Central Queensland Law Association Annual Conference
26 August 2006, 9:00 am, Yeppoon

The Hon P de Jersey AC
Chief Justice of Queensland

Kaye and I are delighted to be at this conference again. The conference illustrates a number of things – in order of significance on my assessment: first, the collegiality of the Central Queensland profession – important because collegial pressures do enhance individual capacities to serve clients; second, commitment to continuing professional development – compulsory now of course, but increasingly evident as a matter of individual commitment anyway; third, the achievement of the Central Queensland profession – a demonstrable capacity to serve well the interests of clients in this region; and fourth, the relevance of the Central Queensland profession State-wide: the presence here of quite a number of people from beyond your immediate ken illustrates our commitment to a State-wide profession. May I suggest today, that Brisbane practitioners can benefit from an exchange of views with their counterparts 636 kilometres to the north. It is in the end that mutuality which erodes parochialism, whether it be regional or metropolitan, and thereby helps clients and promotes the public interest.

Well alright, you may be thinking: he has said what he has to say – now can we have something worthwhile? My response would be that what I have just said was not the product of sentimentalism or idle support: it expresses a conviction borne of almost a decade as Chief Justice and more than two decades on the Supreme Court bench.

At the North Queensland conference earlier in the year, I expressed views about our State-wide profession which I felt significant. I will not repeat them now. You may read them on the Courts' web page, if you wish. Coming to Central Queensland, I will not be repetitive.

I want to speak briefly today about three disparate topics: the capacity of regional communities to judge their peers; community confidence in the sentencing process; and whether clients are adequately served by barristers who are not briefed and instructed by solicitors.

Regional juries

As to the first matter, it is appropriate at this regional conference that I say something about an issue which emerged from the well publicised decision recently, of the District Court, to move a trial from Townsville to Brisbane. There has been no Attorney's reference to the Court of Appeal, so I am relatively free to make some general observations. The publicity following that decision unfortunately, but unsurprisingly, dwelt on the character of the people of the Townsville community.

It is a fundamental principle that the trial of an alleged offender take place in the district where the crime allegedly occurred. That being so, I was disappointed when circumstances conspired some years ago to prevent the Long trial proceeding in Bundaberg, which is and was the Supreme Court centre closest to Childers.

Locating the trial in the district or region of the alleged crime is consistent with the concept of trial by one's peers. Additionally, it will usually be economical to proceed that way: locally based witnesses will not have to travel long distances, for example.

It also should serve to uphold the esteem of regional communities. Jury service is a highly significant aspect of public service. It is important that people throughout the State have the opportunity, and accept the duty, to discharge that role.

Those considerations are, I believe, axiomatic. Also fundamental is the assumption, reasonably made, that having taken the juror's oath or affirmation, the juror will act conscientiously, and that includes acting objectively.

Every human being is burdened by some prejudice or other. But my confidence in the jury system is based on a conviction that once sworn, and instructed by the trial judge, jurors do indeed banish those prejudices from their deliberations. Surveys conducted in recent years here and across the Tasman support that assurance. On one view unnecessarily, judges regularly counsel jurors to proceed in an unprejudiced way. That direction is, as I say, probably not necessary. But it is given,

which leads me to another fundamental assumption reasonably made: that jurors act in accordance with the trial judge's directions, including that they have regard only to the evidence and put out of their minds views expressed elsewhere, as by the media.

The aggregation of these principles and assumptions explains why the trial in Brisbane of a former police commissioner proceeded and why, notwithstanding graphic publicity, the conviction was sustained; and that was very important to public confidence in the criminal justice process.

Within that generally accepted framework, I was surprised when it was concluded a fair trial could not occur with a jury drawn from a catchment the size of Townsville.

Also, it is in my own personal view problematic that such a conclusion be drawn from, or be substantially influenced by, a survey of persons conducted outside the courtroom. Saying to a person conducting a survey that you could not follow a judge's direction to put aside prejudice is one thing. Entering the courtroom, taking the oath, being admonished by the judge through his or her direction in the solemn atmosphere of the trial, and acknowledging the gravity of that process, put the actual juror into a completely different situation. It would I consider be unsatisfactory were the administration of such surveys to become a trend in this State.

The Townsville decision unsurprisingly spawned extensive comment in the community. Attention was also drawn to the infrequency, or limited extent, of indigenous representation on juries. My disappointment about that feature is already on record, and the issue has been explored within the courts and the Department of Justice. Relevant circumstances are that indigenous people are not always enrolled as electors, substantial indigenous communities are sometimes distant from trial centres, and there are extensive familial relationships within the indigenous community which imperil the appearance of impartiality. Regrettably there is no easy solution to this problem, but it should remain on the agenda.

These issues arising from that Townsville decision are, I believe, particularly significant because of the vastness of this decentralised State. I have said many times, and will continue to say, that we must not be controlled by an unduly metropolitan mindset. All parts of the State are important, as are all Queenslanders.

A fundamental assumption must be that we all have the capacity to do our duty as jurors, and will conscientiously discharge that duty. 21 years of judicial experience of the jury system has served only to enhance my confidence in it, and in its operation State-wide. The features I have mentioned this morning should, I hope, mean such decisions are a rarity.

Sentencing

I turn to the second matter. I had intended this morning to speak about the question of community involvement in the sentencing process. I notice however that the concept of a sentencing advisory council, producing guidelines, for example, to assist judges in the sentencing process and including general community representation, has been advocated in one of the election platforms.

A month ago, I attended a very helpful seminar hosted by the Victorian Sentencing Advisory Council. I have some views on this concept, but I will have to defer expressing them until post 9 September. I will however make these general observations now.

Public confidence in sentencing is fundamentally secured in two ways: by the people's elected representatives in the parliament statutorily ordaining a responsible sentencing framework; and by the conscientious discharge of the sentencing function in the courtroom by judicial officers of broad accomplishment.

The people of Queensland are well served by our current system, where judges and magistrates exercise a comprehensively informed and comparatively unfettered discretion.

Bearing in mind the number of penalties imposed by so many judicial officers daily, the extent of variation on appeal is comparatively slight. But the existence of the appeal process does constitute the necessary guarantee. And the good offices of the media guarantee that any sentence of seriously arguable concern will be highlighted in the public domain.

There is another matter. We are presently in the process of developing a comprehensive sentencing database, utilizing software created by the NSW Judicial Commission, and hope to have this available to the courts, the prosecution and Legal Aid shortly. A major object is increased consistency and predictability. This is potentially the most significant development in recent years in the streamlining of our process in the criminal justice system.

Sentencing in the criminal courts is of critical public importance. There should be optimal public confidence in that process. Through the parliament, the people have committed that task to judicial officers. Insofar as recurrent commentary, sometimes strident, criticises judges as out of touch and detached, the criticism is simply baseless. Judges live in their communities; they have families; many have children; they participate in community affairs; they read newspapers, books and watch television … adding in their qualification and experience, the conclusion is compelling they are primely equipped to make these important and invariably sensitive decisions as, in effect, the community's delegates.

I turn to another related aspect. In New South Wales there is currently consideration whether juries could in some way assist sentencing judges. I find this extremely problematic. We already ask a lot of juries, and they do it well. To involve a jury in sentencing would mean educating it about the process. Is it realistic, for example, to expect a jury to distil a range from existing authorities? What if the jury could not agree on any advice to be given? There has been mention of a jury privately advising the judge: that would be repellent to the open transparency critical to the criminal justice process. In this State, we have not experienced the degree of community disquiet which I surmise provoked this consideration in New South Wales. While I will read the New South Wales Law Reform Commission's report, I cannot see any practicable and beneficial, justifiable jury role in the sentencing process, which must be left to the judge.

I turn to my third issue: direct briefing.

Direct briefing: client/counsel

In mid June, I addressed the annual conference of the North Queensland Law Association. In the course of that address, I expressed some concern about the phenomenon of the 'direct briefing' of counsel by clients – absent, that is, an interposed solicitor. It is something which apparently must be allowed because of 'national competition policy'.

I remain convinced that clients are best served by the traditional interaction, the solicitor taking instructions and statements and identifying issues, who then instructs the barrister, who reassesses what has been done, from a slightly different and relevantly different perspective, and advises then how the matter will best be progressed. The barrister then deploys his or her advocacy talents. The result to the client flows from an amalgam of differing talents: the point, obviously, is not to keep people in work, but to make sure the profession does its best for the litigant or the client to be advised.

I was criticised by a couple of commentators on the basis I was not doing my best for the accessibility of justice – not available, as we all know, in an absolute sense, but a goal striven for.

Maybe I was unduly brief. To alert the public, I now say why I sounded that caution.

There is concern the professional capacity of some (but not all) counsel, directly briefed, falls short of the capacity of those whom experienced solicitors would be prepared to engage. The inference is these counsel would not expect to be engaged in the usual way, because insufficiently experienced.

There are other considerations. It is said that in some cases, directly-briefed barristers receive substantial sums of money from their clients as advance payment for fees. Normally, those amounts would be quarantined by the trust account regime, but that is not stipulated for counsel. Problems may arise in the recovery of advance payments should the case prematurely resolve. Also, one hears claims of touting for work, and in inappropriate situations.

Another concerning aspect of those who choose this channel is the circumstance they sometimes operate independently, that is, outside normal chambers arrangements. These counsel therefore lack collegial pressures, which are not adverse, but generally go to engender attitudes which help, not hinder, the optimal service of clients.

Those are the reasons why I expressed concern about this trend earlier in the year, a concern which I maintain.

These views do not run contrary to my obvious goal of enhancing the accessibility of justice, a goal embraced by all members of the judiciary: my concern is to uphold the quality of legal services. No doubt where clients' means are limited, competent barristers will in appropriate cases continue to accept direct briefs. I have recently issued a practice direction to accentuate the directly briefed barrister's perception of his or her responsibility in these situations.

Conclusion

Ladies and gentlemen there is a plethora of matters on which I could additionally speak today. I am profoundly disappointed, for example, when role model sportsmen betray the expectations of their young followers by implying at least that so-called 'recreational' use of unlawful drugs is acceptable. I deplore with countless others the blatant message, from what parades as 'reality TV', that rackety behaviour is the norm … but I will stop there. You know these things. I expect you may share those concerns.

In days, years, decades gone by, an errant child would be taken for counselling to the family solicitor – that is, if the services of the parish priest or minister had not availed. I doubt that occurs much these days if at all. But the community significance of the profession remains high, and especially so I believe in regional centres, where practitioners play a prominent role in their contribution to public debate, in the moulding of responsible public attitudes, and in addressing individual concerns. It is important that role be acknowledged, and encouraged, and that is what I seek to do today.