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"Change and the Legal Profession: six decades on"

The Hon P. de Jersey Chief Justice of Queensland

I am very pleased to have the opportunity to address you. Kaye and I greatly appreciate the chance to be with you. It is important to us both. You will rightly expect the Chief Justice to say something significant, but also interesting, and I will of course endeavour to meet that expectation. I want to take you back, but not as a purely historical exercise; rather as a platform for my saying something about the present.

For a profession regularly said to be slow itself to change, and slow to adapt to changes elsewhere in society, it is diverting to compare lawyers today with the profession of, say, 60 years ago, that is in 1939 just before the outbreak of the Second World War. I recently heard the Lord Chief Justice of England and Wales speak on this subject, and I was interested to transpose his idea to the situation in Queensland.

Our Supreme Court in 1939 comprised only 7 judges, all of them males. Now we have as many as 24 judges, four of them female. There is no doubt that the judicial office was then attended by a degree of grandeur long since gone. There being so few judges, most were well known, recognised in the street and regularly pictured in the newspaper still so, I believe in Central and Northern Queensland, not so in the South. The judges were treated with a degree of public respect which approached that then accorded the vice regal representative. There were, in 1939, only about 60 practising barristers in Brisbane, compared with 498 State wide now; State wide there were then about 450 solicitors, now as many as 4,990. Also interestingly, there were then only 2 senior counsel in practice, now there are 94. Queensland then had no District Court - it had been abolished in 1921: now it comprises 35 judges. The profession was comparatively minuscule, but publicly prominent, six decades ago. But was it a "golden age" we should yearn be replicated now? I doubt that it was.

Generally speaking, and most interestingly, many of the issues now confronting lawyers for presentation, and the judges for decision, are much more socially significant than the questions thrown up by the more black letter law on which six decades ago we were all asked to focus. The judges now, notably, resolve issues

of human rights and high social policy, the rights of aborigines especially, and courts have taken on the large and challenging burden of reviewing administrative decisions of the executive organs of government. As an interesting particular example, courts may now even be called on to review decisions concerning the treatment and management of prisoners. There has been a huge leap in the scope of litigation: cases take longer and are of wider general proportions, by contrast with what I understand to have been the fairly condensed scenarios of the 30's. The technological component is obviously new. And judges now participate in arenas which attract great public scrutiny: people are intrigued now, more than ever, with the administration of the criminal justice system, especially as we know with sentencing levels, witness the Neerkol Orphanage rape sentence, and the decision whether or not to prosecute as with Senator Mal Colston. Six decades have witnessed, not surprisingly, enormous change in what we do, and the public perception of what we do. And I need not tell the Law Society that!

Now these changes have had consequences. Notably, with the sorts of issues the judges now determine, the public is expressing much more interest in who we are: there is growing interest in the blend of gender, background and ethnic origin on the bench; and of course especially at the level of the High Court, in the question of where judges may be expected to stand on the issues of the day - conservatively or liberally? Assessments on these matters are not necessarily reliable, and it is I think often good for judges to disappoint expectations: their honest independence must prevail. I recall Lord Bingham s reference to "the great judicial virtue of inconsistency". There is now more searching interest in how judges are appointed, and we see the development in some jurisdictions of a system of application and formal interview.

The composition of courts and the manner of appointments aside, judges are subjected now to unprecedented scrutiny in the way they actually carry out their work. They are subjected to trenchant wounding in the media, especially with relation to decisions made in the criminal jurisdiction, and to a novel degree of generally unfriendly criticism, as we have seen very recently in Cairns. The public profile of the judiciary is such that judges are naturally unwilling to invoke contempt laws in these situations. How should they react? I suggest by correcting error and explaining their decisions, and by retreating somewhat from the strict isolation hitherto thought essential to maintain respect for the institution.

The charge that judges are "out of touch" is frequently levelled but in my experience rarely justified. No doubt judges sometimes incautiously lay themselves open to the charge, as with the notorious question during the hearing of a case in England: "Who is Bruce Springsteen?" (Harman J - The Times, 4 July 1965). We Judges all have upon appointment resolved to present ourselves as models of consideration and diligence, alive to the advice of Francis Bacon that: "Patience and gravity of hearing is an essential part of justice; and an overspeaking judge is no well tuned cymbal" (On Judicature). One of the Theo Matthews forensic fables describes the lawyer who resolved that should he be appointed to the Bench he

would "avoid the errors and failings of some of his predecessors. In particular he would not indulge in foolish jokes, give vent to irrelevant observations about men and things, or hint that the Bar had sadly deteriorated since he had cease to adorn its ranks". Later he became a judge. "Before the year was out the reporters in his court had recorded that a Plymouth brother could not be believed upon his oath, that it was common knowledge that a married woman was either a slave or a tyrant, . . . and that the moral standards of artists and literary men were extremely low". (Forensic Fables by O, as quoted by Lord Cullen, Lord Justice Clerk, "The Judge and the Public" 5 July 1999, Third World Wide Common Law Judiciary Conference).

In adopting our modern approach, which is more forthcoming and accessible, we must ultimately be careful however not to undermine this basic premise: we are, like it or not, authority figures who "lay down the law". There is a subtle and difficult balance to be struck between the so called "ivory tower" and one s becoming "one of the pack". And even the essence of our court room approach is subject to continual re-examination: is the community best served by the so-called adversarial process? And is adjudication - as opposed to "ADR" - necessarily the best avenue to follow?

There has been great change in what we have to decide, and I believe in consequence of that, enhancement of community interest in the courts, media excitement about launching challenges and criticisms, and inevitably therefore, the issue of how judges should deal with these challenges. I will not speak today on some of the more obvious changes on which I have dilated on other occasions - especially on the impact of technology on our approaches. But there are two practical issues I want to mention because they do I think warrant examination.

The first relates to the heart of our approach, its being public. Open justice is inherent in our concept of a court of law. As Jeremy Bentham put it (Select Extracts from the Works of Jeremy Bentham (1843) page 115):

"Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial."

And as Lord Diplock said in *Attorney-General v. Leveller Magazine* (1979)

AC 440, 450:

> "If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice."

And so we administer justice openly. Courtrooms are rarely closed. But to be fully effective, public access to the courts must involve not only a possible physical presence, but an ability to hear and see what is taking place. This brings me to the arguable problem.

In streamlining the process over recent years, we have substantially increased the extent to which evidence and submissions are reduced to writing, with a corresponding reduction in the oral content of hearings. What concerns me somewhat is how to reconcile this economical condensation of our hearings with the public s right to scrutinise comprehensively what we do.

The second matter concerns the way we decide cases. The greatest commendation a lawyer may be given is the recognition that his or her approach is founded in legal principle. That is an accolade for which we yearn. Knowledge of cases is one thing: the challenge is to distill the principles they reflect. I recall the comment of a lawyer - from another jurisdiction of course: "He knew more cases and less law than anyone I d encountered." The information technology revolution has ensured that judges are now regularly provided by counsel with a plethora of supposedly helpful decisions in other cases. The extent of such reference will certainly increase unless the judges are vigilant about this. How many of the cases cited reappear in judgments? Five per cent? The electronic recording of all judgments of the courts does I think raise the possibility of the system s running out of control unless restrained. We must in this modern society resist the assumption that information is important for its own sake. And so in the court, we must I think boldly resist recourse to the microscopic examination of all authorities however tenuously applicable, and never lose sight of our ultimate dependence on only one thing, and that is legal principle.

The last few decades have witnessed great change. We as a profession have accommodated it. More is to come, substantially more. It is important to pause from time to time to identify what is current, and how well we are dealing with it. I have mentioned two specific matters today, matters which possibly concern the judges more than the profession. I want to turn now to some matters bearing more directly on the profession. For the effective discharge of our work, we judges depend acutely on the effective support of the profession. But the focus of the profession should not be confined to the case in hand: there is I think a relevant broader outlook.

The Queensland profession faces enormous current challenges, and I do not propose to address them directly today. I want to speak a little more generally about the role of the profession in this strongly sceptical environment. Few would doubt that the essence of professionalism is service of the public. That is what distinguishes a profession from other callings. It is what many aspects of the conduct of the profession these days do reflect - witness, for example, the extent of pro bono work, the willingness of practitioners to carry clients financially through speculative arrangements. I have been disappointed that these aspects of the work

of the profession are not generally well known. It may be that the media is uninterested in informing the public about that positive aspect of the profession. I do question however whether the profession does itself sufficiently promote the reality of what it effectively does achieve in the public interest. There are two particular aspects of the profession s approach to which I want to refer.

The first concerns the major challenge confronting all of us. Access to justice is a human right of fundamental importance, of essential constitutional significance. There are countless members of the community who lack access to legal solutions, for lack of knowledge of their rights and resources to pursue them. I suspect that technological advances will provide our greatest current hope of generally increasing access to justice. I refer particularly of course to the worldwide net, and the streamlining of court processes through modern technology.

Lawyers will advance the common good if they are astute to ways of dealing with the very real problem of inaccessibility to justice, and if they are prepared to lend their weight to taking the necessary steps to improve it. I am not talking just about commercial clients who will be less than excited about litigating in courts which cannot match the technology of their own offices. I am talking more about those who cannot, financially, afford access to the courts. It is important generally for lawyers to lend their learning to the development of important social programs with legal complexions.

It must not be thought that most lawyers thoughts stop at the case immediately at hand. Lawyers are jurisprudentially educated to grapple with broader community issues. It is no accident that they frequently find themselves in positions of community leadership: school boards, councils, community organisations: that is the result of recognition of the usefulness of their finely honed skills and their well-developed social consciences. Accessibility of justice is one of those broader issues: and that issue falls within the broad spectrum of general human rights. One question which interests many lawyers is the protection of those rights, and that brings me to another issue of topicality.

In this country we have no constitutionally enshrined bill of rights. We are nevertheless plainly a free and secure society, a robust democracy with wide statutory protection against such things as racial and other discrimination and other forms of unequal treatment; our press is free; our judiciaries are independent; we have statutorily guaranteed freedom of information; and the High Court has been able, through an ordinary common law approach, to confirm and secure particular rights, as with the fundamental right to a fair trial through Deitrich s case.

Recent polling suggests however that a majority of Australians would nevertheless favour a statutorily enshrined bill of rights as such, and the potential utility of such a thing, at least as an aspirational charter, would be obvious enough - although whether "aspirational" statements have a place in this area is itself debatable:

many commentators say that such charters are the place for precise and enforceable provisions, not expressions of hope at risk of being dismissed as merely platitudinous. Whether the common good would be served through an enshrined bill of rights would greatly interest most thinking lawyers. Through valuable contribution to public debate in these sorts of areas, lawyers may and do play an important public role. This is, I believe, to be fostered, not so that lawyers may "direct" these debates, but aid them through the injection of their wide experience. Again, I find it disappointing when lawyers, who do as an aggregation of people display this broader public interest, are criticised for general insularity. I am not persuaded the public generally abhors lawyers, as the popular media would have it. I think lawyers public roles should be made more public.

And so I urge you as professionals to remember your duty to the public, and your capacity to make valuable contributions in addressing issues of immediate concern to the litigating public, especially with relation to accessibility of justice, but more generally also, in areas of major social policy. And even if the public reaction in other respects for a time "appears" unsympathetic.

I have today touched on a number of serious issues. My doing so will I trust be seen as consistent with my commitment to work cooperatively with the profession in all things, acknowledging the primacy of our ultimate joint mission: to uphold the rule of law, and more specifically, to ensure maximum access to justice.

What I think emerges most strongly from my earlier brief historical comparison is the increasing public exposure of us all. Judges plainly must now more obviously interact with the community. But also practitioners should I believe realise the importance of their own potential contribution to the public good, and work actively at thereby demonstrating their true professionalism.

Let me conclude with some brief observations emerging from my experiences over the last two weeks. Kaye and I have been the grateful recipients of much generous Central, Northern, and Far North Queensland hospitality. Our spirits have been rejuvenated by close contact with practitioners who show an obvious commitment to true professionalism. It has been good for us to be with you, and I presume to think you may have thought it worthwhile also, from your points of view, that Kaye and I show a broad State orientation. I have somewhat tongue-in-cheek said over recent days that I prefer to be out of Brisbane. You know what is said of a Chief Justice "someone who takes the reins, but they are not connected to anything"! The Judges of the Supreme Court, I am pleased to say, work together. The Judges in Brisbane are always conscious that they form part of a court which vitally includes resident Judges at Rockhampton, Townsville and Cairns. I warmly applaud the efforts and dedication of the resident Judges: they, together with you, plainly work together very well. There is a very practical side to our recent movement away from Brisbane.

Six decades ago, the Chief Justice would not, with comparative ease, have been able to move along the Queensland coast, visiting three major north Queensland centres, within the space of a week, returning a week later to the central region. I suppose harnessing the lobbying power of Brisbane to secure necessary resources would for all these centres then have been much more difficult. Regrettably, a large part of my new role is as lobbyist. The greatest problem facing the courts as we move beyond the 1900s is to secure adequate financial resourcing. Let me give some examples.

Townsville, where a lot of evidence is usefully taken by telephone, lacks even an up-to-date polycom. It needs another visualiser. The courtroom should be wired for sound: to accommodate a softly spoken witness last week, equipment had to be borrowed, with apology, from the Magistrates Court. Part of the courthouse is occupied inappropriately by the DPP, who cannot afford to go elsewhere. Mackay lacks proper telephone and document viewing equipment. The technology of even the new Rockhampton courthouse could be improved.

Now we have recently secure $1.5m for the forthcoming year for new higher courts technology, with a total of $1.3m follow on funding for the next three years. That is good, but it is merely "catchup" money. We lag here seriously behind the courts of other States in the technology stakes especially.

Fortunately, there is a developing public awareness of this. You know of the current concern about the taking of evidence of children. You may be interested to learn that in the Brisbane higher courts complex, which includes about 45 courtrooms, there is only one equipped to take a child s evidence by video from a detached but nearby location.

Forget for the moment about such "grand" things as creches, wheel-chair access to witness boxes, separately located spines within courthouses for jurors to prevent so-called contamination: we lack even the comparatively inexpensive, but basic and necessary equipment. Why? Because for far too long, no one has firmly spoken up for the Courts; the other arms of Government are, I believe in the position of being simply unaware of our real needs.

I can assure you that we are doing our utmost to change that. The Supreme Court s Annual Report, to be issued shortly, draws attention bluntly to these matters, and calls for a responsible turnaround in Executive Government thinking towards the judicial arm of Government. The issue is large, necessitating cross-departmental attention, and so we seek wherever possible to involve as well as the Attorney-General, who is extremely helpful to us, the Premier and the Treasurer, where that is appropriate. We have also had senior Treasury officials visit the courts at Brisbane: they were I believe unaware of our deficiencies. Things are changing.

I fear, frankly, that in this area, we are now reaping the legacy of probably six

decades of undue detachment. And I must see that now as a major focus of my attention as Chief Justice: as we go forward over the next few years, it must rest substantially on the issue of resources. The problem may be graphically illustrated this way. Over the last three years, funding for the Police increased by 9%, for Corrective Services 78%: yet the Courts, which have always run a particularly lean machine, suffered a 10% reduction. The challenge is acute and substantial.

We all face such challenges. As to the Green Paper, I am personally persuaded that the Judges with representatives of the Bar and the Law Society should sit down urgently with departmental representatives to work through the detail of the current proposal, and we are doing our best to secure that. The Green Paper raises dramatically important issues for us all. As a person brought up for a time in the country, may I say that I am especially and seriously concerned about the effect on smaller, and especially country practitioners. Peter Carne has graphically explained this to me. You may see the Supreme Court Judges response to the Green Paper now on our web page.

I wrote for Bar News sometime last year about what I called "The Power of Three" the three branches of the profession. We must support each other, not to promote our own sectional interests, but the only interest which should and does ultimately concern us: the public interest. We actually share real long-standing power here.

It has been a privilege and pleasure to address you.