. There are judges' standing committees which assist in the administration of the Court. They are concerned with topics such as Finance, Audit and Information Technology. Each committee is supported by staff of the Court and reports to the judges.

The Federal Court judges are all informed about, and actively involved in, administrative issues. (The Federal Magistrates Court follows a similar approach.)

While the Chief Justice in the Family Court has created an invited "Chief Justice's Consultative Committee", holds meetings and requests assistance from particular judges and court employees, the administration is in fact personalised in him.

The difference in the administration of the two courts does not appear to be a function of geographical coverage or the number of judges in the Court. The Federal Court and the Family Court have approximately the same number of judges who are spread throughout the Commonwealth of Australia.

The real difference in governance of the two courts may flow from tradition and personalities, or the nature and functions of the institutions may be the catalyst.

The significant secondary role undertaken by the Family Court, a big business largely conducted by social scientists and communicators, poses a significant distraction from the judicial function. These "client services" could be carried out in the public sector or the private sector by skilled managers under the supervision of government. Judges are not appointed, trained or suited for the management of activities of this nature. It is not their trade and distracts them from the work which is their responsibility. This is the hearing and determining of cases and the proper organisation of that activity.

Embedded in the Court, services are shielded from government control and political accountability by the concept of judicial independence necessary for the Court proper but not for ancillary services.

None of this is to suggest that it is not wholly appropriate to require clients to access adequate conciliation opportunities before they are permitted to go down the litigation pathway (except in cases of real emergency).

The controversy which dogs the Family Court probably flows, at least in part, from a perception that it is the centre of all family issues, a contentious area in a rapidly changing society. This perception is enhanced by its name, its specialist jurisdiction, its breadth of non-judicial family services and its willingness to engage in vigorous public debate ("education").

With the Magistrates Court on stream, judges with specialist family law skills could exercise the judicial power of the Commonwealth within a court of more general jurisdiction. They would there be concerned with family appeal cases, the more difficult portion of the two to three percent of family breakdowns which require determination together with other judicial work.

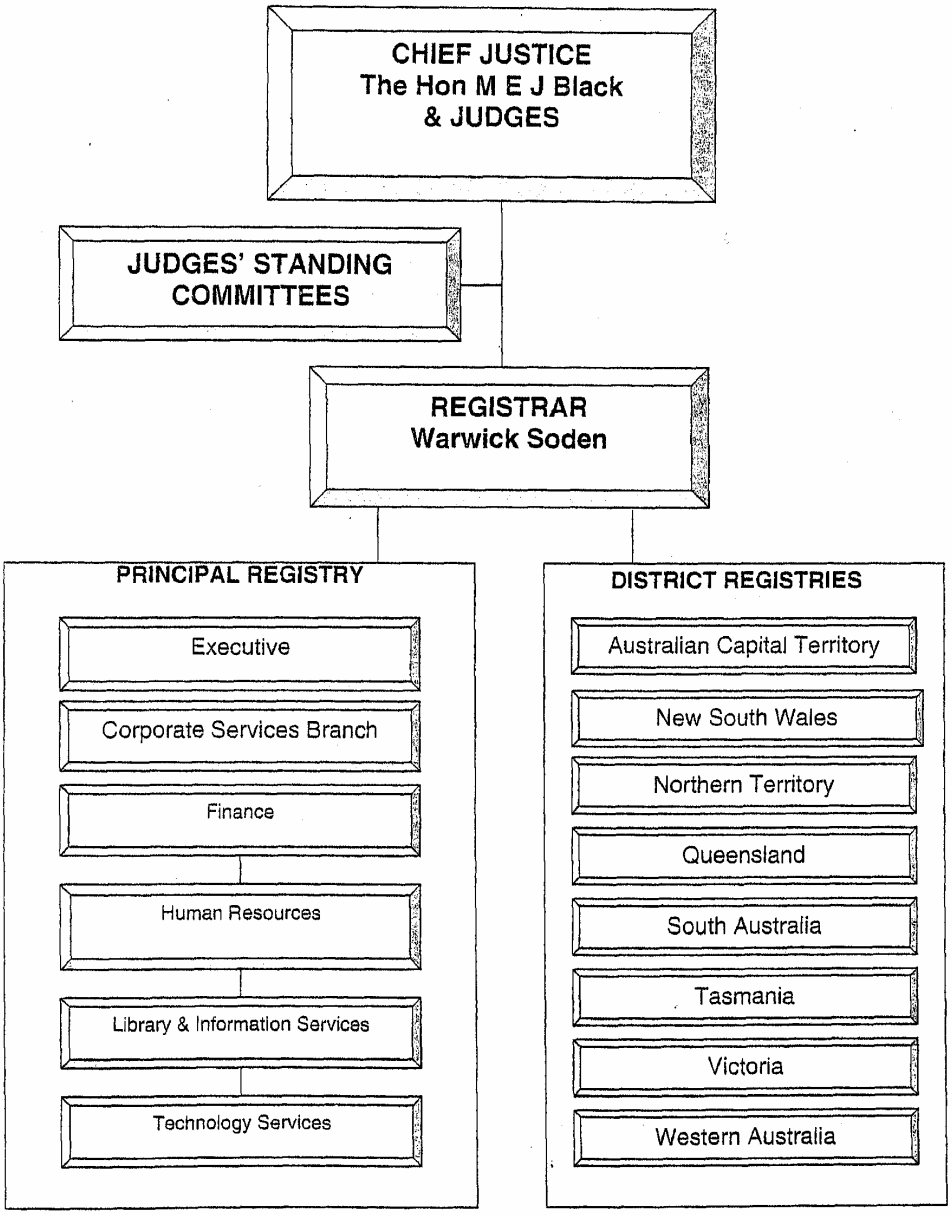
How should courts govern themselves? If a court is composed of the judges, it seems appropriate for each individual judge to join in the responsibility of operating it. The Australian Constitution by protecting individual judicial tenure and providing for individual accountability (before both Houses of Parliament if necessary) seems to contemplate this approach.

In larger federal superior courts both size and geography suggest that an executive committee of judges, combining seniority and elected representatives (together with specialist committees), should carry responsibility between say, twice yearly judges' meetings.

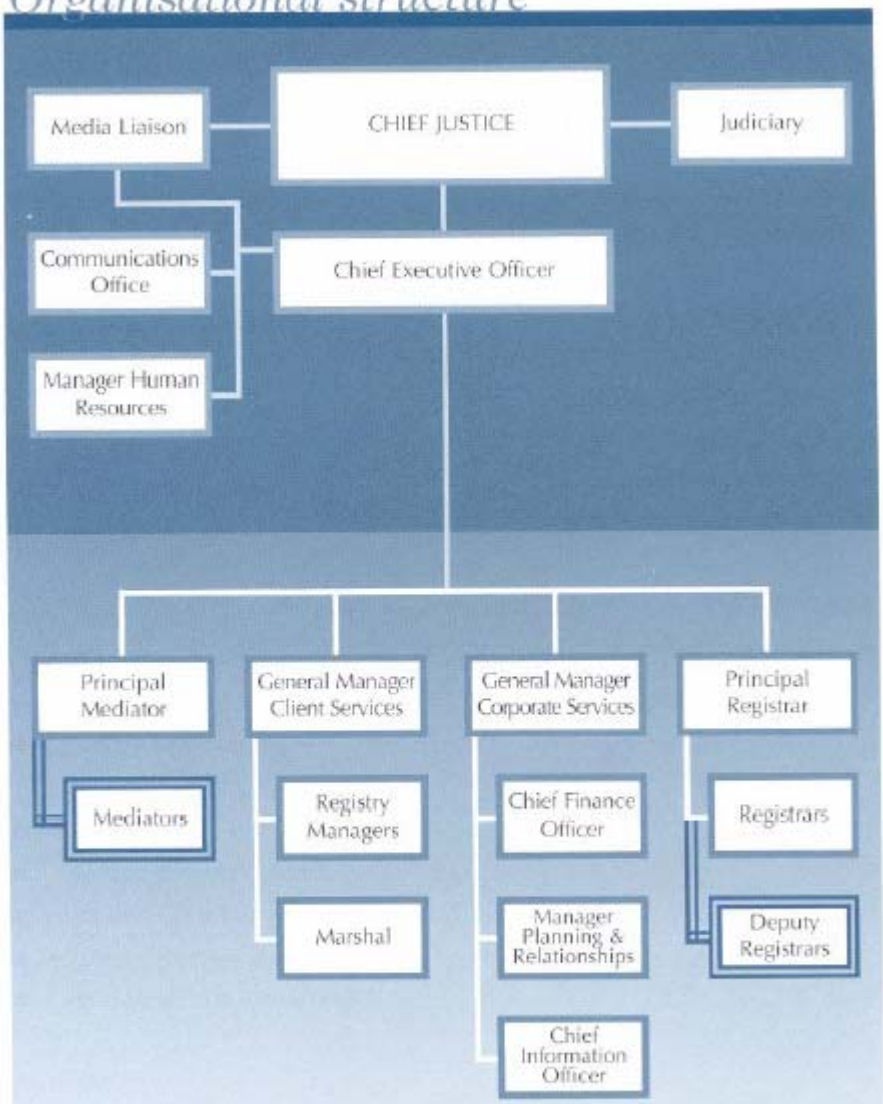
It is accepted that the other two branches of government, except by lawmaking and through financial control, must largely leave courts to self governance. A system similar to a corporation sole (or the papal model) appears out of tune with modern requirements for institutional accountability.

APPENDIX 2

MANAGEMENT STRUCTURE



Organisational structure



DENOTES PROFESSIONAL RESPONSIBILITY

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