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**"JUDICIAL GOVERNANCE AND THE
PLANNING OF COURT SPACE AND FACILITIES"**

by

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TABLE OF CONTENTS

PLANNING AS GOVERNANCE.....	3
United States developments.....	5
Australian models: new developments	8
Judicial role.....	13
LONG RANGE PLANNING	14
PRIORITISATION	20
DESIGN.....	21
Location	21
Symbolism	22
Heritage and environmental factors	23
Standards.....	25
Security	30
Innovations.....	30
TECHNOLOGY	32
Disabilities	32
MANAGEMENT.....	33
Management information and statistics	33
Budget Process.....	34
Alternative financing	35
JUDICIAL GOVERNANCE	36
Judicial involvement.....	36
Non-judicial and Public involvement	37
Summation	38

The planning of court space and facilities is, on its face, a prosaic matter. Apart from the concerns about immediate inadequacies in the supply or fitting of court-rooms or chambers, the level of judicial interest in the topic could not be counted as very high. Two factors are operating to change that perception. The first is a heightened interest in the assumption by the judiciary of responsibility for the affairs of the judicial branch. The second is the increase in the business of the courts and an associated increase in the membership of the judiciary and the staff of courts.

PLANNING AS GOVERNANCE

For Australia, the first issue has been comprehensively considered in the recent report of the Australian Institute of Judicial Administration ('the AIJA') on "Governing Australia's Courts".¹ As the authors of that report point out, "the usual model of judicial administration in Canada and Australia is for court administration to be part of the portfolio of the Attorney-General or a Department of Justice"² but "administrative arrangements must be made according to appropriate philosophical principles".³ Where the relevant philosophical principle is that of judicial independence, it is necessary to consider the operation of that principle in conjunction with matters arising in connection with the governance.

More recently, however, attention has turned to the issue whether the principle of judicial independence requires judicial control of space and facilities planning. Justice McGarvie has written:

"It is very important that the judges of a court should unambiguously possess and exercise the right to control of the court's premises, facilities, staff and budget. Executive control of these areas carries with it the ability to exert or threaten almost as much pressure on judges as the power arbitrarily to remove them or reduce their salaries. Realistically the judges cannot be regarded as in control of the administration and operation of their court unless they control these areas."⁴

¹ Thomas W Church and Peter A Sallmann, 'Governing Australia's Courts', *Australian Institute of Judicial Administration* (1991)

² *Ibid* 2

³ *Ibid* 7

⁴ Mr Justice R E McGarvie, 'The Foundations of Judicial Independence in a Modern Democracy' (1991) 1(1) *Journal of Judicial Administration* 3, 30

He agreed with an earlier expression of views to the same effect by Chief Justice King when he said:⁵

"...There is a tendency to judge the significance and worth of public functions by reference to their outward manifestations. Public confidence in the judiciary could be significantly affected by the nature and the suitability of court buildings and court facilities and by whether those buildings and facilities are seen to be controlled by the executive government or by the judges. If the courts are to have exclusive authority to declare and apply the law and to administer justice, as the principles of the rule of law and judicial independence demand, they cannot confine their responsibilities to the mere hearing of cases. They must concern themselves with all those matters which are capable of affecting the course and the outcome of legal proceedings, however mundane or remote from the traditional role of judges those matters might appear to be. For these reasons I hold strongly to the view that the only effective way in which judicial independence can be adequately ensured is by vesting in the judiciary complete control over the court building and its facilities. Such complete control is, I suspect, the exception rather than the rule in most countries. It is an aspect of judicial independence which demands a good deal more attention than it has hitherto received. ..."

The time is past where there can be any question that judicial administration and judicial independence are intrinsically interrelated. It is now widely accepted that the "contemporary understanding of judicial independence includes a panoply of administrative arrangements."⁶ The same point was made in Australia in the Fitzgerald Report which stated:

"The independence of the judiciary is of paramount importance and not to be compromised. One of the threats to judicial independence is an over-dependence upon administrative and financial resources from a government department or being subject to administrative regulation in matters associated with the performance of the judicial role. Independence of the judiciary bespeaks as much autonomy as is possible in the internal management of the administration of the courts."⁷

In the United States it has been said it is:

"axiomatic that, as an independent department of government, the judiciary must have adequate and sufficient resources to ensure the proper operation of the courts. It would be illogical to interpret the Constitution as creating a judicial department with awesome powers over the life, liberty and property of every citizen, while at the same time denying to the judges authority to

⁵ Mr Justice L J King, 'Minimum Standards of Judicial Independence' (1984) 58 *Australian Law Journal* 340, 344

⁶ Russell Wheeler, *Judicial Administration: Its Relation to Judicial Independence*, National Center for State Courts, 1988, p 7.

⁷ *Report of a Commission of Enquiry* (Government Printer, Brisbane, 1989), p 134

determine the basic needs of their courts as to equipment, facilities and supporting personnel....⁸."

United States developments

Recent experience in the United States shows a movement toward judicial control of the planning of court space and facilities. In 1990 the Federal Court's Study Committee recommended⁹ that legislation should be introduced to make the federal judicial branch, in consultation with Congress, independent of the executive branch in acquiring and maintaining its space and facilities. The Judicial Conference of the United States had approved the possibility of legislation to such effect in 1989 and it did so with support from the Administrative Office of the United States Courts and the National Academy of Public Administration. The Committee said that its recommendation would change the current relationship between the judiciary and executive branches in courtroom and office space matters whereby at present the General Services Administration ('GSA') controls planning for the judiciary's needs and the Office of Management and Budget reviews those plans. The Committee considered the judiciary should control the planning for judicial branch space needs. The Committee supported this view by saying that it would give court administrators greater discretion and control of this support function. It also said any additional administrative burdens that the proposed statute would create for the judiciary would be more than offset by increased efficiencies it would provide for the court.

In its report the National Academy of Public Administration had made recommendations on "ways to reform the system so that new judges could become fully productive in their permanent courtrooms and chambers promptly after their confirmation or appointment".¹⁰ The recommendations fell into three areas. Firstly, that the judicial branch should receive direct appropriations from the Congress for all construction and alteration requirements and control these funds on a project by

⁸ *O'Coin's Inv v Treasurer of the County of Worcester* quoted in Stein "The Judiciary is failing to Protect the Courts" (1979) 18 *The Judges' Journal* 16, 18.

⁹ Report of the Federal Courts Study Committee, 2 April 1990, 161-2

¹⁰ National Academy of Public Administration, *Improving Facilities Management of the US Courts*, August 1987, ii-iii, 23-34

project basis, although still relying on the GSA for most architect-engineering and construction work. In the view of the Academy:

"As the third branch of government, the Judiciary should have an independent funding base for all of its construction requirements. It does not warrant being lumped into the huge public building pot subject to the most recent calamity affecting the executive branch of government..."

A perceived positive outcome of this recommendation was that the courts would be required to take the lead in planning and budgeting their requirements and in setting priorities for their work. The second area was that space planning, architect-engineering work and all steps up to award of construction contracts should proceed promptly after the Judicial Conference has approved the numbers of judges and magistrates and their locations. The Academy saw as a key to this the attainment of a separate line item in the appropriations for the Judicial Conference for improved early planning and architect-engineering work. The third area was that the courts immediately develop a comprehensive space management capability by establishing a planning process and developing priority categories through the work of the Administrative Office. Illustratively of the responsibility which must accompany applications of the principle of judicial independence, the Academy stated that judges must be held accountable to standards developed for courtrooms and chambers because "the Courts must achieve internal discipline if they want the other participants in this process to maintain high performance standards." In similar vein it recommended that the Courts invest more heavily in management training for those judges who are in line, by virtue of seniority, to be chief judges because "the size and predictable growth of the courts demands chief judges who not only are outstanding judges but who have some skill in and appreciation for management."

The problems which the Academy found in the administration of the space and planning needs of the federal judicial branch by the executive department of General Services Administration¹¹ were not only that the judiciary competed with

¹¹ Confirmation of the difficulties experienced with GSA is found in United States General Accounting Office, Report to Congress, General Services Administration, November 1989

executive departments for allotment from appropriations for space and facilities expenditure but also that, despite a predictable growth in numbers of judges, a new judge could expect to be housed in temporary quarters for at least two years and that there was a substantial quantity of unmet space needs for the courts.

A bill to give general legislative effect to the recommendations of these studies, the *Judicial Space and Facilities Management Improvement Act of 1990*, was introduced to the United States Senate in the last Congress. It proposed to vest in the Director of the Administrative Office of the United States Courts appropriate authority with respect to acquisition, construction, leasing, alteration and disposition of court accommodation and in relation to obtaining architectural, engineering or construction services and maintenance. It would preserve to the relevant committees of the houses of the legislature the power to approve acquisitions or construction involving a total expenditure in excess of \$1.5m or alterations to leased space in excess of \$750,000. It proposed the creation of a Judicial Space and Facilities Management Fund in relation to which the Director would have permanent authority to expend monies in such amounts as specified by Congress in annual appropriations acts, the purpose being to allow the Director to control its appropriations and set priorities with respect to the expenditure of appropriations. The Bill lapsed at the end of the Congressional Session and has not yet been reintroduced.

Some aspects of the recommendations giving rise to this proposed legislative provision were shaped by the particular requirements of the courts to which they related. Nevertheless, they highlight some issues applicable to Australia and illustrate latent difficulties not yet experienced in Australia. Both from Australian experience and from such comparative overseas experience it is appropriate to ask whether Australia's courts would be better served by increased judicial governance of space and facilities planning. That is a matter to be considered as much in the light of practical considerations as in the light of pure application of the principle of judicial independence.

Australian models: new developments

The report of the AIJA on "Governing Australia's Courts" examined three models of judicial administration present in Australia.¹² The first is the "traditional" model previously referred to whereby a generalist executive department provides court services. The second is the "separate executive department" model previously seen in South Australia and now applicable in New South Wales. The third is the "autonomous" model seen in the Federal and Family Courts and the Commonwealth Administrative Appeals Tribunal and now adopted in South Australia.¹³

In relation to the planning of court space and facilities, the traditional model has largely left to the executive the planning and prioritisation of the needs of the judicial branch of government. Prioritisation by the executive may well produce results largely acceptable by the judiciary but, in the main, it occurs under this system without the judiciary having the opportunity to make an input into the choices beyond the needs of a particular court. Worst of all, the planning is done horizontally (with a line into each court) thereby denying the cross-fertilisation of ideas among the judicial branch as a whole and fragmentizing the planning process. The effect of this model is to open the way to executive dominance of choices when there is a real conflict between the views of the judiciary and of the executive. The essence of the model is that there is no cohesion or expertise in the judiciary relevant to the planning process and the judiciary are to be passive recipients of space and facilities which others deem appropriate for them. To my mind the model denies the fundamental of any planning process: the views and experience of the users of the facility being planned, not just on the size of chambers and the colour of the carpet, but on the basic issues which constitute the planning process.

In Western Australia informal steps have been taken in an endeavour to overcome the inefficiencies of the traditional model. In 1988, with the approval of the then Attorney General, the Chief Justice established a Supreme Court Planning

¹² Church and Sallmann, *supra* n1

¹³ *High Court of Australia Act 1979*, Pt III; *Federal Court of Australia Act 1976*, Pt IIA; *Family Law Act 1975*, Pt IVA; see also *Administrative Appeals Tribunal Act 1975*, Pt IIIA.

Committee with representation from departments having an interest in the planning of the future of the Supreme Court site in addition to representation from the judiciary and administration of the Supreme Court. By 1992 this committee had been retitled the Courts Planning Committee with a charter to consider and report on the needs of all the courts of State jurisdiction. Its membership included two judges of the Supreme Court, the Chief Judge of the District Court, the Chief Stipendiary Magistrate, the Solicitor General, a representative of the Law Society and the Bar Association, the Under Secretary for Law, the Head of the Court Services Branch and the Manager of Building and Facilities of the Crown Law Department, representatives of the Building Management Authority ("BMA") and a representative of the Department of Infrastructure and Government Administration ("DIGA"). In August 1991 this committee established a Working Party to investigate the options for the future development of all courts (other than the Family Court of Western Australia and the Children's Court which have each recently been rehoused in new accommodation) within Western Australia.

The Working Party gave the opportunity for even wider participation by the Executive Officers of the Courts and other persons in the planning process. The recommendations of the Party were reported to the Courts Planning Committee which adopted them, subject, in the case of the Supreme Court, to the Committee preferring an option previously rejected by the Working Party in the light of unanimous opposition by the Judges of the Supreme Court to the recommended option. Planning monies were then made available for the development of each of these options and their consideration by the Accommodation Committees established within each Court for the development of the particular option proposed for that Court. Since then the Courts Planning Committee has also contributed its views to the prioritisation of the capital works program of the law budget which involves the Committee in giving consideration to the development of both central business district and non-central business district courts. The Committee's views take the form of recommendations to the Chief Justice. The Committee has thus provided the first occasion for cross-

jurisdictional consideration of planning issues facing the judicial branch in Western Australia.

Being an arrangement of recent origin and lacking formal institutionalisation, it must be said that when the executive exerts pressure, the committee structure provides no sure mechanism for guaranteeing that the judiciary have the occasion for input to important decisions. It can simply be by-passed. Such a situation recently occurred following a change of government in the State. The new Attorney urgently requested a report on the planning issues facing all courts and the necessary recommendations concerning their funding. In response to the request, certain recommendations were made by the BMA, DIGA and Treasury and endorsed by the Court Services Branch which cut entirely across the planning process and pre-empted the consultations and work of the previous two years. Although the report itself recommended consultation with the judiciary, the absence of any institutionalised role for the judiciary enabled views fundamental to its future to reach an attorney without any judicial input. The point which this occurrence illustrates is that, in the absence of the appropriate structures, the occasion for judicial input into the planning process can be denied even where that process has been shown to be deliberative and informed by all relevant authorities.

Since that occurrence the Chief Justice, the Chief Judge and the Chief Stipendiary Magistrate have convened as heads of jurisdiction and conferred with the Attorney General in that capacity. The Report of the Independent Commission to Review Public Sector Finances in Western Australia (the McCarry Commission) has recommended "that the vote for the law courts be identified as a separate part in the Consolidated Fund estimates and be determined after discussion between the Treasurer and the Chief Justice each year".¹⁴ These are pointers to a possible change in the current process.

¹⁴ *Report of the Independent Commission to Review Public Sector Finances: Agenda for Reform* (1993), p 55-6.

The development of the separate executive department model commenced in 1981 in South Australia with the establishment of the Court Services Department as a separate department of Government. The enactment of the *Courts Administration Act 1993 (SA)* has taken this much further and introduced the autonomous model to that State. The objects of that act are¹⁵:

- "(a) to establish the *State Courts Administration Council* as an administrative authority independent of control by executive government;
- (b) to confer on the Council power to provide courts with the administrative facilities and services necessary for the proper administration of justice."

The Council is constituted by the Chief Justice of the Supreme Court, the Chief Judge of the District Court and the Chief Magistrate of the Magistrates Court, thus bringing cohesive direction to the governance of the judicial branch.¹⁶ The Council is responsible for providing, or arranging for the provision of, the administrative facilities and services for participating courts that are necessary to enable those courts properly to carry out their judicial functions.¹⁷ Each court still retains responsibility for its own internal administration.¹⁸ Relevantly to planning, the Council may establish administrative policies and guidelines to be observed by the courts in the exercise of their administrative responsibilities.¹⁹ The Council has all the powers of a natural person and may enter into any form of contract or arrangement; acquire, hold, deal with and dispose of real and personal property; and provide services on terms and conditions determined by the Council.²⁰ In addition, it has the responsibility for the care, control and management of all courthouses and other real and personal property set apart for the use of the courts.²¹ The Council has the State Courts Administrator as its Chief Executive Officer, responsible to the Council for the management of the

¹⁵ *Courts Administration Act 1993*, s3

¹⁶ *Ibid.*, s7

¹⁷ *Ibid.*, s10(1)

¹⁸ *Ibid.*, s10(2)

¹⁹ *Ibid.*, s10(3)

²⁰ *Ibid.*, s11(1)

²¹ *Ibid.*, s15(1)

property which is under the Council's care, control and management.²² The Council may not expend money unless provision for the expenditure is made in a budget approved by the Attorney-General.²³ A member of the Council or the Administrator may be required to attend before a parliamentary committee to answer questions about the exercise of administrative powers or discretions.²⁴ Judicial independence is protected by a provision that neither a member of the judiciary nor the Administrator can be required to answer questions about the exercise of judicial powers or discretions²⁵ and a further provision that no power or discretion vested in the Governor or the Minister under the Act be exercised so as to impugn the independence of the judiciary in relation to the exercise of judicial powers or discretions.²⁶

This enactment thus arms the judicial branch with the structure and powers necessary for it to perform the function of independently planning space and facilities. The Chief Justice of South Australia, Mr Justice King, described the benefits of the new scheme as follows²⁷:

"[it] would have the capacity for providing an efficient and unified court administration service. It would remove the ambiguity which presently exists in the relations of judiciary and executive and would be an appropriate vehicle for the administration of an independent court system. It would be entirely consonant with the Westminster system and with ministerial responsibility thereunder. The judiciary through its appropriate organs would have the responsibility, which properly belongs to it, for the administration of the courts in which its members sit. But the actual administration would be performed not by judges, whose training and experience has not equipped them for it, but by trained administrators... the establishment of a judiciary based court administration service free of the ambiguities and confusions of the present system and with clear lines of responsibility and accountability, would clear the way for the development of the standards of efficiency in court administration necessary to meet the contemporary need."

²² *Ibid.*, s17

²³ *Ibid.*, s25(4)

²⁴ *Ibid.*, s29

²⁵ *Ibid.*, s29(2)

²⁶ *Ibid.*, s31

²⁷ 'Independent court administration' (1993) 67 *Australian Law Journal* 245, 247-8

In the case of the autonomous models introduced by the Commonwealth Government, the vesting of autonomy is effected in different ways. In the case of the High Court it is the Court itself which has authority to administer its affairs²⁸ with power to control and manage any land or building occupied by the Court or is in its declared precincts.²⁹ In the case of the Federal Court the management responsibility is vested in the Chief Judge.³⁰ In the Administrative Appeals Tribunal such authority is vested in the President.³¹

Judicial role

Apart from these recent statutory innovations, the law does not vest the judiciary with power to plan and develop the premises which the courts occupy. This matter has been examined by Mr Justice McPherson who considered "the extent in law of court control over buildings occupied for court purposes is not easy to determine."³² He found the legal status of court buildings to be a matter needing to be considered on an individual basis, the metropolitan or principal court house in each State probably having a peculiar history and perhaps legal status of its own.³³ He concluded³⁴:

"Whatever legal rights may be conferred by ownership of public buildings, executive power to regulate and control court houses owned by the Crown is subject to limits implicit in the purpose for which those buildings are provided and used by the courts and the judges who perform their functions in them."

Whatever the legal rights of courts in this respect, the planning of their space and facilities is an issue to be seen in the wider context of executive/judicial relations and of principles fundamental to the judicial branch, including the principle of judicial independence. Planning of space and facilities matters is an act of governance and the question arises in relation to it, as it does in relation to all acts of governance relevant

²⁸ *High Court of Australia Act 1979*, s17(1).

²⁹ *Ibid.*; s 17(2)9d).

³⁰ *Federal Court of Australia Act 1976*, s18A(1).

³¹ *Administrative Appeals Tribunal Act 1976* s24A(1).

³² Mr Justice McPherson, 'Structure and Government of Australian Courts' (1992) 1(3) *Journal of Judicial Administration* 166, 178.

³³ *Ibid.*, 180-1

³⁴ *Ibid.*, 183

to the judiciary, to what extent the judiciary should control or contribute to that issue or whether it should be isolated from it. The submission of this paper is that the provision of space and facilities are so intrinsically a part of the proper operation of the judicial branch, so essential to the maintenance of public confidence in the exercise of the judicial power of government, that judicial participation either by direction or major input is essential. Judicial independence mandates that the judiciary assume a responsibility for the provision of conditions which make the exercise of the judicial power timely and relevant to the needs of the public. Planning of court space and facilities is therefore no longer able to be left to others and is now an issue which must be of central importance to any court wishing to ensure it functions in the public interest.

LONG RANGE PLANNING

Prime among areas in which judicial policy making is vital is the question of *long range planning*. It is patent that any attempt to predict the future requirements of the courts is hazardous. The task necessarily requires statistical projection based upon present information on the work of the courts. Any projection is unpredictable because it is subject to the impact of legislative innovation or change in public conduct. Enactment of a right to sue at the expense of the state in respect of a consumer wrong would produce unanticipated utilisation of the courts just as decriminalisation of drug-taking would reduce it. There may arise an escalation in drug-taking, bank robberies or other crime or the occurrence of severe economic depression producing a dramatic increase in bankruptcies. No planner can be expected to predict with entire accuracy such unpredictables. Allowance for them can be made, however, on a proper statistical basis informed by the judgment of those closest to the work of the courts over a period of many years. As it was put recently, the use of such techniques must be undertaken with sound judgment.³⁵

³⁵ First International Conference on Courthouse Design, Washington DC, 7-9 October, 1992, comments by panellists (to be included in a conference report to be published by the American Institute of Architects).

Various methodologies are currently used in caseload forecasting.³⁶ In 1973 the United States Federal Judicial Center initiated a caseload forecasting study in conjunction with the Battelle-Pacific Northwest Laboratories which projected caseload forecasts in 42 case categories for each district, circuit and the nation for the years 1979, 1984 and 1995.³⁷ This employed three forecasting methodologies: trend analysis, auto-regressive time series analysis and single equation structural regression analysis, of which the last was determined to have performed the best in terms of *ex-post* forecasting accuracy.³⁸ The problem of unpredictables was dealt with by assembling a panel of experts and asking them to identify possible "surprise" events and assess the probability that these events would occur and then incorporating the probabilistic assessments into the forecasts. In 1991 the United States Government Accounting Office released a report³⁹ providing a model for the short range forecasting of workloads relating to investigation, prosecution, adjudication and correction based on the premise that the incoming workload at each level is simply the output of the previous level.

Whatever the uncertainties of long range planning, it is essential that it be considered for any court wishing to properly fulfil its function in the administration of justice. It is not good enough for the judicial branch that pain has to be experienced from inadequate facilities before the problem is diagnosed and a cure sought.⁴⁰ Nor is it sufficient for the judicial branch to rest upon the attainment of a new courthouse or the maintenance of an existing facility. Long range planning is essential to keep properly alive, within the processes of government, the on-going requirements of the judicial branch. Too frequently the judicial branch seeks funds for a major courthouse

³⁶ The information referred to is sourced from A. Fletcher Mangum, "A Survey of Caseload Forecasting Methodologies," unpublished manuscript, 1992 (Mr. Mangum prepared the manuscript as a staff member of the Planning and Technology Division of the Federal Judicial Center)

³⁷ J A Mahaffey, "Reduction of Data Base and Forecasts of Case Filings in the District Courts", a research report by Battelle Pacific Northwest Laboratories for the Federal Judicial Center, June, 1976

³⁸ Jerry Goldman *et al* , 'Caseload Forecasting Models for Federal District Courts', (1976) V (2) *Journal of Legal Studies* cited in Mangum, *supra* n36

³⁹ United States General Accounting Office, 'Federal Criminal Justice System, A Model to Estimate System Workload', Report to the Committees on the Judiciary, April 1991

⁴⁰ (1990) 1(6) *The Court Management & Administration Report* 1

development when it may have been possible to budget towards that goal over a long period of time and perhaps to build progressively, resulting in the required facility being available, in the required period. Proper performance of the judicial function now requires that the judicial branch assume responsibility for its future well-being and not rely upon the appropriate facilities being available when the time requires. Executive initiative cannot be assumed. In the United States it is not unusual for seven to eight years to elapse between first plans and occupancy of a new courthouse.⁴¹ The processes of government require due lead-in time and a sudden demand by the judiciary for a new facility is unlikely to receive the response the judiciary would like unless pre-planning has occurred. It cannot be imagined that any court would wish to have the experience of the federal courts in Massachusetts which, throughout the two hundred years of their operation, have been tenants at sufferance in a series of buildings designed for others, including The Bunch of Grapes Tavern, a Masonic Temple, a post office and an hotel!⁴²

In 1992 it was reported that the United States federal courts are housed in 660 facilities of which 200 had been identified as being out of space within the next 10 years. Given a 7 to 10 year governmental process for acquiring new buildings, a state of crisis is said to be disclosed by the long-range planning requiring the expenditure of in excess of \$US14 billion. Approximately 30% of all Federal Court facilities are said to be unable to house the immediate and short term needs of the federal judiciary. Because of those factors, the United States Judicial Conference directed the Administrative Office to develop a long range facility planning process.

As a result the Administrative Office of the United States Courts has embarked on a long-range planning study of each of the Federal Districts of the Federal Courts. The steps involved in each such study are as follows:

⁴¹ (1992) 24(4) *The Third Branch* 6

⁴² Douglas P Woodlock, 'The "Peculiar Embarrassment": An Architectural History of the Federal Courts in Massachusetts', (1989) 74 *Mass L R* 268

- (1) a time frame of 30 years is selected as the base for long-range planning with intermediate projections for 5, 10, 15 and 20 years.
- (2) prior to any meeting being called, the district is asked to prepare data on its court space and facilities in accordance with steps outlined in a handbook. The emphasis is on the assumption by the district of responsibility for the long-range planning process.
- (3) a three day visit is then set down to enable officers of the Administrative Office to meet with relevant persons in the district. These include representatives of the judiciary, court registrars and other officials as well as representatives of the GSA.
- (4) at the meeting the pre-prepared data is presented and then fed into standard computer models and reduced to graphic and diagrammatic form. These direct attention to the broad trends in the data.
- (5) the assessment of existing facilities is based on building evaluation reports on each facility, whether owned or leased and whether stand alone or multi-occupied. These reports use a comprehensive range of headings to assess facilities, namely, plans, seismicity, structural features, grounds and approaches including parking, exterior, roof, interior, plumbing, electrical, heating, ventilating, air conditioning, facilities for persons with a disability, environmental controls, asbestos abatement, elevators, fire safety, historic preservation requirements, flood control and security of wiring for automated court facilities.
- (6) assumed workload increases over the time bases are also prepared. Oral discussion is directed to eliciting from those present the assumptions upon which these increases have been estimated. Reliance is placed on statistical reduction methods to provide conservative projections. The statistics of the district are analysed by the pre-prepared computer program which takes into account likely points of reduction in upsurges of particular types of litigation.

- (7) the studies do not purport to take into account what is called "the ripple effect": that is, initiatives by other agencies of government which impact on the courts. These unpredictables are sought to be picked up by bi-annual updates of the plan prepared for each federal district.
- (8) where the planning discloses the need for a temporary solution while a long range solution is found, encouragement is given for parallel action to be taken on both requirements.
- (9) a final draft business plan is then produced which contains solutions to the district's space and facilities needs. The solutions are not always prioritised, the significance of the report being as much in the data which it has collected and analysed as in the solutions which it recommends. Its effect is to direct the minds of those involved in the day to day administration of the courts to the long term needs of the district and to produce a plan which they "own" and can develop. Above all the plan provides the data necessary to support budget discussions as well as to inform proper planning.

None of this planning work touches the needs of the State court systems in which the overwhelming volume of trial work is conducted.

In the absence of long range planning, the occasion for space and facilities planning will arise in relation to the planning of new facilities or the renovation of or addition to existing facilities. It may be actuated by the growth in the business of the courts, age of existing buildings, the expansion of a court by appointment of additional judges, the creation of a new court or jurisdiction, the incorporation into the trial process of the requirements of modern technology, greater attention to aspects of security or the necessity for improved building efficiency.⁴³

Growth requires planning not only of the accommodation of judges and court personnel but also of the records of the court. That may entail the making of policy determinations concerning the most appropriate record keeping option for the court

⁴³ (1990) 1(6) *The Court Management & Administration Report 2*

from among such choices as cabinet or shelf storage, mobile high density shelving, microfilming or use of optical disks.⁴⁴

Long range and short range planning may become inextricably mixed. The recent Western Australian experience in planning the future of the Supreme Court is illustrative of this. The broad options facing the Court are either to move entirely from its present site, to add to the present building or occupy sites divided between the present building and proximate supplementary accommodation. The Working Party recommended a solution in the category of the third option. This was unanimously rejected by the Judges of the Court in favour of exploring the option of remaining in the present site with extensions. Ultimately, the Courts Planning Committee recommended that option. It has since been under investigation by the Supreme Court Accommodation Committee. The steps involved in this planning have been as follows:

- (1) The updating of a statistical study of the work of the Court until 2016.
- (2) The preparation of a functional study of the Court.
- (3) The preparation of a design brief on the Court.
- (4) The commissioning of the heritage study previously discussed.
- (5) The preparation of concept designs showing what may be possible on the present site to meet the needs disclosed by the functional study and the design brief in the period addressed by the statistical report and subject to heritage requirements.

Further planning lies ahead in, as yet, unspecified directions.

These planning processes have intermixed long-range and short-range considerations although all are directed to finding a solution for the long-range. The risk of the processes is that planners like planning and there is an ever present possibility in long-range planning of new factors being discovered by the planners to merit further study while the client body, in this case the Supreme Court, languishes

⁴⁴ (1990) 1(7/8) *The Court Management & Administration Report 1*

in out-dated and inadequate accommodation. One role of the judiciary in the planning process is to remind the planners that, even in the case of public buildings, there is a client need to be met and thus to bring a balance between the legitimate interests of planning and the needs of the client.

PRIORITISATION

The determination of priorities in court space and facilities is an area in which members of the judiciary have an important contribution to make. In the AIJA Report, Church and Sallmann found:

"The predominant, current administrative regimes isolate each court from the others in the system, and leave to executive branch administrators the rationalisation of the demands of individual courts and the adoption of system-wide priorities. We believe that this approach has a tendency to aggravate the inherent tensions between different levels of courts. Under this traditional arrangement the incentive is for each court to attempt to maximise its own resources and interests in its dealings with the relevant executive department and cabinet minister, and to leave the other courts to fight their own battles. Since there is no appropriate forum which judicial officers can use to take a broader, court-system perspective, it is hardly surprising that such a view is rarely taken".⁴⁵

In their opinion, "...the greatest practical challenge...will be...to determine how the individual courts will relate to each other on matters of policy development and overall system-wide governance."⁴⁶ Nowhere is this problem better exemplified than in space and facilities planning. Where each court is dependent upon the executive for its planning (the "traditional" model), there is no institutional encouragement to the evolution of a view on behalf of the judicial branch as a whole. Such may come about accidentally, as the result of cross-court consultation emanating from the lines of communication between the chief justices or chief judges of the time, but more often it will not occur and the courts of the judicial branch will not be consulted other than in relation to what are perceived by the executive as the needs of that Court.

⁴⁵ Church and Sallmann, *supra* n1, 77

⁴⁶ *Ibid* 76-7

The Western Australian experience referred to earlier is instructive on this aspect. The Supreme Court Planning Committee was initially constituted as a committee of the Supreme Court to plan in relation to the future of that Court. In the early discussions of the committee it became apparent that the future of the Supreme Court could not be considered in isolation from the District Court and the Magistracy because any long-range planning for the Supreme Court had to take into account projections of the jurisdiction of those other courts. Consideration was required of future jurisdictional shifts between the courts or coalescence of jurisdiction in whole or part. As a consequence, the Chief Judge of the District Court and the Chief Stipendiary Magistrate joined the Committee which became, as has been seen, the Courts Planning Committee. Through the reconstituted committee it became possible to plan the future of all court accommodation requirements on a jurisdictional rather than court basis. It rapidly enabled each court to obtain an understanding of the needs of the judicial branch as a whole and to arrive at a determination of priorities with those needs in mind. It also facilitated advice to the committee from the relevant departments of state on an across-court basis. The experience of this committee bears out what was said by Church and Sallmann and points to the desirability of such a solution being utilised in relation to the affairs of the judiciary in matters additional to space and facilities planning.

Judicial participation in issues of prioritisation has the significance that it allows the judiciary to contribute to a consideration of the policy determinations on which courthouses will be developed, where new courthouses will be established and where old courthouses will cease to be utilised. Where members of the judiciary move on circuit around a jurisdiction they inevitably have views on non-central business district courthouses arising from their experience in utilising the facilities. Clearly judicial opinion alone could not be determinative of such issues; to exclude it entirely is to engage in potentially deficient planning.

DESIGN

Location

The question of *location* of a courthouse is another issue which should attract proper judicial planning and forethought.

Closely related to any decision on location are considerations of whether the court concerned considers it is appropriately situated in relation to the legal profession upon which it relies for the progress of its judicial business. Other considerations which may arise are whether the court is prepared to be divided into separate locations, whether it is prepared to be housed wholly or partly in buildings involving non-court tenancies and whether it is prepared to be accommodated in commercially leased premises. All these are issues to which the judicial branch as a whole and the judiciary of each court should give consideration if that branch is to assume more responsibility for its space and facilities. Of course, none of these issues arise in a vacuum and in most instances the limitations of premises and funds will narrow the choices considerably. It is prior to that point, however, that judicial planning is requisite if the judicial branch is to give meaning to the application of judicial independence in this particular instance.

Symbolism

Symbolism is a major factor to be considered in the planning for both location and design. What sort of symbolism is required is another matter. The choice will be affected by a myriad of considerations including the level of jurisdiction, whether the court is appellate or trial and the current public expectations of the court system as well, perhaps, as the court's perceptions of the public. There can be no question that "the exterior articulation of a courthouse and the relationship of the building to its surroundings expresses our concept of the role of the law in society."⁴⁷ No ultimate national court of appeal could be buried in leased accommodation shared with other tenants: its role demands symbolism, although what is acceptable is unlikely to follow the choice of Jefferson in basing the design of the

⁴⁷ Allan Greenberg, 'Symbolism in Architecture: Courtrooms', *The Public Face of Architecture: Civic Culture and Public Spaces* (1987) 210 213; cf Dennis E Curtis and Judith Resnik, 'Images of Justice' (1987) 96 *The Yale Law Journal* 1727

building housing the original Supreme Court of Virginia on a Roman Temple.⁴⁸ As the level of the court decreases within the hierarchy, the case for symbolism either decreases or takes on another form. At the level of the Magistrate's courts what may arguably be needed are user friendly courts, capable of sustaining large public transience in surroundings able to provide food and child care, disability access and so on.

Heritage and environmental factors

Issues of symbolism will frequently be bound up with considerations of the *historicity* of the present site as well as *environmental factors* impinging upon the appropriateness of extending or otherwise developing an historical site. Originally chosen for its central location, early court buildings often acquire important heritage value while ceasing to have the necessary attributes required for a court. Nevertheless, the long association of the building with the law and the legal profession may ground considerable sentiment for its retention as a court site despite its short-comings to its designated task. The issues can be explosive because they can place the judicial branch at odds with significant community groups seeking to protect these qualities in the building. Independence of the judicial branch requires, however, understanding of these issues which is unlikely to be forthcoming without continuity on behalf of that branch in the planning process. Consultation with the judiciary at the end of the process when the issues have emerged is more likely, it is submitted, to elicit a knee jerk response rather than a considered view developed over a period of time.

Historicity is one of the factors which long range planning takes into consideration in the United States. It may create judicial attachment to a particular building after the building has ceased to have the capacity to meet court requirements. It is a factor of great importance when renovations are contemplated to a building to improve its space usage. It may create public interest in preservation of a building on a site which otherwise would be available for redevelopment. It may lead to the

⁴⁸ Greenberg, *ibid*

relocation of an historic courtroom in a new building. It may result in historic courthouses being preserved by giving over their usage to community legal education or visiting facilities for the public. Just such has occurred in the case of the Old Courthouse adjacent to the Supreme Court of Western Australia in which the Perth office of the Francis Burt Law Education Centre is located with responsibility for managing student and public tours of the Supreme Court and the exhibits of the Law Museum.

The heritage study recently carried out in relation to the Supreme Court of Western Australia is illustrative of the issues which arise. That study had been preceded by two studies, namely a draft Conservation Management Plan for the Supreme Court and a Conservation Plan for the old Supreme Court. Despite the existence of these studies of the buildings on the Supreme Court site, it also became necessary that a heritage study of the site be carried out by the Heritage Council of Western Australia. Established by the *Heritage of Western Australia Act 1990*, the Council lacked funds to commission heritage studies. The budgeting of funds for planning of the Supreme Court provided a funding source for a heritage study of the site. It was accepted that the site, being located in a highly sensitive heritage area proximate to Government House and other buildings of colonial origin and situate in gardens dating from the founding of the colony, should be considered in relation to that precinct. The steps involved in the heritage study included settling the relevant precinct, defining the terms of reference, calling for submissions, consulting relevant bodies and holding public consultations.

Environmental and heritage issues require the planning of court space and facilities to be acceptable to a wide range of bodies in addition to bodies specifically charged with statutory responsibilities in relation to those matters. Examples are the local authority (in the case of central business development, the City Council); specialist environmental groups with an interest in the development of the location; and Aboriginal interests. A complicating factor in consultations with such groups is that none of them should have any current litigation before the Court in relation to

which the approach to them for consideration of planning issues could be misconstrued by parties independent of the planning process.

In the case of the heritage study of the Western Australian Supreme Court it was a requirement that it be carried out in accordance with the Burra Charter (The Australia International Council on Monuments and Sites (ICOMOS) Charter for the Conservation of Places of Cultural Significance). This Charter was adopted by Australia on 19 August 1979 and has been revised on 23 February 1981 and 23 April 1988.⁴⁹ The Charter is supplemented by guidelines on cultural significance⁵⁰, conservation policy⁵¹, and procedures for undertaking studies and reports⁵². Importantly the Burra Charter defines "cultural significance" to mean "aesthetic, historic, scientific or social value for past, present or future generations."⁵³ In the case of historic courthouses there is wide scope for application of these factors. However, the charter is limited in its application to places of European cultural significance. Aboriginal cultural significance therefore arises outside the Charter. In the case of Western Australia the *Aboriginal Heritage Act 1972* imposes the relevant requirements.

A further interesting aspect of environment relative to design is the provision for art. In the United States the "Art in Architecture for Federal Buildings" policy of the General Services Administration allows for one-half of one percent of estimated cost of construction for new buildings and buildings undergoing repair and alteration to be expended on fine arts as an integral design feature.

Standards

Issues of *design and planning standards* have not usually been thought of as the general concern of the judicial branch. Judges generally have tended only to take an interest in such questions at the last moment before the design of their new

⁴⁹ The charter appears as Appendix 1 in James Semple Kerr, *The Conservation Plan*, National Trust, New South Wales, 1990, p 25

⁵⁰ *Ibid*, 29 (Appendix 2)

⁵¹ *Ibid*, 32 (Appendix 3)

⁵² *Ibid*, 35 (Appendix 4)

⁵³ *Ibid*, 25, Art. 1.2

chambers or courthouse is finalised. By that time the possibility of any major input is circumscribed. In that circumstance they are not asked to make any contribution on an on-going basis. At the same time their experience of the operability of courtroom designs should clearly be of major relevance to the evolution of designs for those facilities.

The factors to be considered in evolving design and planning standards are manifestly various, yet they are capable of being identified and catalogued in an objective fashion. In the United States, a 1972 symposium⁵⁴, while lamenting the lack of reference materials and functional standards for courtroom design, set out a standards and statistics check list for the design of court facilities. A 1973 study⁵⁵ defined the objectives of the function or procedure under consideration; described the operation of it, identified the activities, the people involved and the spaces required for each such function or procedure; and defined the environmental requirements of each. In relation to judicial objectives, it relied upon the themes of the need to maintain public confidence in the judicial system, the efficiency and competence of court operations and the need for courts to evince concern for human needs. In the same year the United States Department of Justice published a design handbook for administrators dealing with space management concepts, space management methodology, space standards and guidelines, manpower projection and planning, courthouse security, information systems, cost planning and program administration. In 1976 the National Clearing House for Criminal Justice Planning and Architecture published comprehensive guidelines.⁵⁶

In the United States concern over the philosophy of judicial design and its practical application became of such concern that in the late 1980's the Judicial Conference created a Space and Facilities Committee. Over a four-year period the

⁵⁴ American Judicature Society, *Selected Readings: Courthouses and Courtrooms* (1972) 72

⁵⁵ The American Bar Association and The American Institute of Architects, *The American Courthouse* (1973)

⁵⁶ National Clearing House for Criminal Justice Planning and Architecture, *Guidelines for the Planning and Design of State Court Programs and Facilities* (1976)

Judges Design Group developed the United States Courts Design Guide, approved by the Judicial Conference in March, 1991. It is now used to provide direction for all those involved in the planning and construction of federal court facilities. Its development was based on the overriding principle that the federal judiciary itself must determine the requirements and standards for the design of federal courts.⁵⁷

The 1991 Guide contains general design guidelines addressing spatial relationship, accessibility and circulation diagrams, courtroom floor plans, space and furniture tables, architectural considerations, furniture and finishes, courthouse security, acoustical considerations, mechanical-electrical systems, automation considerations, and barrier-free access requirements. Specific guidelines are then set out for courtrooms, judge's chambers, ancillary facilities, jury facilities, the court library, the clerk's office, judiciary related offices, security services, court related facilities, building support services, and special facilities. Under each of these categories guidelines have been developed for such matters as users, functions, accessibility, space size, design requirements, security, acoustics, heating, ventilating and air conditioning, lighting and electrical, audio, visual, communications and data transmission.

A guide has also been produced by the National Center for State Courts in 1991 titled "The Courthouse: A Planning and Design Guide for Court Facilities". The Center worked in conjunction with The American Institute of Architects, The Conference of State Court Administrators, The National Center for Juvenile Justice and The American Bar Association. This publication lists as design issues of a general nature the following:

1. Impact of Special Casetypes and Changing Nature of Litigation on Courthouse Design
2. Accessibility of Justice and Accommodation of the Public
3. Site Selection
4. Consolidation or Separation of Court Facilities
5. Consolidation or Separation of Judicial and Detention Facilities

⁵⁷ Michael S Kanne, Judge of the US Court of Appeals, 'Design for Federal Courts: A Practical Approach Based On Judicial Philosophy and Requirements', presentation to Harvard Law School Colloquium, November 16, 1991

6. Flexibility of Design and Use
7. Adjacencies and Internal Location of Functions
8. Courthouse Circulation and Zoning
9. Grossing and Efficiency Factors
10. Renovation

As special design considerations it lists the following:

1. Design and Image
2. Court Organization and Administration
3. Courthouse Security
4. Needs of Persons with Disabilities
5. Fire, Life Safety, and Building Codes
6. Environmental Issues
7. Future Trends in Court Technology
8. Records Management and Storage
9. Courthouse Automation
10. Signs and Public Address Systems

Specific design components of each facility in the courthouse are also addressed.

A comparable publication was produced in March 1987 with reference to a particular courthouse under the title "Virginia Courthouse Facility Guidelines". In 1992 the National Center for State Courts published the "Retrospective of Courthouse Design 1980-1991" illustrating and explaining federal and state courthouse developments selected in co-operation with The American Institute of Architects' Committee on Architecture for Justice. In 1991 the Administrative Office of the United States Courts, Space and Facilities Division published the papers of a conference held under the title "Successfully Managing Major Design and Construction Projects." The American Institute of Architects is shortly to publish a report on the "First International Conference on Courthouse Design" held in 1992.

The point of referring to these publications is to highlight the importance of the evolution of developing standards as an integral part of the court planning process. Planning should not be thought of by the judiciary as a once-off exercise. Rather, it is to be perceived as an on-going exercise requiring constant attention and input from the judiciary over the years. The development of standards reflected in guidelines means that there is a repository for judicial and other perceptions of the needs of the courthouse which can be built upon and considered on each new application. In Australia, Victoria has led the way with the preparation of a Design Guide. In

Western Australia, the current planning proposes to lead to the production of room data sheets as the nucleus of the production of standards and guidelines for the building of courts in that State.

It is probably true to say that the executive model of judicial administration largely applicable in Australia has not been conducive to busy judges being encouraged to have an input in this area. Most members of the judiciary would have some opinions on the manner in which the facilities utilised by them could be better designed but more often than not, when immediate personal inconvenience is not involved, there is no institutional arrangement to encourage them to express those thoughts. Their views lie suppressed lest they be thought to be a nuisance or interfering in matters which do not concern them. Assumption of a more evident responsibility by the judicial branch would encourage both immediate and long-range judicial input to design and standards, while leaving to the appropriate administrative machinery the development of the details.

Central to development of design standards is the question of the *type of courthouse and courtroom* considered to be desirable. One issue arising in relation to the type of courthouse is whether it is to be in the traditional mode or whether it is to be reflective of a modern desire to have adversarial and non-adversarial means of resolving disputes under the one roof. The latter has been described as the multi-door courthouse. Likewise, conceptions of the courtroom itself vary from time to time depending upon the level of formality required. That in turn will be determined by whether the court concerned is an appellate or trial court and the nature of its jurisdiction. Within the criminal jurisdiction there are bound to be differing opinions on the relative merits of, for example, different locations for the jury or witnesses reflected in proposals for courtrooms in the round, courtrooms with the judge's bench in the corner and courtrooms with witnesses located opposite the jury. Judges have important experience to bring to conceptions of how the courtroom communicates "its

ideal model of a relationship between judges, prosecutors, jurors and others involved in judicial proceedings."⁵⁸

In 1973 the United States National Advisory Commission on Criminal Justice Standards and Goals recommended that:

"Adequate physical facilities should be provided for court processing of criminal defendants. These facilities include the courthouse structure itself, and such internal components as the courtroom and its adjuncts, and facilities and conveniences for witnesses, jurors, and attorneys."⁵⁹

In the case of the courthouse, the Commission considered it "should be adequate in design and space in terms of the functions housed within and the population served."⁶⁰ In the case of the courtroom, the Commission said it:

"should be designed to facilitate interchange among the participants in the proceedings. The floor plan and acoustics should enable the judge and the jury to see and hear the complete proceedings. A jury room, judges' chambers, staff room, and detention area should be convenient to each courtroom."⁶¹

These recommended standards make apparent the intrinsic connection between physical facilities and the delivery of justice, whether in a criminal, civil or appellate context.

An important reason why standards should be developed is that they can be applied to all court developments within the jurisdiction. The existence of court approved guidelines means that future court growth only takes place in accordance with the guidelines unless the change has been considered, debated and approved. Innovations of a substantial nature in the lay-out of the court-room, for example, would only occur in this manner.

Security

Issues of security have been referred to as among issues on which standards are required. Security is, however, so fundamental as to require a separate heading to draw attention specifically to it. It is a factor requiring reconciliation with all the

⁵⁸ Greenberg, *supra* n47; citing Robert Gutman, *People and Buildings* (1972) 229

⁵⁹ National Advisory Commission on Criminal Justice Standards and Goals, *Courts* (1973) 196

⁶⁰ *Ibid*

⁶¹ *Ibid*

other public requirements of a court-house such as public access and even "user friendliness".

Innovations

In terms of development of overall standards for the courthouse the Model Court Project of the New South Wales Attorney General's Department and the Law Foundation of New South Wales is unique in Australia. That project sought to occasion rethinking of the relationship between the courthouse and its client community based around a selected courthouse (Blacktown). That project was recently completed with some results being implemented in other local courts.⁶² Issues which the project addressed were the formulation of "a general plan to renovate inefficient and antiquated aspects of the system, and of court buildings themselves, capable of meeting the demands of increasing numbers of consumers and deploying modern technology to facilitate their progress".⁶³ Issues dealt with included upgrading of premises, computers in the registry, introduction of a modular counter system, voice activated recording of evidence, additional staff resources, callovers, night court sittings, a review of court documentation, a courtguide interactive video information system, an explanatory brochure, a newsletter and increased productivity.⁶⁴

This link between the development of standards and redesigning fundamental concepts was noted by Chief Justice Rehnquist of the United States recently when he said:

"In the long run, however, planning must focus not simply on facilities expansion but also on innovative alternative methods of dispensing justice. Increased use of alternative dispute resolution services may change the future design needs and lead us to build justice centers instead of the familiar courthouses of the present.

Continued advances in computers and communications may lead to what people call the virtual courthouse where justice can be dispensed without all parties gathering in the same place. A renewed commitment to cooperation

⁶² Law Foundation of New South Wales, Annual Report, 1992, p.11

⁶³ Attorney General's Department of NSW and The Law Foundation of New South Wales, "*The Model Court Project*", (undated) p.7

⁶⁴ *Ibid, passim*

between the federal and state judicial systems may lead to more and more shared facilities joint state-federal justice centers--instead of a separate one for each. Depending in part on the ideas exchanged in this and similar forums the structures in which the justice of the future is dispensed may look very different from the courthouses we see today." ⁶⁵

The development of a range of facilities peripheral to courtrooms, the unpredictability of technological impact, the possibility that the courthouse of the future may accommodate facilities for non-adversarial resolution of disputes as well as adversarial conflict all dictate that planning and design have flexibility as their hallmark. Today's use may not be tomorrow's use but the space attained for use today may well accommodate conversion to tomorrow's need if built with that in mind.

TECHNOLOGY

A recent factor making judicial participation important is the advent of *technological considerations* in the building of courts. Such considerations include information processing, audio-visual techniques and surveillance equipment and extend to the impact on the courtroom of videotaping, television, electronic voice-activated court reporting and sound masking and audio equipment for jurors. Ultimately the fate of technology in the courts will depend upon its appropriate use and application by the judges.⁶⁶ Much can be done in using technology without judge involvement, for instance in the management of the courts and in the preparation and presentation of cases by the legal profession. The business of the courts, however, cannot be divided into sequential segments unrelated each to the other. The courtroom, including the judge or judges presiding, must be thought of as part of the continuum for technology to have appropriate application. Apart from the difficulties which the present generation of judges has with coming to grips with technological innovation, it is clear that the courtrooms of the future must always incorporate the existing state of technological art and potential, as best it can be estimated, to incorporate the developments of the future. By being asked to have some

⁶⁵ Chief Justice Rehnquist, Welcoming remarks, First International Conference on Courthouse Design, Washington DC, 7-9 October, 1992.

⁶⁶ (1990) 1(6) *The Court Management & Administration Report* p. 5-6

responsibility on an on-going basis for such factors the judiciary will be both planners of and learners from the process in which they thus participate.

Disabilities

In the United States the *Americans With Disabilities Act 1992* requires that state and local government buildings, including courthouses be accessible to persons with disabilities. Federal courts are subject to the same standards through the Uniform Federal Accessibility standards. Disabilities include all physical disabilities and visual and hearing impairment. They require both attention to design and to technology. Developments of interest of a technological character are "real-time translation" of proceedings (production on a screen of printed translation of all that is said seconds later); computer software permitting searching of the real-time transcript; video tapes of the court proceedings that use the real-time translation as captions or subtitles for what is being shown on the tape; computer software which permits integration of video and text transcripts with other information in the court's case management data base; and computer creation of Braille versions of court proceedings.⁶⁷ In Western Australia the *Disabilities Services Bill 1993* proposes to continue provisions of the *Disability Services Act 1992* whereby public authorities are required to prepare and implement a disability service plan to ensure that services provided by the authority further the principles scheduled to the Act.⁶⁸ These include the principle that "people with disabilities have the same right as other members of society to receive services in a manner which results in the least restriction of their rights and opportunities".⁶⁹ This has the potential to impact on the planning of court space and facilities.

MANAGEMENT

Management information and statistics

⁶⁷ Reported to the First International Conference on Courthouse Design, Washington DC, 7-9 October 1992.

⁶⁸ *Disability Services Act 1992*, s9(1)(a).

⁶⁹ *Ibid*, Schedule 1, para6.

The planning of space and facilities is intimately related to the maintenance of *management information*. The ability to plan requires analysis of the functions and mode of operation of the court. All too frequently the data maintained fails to yield all the information needed for planning purposes. Involvement of the judiciary in planning processes is more likely to lead to the data collection activities of the courts being oriented to collection of information relevant to planning requirements.

The need to produce reliable statistics necessitates that attention be given to the method by which data is collected within a court. Usually the data will emanate from many sources both within and without the registry. The data collection points will have grown without relationship to each other or to the planning purposes ultimately to be served. Some data collection may need redefining or relocating. The advent of computers at both judicial and managerial levels within a court can assist the reformulation of data collection. Even if the data within a court is well defined and collected, there remains the issue of how well it relates to data of other courts in the same jurisdiction or courts of equivalent status in other jurisdictions.

The AIJA has endeavoured for some years to promote uniform statistics and it is to be hoped this work will come to fruition. Its recent report on Court Management Information provides an analysis designed to heighten appreciation of the collection and uses for such information.⁷⁰ It requires careful consideration with reference to the planning applications of the information collected. The Australian Bureau of Statistics has established a National Courts Statistics Unit and is engaged in defining core data and standards.

Budget Process

The impact of *the budgetary process* on the planning process is not necessarily always understood by the judiciary. Experience with the process makes apparent that demands resulting from the latter process are most unlikely to be met on the sudden. Planning itself will not proceed unless appropriations have been made in

⁷⁰ P M Lane, *Court Management Information: A Discussion Paper*, Australian Institute of Judicial Administration (1993)

that behalf. Furthermore, the planning progress must proceed with the budget timetable well in mind. It is of little use completing an assessment after submissions for the forthcoming budget have been completed; the proposals could lose a year in implementation or further work. *Synchronisation* with other processes of government, and most predominantly the budget process, is therefore a necessary feature of the planning process and imposes its own timetable on judicial and other decision-making in the planning process.

The need to obtain funding will also involve the judicial branch in demonstrating the need for the courthouse to the public: that is, in the task of *politically identifying the need for the expenditure*. Absent the need, appropriation may be unlikely. However, when the need is present it must still be recognised by the other arms of government and that requires the judicial branch to ensure appropriate presentations of its case are made.

There is authority of the Privy Council in *Attorney-General for Jersey v Capelain*⁷¹ that a court or a judge has no power to commit the exchequer to the expense of providing essential alterations or improvements to court buildings, or to direct that the cost of doing so be defrayed out of public revenue, although that decision depended upon the particular constitutional provisions pertinent to the Island of Jersey. In the United States, however, litigation has in the past been instituted in New York and Florida by the courts with a view to the restoration of the court budget in the face of substantial cutbacks by the executive branch.⁷² Those actions are founded on the contention that there is an inherent power in the courts to compel budget appropriations for the reasonable needs of the judiciary in carrying out constitutionally mandated duties.

Alternative financing

Development of court space and facilities has traditionally required public funding. There are sound jurisdictional reasons for this: courts cannot be beholden to

⁷¹ (1842) 4 Moo PC 37 (13 ER 214) cited by McPherson, *supra*, n32, 180

⁷² eg, *Wachtler v Cuomo*, unreported, 1991, New York State; *Beckert v Warren* (1981) Pa; *Carroll v Tate* 442 Pa 45 (1971)

landlords who may be litigants before them; court business cannot be intermingled with commercial business being conducted in the same premises. The necessary independence of courts requires they be set apart.

Consistently with these sensitivities, experience in the United States shows a recent willingness to explore a wider variety of public financing techniques and to allow private development of such facilities under appropriate circumstances. Constraints on the availability of public funds have resulted in a more imaginative approach to courthouse funding. The recent development of the Victorian Magistrate's Courts has reportedly occurred through private funding and may foreshadow such developments in Australia. It may be appropriate for the AIJA to stimulate further examination of funding techniques with a view to ensuring courts do not fall behind appropriate standards in times of financial stringency.

JUDICIAL GOVERNANCE

Judicial involvement

Whether the judicial branch should merely be more frequently involved with these issues or whether it should assume formal responsibility for them will be determined in relation to the whole range of issues affecting inter-branch relationships. The case for more extensive involvement in some way is, it is submitted, overwhelming. The case for judicial branch assumption of responsibility rests ultimately upon wide considerations but it is suggested that unless and until such responsibility is assumed there will not be the necessary institutional encouragement to the members of the judiciary to participate to the extent the planning of the future of the branch dictates.

One irony of these issues affecting judicial independence is that the application of the principle in favour of greater judicial branch assumption of responsibility occurs at a time in which the judiciary is hard pressed for time and overburdened by the judicial business of the courts. Adoption of responsibility in application of the principle of judicial independence requires that the judiciary discard any notion that the function of a judge is solely to try cases in space and facilities

provided to the appropriate standard at the right time by an unseen and unheard executive operating in a distant building.

It is no answer to any suggestion that the judicial branch should be more responsible for its own space and facilities that the judges may inhibit the planning process or bring to it dampening and uncomprehending attitudes grounded in the unexamined practices of the court past. The case for judicial branch responsibility is made in terms of the principle of judicial independence and it is no part of the proper application of that principle that the likely content of a contribution (if it be such) be taken into account. If there be any truth in that prediction of judicial approach, it is well met by the response that participation in the process would expose the judiciary to the planning issues involved and enable it to see the issues which require addressing.

Non-judicial and Public involvement

The case for judicial branch responsibility of space and facilities planning is not a case that the judiciary alone should plan those facilities. It is a case that the judiciary, as a significant part of the process of the administration of justice, should be participants in it so that the contribution of their experience can be fed-in during the long process of planning and not merely consulted on selective issues or at a final stage. Participation in that manner will expose the judicial branch to considerations raised by others in the process including the users of the court system - among whom are the legal profession and community groups, budget managers, architects, engineers and environmental planners. To espouse enhanced judicial participation or direction of the planning of court space and facilities is not to espouse the exclusion or diminution of any of these other legitimate interests in that planning process. It is to urge that the judiciary assume a role in the process from which, in large measure, they have been isolated.

It is certainly not the case that improved judicial branch participation should curtail public input to the planning process. Courts are more and more required to relate successfully to the community they serve. Whether the community be national,

state or local, a court will wish to be thought well of in its physical housing by those it serves. Whether that can now-a-days be achieved without provision of child care, disability facilities, restaurants or cafeterias and so on, is a matter to be considered in each particular circumstance. What is important is that the community should be heard by the court and the community should hear the court on these issues. Indeed, an important aspect of judicial contribution to space and facilities planning is the proper identification of all the parties having an interest in the planning process. Obviously interested parties are the judges, their staffs, the Registrars, the court staff, the security staff, the police, the media, the prosecutors, the legal profession, the budget managers, the architects, the engineers as well as the public and the arms of government relevant to the place of the court in the court hierarchy. Emphasis upon the need for judicial involvement in the issues of space and facilities planning should not be taken as in any way intended to minimise the interest of these other interested parties. As has been said, "at the bottom line it is the public that is most critically affected."⁷³

Summation

The purpose of this paper has been to examine the application of the principle of judicial independence in the context of the planning of court space and facilities. It suggests that space and facilities are fundamental to the proper functioning of the courts and have largely been out of court control and input. Without ongoing planning, the courts lack the expertise and preparedness to make appropriate inputs at the time the planning process requires it and are ill-prepared to match the requirements of on line budgeting periods. Examination and experience in the area also demonstrate that such planning should not be limited to a particular court but should be organised so as to encompass all courts within a jurisdiction so that issues of priorities can be resolved within the branch. Consideration of these issues reinforces the finding of Church and Sallmann that in Australia "...structures will need

⁷³ Howard Stern, 'How Lawyers and Judges View the Problem' in The Institute of Continuing Legal Education Michigan, *Emerging Trends in Courthouse Planning, Design, Administration and Funding* (1975) p18

to be set up to enable judicial officers to make policy decisions and to oversee the administration of their courts."⁷⁴ Nothing better exemplifies the present problems and the future possibilities in the more fulsome assumption by the judicial branch of the responsibilities arising from judicial independence than the role of the judiciary in relation to the space and facilities in which judicial business is conducted.

⁷⁴ Church and Sallmann, *supra* n1, 77