University of Queensland Law Graduates' Association

Customs House
Wednesday, 25 February 2004

Breakfast panel discussion on *Legal Profession Act* 2003

Chief Justice Paul de Jersey AC

If you expect something brilliant at this hour, I take refuge in Oscar Wilde's aphorism that "only bores are brilliant at breakfast". On the other hand, it is very pleasant to join you for breakfast. I trust our experience will not resemble that of Churchill, who said: "My wife and I tried two or three times in the last 40 years to have breakfast together, but it was so disagreeable we had to stop." I will try to be agreeable.

We are here to talk about the mechanics of change. Negotiating change in important areas is usually daunting: why need there be change? Why in these respects? Why by these means? Is the intended result going to be worth the trouble? In this case, those mounting the challenge have utilized a lengthy purchase period. Like it or not, the reform agenda has, with the public, prevailed. And so now, those subject to change must ensure the proposal is implemented as well as may be.

I congratulate you upon your attendance. You demonstrate your public commitment. The stakeholders here this morning represent the courts, the profession and the people. Through the legislature, the people have ordained these reforms. Our profession is premised on the public interest. It falls to us now to ensure the reforms are properly implemented. I suspect that even allowing for the binding force of the legislation, the fulfilment of that goal will still depend substantially on the support of the profession. The first step in assuring that support, and it must be assured, is a proper comprehension of the legislation.

The Act is yet to be proclaimed. I will mention this morning those provisions of the Act which particularly concern the Supreme Court, and bear upon its relationship with the profession.

Throughout the process during which, from the days of the Green Paper produced so long ago by Attorney-General Foley, these proposals for reform have been mooted and discussed, the Judges have been concerned to ensure two things in particular –

1. first, that any reform uphold the Supreme Court as the source of a legal practitioner's professional legitimacy; and
2. second, that any resourcing implication for the Supreme Court be properly acknowledged.

As to the first matter, that has to date been secured through the Supreme Court's being the admitting authority, and when necessary, the ultimate disciplining body, imposing as appropriate the sanctions of suspension or striking off. The Supreme Court has thereby been the ultimate adjudicator on questions of professional standards. That position will still apply. The source of a legal practitioner's unique ethical obligation, owed to the court and the administration of law, will be preserved.

As to the second matter, the question of resourcing, that will rest with the Minister for Justice and Attorney-General. One can only hope the necessary further funding will be forthcoming, and that an already financially stretched court system will not be pushed into further stringency. There is a related matter. Under the original proposals for reform, the Judges were to be distracted from their core function of sitting in court by involvement in a welter of administrative activity. That has fortunately been avoided under the current model.

Plainly a lot of detailed work needs to be accomplished before implementation of the Act. That implementation must be streamlined. I have flagged to the Attorney-General my wish to be closely involved in the further work. Any jeopardy to public confidence in the Supreme Court though disorderly implementation of the legislation could not possibly be contemplated. Not only should the implementation be streamlined, it must also be timely. The public has been waiting patiently for a long time for these reforms. In the public interest, the process of implementation should not now become distended. Again, the issue of public confidence is of prime significance.

Let me cover now some of the detailed provisions, under three headings, Admission, Complaints and the Supreme Court Library.

Admission

The changes in this area are intended to facilitate common admission, and to adopt national admission reforms, including those recommended by the Law Admissions Consultative Committee and endorsed by the Council of Chief Justices.

Applicants for admission as legal practitioners will apply to the Supreme Court. The Legal Practitioners' Admissions Board considers the applications, as in the past have the Barristers' Board and the Solicitors' Board. Those boards will be abolished, as will the Barristers' Board course and admission on the basis of service in government offices.

The Chief Justice appoints some of the members of the Legal Practitioners' Admissions Board, and the Chairperson, and I would expect to do that after consultation with the Judges of the Supreme Court. The Board is to consist of

two solicitors and two barristers, one solicitor nominated by the Law Society, one barrister nominated by the Bar Association, the Principal Registrar and an individual person nominated by the Minister. The lawyers appointed must be of at least five years standing. If the professional bodies fail to nominate their proposed members, the Chief Justice may fill the gap.

The Law Society is obliged to provide the Board's administrative and secretarial support.

It is the court which determines the applications, and no doubt we will proceed as we currently do, save that we will be admitting generically as legal practitioners.

There is innovative provision for early consideration of suitability, should a prospective applicant for admission be worried about a feature which may disqualify him or her. The Board may determine that or refer it to the court.

It is the Supreme Court which maintains the professional roll, and importantly, the Act declares that the practitioner is an officer of the court, attracting the predominant duty to the court and the administration of justice.

For practitioners admitted elsewhere in Australia, on complying with certain State requirements, for example as to professional indemnity insurance, the professional association grants a local practising certificate which renders the person an officer of the court.

The admission rules will have to be rewritten to facilitate common admission. As part of the national model laws proposals, they will have to include the national admission reforms proposed by the Law Admissions Consultative Committee and endorsed by the Council of Chief Justices. Those include

reaffirmation of the so-called Priestley 11 academic subjects and subject content as a prerequisite for admission, adopting national standards for qualifying practical legal training and providing for the required duration of articles of clerkship, as one year. The Act provides for another endorsed Law Admissions Consultative Committee proposal, that newly-admitted practitioners should wait 18 months to engage in sole practice as a solicitor if they have qualified through articles of clerkship or two years in any other case. There will of course have to be appropriate transitional provisions to allow lead time for the adoption of the new practical training standards, and for the circumstances where it is fair for applicants who are part way through qualifying for admission under current arrangements to be admitted as legal practitioners following the commencement of the new regime.

In relation to incorporated legal practices, the practice must have at least one lawyer director, and he or she is responsible for the management of the legal services provided, and obliged to ensure maintenance of ethical standards. You will recall the public discussion about incorporated legal practice, and the important stipulation, in relation to multi-disciplinary partnerships for example, that the practice be structured to ensure the predominance of the existing ethical obligation attaching to legal practitioners. The mechanisms established by the Act seem to me comprehensively to allow for that, in relation to incorporated practices. The question of multi-disciplinary partnerships is to be the subject of further legislation later this year.

Complaints

The legislation envisages greater independence, accountability and transparency in the complaints and disciplinary processes for lawyers.

The Legal Services Commissioner, who is to be appointed by the Governor-in-Council, heads the Legal Services Commission which will receive and manage the investigation of complaints about practitioners.

Before recommending an individual person for appointment as Legal Services Commissioner, the Minister must be satisfied that that person is familiar with the nature of the legal system and legal practice, and possesses appropriate qualities of independence, fairness and integrity.

The Commissioner may refer a complaint to the professional association, or investigate it himself or herself. If the Association investigates the complaint, it reports back to the Commissioner.

The Commissioner may commence proceedings in the Legal Practice Tribunal, or refer minor matters to the Legal Practice Committee. That Committee is to comprise a chairperson, two solicitors, two barristers and two lay members. The lawyers are to have high-level experience and knowledge of the legal system and legal practice. The lay members are to have high level experience and knowledge of consumer protection, business, public administration or another relevant area, and not be lawyers. Appointments to that Committee are made by the Governor-in-Council on the recommendation of the Minister. The determinations of the Committee are filed in the Supreme Court. The Committee's disciplinary powers are not as strong as those of the Tribunal. The Tribunal will deal with the more serious matters, those potentially involving striking off, suspension or substantial fines.

The Tribunal comprises all of the Supreme Court Judges. The Principal Registrar is its Registrar. It is to have a seal, rules may be made, as subordinate legislation, and practice directions may be issued. The Chief

Justice chairs the Tribunal. The Tribunal may be constituted by any one of its members.

When the Tribunal sits, the Judge is or Judges are to be assisted by one layperson and one practitioner taken from respective panels. There is to be a lay panel, and a practitioner panel. The practitioner panel is to consist of both barristers and solicitors. The members of those panels are appointed by the Governor-in-Council. A person is eligible for appointment as a member of the lay panel only if he or she has high level experience and knowledge of consumer protection, business, public administration or another relevant area, and is not or has not been an Australian lawyer, foreign lawyer or otherwise legally qualified. As to the practitioner panel, its members must have held a practising certificate for at least five years. The Registrar is to select the panel members to assist in any case, subject to approval by the Tribunal member.

The Chief Justice allocates the work of the Tribunal. I would currently expect for the first six months or so of the operation of the Tribunal, that applications be brought before the applications Judge for allocation as necessary to a civil sittings Judge. We would gauge how that works on a pilot basis recognizing that it may turn out to be desirable to have a particular Judge or Judges designated to run that list. Much depends on the amount of work which comes forward, but the issue of consistency is obviously important. So is dealing with these matters quickly.

There is an appeal from the Committee to the Tribunal, and from the Tribunal to the Court of Appeal, and not confined to error of law.

The inherent jurisdiction of the Supreme Court in relation to the control and discipline of lawyers is preserved.

The Supreme Court, interestingly, is given express power to issue injunctions to restrain breaches of the law. In relation to those matters, the Commissioner cannot be required to give an undertaking as to damages.

Supreme Court Library

The Act establishes the cumbersomely titled, Legal Practitioner Interest on Trust Accounts Fund. Payments from that fund are controlled by the Minister. The list of potential recipients includes the Supreme Court Library. The Library presently receives a guaranteed – statutorily guaranteed 10 per cent of the interest on trust accounts. The Library may, will be obliged to submit budgets. One has already gone in. We are very concerned that the Library maintain its present share of that fund.

The Library is the research powerhouse for the court and the profession. It may become increasingly important for the profession if there is any doubt about the continuance of the Law Society's professional library, although that matter I understand has not yet been resolved. It must not be overlooked, either, that the Library does not operate just in Brisbane: there are active branch libraries at a number of centres around the State.

Although the Library has enjoyed the security of the fixed percentage arrangement, as earnings on trust account monies have fluctuated from time to time, so have its fortunes. There have been difficulties over the years securing necessary top-up funding. Fortunately in recent years, the Library's position has been properly supported by the Executive. I am very concerned that this continue.

Conclusion

I must say, reverting to the question of being daunted, that I am as Chief Justice a little blanched by the extent of detailed work which needs to be completed to allow for the implementation of this Act this year. I say that allowing for the absorbing reach of existing commitments. You professionals will no doubt be saying, "it is more so with me". Our profession, devoted to the public interest, will no doubt accommodate the need, and with probably little if any public acknowledgement – although we do not live for that!

That said, I urge you to work with the Judges to ensure this blueprint becomes a working and worthwhile reality.

In conclusion to this stage, I thank Justice Williams, the organizers and the Customs House for the meet and right fare at this breakfast. By way of contrast, I am pleased that we have not been subjected to the breakfast reportedly enjoyed at the House of Maclean on the Isle of Mull in 1784, as related in Schott's Food and Drink Miscellany published last year (2003, Bloomsbury, p 148):

> "Porridge with cream, salted herrings, eggs, smoked beef – ham, flummery of milk eggs sugar and rum, butter, cheese, barley cakes, oatcakes, sea biscuit, currant jelly, blaeberry jam, and Jamaica rum."

Now wouldn't that have been a great early way to end the day!