QUEENSLAND MAGISTRATES' CONFERENCE

Monday, 23 May 2005, 10:15am
Novotel Brisbane
"Judicial professionalism"

The Hon P de Jersey AC,
Chief Justice

I am very pleased to have this opportunity to address you.

We are characterized, as judicial officers, by individual independence. That is the feature of our role most often emphasized. But so is its corollary, accountability, which we achieve through giving reasons for judgment, by the public nature of the process, through annual reports to the public, and so on.

The grounding for judicial independence is our individual commitments to the delivery of justice according to law in accordance with our oaths or affirmations of office, that is, "without fear, favour or affection". But no individual has ever operated effectively in isolation. Our public would be appalled to conceive their Judges did not enjoy the benefit of collegial and community interaction. In fact the benefits of that interaction mark our State judiciary.

This conference symbolizes the interaction within the court which happens every day. I am reassured to be told that beneficial interactive relationships within the Magistracy are alive and well.

The conference also allows persons in positions of intended leadership, not to pontificate, but to seek to influence. In an immediate sense you are led by the Chief Magistrate, and I believe most effectively. I have assumed that, as Chief Justice, I have an at least unspoken responsibility for ultimate public perceptions of all levels of our judiciary. I am therefore grateful to the Chief Magistrate for giving me this opportunity today. I wish to speak about our responsibility as judicial officers, generally – but I hope not too generally.

In speaking to Magistrates, I am alive to your landscape: the largest court in the State, with 84 Magistrates, compared with 35 District Court Judges and 24 Supreme Court

Judges; the widest geographical application in the State, with Magistrates sitting in over 100 centres, by contrast with the District Court's at least 40 and the Supreme Court's 12; and the most encompassing daily exposure of the judicial process to the people: times, places, personnel, charges – diverting for an interested observer. It has often been said that it is the Magistrates who effectively expose to most Queenslanders, daily, the face of their judiciary.

We all accept that carries with it a substantial responsibility. The media scrutinizes our discharge of that responsibility. The almost invariable transparency of the judicial process, with openness a large part of the key to legitimacy, facilitates that scrutiny. We have been used for years to media criticism of some decisions of the courts – notably in criminal sentencing. The published analysis is now widening, to embrace issues of conscientiousness or the lack of it – witness the targeting of Judges allegedly guilty of undue delay and tax default, somnolent Judges and those who are captives of alcoholism.

The media is quite justified in drawing attention to relevant vulnerabilities within the judiciary, provided it does so in a fair and measured way. As Judges and Magistrates, we occupy an undoubtedly demanding public position. We discharge significant responsibilities, including deprivation of liberty. Yet we are unelected, and removable – rightly – only upon stringent proof of serious dereliction or incapacity. Where in a particular case there is doubt about the due discharge of these important responsibilities, the media is entitled to flag it; flagging it, that is, with reason and fairness.

The increasing public reference to these things largely reflects the media's increased interest. It does not signify any fall off in judicial standards. As to those standards, they have, over the years, regularly been monitored. There is intense focus these days on continuing judicial education, and there is unprecedented focus on matters of judicial ethics. When I was appointed to the Supreme Court in the mid-1980's, one had respectfully to request the Chief Justice for permission to undertake jurisprudential type work in another jurisdiction. Justice Thomas's seminal work on judicial ethics was yet

three years off. In those days, we lacked even a formal protocol on delay: reserved judgments delivered even 18 months after the conclusion of the case were not unknown, though fortunately rare.

But it is not any media driven imperative which moves us to maintain high standards. Personal goals aside, it is the imperative of our oath or affirmation of office. In an address to the Australian Bar Association in July 2000, Chief Justice Gleeson spoke in these terms of that imperative, which he styled 'express':

> "Judicial power, which involves the capacity to administer criminal justice, and to make binding decisions in civil disputes between citizens, or between a citizen and a government, is held on trust. It is an express trust, the conditions of which are stated in the commission of a judge or magistrate, and the terms of the judicial oath."

I began this address by referring to our independently assuming that obligation. Every judicial officer must individually strive daily, continually, to deliver justice according to law. But the people are increasingly interested, with media encouragement, in how courts operate collegially.

I am afraid to have to acknowledge the Magistracy has rather led the charge in this, with colourful and disturbing publicity surrounding the terminations of the appointments of the Chief Magistrates of Victoria and Queensland. But public interest is not confined to the internal workings of the Magistracy. As reported in March, Justice Michael Kirby implicitly criticized the High Court for an absence of collegiality. Naturally such suggestions intrigue people who are interested to assess these pivotal institutions, institutions which wield great power, publicly but often with few members of the public present.

Earlier in the year, I bemoaned the blight enfolding the legal profession generally because of the faults of a few. My related point today, is to emphasize the primacy of our power, as individual Judges or Magistrates, to affect, possibly crucially, public confidence in the judicial process.

That confidence is by nature fragile, and we must be very careful to uphold it. Witness Palm Island in February/March. The claimed lack of confidence in the police service was but a short step away from confidence in those courts which went on to determine matters of bail, coronial inquisition etc. We must all be continually alive, in our courtrooms, and in our other public and private behaviours, to the primacy of the ultimate perception, as well as reality, that we deliver justice according to law with absolutely uncompromised assurance.

As part of that, we must be conscious that what we do and say may influence public respect or lack of it, not only in respect of what we as individual judicial officers do, but for the work of our courts generally.

There is a recent high level example of this. I was disappointed earlier in the year when Justice McHugh, during the argument in the High Court in the *Fingleton* case, made broadly derogatory references to the way Judges sum up to juries in criminal cases in Queensland. His remarks, or insinuations, were inaccurate and unjustified. Offhand innuendo like that by Judges at high judicial level can do great harm.

Similarly, there is risk of impairing public confidence in the system where a judicial officer is unduly robust in his or her courtroom approach. People are rightly concerned when parliamentarians use the cloak of parliamentary privilege to avoid liability for otherwise grossly defamatory observations. Similarly, judicial officers must be careful to avoid unduly inflammatory criticism of witnesses whose testimony they reject. Likewise, appeal Judges should be careful to avoid unnecessarily thorough going criticism of the work of a primary Judge or magistrate who has simple done his or her best, and Justice McHugh's litany fell into that category.

I have previously spoken at this conference of the professionalization of the Queensland Magistracy. The so-called "police magistrate' system may have been acceptable in our

community decades ago, but we are best served now by our contemporary court: professionally qualified, inclusive, representative, attentive to the need for continuing judicial development.

We have heard horror stories of the court, shall I say three decades or more ago. Fortunately, the "horror" did not generally concern the justice or legality of the outcome. It related more to perceptions of the process, but that also was concerning. The system had become characterized by undue fraternizing between magistrates and police prosecutors in particular; and the expressed reasons for decisions were often not adequate. I accept higher standards in these areas are now being met. In that era, many defendants, not surprisingly, became sceptical of the integrity of their treatment.

These days, a judicial officer should certainly avoid social contact during a case with one party's lawyer in the absence of the other. But even social contact with both present carries risk of misinterpretation. There is no scope for lapse in this area.

While on the subject of perceived bias, apropos something recently published, it would generally be wrong for a magistrate in a regional centre to sit on a case in which one of his or her court officials was a party. Another Magistrate should hear a case like that.

In that same 2000 address, Chief Justice Gleeson said:

> "Impartiality is a condition upon which judges are invested with authority. Judges are accorded a measure of respect, and weight is given to what they have to say, upon the faith of an understanding by the community that to be judicial is to be impartial."

And – I add for present purposes, to be seen, or accepted, as impartial.

Justice Thomas, then of our Supreme Court, described in 1991 the transformation of our magistracy in these terms:

> "Clearly the Magistrates' Courts are simply the courts of first instance in the judicial structure throughout Australia. The professionalisation of the magistracy has been one of the most notable changes in legal professional life over the past two decades. That is the period over which the magistracy has been transformed in substance from a body of persons largely public service trained to a body of professionally trained and legally qualified practitioners. From 1985, *all* new appointments to Magistrates' Courts throughout the Commonwealth have been qualified legal practitioners."

As a markedly more professional court these days, the Queensland Magistrates Court of the 21st century should be particularly alive to individual and collective responsibility.

Timeliness is a feature closely involved with our individual professionalism – punctuality in court commencement, and expedition in the delivery of judgments. One would have thought it obvious a Judge be on time, and give judgment promptly. But history shows the need to dwell on these issues. A judicial officer who sees virtue in delay is plainly unfit for office. I hope none exist. Those guilty of delay are more likely bad managers, or indecisive.

A substantially late court commencement, without adequate explanation, may fairly be condemned as an exhibition of judicial arrogance. Delay in the commencement of a court hearing affects many people – court staff, legal representatives, the parties, one of whom may be a defendant emotionally fraught because facing criminal sanctions. Some years ago, the Malaysian judiciary were required to punch time cards recording court arrival and departure times. Our system is more relaxed, but stretching it may provoke a call for restrictions. This is a "Caesar's wife" type issue: what may be acceptable in other executive or administrative situations cannot be tolerated in our courts of law. Our courts should in these respects exhibit a gold standard.

Undue delay in the delivery of a reserved judgment will fairly be criticized as illustrating a lack of conscientious judicial application. So will the production of inadequate reasons for judgment.

There are recent examples of appellate courts overturning judgments delivered extremely late, with the reasons themselves betraying lack of appreciation of the issues or the evidence – consistently with the unacceptably long interval between hearing and judgment. That sort of judicial non-performance is obviously indefensible, and does great damage to perceptions of our work.

I understand you have adopted three months as the "cut –off" point for the delivery of reserved judgments – as in the Supreme Court. Most Supreme Court judgments, even in difficult cases, are given well within that time. Although Supreme Court Judges have the advantage of designated judgment writing time, much work is still accomplished out-of-hours: in my own case, preparation for appeals, in particular, falls into that category. So if you find yourselves in that situation, please realize you are not alone.

I expect that, like your counterparts in the Supreme Court, you regard that three month stipulation as setting the outside limit – for all but exceptional cases. Be in no doubt: delay is a potentially corrosive force so far as public confidence in our work is concerned. For most cases, judgment well within three months should be the norm. In the Supreme Court, we report to each other monthly, on outstanding judgments, with the object of forestalling delay. Judges are thereby indirectly influenced to adhere to the protocol, which is in any case their natural inclination and goal. The timeliness of our judgments these days favourably distinguishes contemporary courts from those of earlier decades. But public confidence is fragile. Reports of the graphic dereliction of one or two can do great damage.

As to an out-of-hours burden, working outside a 9am to 5pm regime is common for many professional people. While we must manage time efficiently, we must not begrudge our public that additional commitment where necessary, and I appreciate that many Magistrates are often subject to 24 hour call arrangements. Now I am not to be taken as

accepting that the quality of judicial work may not be prejudiced by working too long. As with most things, it is balance which counts.

Many other illustrations of our individual professionalism as judicial officers could be advanced. There is no need this morning to catalogue them. They are all informed by responsibility, discretion and integrity. There is plainly no room for pettiness. For example, where one is healthy, accrued sick leave is simply not taken; where other "entitlements", while available, have no relevance or practical utility to the discharge of our function, they would not be insisted upon. The "Caesar's wife" approach must again obtain. The focus of professionalism rests more on public commitment, than private absorption.

Let me pass now from the individual interest, to the aspect of corporate or collective professionalism.

A good barometer of the internal health of any court is the quality of meetings of judicial officers which regularly occur. When a court is functioning well, such a meeting will be characterized by constructive, productive exchange; judicial officers will be confident their views will be heard and considered, not only with courteous attention, but also with genuine interest; they will consider the experience worthwhile, in that it marks their valued participation in the collegial administration of the institution.

A good test of the state of a court would be the public's assessment of such a meeting. I am not for one moment suggesting that such meetings be open to the public, although, it may be said, very little of what we discuss must be kept truly confidential, and the freedom of information reach these days is broad anyway. Further, a lot of what we have to deal with administratively would be considered simply mundane.

If, however, in doubt about the administrative health of the institution, the "likely public reaction" test could usefully be employed. How would our public assess our approach to these issues, if privy to our communings?

There is very good reason why activities such as meetings of judicial officers should generally be held behind closed doors. The question of the necessary confidentiality of some of the issues aside, privacy is justified to ensure candid exchange.

It is extremely important, I believe, that judicial officers be kept informed of current issues within their courts, and that they have the opportunity to express views which may influence the position finally taken upon those issues. Judges' or Magistrates' regular meetings provide a formal mechanism for that. I acknowledge this process is much easier to arrange in a court with a complement of Judges in number less than one-third of the Magistracy. But modern methods of communication provide the solution. There are also other less formal avenues for communication. Every judicial officer should feel confident that his or her views will be listened to and taken into account so that, like litigants, even should those views not prevail, the person concerned will accept the outcome as regular and reasonable.

While I have suggested that we should not in principle be shy or coy about disclosure of the administrative workings of our courts, I would think it extremely unhelpful were a judicial officer, dissatisfied or disenchanted with a particular direction, to seek to invoke external support to bring pressure to bear in support of his or her particular view. Last year an email about this conference found its way into the public arena. That was most unfortunate because it eroded, even if temporarily, public respect for the court. The more appropriate course in that case would have been to pursue further discussion on the issue within the court – and not necessarily by means of lengthy e-mails. This is where the head of jurisdiction may carry a substantial responsibility. It falls to the head of jurisdiction to try to ensure that the climate of the court is such as to encourage frank and satisfactory resolution of issues within its confines.

That climate should also assist in the alleviation of the personal difficulties which inevitably sometimes beset us. Like members of a family, judicial officers, though respectively independent, work very closely together, and are bound by a joint mission of high public significance. A by-product of that relationship, when it functions in a healthy way, is that we come to appreciate, not only our individual strengths, but also any vulnerabilities. Where those vulnerabilities are seen to be having an adverse impact on our professional work, then naturally we should, with sensitivity, endeavour to assist, and as appropriate ensure that the head of jurisdiction comes to an appreciation of those concerns. Recent events elsewhere illustrate the importance of identifying and dealing with personal problems effectively within the court, so that the discharge of the court's public responsibility is not jeopardized. This may be especially important for Magistrates operating in comparative isolation, alone, for example, in regional centres. In those situations, rotations to other centres and Brisbane, and not infrequent visits by the Chief Magistrate, could be helpful.

In summary, a contemporary court, functioning professionally and well, will exhibit a good collegial spirit; the judicial interaction outside the courtroom will be open, courteous, well-informed and therefore productive; perceived problems will be aired and resolved in-house; and the public, if invited to scrutinize the operation, would confidently give it a good report card.

I am not claiming that contemporary courts are little utopias. Of course personalities will sometimes clash, and individual judicial officers will become frustrated and depressed. Not all decisions can be made collegially, and some made independently by the head of jurisdiction will not be popular with all, and that will be so with some majority decisions also. Our objective, individually and collegially, must be to minimize the impact of those phenomena. Thankfully, our being mature, intelligent, well-intentioned professional people, that should not be too hard.

Over recent years this court has weathered hard times. The difficulties have generated a welter of public interest. This will have at least confused some members of the public. The people expect utter stability from their courts of law. They prefer courts notable for their boring predictability, not colourful turbulence. I again stress the capacity of but a few to distract attention from the dedicated commitment of the vast majority. Public confidence in the court survives fortunately, and that bears testimony to the enduring good work of the Magistracy. There was symbolic support, also, in the new courthouse in Brisbane, which architecturally represents a number of our goals: transparency especially, and also, continuity and inclusiveness.

The healthy operation of the rule of law assumes public confidence in, and preparedness to accept, the judgments of the court. Short of that, there is anarchy. That is why we, as judicial officers, ultimately matter to society. Being faithful and conscientious to our oaths or affirmations of office, we maintain the rule of law. But that may be jeopardized ever so easily, by either individual or collegial conduct.

We must all expect continuing media scrutiny. It complements the transparency on which the legitimacy of the judicial process depends. That process is critical to the future of our civil society. As expressed by Chief Justice Gleeson in that 2000 address, judicial officers must "continue to respect, and be seen to respect, the terms of the trust upon which they exercise their authority. Like fairness, legitimacy should be constantly on display in courts".

Recent troubles accentuate the primacy of two stipulations: individual application of the highest competence, with dedication also to collegial considerations; and second, leadership which acknowledges the crucial significance of the "college" – the Chief Magistrate is but the first among equals, but must establish moral authority to lead effectively a bench of magnitude and diversity.

I believe, with respect, that the court is now well on track. I commend you for your respective roles in assuring that position.