
Chief Justice rails at 'national disgrace'

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A worthy tradition was revived last week when High Court Chief Justice Robert French gave the 16th State of the Judicature address.

It has been seven years since No 15, when French put the case for the court to be funded via an act of parliament rather than through the attorney-general portfolio. He didn't win that one, but there was some more cash to repair the grand edifice on Lake Burley Griffin.

In 2012, French ticked off Julia Gillard for comments made after the Malaysia Solution case, but has mostly kept a low profile as chief.

He put a media ban on himself in 2013, doesn't bother distributing his speeches and for the most part seems determined not to say anything that might engage the wider public.

So it was this time. There was a worthy recital of the work of the Council of Chief Justices - of which French is chair - that would have left patrons nodding to waiters for a top-up. However in the last few minutes, it got interesting.

The Chief Justice rejected mandatory sentencing, lamented the "national disgrace" of indigenous incarceration, urged a stand against the erosion of common law rights and gave the national profession project a good push.

The SOTJ used to be attached to the biennial Australian Legal Convention. The first was given by Sir Garfield Barwick in 1977 and every chief justice who followed took up the challenge (although Anthony Mason passed in 1991 and 1997). It became known as the report card on our judicial system and French declared himself keen to carry on the tradition when he spoke in 2009.

However, the Law Council, as organisers, decided the enthusiasm just wasn't there for another convention. As it faded away so did the SOTJ.

This time - at French's suggestion - it was tied to a meeting of the Council of Chief Justices in Hobart and the Law Council of Australia and the Australian Bar Association put on a dinner for the address.

The Chief Justice has always had a bent for co-operative federalism and, like others, would have been disappointed that only NSW and Victoria agreed to proceed with national profession reform - and uniform laws - in 2015.

"It is to be hoped that all Australian jurisdictions will eventually see their way clear to join it," French said. "Like the standard gauge railway, it is an important micro-

economic reform and should enhance our national capacity to engage in useful discussions with other jurisdictions in relation to cross-border provision of legal services following the coming into effect of recent free trade agreements." He acknowledged the efforts of both his hosts on the impact of mandatory minimum sentencing and its effect on Australia's "appallingly high rate of indigenous incarceration - at least 16 times higher than non-indigenous Australians".

French was sure of one thing. "Mandatory minimum sentences are not the answer ... a nuanced approach, including the concept of justice reinvestment, is required to which they are prepared to contribute in order to address this national tragedy," he said.

However, he was most concerned by laws that encroach upon the traditional rights and freedoms recognised by the common law.

NSW Chief Justice Tom Bathurst tackled the subject in an incisive speech in February and the Australian Law Reform Commission has delivered a report on the topic to Attorney-General George Brandis. French noted each intrusion was justified "by appeals to common sense objectives and operational realities".

"Many such encroachments, taken individually, arguably have little effect. Taken cumulatively over time and across state, territory and commonwealth jurisdictions they can be the death by a thousand cuts of significant aspects of those rights and freedoms." He suggested legal lobby groups like the LCA and ABA should be more vocal on the issue. "They should not accept, nor should anybody else, that public advocacy for the protection of traditional common law rights and freedoms is anything other than the expression of an essentially conservative position," he said.

Like separate funding for the high courts, it's probably a lost cause. Mandatory sentencing is the most obvious development in recent years.

In Western Australia repeat offenders - adult and juvenile - convicted of burglary are given fixed terms; in Victoria it applies to gross violence and in South Australia for organised crime offences.

In Queensland, trafficking, child sex offences and assaulting police officers all attract mandatory jail terms. In the Northern Territory, a 15-year-old boy died in jail after getting a 20-day mandatory term for stealing pencils. A first-time offender got 14 days for stealing a can of beer. It might be a pitiful concession to the baying mob, but governments like how it boosts their "tough on crime" credentials. Giving judges the discretion to decide a penalty, according to the individual circumstances of the case, doesn't quite pack the same punch.