Bar Association of Queensland: Centenary Conference
Radisson Plaza Hotel, Cairns
Chief Justice's closing address
Sunday, 27 April 2003 – 11.45 am

"A New Century of Rights"

Chief Justice Paul de Jersey AC

With the completion of its first 100 years, the Bar Association of Queensland shows an admirable concern to demonstrate, not just its relevance, but its vibrancy – as well exemplified by this centenary conference. The past informs the present, and from the present we gain inspiration to fire the future. Over these last three days, we have been treated to interesting historical analyses of vital subjects, but always the orientation has swung towards the best definition and protection of rights in the years to come.

That is not surprising given the history of our host association. While often the butt of negative criticism for its perceived undue conservatism, the Bar Association has valiantly persisted over the years, helping in a positive way to shape so many aspects of Queensland development – the legal, judicial, social and political immediately come to mind. Drawing on the mature wisdom of others through a collegial approach facilitated by the association, Queensland barristers have risen to their own professional challenges over the years, generally with beneficial outcomes. And the lessons drawn from that century of experience well equip the Bar to recognise and deal with both contemporary challenges, and those yet to come.

While the Bar Association is now celebrating its centenary, there has been a Bar presence in Queensland since as long ago as April 1857, with the inauguration of Ratcliffe Pring as Crown Prosecutor for the Northern Supreme Court. It was then also that the somewhat reluctant Samuel Milford J commenced duty as the Resident Judge of Moreton Bay, a place he ungraciously described as "torrid Siberia" (B.H. McPherson, The Supreme Court of Queensland, Butterworths, 1989, p 15). By separation in 1859, the Bar numbered two, with the accession to its ranks of the Irishman Charles Blakeney. By Federation, the roll numbered more than 100, with a

further doubling by 1960 (cf. R. Johnston: History of the Queensland Bar (1978) p 3). Today the Bar Association boasts as many as 598 members in Queensland, with, significantly, 122 practising outside Brisbane. It is truly a State-wide bar, at least coast-wise, extending from the Gold Coast to this jewel of the far north. And it is a Bar of varied composition – encouraging women members, for example, seven of whom now account for almost one-third of the Supreme Court's complement of 24; a Bar not closed or exclusive, but open to all, from the days of T J Byrnes to the present.

Over the years, the Bar Association has done much to attend to the welfare of its members. As a good example, I mention the scheme to preserve during World War II the practices of barristers away on active service. In more recent decades, there has been the pupillage scheme, with an adjunct program of continuing education, both of which no doubt contributed to the highly effective Bar Practice Course providing practical legal training for prospective counsel. But the reach of the Association has extended well beyond protecting and developing its own members.

The Association has co-ordinated an informed, independent thrust into law reform in the State, including notably the establishment of a legal aid system. It has assumed the role of "watchdog of the interests of justice" (Johnston, supra, p 23), and that has extended to calling errant governments to account, in which presidents have over the years displayed both integrity and courage – and that has extended into contemporary times. Yet the Association's initiatives in these areas of public interest have not necessarily attracted the appreciative applause of the beneficiaries, the people. Over those 100 years, charges of elitism and self-interest have been joined by criticism of lawyers for occupying too many seats in the parliament.

When the Bar Association reached its 75th anniversary, the historian Mr Ross Johnston produced an interesting work in which, as a non-lawyer, he described the role of a barrister in these terms:

> "A basic attribute of any profession is the concept of rendering service to humanity. Certainly some form of

> reward is received, but the prime concept is meant to be the performance of some duty or function for the benefit of mankind. In the case of the barrister, that duty is mainly directed towards helping the individual find justice among the many complicated and counter-acting forces in society, to maintain his freedom and rights against the encroachments of other individuals, organisations and the State, and generally to obtain the means of a peaceful and happy existence in his dealings with members of his society."

Queensland barristers have generally fulfilled that charter, and they have undoubtedly been greatly assisted in that by cohesion generated by the Bar Association, cohesion which has led to an informed consideration of problems which may not, probably would not, otherwise have occurred.

Over recent decades, the significance of a distinct Bar in Queensland has weathered what I have perceived as three major developments in the approach to the resolution of legal issues. They are the rise of the mechanisms of alternative dispute resolution, the increasingly sophisticated reach of the larger and specialised legal firms into esoteric fields, and a general retreat from oral advocacy.

With the encouragement of the courts, an initially reluctant Bar came to embrace alternative dispute resolution in the 1980's. From the courts' aspect, it was helpful in culling court lists then clogged by cases which should not have been there, in that they were ripe for compromise which should much earlier have been attempted. And so barristers learnt new skills: some became successful mediators; those who represented clients at mediations developed a capacity to listen and respond less adversarially. In the '80's and subsequently, the pendulum swung decisively towards alternative dispute resolution, and those who would otherwise have litigated, have clearly benefited. But now with a vast reduction in the civil lists of the courts, and only a fraction of what was, now going to adjudication, there is a newly emerging risk.

The rule of law requires there be a healthy and lively system of judicial adjudication in operation. If the present Queensland trend continues to run its course, the consequence will be that the civil law will end up bereft of current authorities. The first five of the seven decades since *Donoghue v Stephenson* spawned a vast

framework of civil cases from which others could reliably be compromised. But the last two decades have in Queensland seen the loom contracting, the web constricting. There is risk that it cannot be maintained in up to date condition. The pendulum should swing back to the median position. The courts are being by-passed in this area, and that is not in the public interest: neither is it necessarily in the interests of the individual disputants involved, certainly in some cases. Lawyers have discovered another rich vein, and they may be mining it too voraciously. A more ready embrace of litigation is now necessary to restore the balance necessary in the public interest. A contemporary challenge, which will probably intensify if not addressed, is, in short, to restore the balance between the extent of disputes being subjected to alternative dispute resolution, and those which should be running to adjudication proper.

As to the second and third of those matters, three decades ago a barrister's *raison d'etre* was capacity as an advocate and expertise in the resolution of abstruse legal problems. That was still the era of the legendary advocate, the operator who would be criticised by Socrates for "not teaching juries and other bodies about right and wrong – merely persuading them"; and operators, as David Pannick QC recalls for us, like the Manhattan attorney Mow Levin who was said to be "so good that he made money on the side by selling tape recordings of his final arguments"; and A P Herbert's indication that "a certain amount may be achieved through theatrical effects and well -developed reputations: when "Sir Ethelred Rutt … rose to cross-examine … three well-dressed women fainted and were thrown out" (Pannick: Advocates, 1992, Oxford University Press, pp 2, 6, 25). This is really not the occasion to mention names from within our own community, but I will be pardoned for acknowledging what I have been told was the stentorian eloquence displayed by Mr Dan Casey while addressing juries in the criminal courts. Now, with the contemporary managerial approach to litigation, and with, on the civil side, reduction in the oral content of argument, the effective barrister must exhibit corresponding new skills: a capacity to co-operate with the court to ensure expeditious, economic justice in accordance with law, and a capacity to write with eloquent persuasiveness.

I observe that relations in Queensland between bar and courts have generally been healthy and productively cooperative, and now markedly so. That is very much in the public interest. As Lord Justice Sankey once said (*Hobbs v Tinling* (1929) 2 KB 1, 48):

> "The Bar is just as important as the Bench in the administration of justice, and misunderstandings between the Bar and The Bench are regrettable, for they prevent the attainment of that which all of us desire – namely that justice should not only be done, but should appear to have been done."

It is the position, also, that barristers owe their professional legitimacy to the courts.

Three decades ago, certain areas of special expertise were felt to fall squarely within the province of the Bar: commercial law, taxation, administrative law are examples. With the rise of the mega solicitors' firm, many with international links, the Bar's dominance in those areas has been substantially diminished. On the other hand, those barristers continuing to profess speciality in those areas have developed yet more refined capacities, and they have been effective in that. Family law, planning and environment law and industrial law remain secure as distinct specialities.

In his book "Australian Lawyers" published in 1989, Professor David Weisbrot expressed the view (p 273) that:

> "The separate Bar is unlikely to be displaced entirely, … Maintenance of the Bar will rest on several factors. First, the continued need by the smaller firms for a source of specialised expertise not already locked up in the larger firms. Secondly, the preference of the higher courts to deal with a small group of known, specialised advocates. Most importantly, a significant proportion of lawyers still will choose to practise in the traditional style of barristers. … Many lawyers prefer the 'nostalgic ideal' of individual, independent professionalism to employment within a large bureaucracy, public or private".

I agree.

Yet it is not enough that a separate Bar survive to feed the personal satisfaction of those who prefer to work independently, or to satisfy courts which have become accustomed to streamlined presentation by counsel. The rationale for a separate Bar must rest in its unique contribution to the maintenance of the rule of law, through optimal attention to the position of the individual litigant or disputant, thereby enforcing our system of law as the source of civilised social regulation. As society becomes even more complicated, with consequently more sophisticated problems, the intellectual acuity and refinement necessary for the resolution of its legal concerns will rise. The Bar will be increasingly challenged to rise to those demands, which will be accentuated on the civil side of things. Of course on the criminal side especially, the advocate will always have an important role, because natural justice fundamentally demands a man or woman be heard; and while a quality performance may still be guaranteed, barristers will more often than not continue to act in that behalf. As has been noted by others before, our creator, before condemning Adam and Eve, called upon them to explain their apparent offence: they did not have the advantage of counsel, but it is difficult to see that even our local experts could have prevailed in those circumstances.

As the Bar Association lives on into its second century, it will I am confident continue to attend to the welfare of its members, it will continue to fulfil a role as watchdog of the public interest in areas of justice and law, it will continue to exhort its members to absolute ethical dedication and the highest level of competent achievement. And it will continue to assist and encourage its members to adapt to the changes which will inevitably characterise the contemporary legal landscape from time to time, for only then will it fulfil its part in assuring the up-to-date relevance which, in the public interest, our Queensland Bar has traditionally maintained.

In closing this significant conference, I congratulate the Bar, and especially those immediately involved in the organisation and presentation of a stimulating and encouraging event, an event which will go down as memorable in Queensland legal history.