SUPREME COURT
OF QUEENSLAND

Legal Studies Teachers' Conference
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Chief Justice

I am very pleased to have been given the opportunity to deliver this opening address. All teachers discharge an important role in imparting knowledge, developing a student's capacity to reason, and inspiring the student to inquire. As legal studies teachers, you may set some budding lawyers on their career paths – I say "some" rather hopefully, because there certainly would not be places in the practising profession for all who pass through your classrooms. That neatly brings me to the subject of this address, and that is, your educative role in relation to what is the third branch of government.

As a judge, I have never been alone in commenting with regret about the general lack of understanding in the community of the operation of the courts of law. Let me give some examples.

At a hypothetical conducted by ABC Radio in the Banco Court in recent years, there was no universal realization that a jury in the criminal court comprises 12 persons, and that they must generally all agree upon their verdict. Law Reform Commission surveys on what the jurors comprehend by the words "beyond reasonable doubt' – words which trial judges are constrained by law not to define – show that jurors have adopted widely divergent interpretations. Members of the public not infrequently express surprise when they are told that court proceedings are open to the public, a misconception which goes to the very heart of the transparency thence accountability of the system. And let me conclude this brief list with an anecdote. A patient disclosed upon enquiry that her partner was the judge in a recent trial of considerable interest to the medical profession. Oh, enquired the doctor, which side was he on?

As a lawyer and judge, I find it disturbing that notwithstanding they have not studied the law, many citizens nevertheless lack any even basic understanding of legal structures and processes. That dismay flows, obviously, when one recognizes the potential significance of the work accomplished by the courts of law.

Most seriously, courts of law can deprive people of their personal liberty, though fortunately not in this State, since the year 1922, of their lives. Courts of law may punish people in other ways: ordering pecuniary penalties and confiscating their property for example. Courts may even order the continued incarceration of prisoners who have served out their finite terms, where that is considered necessary to protect the community. At the trial level in the criminal court, the trial judge carries an immense responsibility to ensure the trial is conducted fairly and in accordance with law. I would rank next to the criminal court the reach of the Family Court in regulating people's lives, especially in relation to the future welfare of children. Then there is the welter of potentially serious decisions to be made in the civil courts, decisions which can markedly affect the daily lives and financial affairs of individual people, families, corporations, even the State. Contemporary conditions throw up extremely sensitive situations for resolution: Judges may have to determine whether conjoint twins should be separated, whether the seminal fluid of a recently deceased male partner should be preserved for subsequent artificial insemination, and so on. Decisions in relation to local government authorities have in the past necessitated the resetting of rates, with great repercussions for residents.

I have so far mentioned lack of understanding of the work of the judicial branch of government. There is, I fear, a general lack of understanding of the work of all branches of government. In our Centenary of Federation year, the Centenary of Federation Committee conducted an enormous public education program in relation to the system of government. It commissioned an impressively wide array of educational activities directed to schools and more broadly into communities throughout Queensland. One survey at the time suggested a quite substantial consequent increase in awareness of federation in particular, from two per cent to 34 per cent, which was encouraging.

All those efforts assumed that the Australian community was generally ignorant of the fundamental pillars of our system of government. They also betrayed a responsible concern that the Centenary of Federation should not pass by simply as an extravagantly expensive celebration devoid of further abiding significance.

Some years ago people expressed surprise that a State Premier in Queensland should, as we were informed, have an at least incomplete perception of the doctrine of the separation of powers. I surmise that few people could themselves pretend to any precise appreciation of that particular concept. Certainly many would be able to identify the legislature, the executive and the judiciary as the three branches of government, and they would go on to identify their independence of each other as a governing criterion. But how many of us could specify the components of the "executive"? How many could identify the true objective of the separation of powers doctrine, as establishing checks and balances to ensure that no one branch could itself control the machinery of the State? How many Queenslanders would appreciate that in this State we have only a partial separation of powers, and why?

I publicly refer to the judiciary, with a frequency falling only just short of the tedious, as being the third branch of government. I have also explained as best I can from time to time the concepts of the separation of powers and the rule of law. How many of our citizens would think of their courts of law as part of "the government"?

When I speak of the rule of law, I sometimes experience misgiving, for concern that I may be sounding unduly rhetorical. Could many people describe with any real precision the content of that stipulation? A V Dicey provided the time-hallowed formulation: "that no person is punishable except by a distinct breach of law established in the ordinary legal manner and judged in the ordinary courts of the land: that is, contrary to the exercise of arbitrary power; that every person is equal before the law, regardless of their authority or position in society; and that the fundamental rights of the citizen (such as the right to personal liberty, the right of public meeting or freedom of speech) do not depend on any constitutional declaration, but are secured by the ordinary law" (Queensland Constitutional

Review Commission, issues paper, July 1999, page vii). Yet would not most people stop at some vague adumbration, such as that the courts are there to protect the rights of the people?

These are grand concepts. Though unaware of the detail, most people would appreciate that they are fundamentally significant doctrines. Yet it is odd that the community should uncomplainingly suffer such a paucity of knowledge of them.

Intensely symbolic aspects do arouse interest. The flag, the anthem, the preamble to the Constitution are examples. But even in those cases there is scope for some embarrassment. How many Australians would know that the star beneath the Union Jack is called the "Federation Star", and the significance of its points? How many Queenslanders could describe accurately the emblem on our State flag?

Let me come back now to the judicial branch, and particular reasons why some adequate community understanding of its function is especially important.

There are features of the judicial branch of government additionally to its power dramatically to affect people's lives which, I think, warrant particular and informed public interest in how it operates. I have in mind especially its independence.

One of the ways of ensuring the independence of the judicial branch in Australian jurisdictions is requiring appointment by the executive government, not election, and giving judges security of tenure, ordinarily until a retirement age of 70 years or more, with removal from office only for proven misbehaviour or incapacity. This places judicial officers in a comparatively powerful position. Unlike parliamentarians, judges do not periodically have to face the ballot box.

The judicial system responds by ensuring the transparency, thence accountability, of its operation. Courts operate in public, judges give reasons for their decisions, there is an appeal process, there are mechanisms in place to minimize delay and expense and

thereby enhance access to justice, and heads of jurisdiction annually report publicly in writing on the operation of their courts. In Queensland especially, where suppression orders and the like are a comparative rarity, this is a truly public system.

Yet it is the fact that only a handful of spectators will generally sit in the public gallery during court proceedings. Judgments are published on the court's webpage, and although that page registers large numbers of hits, I am not confident that non-lawyers would regularly access those judgments. The low level of public awareness of the process is most graphically and disappointingly revealed by some of the commentary which follows after sentencing in the criminal court in high profile cases, where the commentator's quest for vengeance sometimes seems to overwhelm all else. I remain of the view that if members of the public sat through the sentencing process within the court room and listened to the sentencing judge's explanation for the sentence being imposed, they would more often than not accept that reasoning and not demur from the penalty imposed.

Few of the judgments of the courts, and remember there are daily very many of them, gain public currency beyond publication on the court's webpage. It is really only the controversial and high profile cases which are publicly remarked upon. I suggest the real reason for this is that the community is actually confident that its courts operate dependably, meaning independently and efficiently, so that there is no need to intrude in an actively monitoring sense. But it is nevertheless the controversial cases which accentuate a need for informed criticism, often lacking. Let there be no doubt: courts welcome scrutiny and resultant criticism: the hope is that it be properly informed.

Enter yourselves. You have an important opportunity to instil some worthwhile understanding of the fundamentals of this important system, and thereby provide a foundation for continuing interest, whether the student enter upon a career in the law or not. In particular, you can assist students by facilitating their interest and understanding of the court process. The Queensland Courts are extremely welcoming of visitors, and our Library offers educational programs tailored to student groups visiting the Court complex, ranging in age from primary to secondary school. Each year, around 8,500 students attend

to view court proceedings. Members of the judiciary also participate on a number of occasions, by hosting small group "talk with a judge" question and answer sessions. Most of the student feedback from such visits indicates that it is the criminal proceedings that students find the most interesting – not unlike members of the general public.

I was admitted to practice as a barrister in 1971. The following four decades saw considerable development in the way courts approach the discharge of their mission. While that mission remains unchanged, that is, the delivery of justice according to law, our methods have undergone substantial change. An understanding of the vibrancy and resilience of 21st century courts may be usefully informed by some brief review of those changes, and from my point of view especially, within the Supreme Court.

Last year the Supreme Court celebrated its 150th anniversary, with the opportunity to reflect on the way that institution has developed to its present position. I will repeat some brief observations I made last year, because I think they bear out two conclusions: first, that the workings of this institution should be understood by intelligent members of the community, and second, that coming to understand it can be an interesting exercise.

The Supreme Court grew from humble beginnings, as did the State of Queensland from the former colony, and the growth of the Supreme Court has reflected the growth of the State.

At the establishment of the Supreme Court on 7 August 1861, there was only one judge, Mr Justice Lutwyche, and he sat in the Chapel of the Old Convict Barracks in Queen Street.

Moving to the point half-way along that sesquicentenary timeline, in 1936 there were but seven Supreme Court Judges led by Sir James Blair, including by that stage a Northern Judge and a Central Judge, and the court in Brisbane occupied the grand Italianate style courthouse which burned down as the result of an act of arson in 1968.

As at last year, a further 75 years on, our Supreme Court comprised 26 Judges, including 6 permanent Judges of Appeal including a President, and in addition to a Northern Judge and a Central Judge, a Far Northern Judge. The court in Brisbane occupied and occupies the courthouse at the corner of George and Adelaide Streets, and we keenly anticipate relocation in July this year to the new metropolitan premises at the western end of George Street. The last two decades have seen the appointment of women to the Supreme Court, now numbering nine of its complement of 26, a ratio lower only to that of the High Court and the Family Court.

The Supreme Court is a substantially larger and much altered court from that of 1861 or, for that matter, the somewhat more recent court of 1936. What of its jurisdiction?

The years have seen some erosion in the jurisdiction of the Supreme Court, especially with the establishment in 1977 of the Federal Court, and in 1976 of the Family Court, and though to a lesser extent, the diversion of work to tribunals.

Yet in other areas the court's jurisdiction has expanded, for example in 1991 when through the *Judicial Review Act*, the court was accorded jurisdiction to pass upon the legality of administrative decisions, unfettered by the complicated strictures which had attended the prerogative writ regime. Some newly-acquired jurisdictions have exposed the court to controversy, as with the *Dangerous Prisoners (Sexual Offender)* legislation. For 37 of its 150 year history, between 1922 and 1959, the Supreme Court's workload noticeably increased because of the absence of a District Court.

Despite those oscillations, our Supreme Court has remained, alongside the Supreme Courts of the other Australian States, a court whose plenary jurisdictions assures our citizenry of appropriate remedies in both the civil and criminal domains. While some judgments have drawn criticism, that has generally been overtaken by supervening public confidence in the true commitment of those who comprise that resilient institution.

Unsurprisingly over the years the court has adapted the exercise of its jurisdiction in response to its ever increasing workload. The year 1991 saw the reconstitution of the court with the establishment of the Court of Appeal and the Trial Division. The Mental Health Court and its predecessor brought substantial changes in our approach to offenders against the criminal law who are afflicted by unsoundness of mind. The court's embrace from the late 1980's of the mechanisms of alternative dispute resolution meant that judicial adjudication came to be reserved, largely speaking, for only those disputes actually in need of it, thereby working substantial economies in the interests of disputants. Our procedures have over the years been streamlined in other ways, by the use of electronic trials and other electronic facilities for example, and by the reform of the procedural law effected by the Uniform Civil Procedure Rules.

There have been many changes in the composition of the Supreme Court, in its jurisdiction, in its procedures. But as I have said, those changes aside, the court's mission remains unchanged from that which obtained upon its inauguration in 1861. That mission is now discharged in many centres throughout the State of Queensland.

While it is for others to assess the effectiveness of the court's endeavours, I have no doubt myself that the public is generally reassured by the role the court has played, and will continue to play, in the delivery of justice according to law, and thereby, in the maintenance in Queensland of the rule of law.

But I nevertheless think it unfortunate that the operation of the courts is generally so incompletely understood, if I may put it that way. The courts themselves bear some responsibility for this situation.

Since my appointment to the Bench in 1985, I have been centrally interested in the way the judicial mission is presented. At about the time of my subsequent appointment as Chief Justice, there was published under the auspices of the Australian Institute of Judicial Administration a "Courts and the Public" report which presented the courts in a most unflattering light – out of touch, perhaps irredeemably so. I did not at the time see that as

the reality, and over the last 14 years especially I have striven to let people know that our courts are in tune with the communities from which in fact they are drawn, and of which they form part.

On one level, the courts must operate with a degree of detachment. To preserve their authority they must. A judge who imprisons an offender cannot be just one of the crowd. That aside however, judges' feet are very much on the ground. And to suggest that the criminal court in particular is divorced from the community conveniently ignores the pivotal role of the jury. Increasingly the symbolism of the law focuses on courts as institutions of the people. Our new metropolitan Supreme and District Courthouse in Brisbane, for example, is substantially a glass building, representing the transparency of the process, with little barrier to substantial public involvement, with even those who choose to remain in the Plaza outside given views to what is going on inside.

Why then are our courts nevertheless perceived as detached from the community? That suggested detachment is most frequently alleged in the context of the sentencing to which I referred earlier. Judges are portrayed as either hawks or doves, with the doves pilloried. Legislatures respond to public pressure by introducing mandatory sentencing regimes, grid sentencing, fortunately in Queensland thus far to only a limited extent. Legislatures establish Sentencing Advisory Councils partly I suspect in the hope their work will deflect attention from the doings of the allegedly "blinkered and obdurate" judiciary. Why this persistent criticism?

The reason is, as I earlier suggested, that the courts do not with any great facility communicate to the general public the reality of what they do. I think really that the work of the courts is the least understood operation of government. We struggle to address this, primarily of course by always publishing reasons for the decisions which are given. But who reads them other than the parties to the particular proceeding? As I have said, the courts are almost invariably open to the public, but rarely more than a handful of onlookers attend. The open days are popular, but is that for the sausage sizzle and the balloons for the children? We produce educational tapes and videos, we educate our staff

and judges address community groups. Chief Justices participate in talk-back radio, and are commended for that, but the ABC's morning programme in which I have participated accounts for only a fraction of the South-East Queensland population. We try, but the bloggers are unforgiving, as we especially note when details of judges' international travel are disclosed, which we judges in Queensland choose to do voluntarily and on a regular basis.

Sometimes it is suggested that televising court proceedings would enhance public awareness of the process. I remain sceptical about this.

The vast majority of what goes on in the courtroom would be regarded by most people as extremely uninteresting, raising the real prospect that the media would replay only the dramatic bits, leading to a distorted perception of the overall proceeding. And I have a greater concern, and that is what I see as the inevitability that the presence of a camera, however discreetly placed, would distract participants in court proceedings from the serious business at hand. So I do not personally favour the televising of court proceedings, save for the delivery of judgment in important cases, where the Judge can present a concise and brief synopsis for public consumption.

An argument, of course, is that the televising of court proceedings, or in more contemporary terms the full digital streaming of court proceedings, is simply a rational concomitant of public availability, of the transparency about which we talk so much. I am not convinced of that: transparency is I believe sufficiently secured by current approaches.

I revert to my theme.

In moving some distance towards addressing these inadequacies at the student level, ladies and gentlemen, you can and do contribute to the alleviation of a more general community problem. Your efforts are greatly appreciated, because the courts cannot do much more in that regard. The courts are, after all, busily committed to fulfilling their core

function, which is the judging of cases in the courtroom. Other complementary mechanisms are necessary, and you furnish one of importance.

It is accordingly with great pleasure that I now declare open this important Annual Conference, and wish you an interesting and stimulating time.