

FEDERAL COURT OF AUSTRALIA
CEREMONIAL SITTING - SYDNEY
TUESDAY, 7 JUNE 1983

SPEECH ON WELCOME AS A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

June 1983

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The Hon Mr Justice M D Kirby CMG

UNMEMORABLE WORDS

The words offered by a Judge at his Ceremonial Welcome are probably his least memorable judicial utterances. Having analysed, closely, a series of statements by Judges at their Welcome, I am convinced that judicial policy speeches represent an undesirable new development. Judges should leave policy speeches, like so many other things, to the politicians. Promises to be invariably courteous, respectfully silent and admirably prompt in judgments are frequently offered. But, by the time most people come to judicial office, their personalities are indelibly settled. True it is, if they have come from the Bar, they have often had to disguise their more unusual traits. That is why judicial appointment, like lifting the lid of Pandora's box, frequently discloses strengths and weaknesses previously unknown, perhaps even to the Judge himself.

Speeches at judicial farewells are rather more interesting. By this time, the Judge's qualities of mind and temperament are only too well known. The endeavour to summarise a life in the discipline of the law may be poignant. The last effort of public life to offer suggestions for this or that reform may take on an edge of desperation. But even here, there is increasing judicial appreciation of the transiency of ceremonial occasions. Mr Justice Speight, a Judge of the High Court of New Zealand, recently retired early at age 60. He reflected in his speech on changes in judicial office. He said that a Judge today was actually very much like other members of the community. In the weekends he 'painted the house and watched the footy'. Within days of this speech, he was knighted and appointed Chief Justice of the Cook Islands. He now spends most of his time travelling languidly around tropical islands of the Pacific. I have no illusions that this speech of mine will be similarly rewarded.

Some Judges use these occasions for a statement of grand judicial philosophy : to outline their basic attitudes to the judicial function, to reform, or to the administration of justice, in responding to changing times. Others reflect ruefully, as Mr Justice Fitzgerald did recently, upon the genteel poverty of the Bench, when compared to the riches of the Far Table. Still others press for this or that particular reform, which has been nagging them during the long haul of the Bar and which law reform commissions have incompetently and obtusely neglected.

FRIENDS AND INFLUENCES

The one common theme of all such speeches is the tribute to family and friends. In this regard, I will be no exception. My parents and the other members of my family are here today. I owe to them acknowledgements that are beyond mere words. Both my brothers entered the law, after me. Only my sister spurned its fascinating attraction. I came to the profession without a family background in the law. I still recall my first day as an Articled Clerk, sitting in court. It was 1959. Gordon Samuels, a promising junior, was cross-examining. I remember thinking how fortunate I was actually to be paid five pounds a week for such an exciting life. Later the income grew in strict proportion with the excitement.

In my years as a solicitor and later as a barrister I made many friends. I am glad to see some of them here today. I was greatly influenced by the leading barristers of my day : some of whom are now sitting on this Court — others on other Courts. But the turning point came in 1974, when I was appointed a Deputy President of the Conciliation and Arbitration Commission. I had stepped, unequally, into the shoes left by powerful lawyer advocates before that Commission. They included the present Prime Minister, Mr Justice Murphy, the late Mr Justice J B Sweeney, Mr Justice W K Fisher and Mr Neville Wran. Some people have inferred that my appointment to the Arbitration Commission was made with a view to my later appointment as Chairman of the Law Reform Commission. It was not so. In fact, I was reluctant to leave the Arbitration Commission. I was enjoying greatly my period of responsibility in that most important of national tribunals. I urged the merits of others, older and wiser than myself. But Attorney-General Murphy was persuasive and insistent. And so, in February 1975, I stepped out of the busy world of industrial relations to help establish a new national Law Commission.

The first weeks were spent in the ante-room of the Bankruptcy Court. Perhaps in due course of time my life may come full cycle, back to that ante-room today. The original Commissioners of the Law Reform Commission set a cracking pace. They included Sir Gerard Brennan, Mr John Cain and the present Federal Attorney-General himself, Senator Gareth Evans. The later appointments have retained the same high qualities of integrity, experience and intellect which are needed for the success of such a body. There have been many links with this Court : at the level of Commissioner and as consultants and in private discussion. I believe that the Chairman of the Law Reform Commission should normally be a Judge of the Court. I am proud that, in my time, this has come to pass.

THE COURT AND THE ARBITRATION COMMISSION

When I was welcomed to the Arbitration Commission in December 1974, eight and a half years ago, the speech for the Bar was made by the Hon T E F Hughes QC, the then President of the NSW Bar Association. As you would expect, it was an elegant and witty speech. The transcript still records his claim that 'Your Honour is well known for Your Honour's vanity'. He claimed later that he had said 'urbanity'. But the court reporter was unconvinced, and immovable. Vanity stays. Another speaker on the occasion, assuming my appointment to be a case of judicial nepotism, spent a great deal of time urging upon me the virtues of my 'father', Sir Richard Kirby. But as Sir Richard is no relation, many of the finer points of his advocacy were lost on me — and, I should say, on my father.

It is a source of great regret to me that my appointment to the Law Reform Commission deprived me, almost immediately, of the opportunity to serve in the Arbitration Commission. I have unbounded respect for the high intelligence, imagination and dedication of the Members of that Commission. Its importance to our national life is second to no other curial body, save for the High Court of Australia. The success of its operations affects, literally, the prosperity of millions of fellow citizens. It is fashionable in some unknowing legal quarters, to denigrate, or at least undervalue the importance of the Arbitration Commission and our other industrial tribunals. A certain inflexibility of the legal mind, post-Boilermakers, has led some lawyers to question the role of Judges and lawyers in the industrial relations system. But while ever the Constitution remains as it is, that role is guaranteed. The judicial function is not frozen. And legal skills of a high order are at a premium both in the Arbitration Commission and in this Court.

In fact, I admit to a disappointment that my commission to this Court required my resignation from the Arbitration Commission. It need not always be so. This Court has provided Presidential Members for a number of Federal tribunals, including the Trade Practices Tribunal, the Administrative Appeals Tribunal, the Copyright Tribunal, the Police Disciplinary Tribunal and the Courts Martial Appeal Tribunal. In State industrial bodies, uncomplicated by the rigid separation of powers, it is possible for Judges to perform both judicial and arbitral functions. Some of the inconveniences of the dichotomy between this Court and the Arbitration Commission could possibly be reduced, if some of the Deputy Presidents were also Members of the Court. Such a provision could also ensure a fruitful link between the Court and the Commission, separated so inconveniently and artificially in 1956. Compatibly with the Constitution, I believe that such a reform should be considered.

But now I have done what I promised not to do. I have ventured upon a suggestion for reform. You will forgive the ways of a reformer. You will understand that my suggestion is one that arises from my own history, and the special pain it was for me to sever my formal links with the Arbitration Commission.

I close by saying how pleased I am to be here with so many good friends, both on the Bench and in the well of the Court. I am especially glad to share this Welcome Ceremony with Mr Justice Beaumont, a good colleague of many years. I was afraid that so many lawyers were in Canberra or engaged in Royal Commissions or other inquiries, that my relatives would far outnumber the members of the legal profession here today. I see it is not so. I am grateful for the words of encouragement on behalf of the Executive Government, the Bar and the Solicitors' Branch. I have now been a member of each and each has taught me much. At the request of the Attorney-General, I will be remaining in my post as Chairman of the Law Reform Commission for a little time yet. But when I come to the Court, I will do so wholeheartedly and with enthusiasm. And as a Judge, I will do my best.