SUPREME COURT
OF QUEENSLAND

North Queensland Bar Association Bi-Annual Court of Appeal Dinner
Wednesday 18 June 2014

The Hon Justice J D M Muir
Court of Appeal

Thank you for inviting my colleagues, our associates and me this evening. It is a great pleasure to be back in Townsville.

I had prepared a short speech, which I hoped would provide some light entertainment and make up in part for your missing tonight's Origin match. It occurred to me, however, that you may prefer to be brought up to date on the current controversy over the appointment of de Jersey CJ's successor: a matter which has the potential to adversely affect the working of the Supreme Court, weaken public confidence in the administration of justice and impact adversely on the willingness of parties, who have the freedom of choice in the matter, to litigate in Queensland state courts.

You will see that my focus is substantially different from that of the eminent lawyers who have made public statements. I do not propose to comment on what they have said or on the role, prerogatives or conduct of the executive. The views I am expressing are mine alone. But first I will say a little of what I had intended to say.

I fondly remember the generous hospitality of the north and particularly of the Packs at their beach house at Cungulla. As many of you would know, Bob is to mud crabs what Genghis Khan was to the citizenry of Eastern Europe.

On one occasion, after a magnificent lunch at Cungulla of mud crabs and barramundi, it came time, as the light was fading, to bid a reluctant farewell.

My associate, who had also been invited, re-assumed her chauffeuring role. After a while, I noticed that she was having trouble, because of her height, or lack thereof, in seeing over the dashboard and that she was driving very fast. I suggested that she may care to slow down, but she responded that she couldn't see very well, didn't like driving anyway and, therefore, made a practice of getting to her destination as quickly as possible.

My original theme was random thoughts on advocacy. Advocates, and judges for that matter, need to rediscover precision and succinctness to the degree exhibited by Lord Justice Birkett, who, when an accused found guilty by a jury said, "As God is my judge, I am innocent", responded:

> "He isn't; I am, and you're not."

Don't shun the careful use of language. Language skills are the foundation of good advocacy.

In Sir Walter Scott's novel *Guy Mannering*, Counsellor Pleydell, a Scottish advocate, pointed to the books on his wall and said to the hero:

> "These are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses knowledge of these he may call himself an architect."

The author of *CHURCHILL in his own words* asserts that in his speeches and writings, Churchill drew heavily on his capacious memory of great literature that he prodigiously devoured in his youth. Churchill, who was awarded the

Nobel Prize for Literature in 1953, if asked, would have advised against the use of florid language.

An outline of argument in a recent appeal contained the following:

> "This is an appeal against credit-based findings of fact: findings which, in any view, were open on the evidence. That is not altered by attempts to **accoutre** the appeal in **raiments** of a different **tincture** …"

After a short break, counsel continued:

> "In many instances, the appellant is content merely to **iterate** bald **asseverations**."

Showing exemplary restraint, counsel refrained from accusing his opponent of indulging in **rodomontade** and from asking the Court to **defenestrate** the appellant's case. Unlike a barrister in another outline that I recently had occasion to peruse, he did not refer to what **fell from** his or her honour, conjuring up images of shedded detritus.

Simplicity of language, including brevity of sentences, is normally to be preferred. Churchill remarked at a literary award presentation in 1949:

> "Broadly speaking, short words are best, and the old words, when short, are the best of all".

But heed the words of Justice Oliver Wendell Holmes:

> "No generalisation is wholly true, not even this one."

Winston Churchill's finest speeches are wonderful examples of the power of carefully selected, normally simple, language presented in short sentences. President Kennedy (or was it Ed Murrow) said of him that "he mobilised the English language and sent it into battle".

Simplicity and economy of language is even present in Churchill's witticisms such as: A man was informed that his mother-in-law had died in Rio de Janeiro. Asked what should be done with the body, he replied by telegram, "Embalm cremate and inter. Take no chances".

F E Smith, later Lord Birkenhead, Attorney General and confidante of Winston Churchill was, in his time a brilliant advocate with a fine turn of phrase. He had an unusual penchant for insulting the Tribunal before which he appeared. In a personal injuries case, Judge Willis complained that an observation made by Smith was most improper and an exchange took place. It concluded with the Judge informing Smith that he was offensive. Smith's response gains much of its force from its brevity and simplicity:

> "We both are. The difference is I'm trying to be, and you can't help it."

Of course, the average judge is not as open to just criticism as Judge Willis and nor could the great majority of advocates be so bold as to attempt to advance their client's cause by offensive behaviour.

I wonder what F E Smith would have made of Judge Noel Cannon, a judge in Los Angeles, who, in 1972, was reprimanded by a police officer for inappropriately honking her horn. Later in court, the judge who often presided with her pet chihuahua on her lap, instructed her bailiff:

> "Find the son of a bitch; I want him found and brought in right away. Give me a gun; I am going to shoot his balls off and give him a .38-calibre vasectomy."

Her Honour's language perhaps demonstrates a lack of restraint and decorum, but its directness and simplicity commands attention.

I now depart from my original script. Articles in the *Courier Mail* on 9 June sensationalised the looming controversy over the rumoured appointment of the Chief Magistrate as Chief Justice. The Attorney General, it was rumoured, had searched for a Chief Justice of Queensland and located him in the Magistrate's Court.

The next day, the *Courier Mail* published a letter to the editor by Sofronoff QC. It stated that the Chief Magistrate's impartiality had been called into question and expressed the opinion that he was unqualified for the role of Chief Justice.

Sofronoff QC called on the Chief Magistrate to act appropriately. He said:

> "Since the Attorney General does not have the insight to do so, Judge Carmody should himself quell this present unfortunate and unhealthy speculation about him by stating forthrightly that he would not accept an appointment to the office of Chief Justice if it were offered to him. He would, thereby, instantly gain the respect of his colleagues, including me."

Davis QC, then President of the Queensland Bar Association, was reported in the *Courier Mail* on 10 June as saying: "I entirely agree with the points of principle that are contained in the letter".

A *Courier Mail* article on 11 June had the headline "Carmody backers open fire – lawyers slam biased attack".

Cooke QC was the only such slammer identified. Chesterman QC, in a letter published the same day, endorsed Sofronoff QC's article. He explained why, in his view, the Chief Magistrate could not be appointed Chief Justice "without doing substantial damage to the Supreme Court and public confidence in good government".

A substantial article on the controversy appeared in the *Courier Mail* on 12 June. It contained some expressions of concern by Fitzgerald QC, and quoted a statement by Davis QC that "any person who is appointed to lead the Supreme Court of Queensland ought to have the general respect of the legal profession and the Judges of the Supreme Court".

An article in *The Australian* on 12 June referred to an episode in which the Chief Magistrate, when a Family Court Judge, had cut and pasted into reasons for judgment slabs from an earlier judgment of his. Unfortunately, but inevitably, the earlier judgment dealt with quite different facts. The fatally flawed judgment was set aside.[1]

On 12 June, the Attorney General and the Premier announced the appointment of the Chief Magistrate as de Jersey CJ's successor. The President of the Law Society announced that he welcomed the appointment.

[1] CCD & AGMD [2006] FamCA 1291.

So too did the Queensland Police Union President. The Queensland Bar Association declined to comment.

On 12 and 13 June, the Chief Magistrate, in what was surely a Queensland and Australian first, hit the airways. The public were faced with the unseemly spectacle of a man soon to be appointed Chief Justice spruiking his credentials. He offered these insights:

> "I've often said and I'm sure nobody would argue that I may not be the smartest lawyer in the room, and if you were in a room with me and I was the smartest lawyer it would be a good time to leave it.
>
> There are plenty of [black letter lawyers] already on the Supreme Court and I don't aspire to compete with them for intellectual rigour."

Would the selectors of the Australian cricket team contemplate, even momentarily, an Australian cricket team captain who was inferior in skills to the other team members? Might not an accused in a criminal trial, a party to a civil litigation or a party to an appeal before his Honour expect and appreciate the application of intellectual rigour? Should not a Chief Justice's colleagues be able to seek his or her informed opinions on a range of complex issues?

Associating himself with Winston Churchill, but with a modest denial of comparability with Churchill, the Chief Magistrate pronounced: "Cometh the hour, cometh the man". What gruesome legacy of his predecessor that

needed to be faced and surmounted with Churchillian resolve could the Chief Magistrate have had in mind?

The Chief Magistrate's observation "No one knows if I'm up to it before I've done it" is hardly reassuring. Sofronoff, Chesterman, Fryberg (who by that time had questioned the Chief Magistrate's ability to do the work of a Chief Justice), Fitzgerald, and the Bar Association of Queensland appear not to have shared the Chief Magistrate's difficulty in answering the question.

The Chief Magistrate commented on the reception he received from his future colleagues, saying, "Not one of the Supreme Court judges has congratulated me … yet. I'm surprised and hurt. These are people I have known for 30 years". Revealing a lack of insight, he professed not to know why this was so. Speculating that "some people wait and see – not willing to be the first," he called into question the characters of those he aspired to lead.

The Chief Magistrate wished that he "didn't have to knock on [the doors of President McMurdo and Justice Byrne, Senior Judge Administrator] and say 'Hi, I'm your new Chief Justice, are we friend or foe?'" He saw that no other course was open to him "because that's what leaders do".

Why would the Chief Magistrate presume an entitlement to ask such a question or to expect an answer? Why would an aspirant to the office of Chief Justice be of the belief that the judges in question must be foes if not friends? Does he take the approach: if you are not for me, you are against me? The Chief Magistrate seemingly fails to appreciate that he ought not be engaged in a popularity contest. A judge's duty has nothing to do with his or her like or dislike of a Chief Justice; it is articulated in the oath of office.

In what was probably another Australian first, the Chief Magistrate felt the need to proclaim himself "fiercely independent" and to admit to being "a good human being", to being "up to it alright" and to having "personal integrity".

On 13 June, Davis QC resigned as President of the Queensland Bar Association. He issued a press release which contained disturbing information about the appointment process. He said that it was evident from a telephone conversation he had with the Chief Magistrate on the morning of 10 June that the judge had been told the substance of the confidential conversations he had had with the Attorney General. If Mr Davis' recollection is accurate, the Chief Magistrate was either the passive or active recipient of confidential information.

Later on 13 June, Sofronoff QC appeared on the *7.30 Report*. He again criticised the Attorney General, and stated that the Chief Magistrate has by his own actions shown himself to be too close to the government. He asserted also that the Chief Magistrate had none of the necessary qualities of the Chief Justice of Queensland. He likened the Chief Magistrate's radio campaign as being like a politician spruiking his suitability and observed that it was not something he had seen in 30 years in the law.

On 14 June, Davis QC called on the Chief Magistrate to renounce his appointment. The Australian Bar Association in a public statement expressed its "serious concern" about the process involved in the Chief Magistrate's appointment. This week James Thomas QC and the Law Council of Australia entered the debate.

Independence of the judiciary in the context of the Australian Constitutional and political framework has been described variously as "… a fundamental

principle of the Constitutional arrangements",[2] "a cornerstone of our society",[3] "a necessary guarantee of democracy"[4] and "the primary source of assurance of judicial impartiality".[5]

Plainly, if public confidence in the independence of the judiciary is to be maintained, the judiciary must not be, or be seen to be, subject to direction or influence by the executive arm of government in matters which bear upon the determination of civil or criminal litigation.[6] As it is often said, a significant role of the judiciary is to stand between the citizen and the State. Impartiality must be allied with independence. Chief Justice Gleeson observed:[7]

> "Judges, however, are supposed to be dedicated to the proposition that the administration of justice requires both the reality and the appearance of impartiality, and that both are attainable. Anyone who does not believe that proposition should not be a judge.
>
> It has been wisely observed that enthusiasm for a cause is usually incompatible with impartiality, and is always incompatible with the appearance of impartiality."

The qualities of competence, independence and impartiality in a Chief Justice are even more important than they are in a puisne judge. Their existence is established by conduct not assertion.

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2 The Hon Mr Justice L J King, *Minimum Standards of Judicial Independence* (1984) 58 ALJ 340.
3 The Hon Sir Gerard Brennan AC, KBE, *Courts for the People – Not People's Courts*, the Inaugural Deakin Law School Oration, 26 July 1995.
4 The Hon Ken Marks, *Judicial Independence* (1994) 68 ALJ 173.
5 The Hon Murray Gleeson AC, *Who Judge's Think They Are?*.
6 See the observations of the Hon Murray Gleeson AC in *The Role of a Judge and Becoming a Judge*, National Judicial Orientation Program, Sydney, 16 August 1998.
7 The Hon Murray Gleeson AC, *The Role of a Judge and Becoming a Judge*, National Judicial Orientation Program, Sydney, 16 August 1998.

Chief Justices are described from time to time as "first among equals". I doubt that many Chief Justices place much emphasis on the second limb of the description, but what it conveys is that a Chief Justice is but one of a complement of judges independent even of each other in the way they discharge their judicial duties. A Chief Justice may influence and guide his judicial colleagues by the moral authority he exerts, the respect he commands and by his example, never by dictate.

He should be a capable administrator. He need not be the intellectual leader of the court, but he must command respect for his capability in discharging his judicial duties. He must certainly display no less intellectual rigour than the judges he leads. Often a candidate for Chief Justice will be effectively self selecting. He will have eminence, if not pre-eminence, as a barrister or a judge. He will command universal respect and have the clear support of the legal profession. He will certainly have the respect and confidence of those he is to lead. No court, no matter how dedicated its members, can perform to anything like its full potential if the Chief Justice does not have the judges' respect and confidence. Incidentally, when I refer to "he", read "he or she".

As has been recently observed, persons with the qualities requisite for the office of Chief Justice of a State are not found in abundance, even within State Supreme Courts. It should not be difficult, however, to recognise whether a person has such qualities and whether there are disqualifying factors such as lack of professional or institutional support, a flawed appointment process or informed public criticism of the appointment by respected persons and bodies. It must be exceptional that debate surrounding the appointment of a Chief Justice focuses on whether a person

is qualified for the office rather than the respective merits of competing, obviously well qualified, candidates.

You do not need to be a Churchill to grasp the importance of principles of independence and impartiality. In 1908, he said:

> "The judge has not only to do justice between man and man. He also – and this is one of his most important functions considered incomprehensible in some parts of the world – has to do justice between the citizens and the State."[8]

And:

> "The independence of the judiciary from the executive is the prime defence against the tyranny and retrogression of totalitarian government."[9]

When the Chief Magistrate's appointment was announced, and subsequently, the executive, as it was entitled to do, sought to explain and justify the merits of the appointment. It was not open to the appointee, however, if he wished to behave as a Chief Justice should behave and demonstrate independence, to effectively support the executive's actions by publicly talking up his credentials. Amongst other things, the Chief Magistrate's self promotion as a self made man of humble background, accurate though it may be, meshed with the executive's message. Ironically, the Chief Magistrate, when asserting his independence, was engaged in conduct that called it into question.

I should note here that the Chief Magistrate generously acknowledged the professional standing of those who spoke against his appointment. He also discouraged an attempt by one media interviewer to have him contrast his background with that of other members of the legal community. He told the interviewer, "… a lot of them come from similar backgrounds as well" and that "there are very few legal dynasties around".

Despite this, the usual hares were set running ("ivory towers", "elitist", "out of touch", "legal establishment"). Many participants in and followers of the ensuing debate were left exposed to streams of ill informed opinion. One fact that seemed to go missing was that if there are such things as "a legal establishment" and a "legal elite" they are composed mainly of lawyers from relatively modest financial backgrounds with no family connection with the legal profession, who by dint of hard work, diligence and ability gained professional prominence.

I would hope that because of the unfortunate way in which this saga has unfolded, the obvious lack of support for the Chief Magistrate's elevation to the office of Chief Justice of Queensland and the matters discussed earlier, the Chief Magistrate will see that the only appropriate course is for him to withdraw. To take this course will require courage, but I do not apprehend that this is a quality that the Chief Magistrate lacks.

I will conclude lest I provoke a reaction akin to that of Lord Brampton who, when asked by his chaplain what he thought of his sermon, responded:

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[8] *Churchill in his own words*, 2008, Ebury Press at 106.
[9] *Churchill in his own words*, 2008, Ebury Press at 106.

> "It was a divine sermon, for it was like the peace of God which passeth all understanding and like his mercy, it seemed to endure forever."

Thank you.