Australia has a sound judicial system. The system comprises the courts, the judicature and the staff of the courts. The system is one which has the confidence of the Australian community, and justly so.

One of the responsibilities of the judiciary is to do all that it can to ensure that this continues to be the case. That is, to ensure that the judicial system is sound, and that community confidence in it is maintained.

We can no longer assume that performing our judicial work to the best of our ability will suffice to maintain that state of things. In a changing society we need to do more than that. In this lecture I propose to outline the significant contribution that can be made to the health and strength of our judicial system by the provision of suitable programs of professional development for the Australian judiciary.

I begin by taking one step back, to sketch briefly the place of the judiciary in our system of government.

It is uncontroversial that our concept of governance and of government is one in which the function of governing has three aspects. It involves three conceptually separate functions. The legislative function, the executive function and the judicial function. Each of those functions must be discharged efficiently and effectively, if our society is to be well governed.
It follows that the welfare and sound functioning of our society require that there be an efficient and effective system to discharge the judicial function of government, that is, to administer justice.

Our concept of government has embedded in it the concept of the separation of powers. The separation of powers, by dividing powers, provides a system with checks and balances, the aim of which is to assure individual liberty under and by virtue of the rule of law.

In turn, the independence of the judiciary, both structural and individual, and impartiality both structural and individual, are embedded in our concept of justice. We believe that we have true justice only if we have an independent judicial system administered by a truly independent and impartial judiciary.

Accordingly, it is essential for the functioning of our society, and for its welfare, that we have a judiciary that is independent and impartial. As well, it must be untainted by corruption, and it takes only a moment’s reflection to appreciate that the judiciary must be competent, and the judicial system as a whole must be effective and efficient.

It is easy to take these conditions for granted in a country in which these conditions have been achieved, as they have been in Australia. It is easy to undervalue things achieved without apparent difficulty.

Despite that, these conditions are of fundamental importance. Australians get reminders of their value and importance when they observe events in countries that do not have a judicial system that meets these criteria. Weaknesses in the judicial system are, I suggest, reflected by weaknesses in the system of government, of whatever kind it may be, with adverse consequences for the relevant community.
We also get a reminder of the importance of these conditions when we observe
the emphasis placed by international bodies, concerned with nation building in
underdeveloped and developing countries, on the establishment of a sound judicial
system. Those who are involved in this kind of nation building clearly appreciate the
importance of a sound judicial system as a cornerstone of society, and as a condition
of the economic development and progress that is needed to advance society.

Thus, our achievements in this respect are not to be underestimated, or
undervalued.

At times Australia’s judicial system may appear to be productive of
inefficiency. But the administering of justice requires that at times cases be dealt with
in a manner that would not be adopted if the efficient disposition of the case were the
only criterion. Sometimes the administration of justice emerges as an obstacle to
parliament legislating as it would wish, or to the executive government acting as it
would wish. But the price we pay in terms of apparent efficiency, and in terms of
obstacles to the will of parliament and the will of the executive, are worth paying.

Also, there are occasions when error is made, or the system does not work as
well as it could or should. But this is the exception, not the rule.

We need to remind Australian governments and Australians about the
importance and value of a sound judicial system, and that is one of the things that I
am doing on this occasion. We should do so without appearing to engage in an
exercise of self congratulation, and without appearing to exempt ourselves from
critical scrutiny.

What are the conditions that contribute to a system for the administration of
justice, of the kind that I have described, and to the existence of an independent and
impartial judiciary that will serve in such a system of justice?
First, as I have already mentioned, a state of institutional independence, and individual independence with all that requires. It is sufficient on this occasion for me to make this point, without developing the features of a judicial system and of a judiciary that has the hallmarks of independence.

Second, the judicial system must be open to scrutiny from the public and in particular from the media. Genuine scrutiny, and scrutiny and criticism that take place without fear of reprisal, except when the law is broken, are an important condition of a sound judicial system.

Third, such a system requires men and women who are competent to be appointed to the judiciary, and who can be expected once appointed to have an independent frame of mind.

Fourth, and this is my main focus on this occasion, we need a judiciary that has an institutional and individual commitment to maintaining its competence and independence.

On this occasion I wish to speak about the place that judicial education or professional development as I prefer to call it, has in ensuring that we have a healthy judicial system, and in particular in ensuring that we have a judiciary that has a commitment to competence and independence, and a judiciary that maintains its competence and independence. The point I wish to develop is that suitable programs of professional development are vital to maintain the competence and independence of the judiciary. In connection with that I wish to identify the role that can be played by the National Judicial College of Australia (NJCA) in that respect, and say a little about what the NJCA is doing.

As Chief Justice Gleeson has pointed out, it is often overlooked that Australian governments are required to make no direct investment in the training of a
body of women and men from whom suitable judicial appointments can be made¹. I use the term “judicial” here and later to refer to judges and magistrates. The legal profession provides a pool of men and women suitable for appointment, be they members of the profession in private practice, working for the government or for public sector bodies, working as academics or employed in commerce. Members of the legal profession acquire, refine and shape their professional skills in the course of their professional practice. Their professional experience equips them for the task of judging. The cost is met indirectly by their employers and clients. It is not necessary for governments to make any direct commitment to the training of these lawyers, let alone to preparing them for judicial appointment.

In our legal system there is no occasion or need for governments to establish colleges or other bodies that will impart to legal practitioners the basic skills required to be a judge, and which will prepare them for judicial office. All of this is done within the profession itself. In that respect our system is different from the civil law system.

Nevertheless, it is appropriate for Australians and Australian governments to be mindful of the vital interest that they have in the strength and health of the judiciary. It is also appropriate for them to be mindful of the substantial investment that they make in the judiciary.

First of all, as I have already said, an independent, impartial and competent judiciary is an essential condition of the system of justice which is in turn a cornerstone of our system of government.

Second, the quality of justice that is administered in our judicial system will be affected by the standard at which judicial officers perform.
Third, and linked to it, are some matters that are pertinent when considering the investment made by society in our judiciary. Members of the judiciary are supported by an administrative structure of courts and support staff that it is expensive to maintain. The purpose of this system is to enable judicial officers to perform their task in dispensing justice. I simply make the point that society maintains an expensive structure through which judicial officers administer justice. We surely want to ensure that we get the best value for that investment.

Next, judicial officers tend to hold office for a relatively long period of time. In their recent work “The Australian Judiciary” Professors Campbell and Lee make the point that a survey that they conducted in December 1996 established that 63 per cent of judges of superior courts had been appointed when in their late 40s or early 50s. Experience indicates that a high proportion of them would serve to retiring age, and so would serve for about 20 years. The same survey disclosed that 42 per cent of judges had served between 11 and 20 years, at the time of the survey in question. A recent survey of Australia’s magistrates found that the average time on the bench was 12.8 years. That suggests, having regard to the retirement age, that most magistrates will serve for 20 years or more.

The importance of the administration of justice, and the substantial investment that society makes in the system for the administration of justice, and in judicial officers, leads to the conclusion that it is in our national interest to ensure that judicial officers perform as well as they can.

That means, I suggest, ensuring that they maintain their skills at a high level, and that during the course of their judicial career they improve those skills with practice and with the benefit of experience, and that they adapt their skills and method of performance to the changing expectations of society and to changed circumstances.
As well, and the importance of this should not be overlooked, it means ensuring that they maintain their commitment to and enthusiasm for the administration of justice.

What does that require?

Before answering that question, I remind you that not only do judicial officers typically serve for a lengthy period, of the order of 20 years, but that the vast majority of them work alone, in the sense that they sit alone in court. They have no opportunity to observe other judicial officers in action, nor are they observed by other judicial officers. Their performance is not reviewed by their peers. They are expected to perform much the same task for many years, despite the limitations just mentioned. It is not just that they are expected to maintain their skills. They are expected to maintain a commitment to and enthusiasm for their work, which will ensure that each case is given appropriate attention, and that each person before the court is given a fair and courteous hearing, even though the case and the circumstances of the person before the court may be indistinguishable from hundreds of like cases that the judicial officer in question has dealt with during the judicial officer’s career.

In the recent past our approach was that nothing much need be done at the institutional level to maintain and to improve judicial skills, and to ensure continued vigour and enthusiasm. The theory was that a judicial officer would keep up to date by reading case law, through the arguments of counsel who appear before them in court, and somehow or other (and it was always somehow or other) maintain their skills and enthusiasm, and adjust to changes, without any particular assistance in that respect.

I question whether this assumption was ever valid. I believe that most professions these days accept the need for programs of professional development.
But whatever may have been the case in the past, I believe that in contemporary circumstances the assumption is no longer valid, and that Australian judicial officers need assistance to ensure that they perform as well as they can.

In short, Australia’s judiciary needs, in the national interest, to have available to it a good range of programs of professional development. These programs should place particular emphasis on learning from the experience of others. This is not just for newly appointed judicial officers. It applies to all judicial officers. The programs should assist us to improve our skills in court. They should help us to adjust to changes in the law and in legal practice. They should help us to adjust to changes in society and in society’s expectations of a judiciary. They should address matters that were neglected in the past, although no longer, such as how gender and cultural differences can affect the manner in which justice is administered. The programs should include disability awareness training, so that we ensure that all Australians are treated equally. Like other professionals we can benefit from assistance in maintaining our health and dealing with stress, to ensure that we remain fully fit for our demanding office. And, importantly, Australia’s judiciary need programs that will, when appropriate, refresh and rejuvenate its members, to avoid burnout.

Today there is an acceptance of the need for most of these things. This acceptance has been growing, I believe, over the last ten years or more.

Despite that, and although I suspect that most professions would regard what I have said as axiomatic, the provision of professional development programs for Australia’s judiciary has been neglected, and remains a hit and miss affair. England has had a well resourced Judicial Studies Board since 1979. New South Wales has had the Judicial Commission of New South Wales since 1986. That is a statutory body, which is well resourced, with a current budget in excess of $4.2 million, and a
staff of about 35. It provides a range of professional development programs for the judiciary of New South Wales. Until recently it was the only body in Australia, established with a specific charter to attend to judicial education, and funded for that purpose. Since 2002 Victoria has had the Judicial Commission of Victoria, which has been established to provide judicial education and which is appropriately funded for that purpose. The Australian Institute of Judicial Administration, supported by government funding, includes judicial education among its objects. It has provided education programs open to judicial officers from all states and territories since about 1987.

Elsewhere in Australia professional development for the judiciary depends on various groups and committees, usually set up within particular courts. The members of these groups and committees provide their service on a voluntary basis. As far as I am aware, none of them is assisted by staff with skills and experience in the area of professional development, and appointed to perform that function. Usually they must find the time to meet, without the benefit of any reduction in their normal duties. In short, professional development in most of Australia’s courts depends on the goodwill and commitment of volunteers, doing what they can in their spare time.

They have achieved a lot, despite their lack of resources. But more can and should be done.

By and large Australia’s courts have limited funding for judicial education. Most courts have some funding to enable them to send some of their members to conferences which offer programs of value to members of the judiciary. But funding in this respect is quite limited. As well, often these conferences do not focus on the improvement of the practical skills of judges although it is undeniable that they do play a role in providing refreshment and reinvigoration.
Most courts have very little funding available to them to enable them to develop their own well structured programs of professional development for their own members. There would be few courts in Australia that are able to do much more than provide one or two days of professional development activities for their members.

I suggest that this state of affairs reflects a failure by the judiciary itself, and Australia’s governments, to recognise the extent of the need for professional development for the judiciary, the importance in the national interest of meeting that need, and the common sense of recognising the substantial investment that Australia makes in its judiciary, and the merit of getting the best value for that investment.

In short, there is a substantial unmet need and demand for professional development for Australia’s judiciary.

The NJCA has been established to meet the unmet need. It is an independent body, controlled by the Australian judiciary. Its council comprises a nominee of the Chief Justices of the state and territory Supreme Courts, a nominee of the Chief Justices of the Federal Court and of the Family Court, a nominee of the Chief Judges of the District and County Courts of Australia, a nominee of the Chief Magistrates of the Magistrates, Local Courts and Federal Magistrates Court, and two non-judicial members, a nominee of the Attorney-General of the Commonwealth and a nominee of the Attorneys-General of the states and territories that are supporting the College financially. The College came into existence in October 2002.

Its task is a huge one. There are about 950 judicial officers throughout Australia, many of them in small centres, where there are few other judicial officers. While, as I will explain, the College will work cooperatively with existing bodies, and so proceeds on the assumption that they will continue to do what they are doing, the
unmet need is a substantial one, and exists in relation to judicial officers scattered throughout Australia.

The College’s establishment was promoted by the AIJA and ultimately was an initiative of the Standing Committee of Attorneys-General. That was a commendable decision. But the difficulty of its task is apparent when you consider that it has a commitment for funding from the Standing Committee for a period of four years, and as things stand an annual budget of approximately $318,000.00. That is a tiny sum for a body that is trying to meet the needs of the whole Australian judiciary. The College has a staff of three. Compare this with the position of the Judicial Commission of New South Wales.

We have begun our task, and have been at it now for about 18 months.

Anyone involved in professional development for the judiciary has to recognise and allow for certain matters. First, participation is voluntary. It is generally thought that judicial independence means that a judicial officer cannot be directed to participate in programs of professional development. Whether that is correct may be open to debate, but it is the general view. Second, as a group judicial officers are highly educated, and have a high level of skills in their particular field. They will be a critical audience. They are likely to respond to programs only if they are high quality. Third, programs that are presented must avoid any hint of “compulsory re-education” or of the deliberate shaping or forming of judicial attitudes on issues that will fall for decision. There is a line here that must be drawn with some care. It would be inconsistent with the requirement of independence and impartiality were a program, for example, to be aimed at persuading judicial officers to take a particular attitude to issues that might come before the judicial officers for decision. On the other hand, there is no objection to programs aimed at improving judicial
skills, and aimed at informing judicial officers about the people with whom they deal, their circumstances and expectations, and about the likely effects of particular approaches and decisions. Finally, most judicial officers are busy people. Programs that are offered must not only be relevant, but must warrant them finding the time to involve themselves in the program, and should hold out the prospect of some tangible benefits for the judicial officer.

As well, providing professional development programs for the judiciary is a specialised activity. Providers need to identify the real needs of the judiciary. This will vary to some extent from court to court. They need to be able to draw on the substantial experience and expertise of the judiciary. They need to understand the limitations imposed by judicial independence.

The College aims to work with existing bodies involved in professional development. We aim to try to fill the gaps, to meet needs that they are unable to meet, and to assist existing providers in providing better quality programs. As we develop our own expertise, we hope to be able to use that expertise to assist other bodies involved in professional development.

So far our focus has been on relatively small groups of about 20 to 30 judicial officers. Our emphasis has been on structured discussion of practical problems and using other forms of active learning, as distinct from the delivery of lectures to large groups. Our approach has been one that focuses on the group, rather than on a single teacher. We take the view that a group of judicial officers will often bring more knowledge and experience to an issue than any one presenter can bring. Our emphasis is on the sharing and exchange of that experience. We rely on presenters to guide discussion, rather than work on the basis that they will be the source of the information that is to be imparted. Our approach emphasises that we should not try to
standardise the judicial approach to issues, and in many areas should not approach the issue on the basis that there is a right or wrong approach, or a particular template that should be followed.

In short, to a considerable degree, our aim is to draw on the accumulated experience and skill of Australia’s judiciary, and to ensure that the benefit of that experience and skill is shared widely within the judiciary.

We aim, as far as possible, to take our programs to the Australian judiciary, rather than expect them to come to the College, which is based at the Australian National University, although we will conduct programs there.

One means of reaching a large number of judicial officers, and of dealing with the “tyranny of distance” will be to develop good quality programs that can be delivered electronically to judicial officers at their place of work. A number of educational institutions now provide courses by what is called distance education, and we believe that the same approach can be taken successfully to professional development for the judiciary. However, we recognise that the successful delivery of programs in this way requires the use of particular skills that we do not have, and so we must acquire them. The development of good quality programs will be expensive, and a problem for us is to find the resources that we need to develop suitable programs. We believe that if we can get these resources, and develop the programs, we will have found the means of reaching many judicial officers whom otherwise we would have great difficulty in reaching.

What are the obstacles to the NJCA meeting the need for professional development?

The first is our limited funding. The bulk of our funding is consumed in salaries and support costs for our staff of three. Of necessity, any programs that we
present have to be presented on a cost recovery basis. I just mentioned the need, as we see it, to make a substantial investment in the development of courses to be provided electronically. At present we lack the funds to do that on an ongoing basis, although we have sufficient funds to take the first steps, and we have already commissioned the development of a pilot course. But assuming that the pilot is successful, we will have to find additional funds to enable us to continue with the project.

Our funding has been sufficient to bring the College into existence and for it to find its feet. It is not sufficient for it to discharge its function long term.

Another obstacle to our success is the fact that most courts have very limited funds themselves for judicial education. As I mentioned, of necessity we have to present courses on a cost recovery basis. Some courts have difficulty finding the funds to enable their judicial officers to participate in our courses. We believe strongly in the value of mixing judicial officers from different courts and different locations. So far this year we have presented one program in Hobart, and this week we are presenting another program in Brisbane. These programs are attended by judicial officers from around Australia. That is how it should be, to ensure a good mix of participants. The cost of travel and accommodation, in addition to the cost of the course itself, is quite significant and limits the ability of some courts to send judicial officers to our programs.

Another difficulty that we face is the difficulty that courts have in releasing judicial officers from their judicial duties to attend our programs. The program that we are currently presenting in Brisbane, which is for magistrates, runs from mid Monday to mid Friday. When one allows for travel time, that means that most judicial officers attending the course are unavailable to perform judicial duties for five
days. We believe that the investment of time is well warranted, but we recognise the fact that most courts find it difficult to release judicial officers for this length of time.

In short, our own very limited funding means that our programs must be presented on a cost recovery basis. Our costs, and the costs of travel and accommodation, mean that the participation of judicial officers in our programs require the relevant court to find significant money. The very limited funds that most courts have for these purposes gives rise to a problem, as does the fact that most courts are very busy, and have difficulty in releasing judicial officers for professional development programs.

The Council of the College believes that to date a short-sighted approach has been taken by Australia’s governments, and to some extent by courts, to the issue of professional development. The importance of the judicial function, and the national interest in it being performed as best it can, and the substantial investment that society makes in the judiciary, all lead to the conclusion that it is in the national interest that adequate funding be made available to ensure that judicial officers receive adequate programs of professional development. That requires a much greater commitment than governments are making.

The Council of the College regards this as an important issue. One of our aims in 2004 is to begin the process of identifying a reasonable benchmark for professional development, measured by the number of days that should be made available to each judicial officer, free from ordinary duties for that purpose, and by the funding that should be available to each court to enable its judicial officers to participate in professional development. If we can identify a sensible benchmark, we then aim to persuade Australian governments to meet that cost, and to persuade heads of jurisdictions to do all they can to ensure that the benchmark is met for their court.
The benchmark would also recognise the responsibility of individual judicial officers to commit their own time to professional development, as well as to involve themselves in our programs.

As well, the Council has come to realise that it is not enough for us to provide professional development programs to the judiciary. We need to inform governments and the community about what we are doing. The community are entitled to know, and we want them to know. We believe that this will enhance public confidence in the judiciary.

We also need to inform the community that, as things stand, we are unable to provide programs on every topic on which a need for a program is thought to exist. Our funding is such that we have had to start in a limited way, and will have to continue in that way until we can persuade Australia’s governments of the need to commit greater funding to professional development. I should add that while the College itself requires greater funding, some of the funding of which I speak can be provided either to the College, enabling us to subsidise the cost of courses, or to Australia’s courts, enabling them to meet the cost of participation by judicial officers in our programs. The critical thing is that the funding be provided.

We believe that we should also develop a collection of information on which judicial officers can draw at will. This means the development of an information base stored electronically. For example, throughout Australia each year many papers are presented at small scale seminars and conferences, and never published beyond those who participate. We hope to get access to these papers, and to begin to develop a store of them which will be available to judicial officers through the College’s website.
Realising the importance of information technology to the College, in particular in relation to the online delivery of programs, and the electronic storage of information, we see a need for us to encourage the development of the skills of judicial officers in this area. Also, if we are to provide programs online, we need information technology that is compatible with the different systems used by different courts. Not surprisingly, there are many different systems in use. And we need to ensure that the courses are presented in a fashion that enables judicial officers with the average level of information technology skills to participate in the courses.

So, as you can see, there are a number of obstacles that we face. We believe that they can be overcome, but it will take time, resources and a carefully thought out program on our part.

The Council of the NJCA wants the Australian community to be served by a judiciary whose members administer justice effectively and efficiently, and who perform their task consistently and, over their whole career, as well as they are capable of doing. We want them to be served by a judiciary that is well informed about the community that it serves, and which is alert to the expectations of that community. We believe that if this is to be done, we must assist the judicial officers who comprise the Australian judiciary by providing a strong program of professional development.

The provision of such a program requires that there be bodies such as the NJCA, the Judicial Commission of New South Wales and the Judicial College of Victoria, which can develop their skills and a body of knowledge in relation to professional development. It requires an individual commitment from judicial officers to participate actively in programs. It requires a commitment from heads of jurisdictions to support judicial officers by enabling them to attend programs provided
by bodies like the NJCA, and by encouraging committees within their courts to provide programs tailored to their particular needs. And, in particular, it requires a commitment from Australia’s governments to provide to courts the resources that they need to enable them to meet the inevitable costs associated with the participation of their judicial members in good quality programs of professional development, year in and year out. And that in turn will require a recognition of the community of the importance of the work that bodies like us do for the community, the importance lying in its relevance to the quality of justice that is provided to the community.

The task we face, as a national body, is a huge one. We are committed to the task. But unless Australia’s governments acknowledge the need for resources, and the community interest in providing them, we cannot do what is required in the interests of all Australians.

Footnotes:

¹ Judicial Selection and Training: Two Sides of the One Coin, AM Gleeson AC, Chief Justice of Australia, in Papers from the Seventh Colloquium of the Judicial Conference of Australia, p7

² Cambridge University Press, 2001, pp27-28