SUPREME COURT OF QUEENSLAND

Queensland Law Society Government Lawyers' Conference

Thursday 30 April 2009, 8:45am
Sebel Citigate Hotel

The Hon Paul de Jersey AC
Chief Justice

I am very pleased to have the opportunity to speak briefly this morning at the commencement of this important conference.

It is significant, I suggest, that the conference is convened by the Queensland Law Society. It was to my mind also significant that the Annual Conference of the Bar Association of Queensland, held in early March, was attended by a contingent of prosecutors from the Office of the Director of Public Prosecutions. My point is that government lawyers are members of the practising profession, notwithstanding they need not hold practising certificates. Post-2004 they may not be designated barrister or solicitor, but they remain lawyers, with all the obligations and privileges that classification attracts. It is therefore significant to note the identity of our host today, the umbrella professional organization convening a conference for this part of its constituency.

When I speak of professional obligation, I think at once of ethical obligation. I will not say any more about that this morning. What I will develop, if briefly, is another aspect of professional obligation, and that is professional efficiency and expertise for lawyers engaged in the government service. In contemporary times, high standards are expected of government lawyers. That is effectively mandated by the nature of the work, and the conditions in which it is secured and undertaken.

Much of the law which government lawyers deal with is idiosyncratically difficult, if I may put it that way. The law relating to government contracts, for example, is a field of its own, such that it has warranted a text book by Professor Bryan Horrigan devoted to just that. Also, and obviously, constitutional law is intrinsically difficult, and likewise administrative law, which continually engages governments. Component parts of broader areas have

themselves developed into discrete fields not infrequently calling for closely balanced judgments: the law relating to freedom of information is a good example of that, one which substantially engages me.

It is hardly surprising that the landscape confronting government lawyers is complex. The advice and other contribution by government lawyers relates to a huge economy, and issues of broad ramification, beyond the interests of A and B. The current economic climate will no doubt add to that complexity, where for example the injection of taxpayer funds into public corporations necessitates a variety of safeguards to ensure the assistance does not amount simply to a gift. A quarter of a century ago, as those of us who have survived for, at least, four decades would appreciate, things were much simpler. But George Orwell would probably have said, "be vigilant". A quarter of a century ago, the year was 1984.

The nature of the work mandates high standards. With the increasing sophistication, and in some respects intricacy, of government legal work over recent decades, the inevitable expectations of those carrying out that work must have correspondingly increased. Public/private partnerships exemplify this. Also, government lawyers in those situations will often be working in close consultation with privately retained colleagues. Another example of the diversity of talent now expected of government lawyers is their regular involvement in negotiating copyright rates for the Education Department.

Subject matter aside, government lawyers are additionally challenged, and particularly challenged, by the prospect their causes are or may become controversial. This necessitates particular care. There is the additional feature that government lawyers tread a delicate interface between discharging their professional duty and working within executive government. The prospect of governmental disappointment, at least, where given professionally-based advice, would not dissuade a government lawyer from presenting that appropriate advice. But the reality is that inevitable executive pressures

will be there, and have to be endured, and that perhaps reflects a less than attractive potential aspect of your work in difficult and sometimes emergent situations.

Then there is the abiding stipulation, where litigation is the order of the day, that the Crown is a, or maybe "the", model litigant. This is recognized in print in guidelines for Commonwealth lawyers. It necessitates fine judgments.

In the arena closest to the courts' work, for example, how does the model prosecutor proceed through a criminal case? Depending on whether he or she comes at it from the community perspective, or the usually opposed defence perspective, the views would differ: the community would expect strong prosecution; the defence would hope for a rather more hands off prosecutorial approach, leaving the jury unimpeded by any particular, albeit reasonable, call for conviction. This can create difficulties for the prosecutor, who is obviously enough obliged to push any case reasonably justifying conviction. A pressure comes from the risk of an admonitory complaint from the defence, raised either administratively or before the Court of Appeal, that a prosecutor has gone too far: and how variously opinions may differ when those issues need to be resolved.

A particularly difficult aspect of the criminal jurisdiction for government lawyers, in a field fertile for controversy, concerns bail. Where a grant of bail is followed by the commission of a further offence, the media may be moved, first up, to criticize the judicial officer. But there is particular responsibility in the prosecutorial officer who assists the judge in those situations. The prosecutor's approach to a bail application always calls for a careful, and sometimes even courageous, assessment. The prosecutor will be guided by the police view, although that need not be determinative. It is where things go wrong that external commentators will be all too anxious to second-guess the Director's approach, quite apart from criticizing the judge for gullibility. The outcome of the vast majority of bail applications is reasonably predictable. But there is a core of really difficult cases, and they test both prosecutor and judge. This area, like FOI, though confined, has important ramifications, and imposes particular demands on government lawyers.

While it is the fact that a lawyer in the government service will generally not be remunerated as highly as comparable lawyers in private practice, there are still considerable attractions in your sphere, especially because you are not generally, I believe, subject to quite the same commercial pressures as attend the ordinary billable hours regimes of the private arena. Nevertheless the government lawyer must reach performance standards every bit as demanding as those expected of private practitioners doing comparable work.

My own exposure to the government legal service began in 1969 when I spent 12 to 18 months as a clerk in the prosecution section of the Solicitor-General's office. Then throughout my ensuing 13 year career at the Bar, I was fortunate to be briefed regularly by the Crown, in a great variety of cases, including many constitutional battles in the High Court. My impression of that era was that much Crown work was briefed out. Also, I think Crown Law was responsible for most departmental legal work. That was because the departments did not then have their own legal sections, unlike now.

How the landscape has changed. I suggested earlier that the way the work is now obtained and undertaken engenders an expectation that it will be accomplished to a high standard. My understanding is that departments now maintain their own legal divisions, at least in many cases. When departmental legal work has to be briefed out, Crown Law is in the position of having to tender for the work in competition with external firms; likewise for work briefed out by government owned corporations. I understand that only constitutional work ordinarily remains in-house, tied to Crown Law and the Solicitor-General. There is no room for any acceptance, if there ever was, that some lesser standard of efficiency and expertise attends the carrying out of legal work in the government service, by contrast with the quality of execution by private practitioners.

This conference programme raises subjects of considerable complexity, consistently with what I have been saying about your professional diet. I wish you well as you embark upon the day's endeavour.

I conclude by noting the courts' dependence on the efficient performance by government lawyers, particularly the officers of the Director of Public Prosecutions, state and national, and officers of Legal Aid Queensland. I was impressed some years ago to note the great professional pride expressed by officers of Legal Aid Queensland, and the rapidly developing pride evident within the prosecution service, as conditions there substantially improve. The courts are the grateful beneficiaries of high levels of efficiency and expertise from these segments of the government legal service.

In the end, our joint mission is optimal public service. Your attention and participation today, ladies and gentlemen, should equip you even better to discharge your part of that mission. I wish you well.