The Aspiration of Excellence*

The Hon. Marilyn Warren AC
Chief Justice of Victoria

Judiciary of the Future –
International Conference on Court Excellence,
Singapore
28-29 January 2016

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* This paper includes unpublished material previously presented to the Conference of Chief Justices, Chief Judges and Associates, Ottawa, Canada, 30 March 2015. Sources, references and data are available from the author.

Introduction

My discussion will be wide ranging, covering broadly the themes of this excellent conference.

At the outset I warmly congratulate the State Courts of Singapore for the vision and energy to provide this international event devoted to *court excellence.* The fact of the convening of this conference is demonstrative of fine and inspiring leadership by the State Courts.

In summary I will cover the accountability of courts and why it is necessary; approaches to measuring courts' performance and the Australian experience; a personal experience of the *International Framework for Court Excellence;* a consideration of excellence and why it matters; courts' transition from "good" to "great"; court procedural reform as a demonstration of excellence and its link to performance; and the connection with judicial education. Finally I will discuss a topic not on the conference agenda but one which I regard as integral to court excellence, namely judicial wellbeing.

In order to appreciate the relevance and importance of measuring court performance it is first necessary to consider the context: what courts do.

The Context — The Role of the Courts

The courts serve the community. However, they do not serve the community in the same way as members of Parliament or public administrators. Courts serve the community by applying the rule of law. They do not do this in a way that is politically expedient or subject to the policies of the government of the day. Instead, our democratic system rests on the premise that justice is served by the impartial application of

the law by the courts, rather than the subjective imposition of the best outcome.

In order to uphold the rule of law, courts cannot have regard to notions of public opinion and they cannot fear or favour governments, for to do so would compromise their impartiality.

Alexander Hamilton cautioned in the *Federalist Papers* that in practice the judiciary is the weakest of the three branches of government because it controls neither the sword nor the purse. Yet, through the application of the rule of law, the courts have the power and authority to overrule or strike down the laws made by the Parliament, and to direct or restrain actions by Ministers of the government of the day and the public administrators serving that government.

One of the roles of courts in a democracy is to stand between the citizen and the state. Necessarily, their decisions may have unpopular consequences, and they may be embarrassing or inconvenient to government.

Sometimes it is forgotten in the running commentaries about our political structures and society that the courts play an important part in maintaining peace and harmony within our society. The criminal justice system developed as a means of replacing individual retribution with state-imposed punishment for those found guilty through due process of law. The civil law, too, contributes to the functioning of civil society. Professor Hazel Genn in the 2008 Hamlyn Lectures spoke about the role of civil justice as a public good. She said:

> … my starting point is that the machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights.

There is a collective benefit in the rule of law. It facilitates peaceful dispute resolution between citizens, thereby avoiding citizens resorting to confrontation and violence. It supports the tranquillity of the state through ensuring social order, cohesion and, significantly, restraint on the Executive. As Professor Genn also pointed out, civil justice re-enforces the civic values and norms of our society.

Of the civil cases litigated in the courts, less than five percent ultimately go before a judge. While the ritual and costume of court proceedings sometimes create an image of courts as old-fashioned, the modern judiciary plays a critical role in the efficient management of cases and the promotion of alternative dispute resolution between parties, frequently culminating in the settlement of cases to the greater social good. However, it is the courts that enable parties to enforce their rights and the existence of that option brings reluctant parties to the negotiating table.

Of course, in performing their function, courts require considerable public expenditure. It is appropriate and necessary that they account for that investment by the public and thereby instil confidence in their function.

The Accountability of the Courts

For many judges, especially those on common law courts, the prospect of performance reporting and assessment is at best a curiosity, and at worst an anathema. In the common law world, many judges are

recruited from the bars. They were previously self-employed barristers or attorneys oblivious to KPIs, trend analysis, through-puts, clearance rates and backlogs. For judges, their primary function is to hear and determine cases, providing reasons for their decisions. Individual brains function differently; some judges are quick and some are slow.

Against this background, bringing courts to a point of understanding the need and also the value of performance measurement has been a long journey.

In 2005, the US National Centre for State Courts provided the *CourTools* performance measures. These had been preceded by the watershed *Trial Court Performance Standards* in 1997. The Centre noted:

> Modern courts are busy places. A vast array of different case types in all stages of the legal process simultaneously compete for the time and attention of judges and staff.
>
> Satisfying the expectations of court customers who vary in their roles and goals is a daunting challenge for court leaders …
>
> With performance indicators in place, judges and court managers can gauge how well the court is achieving basic goals such as access and fairness, timeliness, and managerial effectiveness.

In 2008, the NCSC and the State Justice Institute published a final report entitled *A Unifying Framework for Court Performance Measurement.* It noted:

> The NCSC has developed a schema by considering the common outcomes measured across a broad spectrum of measures and applying a balanced score card approach adapted from the Harvard Business School.

So, business management techniques and jargon came to be embedded in the courts' lexicon. By 2009, the European Union had picked up the need for performance assessment of courts: see, for example, the work of Dr Pim Albers.

In 2010, Dr Ingo Keilitz published *Smart Courts: Performance Dashboards and Business Intelligence* for the NCSC, further exploring the potential for performance metrics to become a tool in the daily management of modern courts, with the assistance of new technology.

In Australia, it must be said that the economists were interested in measuring the performance of the courts well in advance of the courts themselves. Broadly speaking there are now three main mechanisms for the measurement of court performance in Australia, to which I now turn.

Annual Reports to Parliament

One longstanding means of court accountability remains courts' annual reports. Most Victorian courts are accountable to the local legislature, the responsible minister and the broader community through their separate annual reports.

National Reporting

Next, under the Council of Australian Governments (COAG) regime, the Productivity Commission produces an annual Report on Government Services (RoGS). Included in the report is a chapter on court administration. It features detailed analysis of each of the state and federal courts, broken down into civil and criminal matters at both the trial and appellate stages. The report is intended to provide a national comparison of the performance of the various courts.

The International Framework Model

In addition, in the Supreme Court, as part of assessing our own performance we have embraced the *International Framework for Court Excellence.* The Framework was developed by an international consortium in 2008. Under the rubric of the Framework, the Supreme Court has developed a strategic statement. Our goal is to be an outstanding superior court. We define our purpose as safe-guarding and maintaining the rule of law, and ensuring:

- equal access to justice;
- fairness, impartiality and independence in decision-making;
- processes that are transparent, timely and certain;
- accountability for the Court's use of public resources; and
- the highest standards of competence and personal integrity.

I will develop these key elements in turn. Together, these elements are all part of the Supreme Court's ongoing improvement of its transparency and accountability.

The citizen's expectation

Every Victorian citizen is entitled to expect a Judiciary made up of judges who are independent and impartial and who decide cases without fear, favour, affection or ill-will. That is the oath we take as judges. The citizen is also entitled to be confident that there will be sufficient judges assigned to hear cases; that court sittings will be scheduled; that court lists will be controlled and managed in a way so that cases can be heard expeditiously; that there will be courtrooms available where judges can sit and determine cases; and that there will be a registry and court staff capable of carrying out these functions and supporting judges in the

delivery of justice in the determination of disputes between citizens and between the citizen and the state. Above all else, the citizen is entitled to expect a Judiciary which is not subjected to controls and interference from the Executive, but which is independent of the government of the day and beyond corruption. The entitlement of the citizen underpins the obligation of courts to be accountable, subject to the proviso that performance measurement and the pursuit of accountability ought not to interfere with or compromise the independence and separation of the judicial function.

The Current and Future Measures of Court Performance: the Victorian Experience

Victoria is a state within the Australian Federation and most Australian states have a predominantly executive model of court governance. That is, the executive arm handles and manages all aspects of court resourcing and related matters. The federal courts (the Federal Court, the Federal Circuit Court and the Family Court) operate on a different model, which is quite distinct from the executive model. Under recent federal legislation, these courts are about to change their governance arrangements. Individual federal jurisdictional budgets will be protected while shared services such as IT will be controlled and managed for all federal courts by the Chief Executive Officer of the Federal Court.

In Victoria, we historically had an executive model of court governance until, after many years' work, we finally achieved independence from the executive arm through the establishment of what is known as "Court Services Victoria", which commenced on 1 July 2014. We are eighteen months in and things are going quite well.

The CSV, as we call it, is chaired by the Chief Justice. It has a council comprising the heads of all jurisdictions plus two lay members. This Courts Council is the governance body for all courts in Victoria. The CSV is directly accountable to the Parliament, not to the Executive. It is governed by the Courts Council and receives an annual budget within which, importantly, there are protected segments allocated for each jurisdiction. So, for example, the Supreme Court has a budget within the CSV budget which is quarantined from the budgets of other jurisdictions. The Supreme Court also reports annually to the Victorian Parliament. A great deal of work is done in the lead up to the delivery by the Treasurer of the Victorian Budget. The Budget Papers have a chapter devoted to the courts. Historically that chapter included a set of performance targets which were fixed arbitrarily by Treasury officers. The courts would be told how many cases they would have to put through in the coming year (generally based on the previous year's performance). For some years, as part of our struggle for independence, we argued against those performance targets. I am pleased to say that we are in transition at this time and are in the process of having those targets removed. Victoria now utilises Framework measures for all the courts. This may well be unprecedented, even a world first.

As I have mentioned, the Council of Australian Governments (a body which includes the Federal Government and all State and Territory Governments) established many years ago an annual Report on Government Services (RoGS) which contains statistical information regarding a range of government services, across each of the jurisdictions. The RoGS is collated by the Productivity Commission, an advisory body established by the Australian Government to provide advice and

information on economic, social and environmental issues. It has a strong economic focus and statistical capability.

One volume of the report is devoted to the "Justice" sector, and within that "Courts" are the focus of a dedicated chapter. The intention is to provide a series of comparative high level data in relation to a performance framework of equity, effectiveness and efficiency. The result is the publication of results against indicators which will be familiar to many courts internationally — initiations, backlogs, clearance rates, and timeliness measures, as well as economic measures: average fees paid by parties, cost per finalisation, judicial officers per head of population, and so on.

The Productivity Commission sets out the framework of measures and counting rules. Each jurisdiction provides data to the Commission which is then collated in the report together with some descriptive and explanatory material. Notes are appended to the statistics and indications are given when there are difficulties with the comparability of the data. As you would expect in a federation with states and territories of very different sizes and differences in court structure and process, there are inherent difficulties in comparing jurisdictions. Nevertheless, courts tend to benchmark themselves against those jurisdictions which they consider to be appropriate comparators.

The RoGS is published at the end of January each year. It is a document that it keenly anticipated by heads of government departments and also, of course, by heads of jurisdiction. The RoGS covers just about everything — police, corrections, hospitals, health — all the sorts of things that one would expect to see in a report on government services. The

RoGS has, historically, largely been developed by economists because it is an economic measuring tool as to the performance of government services.

The RoGS includes information on lodgements. It deals with filings in civil jurisdictions across the whole of Australia at each level of the court hierarchy. This table gives all who look at it a snapshot of how many cases are being filed in each of the jurisdictions and at which level across the whole of the country.

The RoGS includes information on the number of judicial officers (full-time equivalent) at each court level. Then, there is a table dealing with backlog. That gives a national snapshot as to how cases in each jurisdiction are progressing.

The RoGS also deals with clearance rates for criminal and civil matters. These are broken up into Supreme Court appeals, Supreme Court non-appeals, District/County Court appeals and so on down the line. A comparison is done between the numbers of lodgements and the number of finalisations to produce a clearance rate. It is, from an economist's point of view, desirable that a jurisdiction have a 100% clearance rate, in other words, that its courts are putting out as much as is coming in. Better yet, a higher clearance rate indicates that a backlog is being cleared.

This is a broad indication of how the national government assesses the performance of the courts as part of its broader assessment of government services.

The RoGS also sets out on a comparative basis the gross and net recurrent expenditure across all courts. If one takes a jurisdiction that is shared between the Federal Court and the state courts, such as the corporations jurisdiction, the cost per item for processing each corporations matter filed in the Federal Court can be compared with the cost of processing a like file in, say, New South Wales or Victoria. On that basis, a Chief Justice may use the independence of the RoGS to demonstrate to government that their court is under resourced compared with what another jurisdiction is doing.

The institution of the RoGS analysis was the first time that KPIs had really been applied to Australian courts (at each of the three main levels: superior, intermediate and subordinate). Yet by 2011, as Chief Justice French of the High Court of Australia then observed, the use of performance indicators had become accepted as an incident of accountability for public expenditure and was no longer seen as an erosion of judicial independence. This was a seismic shift from earlier judicial scepticism, even hostility, towards performance measurements.

Despite this shift, from the point of view of heads of the Australian courts, the RoGS data proved to be a media feeding frenzy each January. Public comparisons were made and criticisms were levelled, often, we felt, unfairly. Heads of jurisdiction despaired: like was not being compared with like, and overall there was a perception that a widget counting mentality was being applied.

The RoGS is an overview assessment of Australian courts at a national level. It has proved unsatisfactory and of limited utility to courts

themselves. As a result, some Australian courts have looked for more analytical alternatives.

It was in this context that the development of the *International Framework for Court Excellence* was a godsend for Australian courts.

International Framework for Court Excellence

The International Framework for Court Excellence has provided a means for court accountability through self-assessment and self-improvement without compromising judicial independence.

Inspired by court quality models used internationally, experts from Europe, Asia, Australia, and the United States formed the International Consortium for Court Excellence (the ICCE) in order to develop the International Framework for Court Excellence (the Framework). Australia's participation in the ICCE occurred through the Australasian Institute of Judicial Administration.

The first edition of the Framework was launched in 2008. It is a quality management system designed to help courts to improve their performance. It represents an all-encompassing approach to achieving court excellence, rather than viewing particular aspects of court governance, management or operations as isolated or unrelated issues.

In 2013, the ICCE launched the second edition of the Framework, which incorporated the latest developments in international court improvement strategies. At that time, the ICCE took the opportunity to closely link globally accepted performance measures with the Framework methodology by introducing the Global Measures of Court Performance

(the Measures). Full details of the Framework and the Measures can be found on the ICCE's website (http://www.courtexcellence.com).

The Framework

The foundation of the Framework is the clear statement of the fundamental values to which courts must adhere if they are to achieve excellence. The Framework then presents seven detailed Areas for Court Excellence aligned with those values, by reference to which courts worldwide can voluntarily manage, assess and improve the quality of justice and court administration.

As the Framework notes:

> [The court values] guarantee due process and equal protection of the law to all those who have business before the court. They also set the court culture and provide direction for all judges and staff for a proper functioning court.
>
> … It is important for courts to not only publicize the values which guide performance, but also to ensure those values are built into the court's processes and practices.

The Framework splits a court's processes, practices, roles and functions into seven Areas for Court Excellence. Each area represents an important focus for a court in its pursuit of excellence. The significance of each of the seven areas is further clarified by their grouping into three categories. The Framework clearly articulates that leadership and management is the "driver" of a court's performance. It then clusters three of the areas under the heading of "systems and enablers" and, finally, the three remaining areas under "results".

The Framework also promotes the concept of organisational self-assessment. It declares that "the first step on the journey towards court

excellence involves an assessment of how the court is currently performing … measured against the Seven Areas for Court Excellence". The Framework anticipates that engaging in this self-assessment process will allow a court "to identify those areas where attention may be required" and "to set a benchmark against which the court itself can measure its subsequent progress".

The Measures

The Framework notes that courts can and do measure their performance in various ways which can be mapped against the Seven Areas for Court Excellence. To promote a consistent approach to performance measurement, the ICCE is developing a set of internationally accepted performance measures, most recently outlined in a November 2012 Discussion Draft.

The Global Measures of Court Performance are a suite of eleven "focused, clear, and actionable core court performance measures aligned with the values and areas of court excellence of the [Framework]".

As the Discussion Draft notes, the ultimate aim of the measures is "to establish international standards and common definitions of court performance measurement", both to "provide individual courts … [with] a guide of good practices for successful performance measurement and management" and to "encourage comparative analysis and benchmarking across different jurisdictions".

The Measures and their descriptions are as follows:

Global Measures of Court Performance

	Name	Description
1	Court User Satisfaction	• The percentage of court users who believe that the court provides procedural justice (e.g. accessible, fair, accurate, timely, knowledgeable and courteous services)
2	Access Fees	• The average court fee paid by litigants per civil case
3	Case Clearance Rate	• The number of finalised cases expressed as a percentage of initiated cases
4	On-Time Case Processing	• The percentage of cases finalised within established time reference points in a specified time period
5	Pre-Trial Custody	• The average elapsed time criminal defendants are jailed awaiting trial
6	Court File Integrity	• The percentage of case files that meet established standards of availability, accuracy and organisation
7	Case Backlog	• The age of pending cases awaiting finalisation expressed in terms of the number of elapsed calendar days between the initiation date of the case and the current date
8	Trial Date Certainty	• The certainty with which trials are held when scheduled, expressed as a proportion of trials that are held when first scheduled
9	Employee Engagement	• The percentage of judicial officers and staff who indicate they are productively engaged in the mission and work of the Court
10	Compliance with Court Orders	• Recovery of criminal and civil court fees as a proportion of fees imposed
11	Cost Per Case	• The average cost of finalising a single court case broken down by case type

The Measures reveal a strong preference for outcome measurement that gauges the impact of courts' services on the community, rather than mere measurement of inputs and outputs.

Court & Support Delivery Policy

In part, the Framework is defined as a framework of values, concepts and tools by reference to which courts around the world can voluntarily assess and improve the quality of justice and court administration they deliver. This implies, of course, that a court has a clear, unambiguous understanding of the justice and court administration it delivers.

Expressed in a commercial sense, this means that a court must clearly understand itself — what it does.

The Supreme Court of Victoria goes to great lengths to make it clear that it is not a commercial enterprise. It does not manufacture "widgets" and it cannot be monitored by inputs and outputs that simply count how

busy the Court might be. However, as the Framework suggests, the Court does deliver justice and court administration. The challenge has been to determine how the Court should define what it delivers so that its performance might be more readily assessed and improved.

To date, the Framework has proved very effective for the Victorian Supreme Court, both internally and externally. More information is available on the court's website (http://www.supremecourt.vic.gov.au) and I will explain shortly one way in which it has been of use to us.

State Reporting on the Victorian Courts

The RoGS data discussed earlier is relevant to the Victorian State Budget because the performance indicators used in the RoGS data are presently extrapolated by the State Treasury for the purposes of stipulating targets in the Budget Papers and assessing courts' performance.

There are a number of types of quantitative measures and targets that have been imposed upon the Victorian courts. To take one example, timeliness has been considered a relevant performance measure, but with the primary focus on the mere duration of proceedings. Of course, to treat court proceedings as widgets is totally unsatisfactory. Let me give you the obvious illustration. In the Victorian Supreme Court we have had class or group actions that have run for between 12 and 18 months. We have had terrorist trials which have run for in the order of nine months. The demand these matters place on judges' time and other court resources has been substantial and significant. There are, on the other hand, those quick consent matters that are disposed of promptly and oftentimes on the papers. Allocating the same value to a matter that is signed off on the papers as to a contentious matter which may take 12 to 18 months to

finalise (in the public interest) is no more than a widget counting approach. The challenge that we took up was to look for some way of measuring performance that would allow for comparisons but which would reflect and value more accurately what we do. We decided in Victoria to adopt the International Framework for Court Excellence.

The sorts of indicators that the Framework adopts are, as I have described, far more qualitative. In addition to measures such as timeliness, attention is paid to the quality of registry services, the quality of case processing and all the sorts of matters that we as heads of jurisdictions would want to have understood and considered in assessing our courts' performances.

It needs to be borne in mind that the State Budget indicators cover all Victorian jurisdictions, not just the Victorian Supreme Court. Court Services Victoria advocated on behalf of all the courts, explaining how the existing targets failed to distinguish between the short, sharp consent resolution of a matter and resource-intensive, time-consuming trials such as a class action or a terrorist trial. The International Framework for Court Excellence was used as the basis for developing a model of revised court indicators for measuring the performance of Victorian courts. These were accepted by the Departments of Treasury and Premier and Cabinet and were incorporated into the Victorian Budget Papers for 2015–16. This was a seismic reform. In the course of the dialogue with the relevant Ministers and the Department of Treasury it was very powerful to point out that the International Framework is just that — an international model that has been tried very successfully in other jurisdictions. Our proposed indicators did not represent anything revolutionary, but rather promised to provide a far more accurate way of measuring what we do in our courts.

Reforms of Court Procedures

Australian jurisdictions have seen another shift in the courts' pursuit of excellence. Judges have become more assertive in the exercise of judicial management of their cases. Across most of the country, significant civil procedure reform has occurred, such as the reforms to the Federal Court of Australia's civil procedure rules and the introduction of the Victorian *Civil Procedure Act*. These reforms have been for the most part judge-led or judge-driven.

In 2010, Victoria introduced civil procedure reforms which provide a clear framework for the conduct of civil litigation in our State. The *Civil Procedure Act 2010* usefully complements the power Victorian courts have always had to supervise the conduct of proceedings: courts now have a clear legislative mandate to manage cases proactively and to impose sanctions on parties who fail to meet their obligations under the Act.

The overarching purpose of the *Civil Procedure Act* is "to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute". The Act requires the courts to seek to give effect to that overarching purpose in the exercise of any of its powers, and it empowers the courts to have regard to a whole range of matters in doing so.

The Act also imposes overarching obligations on all parties and practitioners engaging in civil litigation in the State. These obligations apply at every stage of civil proceedings, including during mediations and other forms of early dispute resolution. In addition to a paramount duty to the court to further the administration of justice, the overarching obligations include:

- an obligation to act honestly;
- an obligation to have a proper basis for any claims made;
- an obligation to only take steps reasonably believed necessary to the resolution or determination of the proceeding;
- an obligation to cooperate with other parties and the court in the conduct of the proceeding;
- obligations to narrow the issues in dispute and to use reasonable endeavours to resolve the dispute;
- an obligation to ensure costs are reasonable and proportionate;
- an obligation to minimise delay; and
- an obligation to disclose the existence of documents critical to the resolution of the dispute.

The Act allows courts to take into account any contravention of the overarching obligations in exercising any powers in a civil proceeding, and gives courts a broad power to make any orders they consider to be in the interests of justice where a person has contravened any overarching obligation. These powers have been a useful tool for courts in the management of subsequent cases, with the State witnessing an intensified level of alternative dispute resolution as well as increased efforts by litigants to focus on the real issues in dispute. In cases where contraventions have occurred, consequences have included the striking out of proceedings, the refusal of applications to exclude evidence, and the making of costs orders against solicitors and expert witnesses as well as against litigants. The Victorian Court of Appeal has observed that the Act requires judges to take a proactive role in enforcing its provisions.

These civil procedure reforms are but one example. There are many other examples of court procedural reform that have been judge-led and

judge-driven in Victoria, including criminal appeal reforms, civil appeal reforms, the expansion of alternative dispute resolution, the establishment of a Commercial Court and (in the Federal Court) a Fast Track List, the implementation of diversion programs and therapeutic jurisprudence within the lower courts, and the introduction of specialist courts such as drug and indigenous courts (called Koori courts).

The Pursuit of Excellence

This conference is devoted to excellence. In the modern management lexicon the aspirational goal of organisational "excellence" has sometimes become a mantra without careful analysis of what it really means. A very informative analysis of the understanding of excellence is found in the two-part 2008 article "A pathway to excellence for a court" by Michael Gething, Principal Registrar of the District Court of Western Australia, which can be found in volumes 17 and 18 of the *Journal of Judicial Administration*.

I venture to suggest that "excellent" has many connotations, yet when applied to courts it is somewhat ephemeral because it is being applied to the delivery of justice. As former Chief Justice Gleeson of the High Court of Australia said in an intellectually persuasive statement:

> For courts, effective functioning includes dealing with the business of the court with due dispatch and by procedures which are fair and which serve the ends of justice and which allow for reasonable access to the court by citizens. For the judiciary as an institution, effectiveness includes the maintenance of the rule of law and the preservation of a just society.

Although the Chief Justice was focusing on court effectiveness, the elements he identified articulate many attributes of the judicial vision of an excellent court.

The Framework articulates excellence differently. It has more of a user's and payer's perspective, but for the reasons already discussed it is effective in its own way.

Regardless of the approach of a court to "excellence", we all face the challenge of complacency, of succumbing to being "good" despite knowing we may be capable of greater performance.

The well-known management commentator Jim Collins wrote the bestselling book *Good to Great.* He said: "good is the enemy of great". As judges, we find conversations about excellence a vexing thing. We just want to judge. For most of us, if our jurisprudence is admired, valued, cited, approved by appellate courts and followed by other judges we would regard our court and our individual selves as excellent.

I have reflected on how to engage with my colleagues on the transition from good to great. I thought the dialogue might start this way:

> Let us consider the things the Supreme Court of Victoria does well. Then let us consider the things we need to improve, or do not do well. Ultimately, what we might do is reassess the reputation of the court: where is it now and where should it be? We might ask the question: we aspire to be an excellent superior court — are we there yet?

And so it would go. We may learn from management theory how to review, refine and redevelop ourselves and thereby progress from being a good court to being a great court. We shall see.

What cannot be doubted is that there is much a court can learn from external institutions on this journey. For many judges, a strategic plan in

itself is anathema to the function of a court. Yet the very institutions we admire and draw upon in developing our jurisprudence have visionary and aspirational statements, such as the University of Melbourne's *Growing Esteem* strategy or the University of Oxford's *Strategic Plan.* The fact that courts deliver justice and form the third arm of government should not quarantine us from moving from good to great, or from achieving continuous excellence.

Judicial Education

In my view the significance of judicial education for court performance can never be underestimated. Through the Judicial College of Victoria, we have very carefully developed 360-degree performance assessment which is provided individually to judges. The key to 360-degree performance assessment is of course for the heads of jurisdiction to also submit themselves to it. In addition, judicial officers receive feedback from trained instructors through the Judicial College's Court Craft project. This is very useful in the dialogue with government as a demonstration of the depth of our transparency and accountability and our commitment to ongoing professional improvement and development.

The judicial role has never before come under so much pressure. Judges face pressure to become more efficient in an environment of increasing workloads, and to deliver timely judgments, rulings and sentences that are often complex and subject to intense scrutiny. At the same time, life in the courtroom is becoming increasingly complex as the community becomes more diverse and technology speeds ahead at a rate that may, for some judges, be overwhelming.

Feedback

The Court Craft project emanated from discussions with judicial officers as to how difficult it is for them to obtain honest and genuine feedback to enable them to enhance their skills, and how isolating it can be to never see each other at work. As part of the project, judges nominate a number of observers who watch them in action and complete a confidential survey. The findings are then provided confidentially to the judge, who gains the benefit of honest feedback from individuals whose opinion he or she values.

360-degree survey tool

The 360-degree survey is an evaluation tool that provides a judge with insights into how he or she is perceived and what his or her strengths and weaknesses might be, and provides opportunities for self-reflection in relation to whether he or she:

- communicates in language all those involved can understand;
- asks clear, concise and relevant questions that are understood by those to whom they are addressed;
- uses appropriate body language;
- handles difficult dynamics appropriately;
- conducts him/herself in a manner that establishes and maintains the independence and authority of the court; and
- gives oral reasons/decisions in a clear and concise language so that those involved can understand the reasons/decisions.

Most importantly, specific questions in the survey relate to efficiency. These include questions about whether the judge:

- Is punctual and time conscious
- Manages cases using the most efficient approach and procedures to avoid unnecessary delays
- Delivers judgments/rulings/decisions/sentences promptly

- Demonstrates sound and current knowledge of law and procedure and their application
- Acknowledges his or her own lack of knowledge when appropriate and seeks guidance
- Undertakes necessary preparatory work

Each participant is provided with a copy of his or her confidential report at a lengthy one-on-one individual debrief with a psychologist.

Communication in the Courtroom workshop

Armed with the 360-degree feedback, judges participate in a one-day fully interactive communication skills workshop to learn and practise new techniques to enhance bench skills. Conducted in a courtroom, the judge works with professional actors who have been specially trained by the Judicial College on working within the court environment. The workshop covers:

- the use and importance of non-verbal communication;
- communication challenges e.g. litigants in person, children, etc.;
- communicating a difficult message in a high emotion environment;
- dealing with difficult counsel; and
- effective listening.

A workshop such as this has the added benefit of instilling public confidence and transparency in the judicial system, and making the judge more accountable. It also demonstrates a strong commitment to ongoing professional improvement and development.

Judicial Wellbeing

One topic historically overlooked, both generally and in considering court excellence, is the significance and value of judicial health, wellbeing and happiness.

Wellbeing issues have come to the fore in the legal profession — the recruiting ground for judges. Indeed, it is now recognised that the legal profession has one of the very highest levels of depression among professions. As long ago as 1995, Justice Kirby, then President of the New South Wales Court of Appeal and later a justice of the High Court of Australia, delivered a paper to a judicial orientation program co-hosted the AIJA. It was entitled "Judicial Stress: an unmentionable topic". Twenty years later many of his observations stand, albeit that in the early 21st century, some American psychologists and academics were researching and surveying the topic.

In August 2015, the Judicial College of Victoria ran a two day seminar for judicial officers on the topic of judicial wellbeing and stress. It was a significant event when judges, including the President of the Victorian Court of Appeal and myself, met with experts on sources of judicial stress; the links between lawyers, lawyering and stress; the factors and signs of stress; how to build wellbeing with positive psychology; resilience training and performance enhancement strategies (including mindfulness, vicarious trauma and burnout management strategies); and, relevantly, institutional responses. In the feedback on the seminar, one judicial officer said:

> Excellent stuff on a long-neglected area. Heads of jurisdiction ought to take heed of the real concerns exposed in this valuable seminar. There are real risks

associated with not taking proper care of emotional well-being of the judges of this state.

Another judicial officer said:

A magnificent program that is a MUST for ALL judicial officers.

All Victorian judicial officers have access to excellent reading materials on the Judicial College's website. Funding is planned to allow the College to provide a specialised 24 hour psychological counselling service to all judges, in addition to the general public sector service already available.

An academic who is working with the Judicial College of Victoria, Carly Schrever, published a revealing article on judicial stress in the September 2015 issue of the *Law Institute Journal*. She pointed out that in Australia, while little is known on the topic, we do know four things about judicial stress.

First, judges are not immune from stress. Secondly, judges are senior members of a stress-prone profession. Thirdly, many aspects of judicial work are inherently stressful. Fourthly, judicial stress is problematic not only for the judges but more widely. On this point Ms Schrever said:

… judicial stress also has the capacity to negatively affect the broader community. Judicial decisions have enormous impact on judicial lives, and stress is well known to affect the quality of decision-making.

…

When under stress or "cognitive depletion", decision-makers rely more heavily on intuitive decision-making systems and mental heuristics, rather than rational systems, which can lead to more biased, stereotypical and conservative decisions.

It is my strong view that a meaningful discussion of court excellence, performance, governance and future planning cannot occur without the inclusion of a robust discussion of judicial health, wellbeing and happiness.

Governments make a substantial investment in judges in both civil and common law systems, especially where state-funded pension schemes are involved. In the Victorian Supreme Court, the mean time in judicial office is around 13 years for men and 15 years for women. Many judges serve for 20 years. There is an institutional interest in maximising judges' endurance, resilience, longevity and quality of performance by protecting judges' health.

Closing Remarks

In closing I will summarise what I see as the three main ways that court performance data can have value.

First, as I have explained, at least in Australia the measurement and assessment of court performance evolved first of all to enable governments to assess court performance from an economic perspective. That perspective in itself is of limited benefit to heads of jurisdiction. The second use to which court performance measurements can be put is for the benefit for the heads of jurisdiction themselves as part of their internal management of a court. This is of course difficult and oftentimes tricky. I am aware that the Family Court of Australia has experimented with a model where the Court collects data on the number of cases determined by individual judges and the time they take. The Chief Justice of the Family Court sits down annually with each judge privately and places before the judge a table which shows, anonymously, the highest performer

in the court at the top of the page and the lowest performer in the court at the bottom of the page. The individual judge is shown where on the page they sit within the range, and the Chief Justice then engages in a conversation with the judge about his or her performance. It is a very interesting model, but it illustrates how performance measurements can start conversations aimed at performance improvement. The third way that all the data and performance indicators available to us have value is that they are important reference points for us as advocates for our individual courts in negotiations with governments for resources. I have mentioned the value of the Framework to the Victorian courts in this regard.

Comprehending and implementing performance measures competently and then acting both responsively and pro-actively to achieve change is a challenging part of the modern role of a head of jurisdiction. That said, the key to balancing accountability with judicial independence may be achieved through a strong and serious commitment by courts to judge-driven measures based on indicators cast in terms economists can comprehend. In Victoria, we are advancing that goal.