5TH AUSTRALASIAN DRAFTING CONFERENCE 2008
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I wish to speak this morning about two Queensland examples of interaction between the courts and the Office of Parliamentary Counsel. One of them stems from the development of Queensland's Uniform Civil Procedure Rules, and I will mention some of the history of that. That initiative illustrates an attempt at so-called "harmonized" drafting at State level – the development of rules of court applicable to all three State courts. The second example concerns our practice in Queensland in assisting executive government with commentary on draft legislation.

I preface what I am about to say by acknowledging the professionalism and expertise of parliamentary drafters in our contemporary situation. I can speak with personal experience limited only to Queensland, but I imagine the level of skill and experience to which we have become used here is indicative of a nationwide standard.

The Queensland Uniform Civil Procedure Rules came into force on 1 July 1999. They were unique in Australia, in prescribing procedural rules governing proceedings in all three State courts – Magistrates, District and Supreme. The objective was to eliminate unnecessary distinctions in the procedures of the three courts, with a view to reducing cost and inconvenience, and increasing accessibility for all parties, especially those not represented by legal practitioners. While the rules are termed "uniform", they do accommodate some necessary differences in the work of the courts, although those are not substantial.

The then new rules did not merely harmonize three previously existing sets of rules. The opportunity was taken to modernize the rules to reflect contemporary conditions and anticipate further change. The summary judgment provision, for example, contemplated a somewhat more robust approach on the part of a court. Also, the rules for the first time

included detailed provision about recourse to the mechanisms of so-called "alternative dispute resolution".

My perception is that the rules have worked well, and that they are achieving their stated purpose. That purpose is "to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense". The rules are continually monitored by a rules committee, established by the *Civil Justice Reform Act 1998*, and now referred to in s 118C of the *Supreme Court of Queensland 1991*. That committee comprises judges and magistrates, representing the three State courts.

Section 118 of the *Supreme Court of Queensland Act 1991* empowers the Governor-in-Council to make rules of court, but "only with the consent of the Rules Committee".

Needless to say, the Rules Committee works in close collaboration with the drafters of the Office of Parliamentary Counsel. That has been an extremely productive relationship, from the point of view of the courts. It is fair to observe that the drafters have brought a unified, overall assessment to the question of the desirability of particular changes, for example. Because of the importance of preserving the uniformity, and unity, of the Uniform Civil Procedure Rules, that has been an important consideration. Also, the drafters have brought an inevitably different perspective to mooted changes: is this really what the Rules Committee seeks to achieve; would this slightly different approach more effectively achieve the desired result while better respecting the unity of the rules?

Most recently, the Committee completed a major project in revamping the costs rules. This arose from the effective transfer of the assessment of party and party costs from court registrars to court accredited assessors, who are legal practitioners. Those accredited assessors now also carry out solicitor and client assessments. This major reorientation of costs assessment necessitated a complete restructuring of the costs chapter of the UCPR. The Office of Parliamentary Counsel was of enormous assistance in effecting those substantial changes efficiently and expeditiously.

The motivation for the development of the UCPR was concern that unnecessary distinctions in the rules relating to the three State courts were producing inefficiencies and adding to the cost of litigation. In addition, the existing rules did not conform with an emerging judicial philosophy, that courts should more actively 'manage' cases before them, not leaving the progressing of cases just to the parties' legal representatives. In the years preceding the advent of the UCPR, delays within the courts had provoked criticism, much of it justified. The UCPR signalled a new judicial philosophy characterized by a more evident determination to ensure the timely and otherwise efficient progressing of cases through the court systems.

What was the genesis of the UCPR? They drew substantially on a set of model procedural rules developed by a committee headed by Justice G N Williams working over a long period beginning in the mid-1980's. That committee progressively examined and modernized the predecessor to the UCPR in the case of the Supreme Court, the Supreme Court Rules, which had in turn been based on the English White Practice, although originally drafted by Sir Samuel Griffith. In 1991, the Queensland Parliament legislatively established a body called the Litigation Reform Commission, which considered and facilitated a number of reforms of court practice on both the civil and the criminal sides. But that body did not progress the development of uniform court rules, at least not in any substantial way. The development of the uniform rules was an initiative of Attorney-General Denver Beanland, in the term of the Borbidge government, as acknowledged by Justice Williams at his valedictory ceremony early this year. That Attorney's officers drew on the work of the Williams' committee and produced a draft set of rules to which the Queensland Law Reform Commission gave consideration in due course.

In the course of the initial development of the rules, in which the court was of course involved, the question arose whether the rule making power should remain with the courts, or be vested elsewhere within executive government. The government rightly acknowledged the courts' insistence that they retain the power, which is an important adjunct of a court's power to control its own process. Hence the provision in the *Supreme Court of Queensland Act 1991* that the Governor-in-Council may make rules of court, but only subject to the consent of the Rules Committee. The reality over the years since the

inception of the UCPR has been that all amendments and further refinements, and there have been many, have been at the instance of the courts themselves.

I have dwelt on the UCPR for two reasons: first, because they did and still do amount to a ground-breaking development in procedural law within this jurisdiction, particularly because applicable to all three State courts; and second, because they instance the dependence of the courts on the particular expertise resident in the Office of Parliamentary Counsel, expertise and experience of which Queensland Courts have in this instance been most grateful beneficiaries.

That example of Queensland's production of one set of procedural rules applicable to all three State courts brings to mind the July 2007 edition of the "Protocol on Drafting National Uniform Legislation" of the Parliamentary Counsel's Committee. I have been interested to read that protocol and its attachments.

Of course completely uniform legislation among the States, Territories and Commonwealth would be inconsistent with the notion of federalism which imbues the Commonwealth Constitution. But that is not to deny the importance of achieving at least relative uniformity where there should be no substantial reason for a differentiation from one jurisdiction to another.

Let me illustrate the point in this way. We now have a national legal profession, or are close to developing one. A practitioner admitted in Queensland may practise anywhere in the Federation. Ideally, just as a Queensland practitioner can now comprehend the procedure applicable to all three State courts by mastering just one set of rules, Queensland practitioners should be able to practise anywhere in Australia without resort to a substantially different procedural framework. That is because it is hard to identify any substantial reason why court procedure should differ from one jurisdiction to another. And of course I am something of a publicist for the Queensland rules!

The Standing Committee of Attorneys-General acknowledges the importance of securing uniformity where there is no reason for differentiation, and there are many justifications for

that approach. Unnecessary differentiations can be anti-competitive; they may add to the expense, and increase the inconvenience, of ordinary human and commercial intercourse; they may feed a perception that the nation is riven by idiosyncrasy and sometimes even pettiness; they may betray a parochialism, in the relationship between the States and the Commonwealth, and amongst the States inter se. The list goes on.

It is important that this national conference dwell on that commendable initiative of the nationally convened committee. In encouraging the sensible application of the protocol, I refer to the encouragement we have been able here in Queensland to draw from our own experience in developing, maintaining and enhancing the Uniform Civil Procedural Rules which have proved so effective state-wide. In that context, we must not forget that this State is of such geographical immensity that its land masse would encompass five Japans: there is some utility in heeding our experience.

There is another example of involvement of Queensland Courts, indirectly, in the drafting of legislation, which I now mention. Courts have not been shy in drawing attention to drafting inadequacies or error in legislation, when called upon to construe and apply that legislation. Some of the criticism over the years has been colourful, and not all has led to the amendment the court has suggested, or at least not in the short term. Courts do not generally enjoy or relish such criticism. The question arises whether courts or judicial officers may themselves play a legitimate part in avoiding the occasion for such criticism.

As I have mentioned, in 1991 the *Supreme Court of Queensland Act* established the Litigation Reform Commission, which comprised the President and Judges of Appeal, and other appointees. That Commission was charged with making reports and recommendations with respect to the operation of the courts, which were directed to the executive, and which inevitably involved consultation with the executive as to various proposals. The body no longer exists, but it has been the practice of the government to provide the court with drafts of legislation which may have an impact on the workings and jurisdiction of the courts. My practice has been to seek the assistance of other judges prior to formulating any comment, and we are careful not to intrude into areas of executive policy.

The process has worked well, and the court has not been discomforted by having to pass subsequently on the validity or interpretation of legislation on which views have previously been offered. This approach has been justified in the public interest, although one must approach the matter generally with care. I am not aware whether this approach is taken in other jurisdictions as well, or whether it is unique to Queensland. Some may in previous times have condemned the approach as involving a blurring of the separation of executive and judicial powers. Executive governments, and courts and judges themselves, must in these times be careful to ensure that the clear delineation of the judicial function does not become blurred or distorted. But that blurring or distortion is not the inevitable result of any degree of interaction between the two branches of government. This particular approach provides an illustration of a cooperative relationship which plainly does not breach fundamental doctrine, but on the other hand, produces a result which is publicly beneficial.

Much is expected of the contemporary drafter: a clear grasp of the legislative intent, an appreciation of the relevant legal framework within which that intent is to be pursued, and a capacity for precision, if not exactitude, in the use of language. There are many who rely on those capacities, in the direct sense the legislatures themselves, but ultimately and most importantly, the citizenry. As well as reflecting the policies expected of our elected representatives, the laws which govern us must be readily comprehensible. The latter also naturally eases the tasks of courts charged with the construction of legislation.

As would be apparent from what I have said already, Queensland Courts, and thereby the people of Queensland, have been the beneficiaries of the accomplishment of the officers of our Office of Parliamentary Counsel, and in making that acknowledgement, I express considerable gratitude.