SUPREME COURT
OF QUEENSLAND

Induction for New Members of Parliament
Undumbi Room, Level 5, Parliamentary Annexe
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The Hon Tim Carmody
Chief Justice

Induction for New Members of Parliament

Introduction

Good morning. Let me start by congratulating all of you on this amazing achievement. It is a great honour to have the confidence of your electorate. For those of you that do not already have a legal background, it is important for your chosen career path that you have a basic understanding of the function of the courts.

I will attempt to provide you with an outline of certain key principles and relevant information pertaining to the Supreme Court of Queensland.

Origins of the Supreme Court of Queensland

Let me begin by briefly touching on some points of historical relevance in relation to the Queensland Supreme Court. It was only after Queensland's emergence as a colony following its separation from New South Wales in 1859 that the Supreme Court of Queensland was first established.

The very first judge of the Queensland Supreme Court was Justice Alfred Lutwyche who was appointed in the same year Queensland received its status as a separate colony. For some time, Justice Lutwyche was the only Supreme Court judge.[1] When contrasted with the number of judges which comprise the Supreme Court today, it is difficult to imagine this one judge system.

In 1863 Sir James Cockle was appointed as the first Chief Justice of Queensland. But perhaps of particular interest to this audience of fledgling politicians is the third Chief

[1] John McKenna, *Supreme Court of Queensland – A Concise History* (University of Queensland Press, 2012) 43.

Justice of Queensland, Sir Samuel Walker Griffith. Like all of you present today, His Honour's illustrious legal career was preceded by an impressive political career, during which time he served as both attorney-general and premier.[2] The final great achievement in His Honour's career is his appointment as the first Chief Justice of Australia.

Central principles: the rule of law, separation of powers and judicial independence

In my view, any understanding of the Australian legal system requires knowledge of certain key principles. I apologise in advance to those of you that may already be familiar with these principles. I hope this will not be too tedious for you.

First, the principle of the **rule of law** has been deemed the cornerstone of a society that enjoys freedom and democracy.[3] It has also fittingly been described as one of humanity's greatest achievements. Yet there is considerable academic debate surrounding the precise meaning of this principle. It is by no means an easy ideal to pin a definition on. Nonetheless, Ilija Vickovich, a lecturer at the Macquarie University, says:

> (The rule of law is) readily understood in common parlance as the ordering of a society according to rules which all citizens, including those in power, are subject. The rules are put into effect by accountable and responsible formal legal institutions.[4]

Similarly, when delivering a speech at the University of Melbourne, former Chief Justice of the High Court Murray Gleeson narrowed it down to the principle that "all authority is subject to, and constrained by law".[5]

A clear theme emerges from the different attempts to define the rule of law. In essence, its purpose is to ensure that *everyone*, including those in elevated positions of power and

[2] Ibid 201.
[3] Hon Marilyn Warren AC, 'Does Judicial Independence Matter?' (2011) 85 *Australian Law Journal* 481, 481.
[4] Ilija Vickovich, 'Lawyers and the Legal Order in Early Modern England: Social and Cultural Origins of the Rule of Law' (2013) 32(1) *The University of Tasmania Law Review* 96, 96.
[5] The Hon AM Gleeson 'Courts and the Rule of Law' (Speech delivered at The Rule of Law Series, The University of Melbourne, 7 November 2001).

authority, is the same in the eyes of the law. The critical point being that no one is above the law. Each and every one of us is bound by it.

There are several key tenets attached to this overarching principle, some of which include the separation of powers and judicial independence (both of which I will discuss shortly), equal and fair application of the law and access to justice for all.

A basis for this fundamental principle can be traced as far back as the book of Genesis in the Bible. The story of Adam and Eve in the Garden of Eden, for example, stresses the importance of adherence to the law and the consequences attached to disobedience.

Hints of what would soon be a universally recognised principle could be seen as early as the Magna Carta in 1215 when the previously arbitrary power of King John of England was bounded.[6] Interestingly (or at least I hope you share my interest), on the 15th of June this year it is the 800th Anniversary of the Magna Carta. The Rule of Law Institute of Australia has established the Magna Carta Committee in celebration of its upcoming Anniversary. The vast influence of the Magna Carta stretches beyond the rule of law to the doctrine of the separation of powers and the principle of judicial independence which I come to now.

The doctrine of **separation of powers** distinguishes between legislative, executive and judicial power. These powers are then divided between three separate bodies. Specifically, legislative power is vested in Parliament, executive power in the Queen and exercisable by the Governor General, and judicial power in the various courts. This doctrine is grounded in the Australian Constitution.[7]

Legislative power is commonly referred to as the *'law-making'* power. According to Stanley de Smith, it involves "the creation and promulgation of a general rule of conduct without reference to specific cases."[8] It is also essential to be aware of the parliamentary

[6] Kate Galloway and Allan Ardill, 'Queensland: A Return to the Moonlight State?' (2014) 39(1) *Alternative Law Journal* 3, 3.
[7] See sections 1, 61 and 71.
[8] Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law – Foundations and Theory* (Oxford University Press, 2012) 111.

sovereignty possessed by Australian legislatures in their law-making capacity. In highlighting the magnitude of parliamentary sovereignty and effect of the principle of legality, Lord Hoffman said:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[9]

Lord Hoffman's observation emphasises the extensive law-making power possessed by Parliament in the United Kingdom and what might be described as the "limiting" effect in particular instances of the principle of legality which requires the law to be clear and unambiguous. While Australian legislatures, to a certain degree, also have parliamentary sovereignty, it is not identical to that of the British Parliament. This disparity can be largely traced to the fact that Britain does not have a written constitution. As observed by Suri Ratnapala and Jonathan Crowe:

> The sovereignty of the Australian Parliaments is not coextensive with the sovereignty of the British Parliament. Their legislative powers are constitutionally limited.[10]

Legislative power can be distinguished from judicial power which involves *interpreting* questions of law as opposed to creating it. Judicial power is dependent on specific cases

[9] *Regina v Secretary of State for the Home Department, Ex parte Simms and another* [2000] 2 A.C. 115, 131.
[10] Ratnapala and Crowe, above n 8, 49.

that come before the courts to determine legal questions. Unlike Parliament, the courts possess no general law-making authority.[11]

Executive power involves the *administration and enforcement* of the existing law. It encompasses a relatively broad range of areas including the ability to carry out any tasks that fall within existing laws, police power, military power, foreign affairs power and contracts power.[12]

There are several fundamental justifications for this model of governance. First, it is widely recognised as being a pillar of democracy. Placing legislative power in the hands of Parliament means that the power to make laws resides in a body that has been elected by the Australian people. It is also a vital means of ensuring that a system of checks and balances is in place. Finally, division of these powers is essential for the maintenance of the rule of law. As I have mentioned, the rule of law is premised on no one being above the law. A separation of powers acts as a safeguard against any concentration of power which might otherwise enable an individual or body to put itself above the law. Such a possibility would greatly jeopardize the rule of law.

However, absolute separation is not always achievable. Consequently, there is a certain degree of overlap. This is especially so where Parliament delegates legislative power involving the *detail* of the law to the executive.[13] As observed in *Australian Constitutional Law – Foundations and Theory*, the reason for delegation is linked to factors such as time constraints and the fact that Parliament does not possess the relevant "technical expertise".[14] In any event, delegated legislation is still subject to Parliament's overriding authority.

The division between executive and judicial power is also hazy in those instances where the executive has authority to apply the law, thereby changing legal relations.[15] This has

[11] Ibid 112,
[12] Ibid 113-117.
[13] Ibid 113.
[14] Ibid.
[15] Ibid 117.

been termed "quasi-judicial" power. I will not venture further on the subject of overlapping powers, but suffice it to say that the reality is that the lines separating these three powers are not always clear cut.

Importantly, there is special emphasis on insulating judicial power from non-judicial power. Inextricably linked with the doctrine of separation powers and the principle of the rule of law is this notion of **judicial independence**. There is an abundance of literature on this subject. And rightly so in view of the potentially detrimental impact to the rule of law where external pressures are perceived as influencing judicial decisions. Chief Justice of Victoria Marilyn Warren correctly observes that judicial independence requires judges to be:

> …free from the government of the day, the parties before the court, the media, other judges' opinions and, even, the predispositions and predilections of the individual judge or judges deciding the case before the court.[16]

An important aspect of the rule of law is that justice must not only be done, it must be *seen* to be done. Therefore, public confidence in the independence of the judiciary is imperative for upholding the rule of law. This idea is reflected in an observation by former Chief Justice of High Court Gerard Brennan that:

> …independence continues to be essential to the due administration of the criminal law. If that independence were, or were thought by the litigants or the public to be, put at risk, the rule of law would be imperilled and the peace and order of society would be problematic.[17]

The judiciary has been referred to as a "buffer" between citizens and the government.[18] It is paramount that the judiciary continues to be independent and impartially determine any decisions which come before them.

[16] Hon Chief Justice Marylin Warren, 'Does Judicial Independence Matter' (2011) 150 Victorian Bar News 12, 12.
[17] Hon Sir Gerard Brennan, 'Judicial Independence' (Speech delivered at the Australian Judicial Conference, University House, Australian National University, 2 November 1996).
[18] Galloway and Ardill, above n 6, 8.

I have only provided you with a basic overview of the rule of law, the separation of powers and judicial independence, otherwise I would undoubtedly be here a lot longer than the time I have been allocated to talk to you this morning.

Composition of the Queensland Supreme Court

I will now shed light on the composition of the Queensland Supreme Court, the most superior of the state courts.

Excluding the Chief Justice, there are currently 26 Queensland Supreme Court judges in total. Twenty-three judges out of this number are Brisbane-based, but three are located in the regional areas of Cairns, Rockhampton and Townsville. Of the 26 Queensland Supreme Court judges, six are Court of Appeal judges and the remaining 20 are judges of the trial division.

I have had 17 predecessors which makes me the 18th Chief Justice of Queensland.

The Queensland Supreme Court encompasses both the trial division and the Court of Appeal. The trial division comprises all Supreme Court judges with the exception of myself as Chief Justice, President McMurdo of the Court of Appeal and the other Supreme Court Judges of Appeal. Contrary to the Court of Appeal, matters that come before the trial division are dealt with by a single judge. In its *criminal* jurisdiction, the trial division is responsible for hearing the severest criminal matters. In its *civil* jurisdiction, the court can deal with civil matters involving sums in excess of $750,000.

The division of the Court of Appeal is responsible for the *appellate* jurisdiction of the Supreme Court. The Court of Appeal comprises President McMurdo plus a panel of three to five Supreme Court Justices of Appeal. The current judges of the Court of Appeal are Justices of Appeal Holmes, Fraser, Gotterson, Morrison and Philippides. The Court of Appeal provides an avenue for appeal from the decisions of lower courts or tribunals where a party feels that a sentence or decision is unsatisfactory. It is within the power of the Court of Appeal to dismiss an appeal thereby leaving the decision of the lower court

intact. Alternatively, allowing the appeal effectively means that the decision of the lower court is set aside and a different order made by the Court of Appeal. The Court of Appeal also possesses the authority to order a retrial.

Of particular relevance to this audience is the *administrative* jurisdiction of the Supreme Court. This involves judicial review of the legality of decisions made by the executive, or rather, the Queensland government. According to the principle of legality, government officials must act in accordance with the law.[19] This principle is regarded as being central to the rule of law.[20] In the High Court case of *Church of Scientology Inc v Woodward*, Justice Brennan (as he then was) underscored the importance of judicial review when he observed that it is:

> …neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[21]

For the purposes of judicial review, it is fundamental to distinguish between the *legality* of administrative action which involves considerations of natural justice, procedural fairness and jurisdictional error, on the one hand, and the *merits* of administrative action on the other. Critically, the court has no power to review executive decisions on their merits. The extent of judicial review was highlighted in the High Court decision of *Attorney-General v Quin*, where Justice Brennan remarked that:

> …the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone. The consequence is that the scope of judicial review must

[19] Ratnapala and Crowe, above n 8, 20.
[20] Ibid.
[21] *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70.

> be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise.[22]

The significant High Court decision in *Kirk v Industrial Court of New South Wales*[23], is deemed as having "entrenched"[24] the supervisory jurisdiction of State Supreme Courts to correct jurisdictional errors. It was held by the High Court that State Parliaments do not possess the authority to deprive State Supreme Courts of their supervisory jurisdiction. To do so, the majority observed, "…would be to create islands of power immune from supervision and restraint."[25] This reinforces the vital role of judicial review as a safeguard against abuse of power by the executive and a means of upholding the rule of law.

Concluding remarks

I hope that the induction program has been informative so far and will continue to be.

All of you have such an important role to play in the future of our State and I wish you the very best as you embark on your political careers.

[22] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36.
[23] (2010) 239 CLR 351.
[24] The Hon Justice Peter Applegarth, 'Kirk v Industrial Court of New South Wales: Its implications for the Supreme Court' *Queensland Legal Yearbook 2013* 260, 260.
[25] *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 581.