TRAINING FOR JUDGES?

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It will be recalled that, after Cadmus had slain the dragon on the future site of the city of Thebes, obeying the voice from the immortal gods, he extracted the dragon's teeth and sowed them in the ground. No sooner had they been sown than a crop of men sprang from the soil, fully grown and fully armed. In Australia, when members of the Bar are elevated to the Bench, the expectation appears to be somewhat similar. The assumption which is made is that the newly appointed judges are fully equipped immediately to discharge their responsibilities in whatever field of the law they may be called upon to exercise their calling. In part, this derives from a confident belief that there is no better training ground for judicial work than active practice as a barrister.

The conclusion of the legend of the dragon's teeth came with the casting by Cadmus of a stone into the midst of the soldiers, whereupon, each believing that his neighbour had thrown the stone, they set upon one another until only five subservient soldiers remained. Calls for the training of judges have not generally been well received by members of the judiciary themselves. When the subject has been raised, there has been a marked tendency to dismiss the notion entirely, even without considering, at the very least, whether there might not be significant distinctions to be drawn between the position with respect to appointments to the various levels in our hierarchy of courts — Magistrates' Courts, District or County Courts and Superior Courts or, equally as importantly, between appointments to trial and to appellate courts. But the problem is even wider. Little regard is had to the fact that many persons presently exercising judicial functions outside the traditional courts have had no, or only a brief, experience on the preferred training ground. The general response in the United Kingdom to the Consultative

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Working Paper and to the final Report, published in 1978, of the Working Party on Judicial Studies and Information, chaired by Lord Justice Bridge, was antagonistic, notwithstanding the very limited nature of the Committee's terms of reference and of the recommendations which it made.[1] The suggestion put forward in 1983 by Mr Justice Michael Kirby in his Boyer Lectures for the establishment of a national judicial institute for the training of magistrates and tribunal personnel, as well as for the training of judges, was also less than enthusiastically received amongst many members of the judiciary in Australia.[2]

The reasons for the opposition to the training of judges are varied in nature. Some can perceive no benefits accruing from the adoption of any training scheme. Those persons point to the obvious differences between the experience and legal background of many of those appointed to the judiciary in the United States of America, the members of which have generally embraced training schemes, and the experience and legal background of those appointed to the Australian judiciary, the members of which have built up a considerable tradition without resort to any formal training schemes. Some see the adoption of any scheme as being likely to have an adverse effect upon the public standing of judges and as being likely to do little to enhance their standing in the eyes of the Bar. Others see the implementation of training schemes as representing simply another attack upon the ever fragile concept of the independence of the judiciary. There is some substance in each of these views; but their ultimate validity depends in large measure upon the type of training which is contemplated, by whom any scheme would be supervised and administered, and whether participation in any scheme would be compulsory. It may, in fact, be desirable to get right away, as eventually did Lord Justice Bridge's Working Party, from the expressions "judicial training" and "judicial education", with the connotations which those terms carry, although, provided that what is intended to be conveyed by them is well understood, such a change would seem to be unnecessary.

There can be little doubt that, up to the present time, with few exceptions, the existing system has operated surprisingly satisfactorily, both in Australia and in the United Kingdom, which has served as our model. Having regard to the sporting theory of the nature of adversarial litigation, it has relied upon the selection of the gifted amateur. Some of those who have experienced the system have written of their own introduction to judicial work. For example, Lord Wilberforce said in an address delivered in 1969:

> [a]nyone who is appointed a judge is, I suppose, as astonished at the metamorphosis which is forced upon him as a colourless grub that suddenly finds he can fly with painted wings! At one moment a busy divorce silk, next day called on to try a conspiracy case or a fatal accident action with complications. Take my own experience. In the last two years before I became a judge, I was absorbed in restrictive practice cases, revenue cases,

1 Note, (1978) 4 *Com LB* 1041

2 Note, (1984) 58 *ALJ* 127.

> appeals in the Privy Council, private international law. I spent about two months in the year abroad in Africa, Europe and Singapore, what glorious fun it all was. Suddenly I had to drop all this in one day, to do what? Adoption cases, of which I had never done one at the Bar! Very difficult, often painful, with no text-books, no precedents to go by, only such common sense and humanity as one has, plus a limited knowledge of the working of local authority welfare services. Infancy cases much the same, of which I had had a little experience, but not nearly enough to qualify as an expert. Variation of trust cases where I had read the Act but knew very little of the intense sophistications developed by the experts. Lunacy, or I should say mental health, a fascinating compartment of which I only knew the fringes. Bankruptcy the same, but not so fascinating, and so on.[3]

Lord Denning recalled a similar start to his service on the Bench:

> [b]efore I became a judge, I never did a divorce case. Not that I had any religious objection ... But divorce work was considered inferior and unpleasant. The best juniors did not touch it. No one in our chambers did any. The fashionable silks might now and again, if paid enough. But not us. Yet, on my appointment to the Bench, I was assigned to the Divorce Division.

Nevertheless, he also recorded that he did not reserve a single judgment for a whole year.[4]

There are many comparable examples to be found, and, in particular, shortly after the passing of the Judicature Act 1875, when, "as if to symbolise the catholic jurisdiction of the new High Court of Justice",[5] the future Lord Lindley, a Chancery practitioner, with, it must be said, conspicuous success, was made a judge of the Common Pleas Division.[6] Rather less successful was the assignment of Sir Ford North to the Queen's Bench Division, and similar difficulties apparently attended the appointment of Kekewich J.

Generally, other than in New South Wales, where the continuing tendency has been towards specialisation, both within divisions of the Supreme Court and within separate courts, the expectation in Australia has been that, upon elevation to the Bench, newly appointed judges have the capacity immediately to preside at the trial of all matters within the jurisdiction of the court to which they have just been appointed. An American judge has described how, when she became a judge, she was given a robe, a courtroom and a case to try. In Australia she would not have been given the robe. At the Supreme Court level, this has meant, in particular, that the new judge is faced with the task of presiding at trials of the most serious criminal offences and of then sentencing those who have been convicted. Yet he may not previously have appeared in a criminal court, or, at best, he may not have done so recently. In some jurisdictions, he may not have had any experience whatever of jury trials. One of the most distinguished former members of my own court, finding himself in that position, described the immense relief he experienced on his first criminal trial when he found that he had succeeded in getting twelve jurors into the jury box.

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3 Lord Wilberforce, "Educating the Judges" (1969) 10 *J Socy Pub Tchrs L (NS)* 254, 260.
4 Lord Denning, *The Due Process of Law* (1980) 187, 190.
5 C.H.S. Fifoot, *Judge and Jurist in the Reign of Victoria* (1959) 18.
6 *Ibid.*

Not only may recently appointed judges have to move within fields of the law which are either entirely new to them or which, perhaps due to the ever increasing drive towards specialisation, they have long since abandoned, they may also suddenly be confronted with procedural issues which, even as experienced counsel, they may not previously have encountered or, if they have encountered them, may not have been of any concern to them. Even apart from these considerations, it cannot be doubted that the transition from advocacy to adjudication is as substantial as it is abrupt. The difference between counsel's seeking to persuade a court to the point of view which he is advocating and a judge's having to determine a dispute is profound. Far greater is a change from academic life or from practice as a solicitor to work on the Bench.

Accepting that there are substantial arguments in favour of having "generalist" judges, and acknowledging that the current system has operated beneficially in the past, the question must be asked whether it may not now be possible, with advantage, to adopt at least some of the measures which have been adopted in other countries to provide facilities for judicial studies, both for new appointees and for serving judges.

Up to the present time, the practice in Australia has been to rely almost exclusively upon the self-education of judges and upon their acquiring the necessary knowledge for their various tasks by informal consultation with their colleagues; but there are limitations to any such solution. At the Supreme Court level, other than in New South Wales, there is the ever-present possibility of one's colleagues having to sit on an appeal from the decision which eventually you make. Some only of the courts have available to their members handbooks (or bench books), dealing with questions of practice and procedure from the perspective of the judge, or sets of model directions to juries in crime. Moreover disappointment lies in store for any new judge who seeks to refer to the available literature to guide him in the performance of his new responsibilities. What Karl Llewellyn wrote in 1960 of appellate judges in the United States, remains generally true in Australia:

> [c]ertainly there has as yet been a failure of the great appellate judges, as also of the articulate appellate judges who are not yet great, to get together into any pooling of their craft-wisdom... Certainly, when one turns to the judges whose writings address themselves to building and communicating a workable working philosophy for the newcomer or the still worried old-timer, their writings, too, during the present century in this country look about like a crop of a couple of dozen alfalfa plants scattered over a ten-acre field...[7]

That literature which is available is unlikely to provide a great deal of comfort to the newly appointed judge. Sir Owen Dixon described judicial work as being, in his judgment, "the most difficult, most exacting and least satisfying of any work which I have had to attempt".[8] Nor is there much

7 K. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) 197.

8 "Address Upon the Occasion of First Presiding as Chief Justice", in Sir Owen Dixon, *Jesting Pilate* (1965) 250.

solace to be found on the other side of the Pacific Ocean, where Benjamin Cardozo wrote:

> I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. I found 'with the voyagers in Browning's 'Paracelsus' that the real heaven was always beyond'. As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable.[9]

There is a paucity of material providing guidance in such a fundamental area as the writing of judgments, although Sir Frank Kitto, in an address to a Supreme Court Judges' Conference, made a notable contribution in this respect and it is possible to learn something of the temptations of brevity and of law from a published address given by Sir Robert Megarry.[10] Until Mr Justice Thomas of the Queensland Supreme Court produced a paper on Judicial Ethics at the 1987 Judges' Conference, there was a conspicuous lack of any useful discussion in Australia of this particularly important matter.

As for general advice, there is probably still little which is available to surpass that proffered by Francis Bacon:

> [j]udges ought to be more learned than witty, more reverend than plausible, and more advised than confident...Judges must beware of hard constructions, and strained inferences; for there is no worse torture than the torture of laws. Specially in case of laws penal, they ought to have care that that which was meant for terror be not turned into rigour...In causes of life and death, judges ought (as far as the law permitteth) in justice to remember mercy; and to cast a severe eye upon the example, but a merciful eye upon the person...Patience and gravity of hearing is an essential part of justice; and an overspeaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the bar; or to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions, though pertinent... There is due from the judge to the advocate some commendation and gracing, where causes are well handled and fair pleaded; especially towards the side which obtaineth not; for that upholds in the client the reputation of his counsel, and beats down in him the conceit of his cause.[11]

In civil law countries, with their tradition of career appointments, aspiring or probationary judges are trained accordingly.[12] In common law countries, however, with their preference for mid-career appointments, there has now emerged an increasing tendency towards structured training or education for the judiciary. In the United States, judicial education has a long history. The State of Wisconsin, for example, formally recognised the need for further education for judges more than seventy years ago. Seminars for appellate

9 B.N. Cardozo, *The Nature of the Judicial Process* (1921) 166.

10 Sir R. Megarry, "Temptations of the Bench" (1980) 54 *ALJ* 61.

11 F. Bacon, "Of Judicature" in *Essays* (1625) 222.

12 There is a great deal of literature on this subject. For a recent summary, see L. Muniz-Arguelles and M. Fraticelli-Torres, "Selection and Training of Judges in Spain, France, West Germany and England" (1985) 8 *BC Int'l & Comp L Rev* 1.

judges commenced in 1956, at the New York University Law Centre's Institute of Judicial Administration, and by 1971 it was reported that more than three-quarters of the highest appellate judges in the United States had attended at least one of the annual seminars. There are now many well known and well respected institutions concerned with judicial administration, including the Federal Judicial Centre in Washington and the National Judicial College at the University of Nevada in Reno. In 1986, it was noted that there were more than seventy programmes providing education to judges and court personnel, and it was said that all States made available some form of education (sometimes compulsory) for their judges, although there were considerable differences in the number, scope and comprehensiveness of the programmes offered. All States, with one exception, had regular in-State programmes for judges, involving both new and experienced judges. Six States had separate programmes for appellate judges. A survey also indicated that twenty-seven of the States trained more than three-quarters of their judges.[13] In 1980, the University of Virginia even established a graduate programme for judges, leading to the award of the degree of Master of Laws in the Judicial Process, to earn which the candidates had satisfactorily to complete two successive summer sessions of six weeks each and to write a thesis under Faculty supervision. This course was created specifically to meet an expressed demand.

It has been consistently argued that the judiciary in the United States is so far removed from our own in its nature as to invalidate any comparisons between the two. It is, of course, true that a substantial number of State judges in the United States are elected, and that there are many essentially political appointments. In some States, moreover, and at some levels, legal qualifications have not been a prerequisite for appointment. Quite radical changes are, however, now being effected with respect to appointments to the judiciary. Whilst the practice of recruitment to the Bench from the most senior available members of the Bar has not been adopted generally in the United States, it does not follow that there is not a great deal which may be learned from the developments which have there taken place. The topics which are dealt with at the various courses which are provided are not directed merely to the education of newly appointed judges in matters of substantive law. Their scope may be illustrated by the following subjects which have been considered at appellate judges' seminars: the nature and function of the appellate judicial process, judicial administration, preparation of opinions, appellate review of criminal cases, State courts and the Federal system, appellate review of decisions of administrative agencies, free Press and fair trial, judicial ethics, disqualification from particular cases, principles and techniques of statutory construction, appellate control over the rules of

13 M.A. Stein, "Judicial Education: How Does Your State Measure Up?" (1986) 25 *The Judges' Journal* (Fall) 28, 30.

evidence, computer legal research, appellate control over the judge-jury relationship, the function of dissenting opinions, prospective over-ruling of case law, efficient and appropriate use of staff and of the courts' own manpower, external relationships with the legislature on institutional matters and on law generally, judicial notice of socio-economic facts which may affect decisions, common observation of facts bearing on controversial socio-economic theories and reliability of sources, critique of quality of judicial opinions, exchange of ideas and material among members of court, concurrences and dissents, *per curiams,* style in judicial writing, what a law editor looks for in judicial opinions and what a newswriter looks for in judicial opinion.

Canada has for some time made provision for judicial education, although on a rather more limited scale than in the United States. Last year, Judge William Stevenson of the Court of Appeal of Alberta, who was appointed to inquire into judicial education, presented his report to the Chief Justice of Canada and to the Canadian Justice Minister. He concluded that Canada's judges were being educated inadequately for their tasks and he recommended that a national education centre be set up immediately. At least seventy-five per cent of 1,700 Canadian judges who were surveyed desired a national centre to share information, to develop manuals, to study the impact of new legislation on the judiciary and to create a data bank. In Judge Stevenson's opinion, whilst there was significant duplication of effort in the existing programmes, large parts of the judiciary were left unaided. He recommended that the centre should be financed by federal and by provincial governments, but that it should be independent of government and outside interests. It should be administered, he considered, primarily by judges, but it should be set up close to the campus of a major law faculty. His recommendation was that the centre be managed by five directors, one being appointed by each of the Canadian Judicial Council, the chief judges of the provincial courts, the Canadian Judges' Conference and the Canadian Association of Provincial Court Judges. The fifth member was to be the Chief Justice of Canada, who would act as chairman.

The recommendations in the Stevenson Report were undoubtedly influenced by the considerable problems currently posed to the judiciary in Canada in relation to the performance of their responsibilities under the Canadian Charter of Rights and Freedoms. It is also true that the Canadian legal profession operates rather differently from our own, with the result that persons with different backgrounds from those to which we are accustomed are appointed to the Bench; but it may also fairly be suggested that the Canadian experience is not so foreign to our own as to invalidate any useful comparison.

In the United Kingdom, the progression towards judicial education has been much more tentative. There has for some time been limited training available to lay magistrates, to Recorders and their deputies and to the Chairmen and Deputy-Chairmen of Quarter Sessions, but only in restricted fields, being essentially those of sentencing and penology. In 1975, however,

a working party was appointed under the chairmanship of Lord Justice Bridge to review and to make recommendations upon the machinery for disseminating information to the judiciary about the penal system and matters relating to the treatment of offenders and upon the scope and content of possible training and the methods by which it might be provided. The publication of the working party's working paper drew many objections, not the least of which was directed to the concept of "training" suggested by the terms of reference, and to the use of the expression "judicial training" in the working paper. This led the committee to abandon these descriptions and thereafter to adopt the term "judicial studies". Although the terms of reference of the committee were limited to considering the judge's role as a sentencer, it took the view that any judicial study programme designed to prepare new judges for their future role should also embrace other aspects of the judicial conduct of criminal trials. The committee concluded that neither the process of self-tuition, nor the existing arrangements for the attendance of most new judges at one-day conferences, and for the attendance of some judges at one-week seminars, was adequate to prepare them for their responsibilities in the Crown Court. A more elaborate permanent organisation was recommended, with a view to producing flexible programmes of study. It considered that, if the planning and presentation of judicial study programmes was under the control of an appropriate organisation, the requirement that judges should attend them after appointment represented no threat to judicial independence. The organisation, it was recommended, should have an institutional base at a University, but it should be independent of that University. It envisaged study programmes of up to two weeks for those judges appointed to the Crown Court without substantial previous experience in criminal practice, with a continuation of study programmes after the first two years from appointment and thereafter at intervals of approximately five years. A period of pupillage, sitting with experienced judges, was also envisaged.

A Judicial Studies Board was established in 1979, generally in accordance with the recommendations of the working party. That Board has conducted a series of three-day seminars for new and for experienced Crown Court Judges and Recorders. It has also been responsible for producing, with the approval of the Lord Chief Justice, model directions in criminal trials.[14] The Board's role was expanded in 1985 to cover training in the civil and family jurisdictions in addition to training in the criminal jurisdiction, and to cover the supervision of the training of magistrates as well as the training of judicial chairmen and members of tribunals.

Within Australia, the New South Wales government proceeded last year, by the Judicial Officers Act 1986, to constitute a State Judicial Commission. Without seeking in any way to limit a court's discretion, s.8 of the Act

14 See *Beckford* v. *The Queen* [1987] 3 WLR 611, 620.

empowers the Commission, "for the purpose of assisting courts to achieve consistency in imposing sentences", to monitor or assist in monitoring sentences imposed by courts and to disseminate information and reports on sentences imposed by courts. The aim is to provide judicial officers with the means to allow them to become more aware of sentencing patterns across all jurisdictions and for all offences. Significantly, the legislative provision is directed expressly only to achieving consistency in sentencing and it seeks to go no further in this difficult area.

By s.9 of the Act, the Commission is also empowered to organise, and to supervise, "an appropriate scheme for the continuing education and training of judicial officers". The section goes on to require the Commission, in organising any scheme, to endeavour to ensure that it is appropriate to the judicial system of the State, having regard to the status and experience of the judicial officers concerned, to invite suggestions from and to consult with judicial officers as to the nature and extent of an appropriate scheme, to have regard to the differing needs of the various classes of judicial officers, to give particular attention to the training of newly appointed judicial officers and generally to have regard to such other matters as appear to the Commission to be relevant.

The Commission is now in the process of recruiting its senior staff. It is seeking a person who will

> carry out the development, implementation and monitoring of policies and guidelines on sentencing consistency, judicial education and training and general administrative matters, [a] criminologist [who] is to undertake the development, implementation and monitoring of policies on sentencing consistency [and] to provide advice and information and to prepare reports and submissions...[and also an] education director who is to organise and supervise the scheme for continuing judicial education, to develop manuals and hand-books, [to] provide advice and information and [to] prepare reports and submissions.[15]

At the present time, most levels of the judiciary in Australia, at more or less regular intervals, hold both inter-State and intra-State conferences. Unquestionably, these conferences serve a most useful and necessary function in providing a forum for the interchange of experiences, information and ideas; but they are unable, at the present time, to fulfil all the needs of the judiciary. They are relatively brief in length, the topics discussed are necessarily restricted and there are limits upon the numbers who are assisted to attend, with the result that an individual judge may attend some conferences only once in every two or three years. These conferences are unable to generate the required amount of information to satisfy the needs of the judiciary and, of course, they are unable to satisfy the immediate needs of any new appointee.

The Australian Institute of Judicial Administration is now doing something to fill the void. Notwithstanding its title, one of the objects of the Institute is to arrange and conduct professional skills courses for judges and magistrates,

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15 Note, (1987) 61 *ALJ* 387, 388.

as well as for court administrators, the practising legal profession, members of the legal profession employed by governments and professional teachers of law. At the end of 1986, it arranged seminars for the purpose of discussing the concept of judicial education and, in particular, whether there was a need within Australia for courses of assistance and, if so, whether there was a role for the Institute to play in this regard. It has since conducted successful seminars on the subjects of complex civil litigation and on sentencing.

The requirement for education is plainly not limited to members of the superior courts. Members of the magistracy and of the intermediate courts are much less likely to have gained previously a broad experience through trial work as practising barristers. Furthermore, in the lower courts, the probability is that counsel appearing will be less experienced than they are likely to be in the higher courts and therefore will provide less assistance. At the same time, it is to be observed that the great bulk of the criminal work, and increasing amounts of civil work, including, in some States, all personal injury claims, are now dealt with at a level below Supreme Court level. A further need exists with respect to the chairmen and members of the many tribunals which now proliferate, but whose backgrounds alone do not necessarily equip them for their tasks. At the very least, they should be advised as to the requirements of natural justice (or procedural fairness).

There does appear to be a special need for assistance to be made available to newly appointed magistrates and trial judges. Appellate judges obviously stand in a different position in this respect. The purpose of that assistance would not be, of course, to improve the general level of knowledge of substantive law on the part of new appointees, but to inform them of possible solutions to particular problems which they might encounter and of which they might not have had previous experience. For example, it would be useful for them to be forearmed concerning the appropriate methods for dealing with any disruption of proceedings. The need for assistance to be given to new appointees becomes important in the light of what might well become an increasing tendency to appoint to the judiciary from outside the ranks of the Bar. For example, the requirement, in s.22(2)(b) of the Family Law Act 1975 (Cth), for appointments to the Family Court to be made only from persons who "by reason of training, experience and personality" are "suitable ... to deal with matters of family law", has led to the appointment of some solicitors and some academics.

There are other areas in which there could be a considerable advantage to be gained from the provision of some facility to enable judges to add to their knowledge. The first area, and it is an area in which the need is generally acknowledged, is that of sentencing. Sentencing is not an exact science. Nor, as a rapidly diminishing number of judges claim, is it merely a robust exercise of good sense. It involves a balancing of a number of complex factors, some of them diametrically opposed, one to the other. These include retribution, just desert, rehabilitation, deterrence and incapacitation.[16] The subject is one

16 See Discussion Paper No. 29 of the Law Reform Commission, *Sentencing: Procedure*, 15-21.

which now receives a great deal of attention in many quarters; but the solutions still seem to be far away. Further steps might usefully be taken to devise some method of comparing levels of sentencing across Australia, taking into account the extraordinarily diverse statutory provisions in the various States for the early release of prisoners, for parole and for ordinary remissions. Subject to matters of special local concern, it might be thought to be desirable that, generally speaking, a person should receive the same effective sentence for his crime, irrespective of the place within Australia where the crime was committed. In addition, however, although consistency in sentencing is obviously a highly desirable aim, it is just as important to ensure that, so far as possible, a sentence for a particular crime is appropriate in relation to the sentences for other crimes. There are no simple solutions to these problems; but there can be little doubt that, in this area, a full interchange of information, knowledge and ideas can only be advantageous.

There is also a need for an awareness, if not an understanding, of computer technology. Many of the present incumbents were appointed to the Bench prior to the time when computers assumed their current importance, and they lack a sufficient knowledge of the technology. There is a need for a greater understanding of how computers may assist the work of the courts generally, and the work of the individual judge in particular. There is also a need for understanding the problems which may be associated with computer generated data. Although a number of individual judges on the various courts have developed a keen interest and expertise in the use of computers, this has come about as a result of their own special efforts. It should not be difficult to make available facilities to enable other members of the judiciary to gain a better understanding of this critical technology, and to assist them in using, with profit, the greatly increased amounts of information which the technology has the capacity to provide.

There is another special area in which it might be possible to assist trial judges in their difficult task, and that concerns the evaluation of witnesses. Appellate courts are constantly reminding us that they have not had the advantage of a trial judge in seeing and hearing witnesses, and therefore that the trial judge's findings of fact should not be interfered with. Such an attitude would seem to be inevitable; but it would also seem to be desirable to ensure, so far as practicable, that a trial judge will take advantage of the opportunity so presented to him. This is a matter, of course, which Jerome Frank raised in 1949. Having discussed the weight which courts give to a trial judge's observation of witnesses' demeanour traits as clues to their trustworthiness, he said:

> [t]o be valuable as clues, those traits need to be wisely interpreted. Occasionally there are astonishing revelations of absurd rules-of-thumb some trial judges use, such as these: a witness is lying if, when testifying, he throws his head back; or if he raises his right heel from the floor; or if he shifts his gaze rapidly; or if he bites his lip. Every psychologist knows how meaningless as signs of prevarication any such behaviour may be. The skilled perjurer may have no such indicia. I suggest that the future judge should learn what there is to learn about the interpretation of demeanour.[17]

17 J. Frank, *Courts on Trial* (1963) 247.

He then went on to refer to the need for judges to "come to grips with the human nature operative in themselves" and the need for the future trial judge to:

> [e]ngage in a voyage of intensive self-exploration, so that he will be sensitively aware of many of his own hidden biases and antipathies to diverse kinds of persons; then he will be able to control or modify many of his biases with respect to the witnesses who will appear before him.[18]

The conclusion to be drawn is, I think, that there should be some exposure of the judiciary to the social and behavioural sciences, without, however, going as far as Jerome Frank suggested; his suggestion, which is not likely to be greeted with great enthusiasm by any judge, being that each judge should "undergo something like a psychoanalysis". Although, of course, ordinary individuals in the course of their normal activities have regularly to make their own assessments of the credibility of persons with whom they come in contact, and barristers in their daily practice have an immediate concern with the credibility of the witnesses in the trials in which they are participating, the position of the judge is unique. His decisions can have the most critical consequences for the parties before him, and any assistance which can usefully be given to him in his difficult task of arriving at a rational conclusion on questions of credibility should be given to him. This may be linked with a need for a consciousness on the part of judges of social life generally, although it is unnecessary to adopt the enthusiastic suggestion of one judge in the United States, that

> [v]isits or tours through ghettoes, business districts, correctional institutions, sanitariums, old age homes, tenement housing projects, manufacturing plants, and possibly a trip to a used car dealer, to name a few, would enhance a candidate's outlook before investiture.[19]

A certain degree of complacency may have led to the belief that our present system is the best system, and that it is quite sufficient that each new appointee should go through his own learning process, at his own expense, in his own way, and in whatever time he can make available in a full schedule, on the basis that, if the new judge makes some error, it may be corrected on appeal. But that is not always possible, and such a solution is, in any event, wasteful. There are, it may be suggested, very considerable advantages to be gained from a more structured process of learning. It is, however, essential at the same time to ensure that the independence of the judiciary is safeguarded. For this reason, it is of the greatest importance that any programme of education should not be compulsory — although it is highly likely that it would be well supported — and that it be conducted by the members of the judiciary themselves, with such outside assistance as they deem desirable. Consistently with the view adopted overseas, there would be a great advantage in having the programme associated with, but not controlled by, a

18 *Id.*, 248.
19 R. Manuwal, Note, (1980) 12 *UWLA L Rev* 17, 18.

University Law School. Finally, it may be suggested that any programme should be a national programme. No State on its own could provide a programme as frequently or as broadly based as could a national body established for this purpose. Although there is much to be said in favour of the initiative taken in New South Wales with respect to judicial education, it would be unfortunate if this should have the consequence of delaying, or even preventing, the establishment of a national scheme in Australia.