QUEENSLAND LAW SOCIETY SENIOR COUNSELLORS' CONFERENCE 2013, 25 OCTOBER 2013, 9.10 AM, OLIVER'S ROOM, PULLMAN BRISBANE, KING GEORGE SQUARE

What a pleasure to be with wise and generous practitioners discussing something dear to our hearts, professional ethics. In doing so, we continue a tradition far more ancient even than the roots of our fine profession in England in the reign of Henry II. For tens of thousands of years before European contact, the Turrbal people prospered here in this place they knew as Meanjin where their Elders held meetings to better organise tribal life, not so different to today's conference. I acknowledge the Turrbal Elders past and present.

It is especially timely in light of recent events to reflect that effective democratic government is reliant on the concept of the separation of the three arms of government, of checks and balances, so that no one arm of government can exercise or abuse total power. As Justice Stephens of the US Supreme Court noted in delivering the majority opinion in *Hamdan v Rumsfeld*:[1]

> "[t]he accumulation of all powers, legislative, executive and judiciary in the same hands, … may justly be pronounced … the very definition of tyranny."

In the words of erstwhile New South Wales Chief Justice, James Spigelman:

> "The independence and integrity of the legal profession, with professional standards and professional means of enforcement, is of institutional significance in our society. It is an essential adjunct to the independence of the judiciary. … a bulwark of personal freedom, particularly against the hydra-headed executive arm of government, which history suggests is the most likely threat to that freedom. The profession, no less than the judiciary, operates as a check on Executive power."[2]

As Justice Kirby has explained:[3]

> "The rule of law will not prevail without assuring the law's principal actors – judges and practising lawyers and also legal academics – a very high measure of independence of mind and action."

With those principles in mind, I commend the Queensland Law Society and its President, Ms Annette Bradfield, for publicly raising concerns about the recent *Vicious Lawless Association Disestablishment Act* which requires courts to impose mandatory cumulative sentences in specified circumstances which may extend well beyond the punishment of bikies. My 37 years' experience in the criminal justice system, whether as defence lawyer, prosecutor, trial judge or appeal judge, has convinced me that community interests and the interests of justice which, after all, coincide, are best served by giving judges the broadest possible range of sentencing options. This ensures the punishment fits the crime. The maintenance of the sentencing discretion is an essential part of a functional criminal justice system. It keeps the "justice" in the "system".

Recent amendments to the *Criminal Law Amendment Act* 1945 (Qld) will allow the executive, without a court hearing or order, to indefinitely detain in custody a person subject to the *Dangerous Prisoners (Sexual Offences) Act* 2003 (Qld). The constitutionality of those provisions is likely to be subject to future judicial

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1 No 05-184, 29 June 2006, 12.

2 'Extra-Judicial Notes' (1998) 17 *Australian Bar Review* 105, 106, 108.

3 Kirby J 'Independence of the Legal Profession, Global and Regional Challenges' (2005) 26 *Australian Bar Review* 133.

determination and for that reason I will not comment on them. I commend Ms Bradfield, however, for carrying out her institutional, democratic role as a leader of the Queensland's independent legal profession in publicly stating QLS concerns that the amendments offend the separation of powers.

The fundamental duty of lawyers is to protect and pursue their clients' rights in independent courts, unswayed by the power, privilege or wealth of others and subject only to their duty to the court as officers of the court. That is the background and context to the Australian Solicitors Conduct Rules (ASCR) which state that a solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.[4]

Courts have exercised jurisdiction over lawyers as officers of the court "from time immemorial".[5] Brennan J explained the duty in *Giannarelli v Wraith*:[6]

> "The purpose of court proceedings is to do justice according to law. That is the foundation of a civilized society. According to our mode of administering justice, parties with inconsistent interests are cast in the role of adversaries and the court or judge is appointed to be an impartial arbiter between them. Counsel (whether barrister or solicitor) may appear to represent the adversaries, but counsel's duty is to assist the court in the doing of justice according to law. A client – and perhaps the public – may sometimes think that the primary duty of counsel in adversary proceedings is to secure a judgment in favour of the client. Not so. The true position was stated by Lord Eldon:
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> > 'He lends his exertions to all, himself to none. The result of the cause is to him a matter of indifference. It is for the court to decide. It is for him to argue. He is, however he may be represented by those who understand not his true situation, merely an officer assisting in the administration of justice, and acting under the impression, that truth is best discovered by powerful statements on both sides of the question' " (cases and citations omitted).

Lawyers owe a duty to the court as a consequence of the court's duty to the public to ensure the administration of justice. A lawyer must not act in a way which might defeat justice in the cause in which the lawyer is professionally engaged.[7] As officers of the court, lawyers are concerned in the administration of justice and have an overriding duty to the court, to the legal profession and to the public even where this conflicts with the client's instructions or personal interests. For example, lawyers must not mislead the court. A solicitor who wrongly blamed her barrister for not complying with a court-ordered direction was publicly reprimanded and ordered to pay $10,000 plus costs.[8] A solicitor who obtained a court adjournment by relying on an affidavit which she knew was no longer accurate, was held to have acted unprofessionally.[9] Lawyers must not cast aspersions on other parties or their witnesses without a proper basis.

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4 Rule 3.

5 See *Meyers v Elman* [1940] AC 282, 382 (Atkin LJ); *Davies v Clough* (1837) 8 Sim 262, 267; 59 ER 105, 106.

6 (1988) 165 CLR 543, 578-579.

7 D A Ipp, 'Lawyers duties to the court' (1998) 114 *Law Quarterly Review* 63.

8 *Legal Services Commissioner v Janes*, Courier-Mail, 23 October 2013. Unreported, 16 October 2013.

9 *The Council of the Queensland Law Society v Wright* [2001] QCA 58.

Lawyers must not withhold from the Court authorities or, in some circumstances, documents which may tell against their clients.[10] For example, a father brought an action for damages for nervous shock after witnessing unsuccessful attempts to rescue his young daughters from a motor car driven into a river by the nanny.[11] After the trial but before judgment, his barrister learned that the man's psychiatric position had significantly improved. The English Court of Appeal, in a split decision, held that counsel should have disclosed this altered position to the defendant and the trial judge.

Lawyers' duties include not abusing the court's process by the improper initiation or maintenance of court proceedings, for example, to delay the legitimate recovery of funds from the lawyer's client.[12]

The institutional independence required of the legal profession mandates that lawyers must not act in matters in which they have an actual or potential conflict of interest or where, by reason of their relationship with their client, their professional independence could be called into question.[13] The test is:

> "… whether a fair minded, reasonably informed member of the public … would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in order to protect the integrity of the judicial process and the due administration of justice, including the appearance of justice. The jurisdiction is an exceptional one and is to be exercised with caution, and due weight must be given to the public interest in a litigant not being deprived of the lawyer of his or her choice."[14]

One of the greatest challenges for the legal profession in the 21st century is affordable access to justice. Lawyers and judges must work together to avoid undue delay, expense and technicality,[15] major contributors to the high cost of litigation. Overcharging clients is a breach of professional duties.[16]

Personal relationships with other lawyers or the judicial officer hearing a case can cause ethical difficulties so that disclosure to the court and other parties is usually prudent. The question is whether a fair-minded observer would perceive that, if the case were to proceed with the present lawyer and judicial officer or officers, there could be an apparent interference in the integrity of the justice system.

By way of example, a conviction for rape was set aside and a new trial ordered because the appellant's barrister did not disclose to the client the barrister's sexual relationship with the prosecutor. This omission provided a basis for a reasonable apprehension of a miscarriage of justice, even though the prosecution case was strong and both barristers' conduct of the case was sound.[17]

Inherently intertwined with a lawyer's duty to the court and the administration of justice is the obligation not to engage in conduct which is prejudicial to or diminishes

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10 *Rondel v Worsley* [1969] 1 AC 191, 227-228 (Lord Reid).

11 *Vernon v Bosley* (1996) 3 WLR 683.

12 *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1998) 156 ALR 169, and on appeal (1999) 163 ALR 744.

13 See *Kooky Garments Ltd v Charlton* (1994) 1 NZLR 587, 590.

14 *Mitchell v Burrell* (2008) NSWSC 772, [1] (Brereton J).

15 *Westland Pty Ltd v Johnson* unreported, 29 October 1999, [11] (Wilson J).

16 *Legal Services Commissioner v Baker* [2005] QCA 482; *Legal Services Commissioner v Dempsey* [2008] QCA 122.

17 *R v Szabo* [2000] QCA 194.

confidence in the administration of justice or brings the profession into disrepute.[18] Everyone knows that misappropriating client trust funds is professional misconduct.[19] But so is:

- failing to lodge personal income tax returns for 11 consecutive years;[20]
- back dating documents with an intention to mislead; [21]
- failing to adequately supervise the conduct of employed solicitors;[22]
- using crude, insulting and offensive language in the course of professional duties;[23]
- making public derogatory comments about a former client's family;[24]
- delay and lack of communication with clients;[25]
- carrying out work for private clients without holding a principal level practising certificate.[26]

A duty for which I am especially grateful is that lawyers must not advance unarguable grounds of appeal.[27] Another is that lawyers have an obligation to inform the court at the earliest reasonable opportunity when a listed case settles. Judges are never happy to learn for the first time in court on Monday that the case, which they spent half their weekend preparing, settled at lunchtime the previous Friday!

A key requirement at the heart of lawyers' professional duties, whether to clients, the court, or the administration of justice, is competence. A single incident of incorrect advice arising from a failure to know the relevant law or to conduct proper research into it was held to be unsatisfactory professional conduct. The practitioner was publicly reprimanded and ordered to pay the Legal Service Commission's costs.[28]

Lawyers offering and delivering professional legal services must ensure they are skilled in their areas of practice. And QLS senior counsellors must also ensure they are competent to give the advice sought from them. For that reason, I commend QLS for organising and you for attending this important conference which includes an interactive session with Judge Farr and me; a Q and A session; a workshop on the ASCR and sessions on how to embed ethics into firms, how to support early

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18 ASCR, r 5.
19 *Legal Services Commissioner v Baxter* [2013] QCAT 59.
20 *Legal Services Commissioner v Hewlett* [2008] 2 Qd R 292, 296, [20].
21 *Attorney-General v Bax* [1992] 2 Qd R 9.
22 *Legal Services Commissioner v Baker (No 1*) [2005] QCA 482; *Legal Services Commissioner v Rider-Bell* [2013] QCAT 176.
23 *Legal Services Commissioner v Winning* [2008] LPT 13; *Legal Services Commissioner v Cooper* [2011] QCAT 209.
24 *Legal Service Commissioner v Tampoe* [2009] LPT 14. The case concerned Schapelle Corby's family.
25 *Legal Services Commissioner v Williams* LPT 8*; Legal Services Commissioner v Ballantyne* [2012] QCAT 591.
26 *Legal Services Commissioner v Kellahan* [2012] QCAT 263.
27 *Steindl Nominees P/L v Laghaifar* [2003] QCA 157; *R v Lavery [No 2]* (1979) 20 SASR 430, 431, 435-6.
28 *Legal Services Commissioner v Rouyanian* [2013] QCAT 57.

career lawyers, effective communication, modern technology and ethics, and client-lawyer privilege for in-house and government lawyers.

The issues canvassed at this conference demonstrate that potential ethical dilemmas are infinite. Their resolution can be difficult and finely balanced, even for experienced practitioners and judges. I was pleased to learn from Stafford Shepherd that you can discuss complex cases confidentially with each other and with members of the QLS Ethics Centre team. This conference provides an excellent avenue to build on those vital relationships.

I will conclude by discussing a duty which flows both from the lawyer's duty to the administration of justice and from the duty not to diminish public confidence in the administration of justice or bring the profession into disrepute, namely, courtesy in dealings with fellow practitioners.[29] From what I hear, professional courtesy these days sometimes falls victim to the pressures of long working hours, tough economic times, high overheads and the drudgery of billable six minute blocks. My colleagues and I were disappointed recently when a young barrister, apparently inexperienced in appellate work, repeatedly asserted, without any factual basis, that the prosecutor at trial had lied to the jury in her closing address.

I am encouraged, however, in knowing that even if levels of courtesy between Queensland practitioners could improve, they are infinitely better than in the USA. A male attorney was fined by a New York judge for telling his female opponent: "I don't have to talk to you, little lady."[30]

But that was deference compared to this exchange in court between two US attorneys:

"Attorney A: You don't run this deposition, you understand?
Attorney B: Neither do you, Joe.
Attorney A: You watch and see. You watch and see who does, big boy. And don't be telling other lawyers to shut up. That isn't your goddamned job, fat boy.
Attorney B: Well, that's not your job, Mr Hairpiece.
Attorney A: What do you want to do about it asshole?
Attorney B: You're not going to bully this guy.
Attorney A: Oh, you big tub of shit, sit down.
Attorney B: I don't care how many of you come up against me.
Attorney A: Oh, you big fat tub of shit, sit down. Sit down, you fat tub of shit.[31]

Finally, a case from California. A criminal defence lawyer successfully appealed against his client's conviction on the ground that the prosecutor conducted the case unfairly. The unfairness was in the prosecutor constantly interrupting the defence closing jury address by farting 100 times![32] I am confident that QLS senior counsellors conduct themselves in a more settled way and with less hot air!

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29 See ASCR 4.1.2 and 5.

30 When Learned Friends Fall Out in Court, "The Times", Tuesday, October 6, 1992, page 29, David Pannick QC.

31 The Honourable Marvin E Aspen, 'Procedural Reform in United States Court' (1994) *Civil Justice Quarterly* 107 (Paper delivered at the International Conference on the Reform of Commercial Arbitration Procedures, London, February 17 and 18, 1994).

32 Above.