SUPREME COURT OF QUEENSLAND

North Queensland Law Association Conference 2010
Friday 28 May 2010, 9:25 am
Shangri-La Hotel, Cairns
"Matters of interest to the courts and to the profession"

The Hon Paul de Jersey AC
Chief Justice

I am very pleased to have the opportunity to be with you, and to make some observations at this opening session.

I begin by congratulating the northern profession on the golden anniversary of the North Queensland Law Association. The longevity of the Association bears witness to a particular feature of regional practice, and that is its high collegiality, a characteristic not quite so evident in the metropolis. I congratulate you on maintaining that interaction. It is very much in the courts' and thereby the public's interest. I expect this remains one of the few parts of the State where generally speaking a solicitor's word would still be accepted as his or her bond, although the development of electronic communication has probably rendered that convenience largely otiose.

Substantial numbers of practitioners service North Queensland and Far North Queensland. You may be interested to know the latest figures. There are 343 solicitors practising in Cairns, 270 in Townsville, 113 in Mackay, 25 in Mt Isa, and 37 in other centres, a total of 768. At the bar, 30 in Cairns, 24 in Townsville and 5 in Mackay. You account, ladies and gentlemen, for a sizable chunk of the Queensland profession, which itself illustrates the potential importance of the role played by the Association.

Another feature of regional practice which I especially admire is the closer relationship between the profession and the courts, which again potentially serves the public interest very well. That brings me to my acknowledgement of the contribution of the North Queensland judiciary, and I particularly wish to mention the Northern and Far Northern Judges this morning.

Each of those Judges has made an outstanding contribution to the delivery of judicial services in Queensland, which should be acknowledged as they approach retirement late next year. Justice Cullinane has been the Northern Judge since 16 November 1992, only the eleventh judge to hold that significant office. Justice Jones has been the Far Northern Judge since 13 October 1997. His Honour has been the inaugural Far Northern Judge, appointed at a time when my predecessor felt there would be insufficient work. That forecast was not borne out. These Judges have not only serviced busy court centres. They have also played leading and highly respected roles in North Queensland community life, recognized in one way by their being admitted to the Order of Australia. It is appropriate that we pause at this conference to express gratitude to Justices Cullinane and Jones, at this stage in their judicial careers, for their lengthy and exemplary public service.

Almost exactly one year ago, I was pleased to attend, in Bowen, a Q150 celebration at the superbly refurbished Bowen Courthouse. The event was convened by the Townsville profession. I was most impressed at the efforts of the North Queensland profession in organizing that occasion, which was in fact the only such event held State-wide, further illustrating the vibrancy and cohesion of the North Queensland profession – as well as its sense of history.

Bowen holds a dual significance in relation to the delivery of legal services in Queensland. In the first place, it was there that the first solicitor to practise in North Queensland hung out his shingle: that was Charles Beaufort Grimaldi, who arrived in Bowen on 10 August 1864. In the second place, the first Northern Judge was statutorily obliged to reside and do duty in Bowen. That was Edmund Sheppard, who was followed by Pope Cooper, until after 15 years the Northern Judge was moved to Townsville, where he sat in the old courthouse on Cleveland Terrace. That courthouse had ironically, in an earlier era, been the Bowen School of Arts.

Many northern practitioners travelled substantial distances to be present in Bowen a year ago. After the ceremonial sittings, we joined outside the courthouse for a group photograph. The group comprised as many as 58 persons. I have asked that that photograph be included, with names, in the Supreme Court's Annual Report which will be published later this year.

Back to the realities of day-to-day practice, there are two thrusts I mention today: the Moynihan jurisdictional changes, briefly, and at a little more length, national legal profession reform.

My own view is that the Moynihan reforms are most appropriate, if not overdue. It will be important to monitor the consequences of the jurisdictional changes. The implementation is being carefully managed by a taskforce of which I am a member. One obvious point to be made with the substantial increase in the District Court's civil jurisdiction, rising to $750,000, is the prime need to maintain the quality of appointments to that court, especially on the commercial side. A related consideration, with the increasing Queensland population, is the need to at least maintain the present ratio of judicial officers to population – in fact the lowest in the nation, which may bear testimony to the working commitment of Queensland Judges and Magistrates.

The Attorney-General confirmed recently that the first tranche of reforms, which include the changes to the monetary jurisdictions of the courts, are covered by legislation presently in the House, which should pass in the next few months. The changes to the monetary limits will take effect upon proclamation. I understand that the legislation will prevent what occurred with the last similar changes many years ago, and that was the remission of a lot of cases from the Supreme Court to the District Court. The Supreme Court will retain its caseload as at proclamation, even though a substantial amount of that caseload will then fall within the jurisdiction of the District Court.

I turn to the second matter, national legal profession reform, an initiative of the Council of Australian Governments. The major objectives are commendable – simplified uniform legislation and regulation, national standards policies and practices where practicable, freedom of movement between jurisdictions to foster a truly national profession, and clear and accessible consumer protection – though it is not clear to me that they are not presently being secured.

On 14 May 2010, the COAG Taskforce released a consultation package, including draft legislation. Submissions are invited. I will revert to that.

Under the proposal, courts would remain the admitting authorities, and current mechanisms for the treatment of disciplinary complaints would be largely respected: that is, disciplinary applications would be determined as at present, though processed through a central national agency. A complaint against a practitioner in Northern Queensland must be determined by a State-based tribunal familiar with any relevant nuances of practice here. The uniquely decentralized nature of practice in Queensland gives rise to some considerations quite different from those of practice in other, largely metropolitan, jurisdictions.

I remain seriously concerned about the composition of the peak board. The presently advanced model involves a National Legal Services Board responsible for developing national standards on a number of important matters, including admission, suitability for admission, practising entitlements, professional conduct and business practice – though the final say would rest with SCAG, inevitably injecting a political dimension into the equation.

Those matters, especially the setting of ethical standards, go to the heart of the profession. A major concern stems from the posited composition of the Board. The original discussion paper of the Consultative Group proposed that the Board would comprise "a small body of around five members appointed on the advice of the Standing Committee of Attorneys-

General": a small, powerful body, and because small, one may at once query whether all relevant interests could be represented. The draft legislation specified these interests: the practice of the law, protection of consumers, regulation of the profession, experience in large jurisdictions, experience in small jurisdictions, a balance of expertise. The latest, May, proposal mentions up to seven members, all of them appointed by SCAG. An apparent "concession" to concerns expressed by the Council of Chief Justices and the Law Council of Australia is that each of those bodies would be invited to nominate a panel of three, from which SCAG would appoint one Board member. That alone illustrates how potentially political regulation of the profession would, under this model, become.

Another major concern relates to the making of rules setting ethical standards and the like. This draft legislation authorises the Board to develop such rules, and the proposal contemplates that that will occur in consultation with the professional bodies. But significantly, the Board would then be obliged to submit proposed rules to SCAG: it would fall to SCAG whether or not to approve the rules. SCAG would even be entitled to give policy directions to the Board.

Furthermore, this draft legislation proposes that SCAG would have "a general supervisory role" in relation to the Board, SCAG might request reports from the Board, and SCAG could give directions on policy matters to the Board.

Take this scenario. SCAG directs the Board that as a matter of policy, a person is fit for admission only upon an undertaking to report to the police any confession by a client, at interview, of serious criminal conduct. Fanciful? With some species of crime that would resonate well with sections of the populace/electorate. But it would seriously erode the legal professional privilege central to the independence of the profession. The notion of SCAG giving 'policy' directions to the peak regulatory body would be anathema to anyone who seriously values an independent legal profession.

I said earlier the Supreme Courts would under this proposal remain the admitting authorities. Even that needs to be qualified. The court may only admit, under this model, if the National Legal Services Board issues a compliance certificate. So the court's capacity to admit, under this model, depends on a SCAG appointed board giving the applicant a tick. The draft legislation says it is not intended to interfere with the Supreme Court's inherent jurisdiction to refuse admission. What of the court's inherent jurisdiction to admit?

How could the legal profession remain independent if effectively governed in these ways by the Executive Government? The substantial constraint to which the profession has to date been subject, and which warrants its being characterized as the legal profession, is the supervisory jurisdiction of the court over its individual members. That would substantially change, were SCAG to determine the sorts of fundamental issues just mentioned.

Were that Board to be a joint creature of the courts and the profession, with its determinations self-executing, the result would be more acceptable. Of course it should include non-lawyer community representation. But in this aspect, the current proposal is fundamentally flawed.

At the QLS Symposium in March, I endeavoured to articulate why these considerations are so important. I sought to do that because generalized reference to concepts like independence can sometimes be dismissed as mere rhetoric.

From the point of view of the courts of law, the operation of the legal profession is of critical concern. The courts depend on an efficient, ethical profession in which disputants and potential disputants have confidence; along with those who rely on expert assistance in non-contentious matters. But the independence of the profession is a supervening characteristic, surpassing efficiency and ethical commitment, and it is of central importance.

Independence is important for public trust in the profession. But it is also critical to perceptions of the judiciary drawn from the profession. If only because there can be no compromising the independence of the judiciary, there can be no compromising the independence of the source from which it is drawn.

As I said in March, the importance of upholding the independence of the legal profession from Executive Government appears distinctly when the State is a litigant or claimant, which is the case for all criminal work, and a lot of civil work. The other party to the claim may think it unfair that the Executive Government of the State delineate the framework within which that party's legal representatives may operate, with concern, naturally felt if in fact misfounded, that the Executive Government would principally be doing its best to establish a framework favourable to the disposition of the business of the State.

In some jurisdictions which have turned their faces against the rule of law, the profession has been denied independence; in Zimbabwe, for example, where I understand practitioners who do not undertake to promote government policy in their practice can find it difficult to obtain a practising certificate. There are at least incipient similar concerns in Fiji and Tonga.

Preserving the independence of the profession is critical, extending to the capacity of the profession to stand boldly between State and citizen, with the profession expressing, with a voice which will be respected, opposition to State initiatives seen to imperil individual rights and freedoms.

I understand the concerns which are firing these initiatives were experienced primarily in large national firms. They were frustrated by the expense, delay and inconvenience involved in having to master and operate within varying regulatory regimes from State to State. I understand these concerns provoked this quest for the centralization of control of

the profession – I doubt they envisaged that control would reside with the executive government.

I have not heard concerns from our 1,200 strong Queensland bar nor from the majority of our more than 8,000 Queensland solicitors, nor from those members of the Queensland public who utilize legal services.

The Law Society informs me that the nationally based firms account for only about 12% of Queensland solicitors. It will be unfortunate if the influence of those national and multi-national-based firms brings about a refashioning of the profession to the point where it loses its independence through such control.

It is fanciful at the moment to think this reform drive will not proceed in some form or other. It is very important that whatever is done not imperil something so basic and fundamental as the true independence of the legal profession from the executive government. And the current package seems to me to make no real attempt even, to address this concern which has been very much in the public arena over recent months. It is not only disappointing, but disturbing, that the detailed proposal was eventually released in this form.

Another important concern relates to the cost of the bureaucracies which the proposed new instrumentalities will inevitably spawn. The proposed National Legal Services Board, the Standards Advisory Committees and the National Legal Ombudsman will not come inexpensively. The question is who will be called upon to bear the cost. The existing legitimate demands in this State on the Interest on Trust Account Fund are substantial. Our present system in Queensland works well. It would be regrettable were Queensland taxpayers, or Queensland practitioners, or Queensland citizens using legal services, required to subsidize the cost of a new national system introduced to appease the misgivings of a small and high income group of the nation's solicitors. I am not convinced by the preliminary estimates mentioned in the package that the savings will offset the costs.

Interacting regularly with practitioners from regional Queensland, I am struck by their utter dedication. I would be very concerned were the viability of practice in centres like Emerald, Blackall, Longreach, Mt Isa, Weipa … to be jeopardized by any new financial impost.

The recently released 'consultation package' includes the April report of the Taskforce, 197 pages of draft legislation, proposed national rules, and an 'impact statement'.

I urge you seriously to consider that material. The Law Society will undoubtedly be making comprehensive submissions. It may be that the North Queensland Association would wish to consider presenting a submission itself based on unique aspects of practice in this part of the State, not just practice on the seaboard, but practice in the more remote Western centres also.

I believe it is very important that the Executive Government be made aware, and emphatically aware, of special features of Queensland practice which are unlikely otherwise to impinge on Southern mindsets.

The package says the proposal is to be "resubmitted" to COAG in late 2010, presumably after the federal election. I am told the "consultation period" is 14 May to 13 August. I would hope real attention would be given to Queensland views. Of a national profession numbering about 100,000 practitioners, the Queensland profession, at approximately 9,500, accounts for almost 10%, and as I have said, there are particular features of practice in Queensland not evident, or so evident, in other Australian jurisdictions.

I turn now to a completely different subject, and that is the construction of the new metropolitan Supreme and District Courthouse in Brisbane. Work on that vast project proceeds apace. The shell of the structure has risen to above ground level 6, which is two floors above the Banco Court. The overall construction will reach 19 stories above ground.

The tower should be completed by the end of this year, with internal fit out next year. The Building Committee Judges have had substantial input, in close association with the architects, Architectus, and the managing contractor Bovis Lend Lease.

I had been hoping for an opening late next year, which will see the sesquicentenary of the inauguration of the Supreme Court. More likely is an opening early in the year 2012.

The State will then at last have a metropolitan courthouse optimally suited to the disposal of the mass of very serious work daily accomplished in the Supreme and District Courts. The 47 courtrooms and related facilities in this new complex will constitute essential infrastructure which will serve the people well for many years to come.

We tend to focus on utility, for the litigating public, jurors, court staff and prisoners. But that should not mask a broader, striking public vision. As a former State Architect has reminded me, this will be the most significant public building constructed in the capital city since the current Executive Building, which was completed some 39 years ago. Parliament House, by the way, opened in 1868. One hundred and forty four years later, likely in 2012, we will see the emanation, at the other end of George Street, of the "headquarters" of our third branch of government.

I urge you to look at the Bovis Lend Lease webpage for depictions of the construction. The cost of the project, $600 million, itself gives an idea of its magnitude. The design, with the focus on a transparent presentation, is captivating if not enthralling.

This will fix public perceptions of the role of the courts of law upon the reality, which is, their being bastions of independence and objectivity in the delivery of justice according to law. The inspired design reflects the challenge of that mission, and the building's utility will help assure the fulfilment of the undertaking.

This new courthouse is rightly located in the State capital. It will nevertheless be the metropolitan courthouse of all Queenslanders. It will be a source of community pride, and signify the esteem in which all proud Queensland citizens hold their pivotal institutions.

I regret that the major development of the Townsville Courthouse remains overdue. I know that the Attorney-General and the Acting Director-General appreciate the necessity for that work. I can only seek to console by pointing out that the Brisbane redevelopment, when begun in 2008, was itself many years overdue. I obviously hope that the next few years will see a firm commitment to the necessary Townsville redevelopment, especially if economic conditions improve, and I will be doing my best to keep that need on the relevant radars. I expect that project will be regarded as "the next cab off the rank".

I am, however, pleased to confirm that court services available in the metropolis are also generally available here, technology especially. Ashley Hill, the Director of the Courts Information Services Branch, has told me that in fact the best equipment goes, not to Brisbane, but to the regional centres, because of the lack of on-site maintenance personnel. There has been a concerted effort from Brisbane, particularly over recent years, to ensure that the regional centres are properly looked after. A recent development is the extension to North Queensland of the Court Network, the organization of voluntary guides who assist unrepresented persons through the court process.

That provides a neat segue into my final point, which is to commend the North Queensland profession for its commitment to pro bono work, so important in enhancing the accessibility of civil justice especially. I recall a few years ago the willingness with which many firms committed themselves to important QPILCH projects in this part of the State, and I express sincere gratitude for that continuing commitment.

This is the 13th consecutive North Queensland Law Association annual conference I have attended in my capacity as your Chief Justice. Kaye has been able to attend, and has attended, all but one of those. We have regarded it as a privilege to be invited with such

frequency, and to have been able to attend. Your spirit, ladies and gentlemen, is enlivening and reassuring. I greatly admire your professional dedication, and treasure the opportunity to be able to say so. I wish you continuing professional and personal fulfilment.