



THE UNIVERSITY OF NEWCASTLE

CEREMONY FOR THE CONFERRING OF DEGREES

FRIDAY, 1 MAY 1987

ON THE CONFERRING OF THE DEGREE OF HONORARY DOCTOR OF LETTERS

"ON A RETURN TO NEWCASTLE"

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ON A RETURN TO NEWCASTLE

The Hon. Justice Michael Kirby, CMG  
President of the Court of Appeal

IN REALMS OF GOLD

Life has a tendency to go round in circles. Especially if you are of Irish extraction, you feel an irresistible urge to return to places of your past. I wonder how many of my fellow graduates have indulged that temptation of late. Go back to your primary school. Walk in the school grounds. There you will almost certainly hear the noise of playmates, the rustle of grease-proof paper as cut lunches were eagerly devoured, the smell of chalk. Walk in the University grounds and you will suddenly remember the sinking feeling you had when you entered that new world. So many unfamiliar sights - a little frightening, really; but you must not admit it or show it. The first lecture; the new friends will come crowding into the mind's eye. We should all, from time to time, wander in these realms of gold which lie locked away in our memories.

So it is for me today. My association with this University began 11 years ago, almost to the day. It was a

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ceremony just such as this in May 1976. A year earlier I had been appointed the first Chairman of the Australian Law Reform Commission. This was a brave new idea established by Federal Parliament on the urging of Senator Lionel Murphy. Then came Remembrance Day 1975 and the fall of the Whitlam Government. The Law Reform Commission suddenly seemed a very fragile thing. Easy it would have been for the new, confident Fraser administration to sweep it away as just another of the playthings of suggested extravagance of its predecessor.

This was the context in which I accepted the invitation of Professor Donald George, the then Vice-Chancellor, to deliver a graduation address, here in this hall. Such addresses have an honourable history for occasional announcements of more than passing importance. You will remember that it was in one such address that Winston Churchill first talked of the Iron Curtain and thereby gave a label to 30 years of European relations which to this day have changed much. I could not assume that my pearls would last for 30 years. But I did use the occasion - doubtless to the astonishment of not a few in the audience - to talk about the challenges to privacy and the need for law reform to protect this precious value in society.

#### A TIMELY ADDRESS

As it happened, the address captured attention throughout Australia. The Law Reform Commission set upon the task of investigating and proposing laws to secure our privacy. I shall return to this topic. Suffice it to say that the Law Reform Commission survived. It even, I believe, flourished. It was not abolished. It went on to do good and useful things. It is still at work to improve our Federal laws, although (despite the many

issues of law reform requiring attention) it has not received any new projects from the Federal Government for more than two years. I hope that the Grim Reapers in the Treasury are not about to attack it again.

My address that sunny day in Autumn 1976 on this splendid campus was not only my first visit to the University of Newcastle. It was my first graduation offering anywhere. Since then, I am ashamed to say that I have given countless graduation speeches. But the prototype, for me, remains the one I gave in Newcastle in 1976. It began, as all good essays in this genre must do, with words of congratulation to the graduates, their families and friends. What began at a local kindergarten comes to its natural fulfillment in this ceremony. We dress up in medieval robes and take ourselves rather seriously because this is a solemn moment in life. It is like the laying on of hands, by which authority is passed from one generation in the Church to the next. This is the place where new recruits are consigned to the world as tested scholars. In comparison with its competitors, Australia has a low educational retention rate. Therefore, these are precious additions to our intellectual capital. We should welcome them for our country, in hard times, needs them.

Latest UNESCO figures show that to produce a single graduate, on average 72 litres of ball point oil are used, 14.7 tons of coffee beans are consumed and 2.6 hectares of forest land cleared for paper. So it is a very costly enterprise indeed that brings us to this moment.

THE UNIVERSITY OF NEWCASTLE

I had known Donald George when we sat together on the

Board of Sydney University Union. It seems only yesterday that I was a raw youth and radical student activist and young Dr. George was an up-and-coming engineering lecturer. Now he has completed his term as Vice-Chancellor and has retired. I have just pulled through mid life crisis. Let my oft repeated warning about fleeting time be the main lesson which my fellow graduates learn from this, possibly the last of their University lectures.

So entranced was I with the beauty of the Australian bushland setting of this University, the congeniality of the Chancellor (Sir Alister McMullin) the then Deputy Chancellor (Sir Bede Callaghan) - not to say tempted by the fish finger lunch provided to the Council members - that when Professor George invited me to join the Council of the University, I accepted with alacrity.

I have now sat on three University Councils: the Sydney Senate, the Council of this University and the Council of Macquarie University where I am now Chancellor. None has been more energetic, questioning and innovative than the Council of this University. As I stand here, I vividly recall so many debates, under the leadership of the Chancellor, and spurred on by Don George, Reyn Keats, Alec Forsyth, Frank Purdue, Ken Booth, Cliff Ellyett and many others and their successors. We broke much new ground. University Council meetings were thrown open to students and staff - one of the first Australian universities to do so. A procedure of appeals was provided for staff members disappointed in their non-promotion. Provisions were made for access to student and staff files. This is not to say that the meetings were always harmonious. There was

sometimes that edge of tension which usually accompanies creativity. Doubtless we had our failures. We certainly had a few sad and troubling cases. But it is a wonderful thing to see a University's government at work. Universities are no longer entirely independent - for the great investment of the public purse demands public accountability. But it is a good thing that Governments of differing persuasion continue to see merit in the delegation to a group of scholars and citizens of the largely autonomous administration of our universities. I hope that universities will continue to deserve this large measure of trust.

LAW AS LITERATURE - A CONTRADICTION IN TERMS?

Three years ago, when I was invited to become Chancellor of Macquarie, I departed this place with a sense of loss. I had made many friends and learned much. Now, by this honorary degree, I am linked forever to the fortunes of the University of Newcastle and its other members. It is a tremendous privilege - and for me a precious one. I am especially glad that the University has chosen the Doctor of Letters to mark my association with it. Some unkind critics would say that it is a contradiction in terms to give a lawyer a degree normally reserved to people of literature, poets, essayists and other like civilised people. Yet some of the best writers of our tongue were trained in the nurseries of the law. Bacon and Lamb, Thackeray, Walter Scott and Dickens and many more sharpened their talents in the rigorous study of legal precepts. On the other hand, Lewis Carroll in Alice's Adventures in Wonderland was unconvinced. He saw a more limited function in the life in the law:

"In my youth" said his father, "I took to the law;  
And argued each case with my wife;  
And the muscular strength which it gave to my jaw  
Has lasted the rest of my life."

More lately W.H. Auden had this to say about people like me -

"Law, says the judge as he looks down his nose,  
Speaking clearly and most severely,  
Law is as I have told you before,  
Law is as you know I suppose,  
Law is but let me explain it once more,  
Law is the law."

Encouraged by this honorary degree, I shall now try to do better. It should not be difficult. The court rooms are full of human dramas. We see paraded before us the passions, follies and triumphs of mankind. This is the stuff of literature. In future, when my colleagues see a particularly flowery piece in a judgment - a literary allusion or two, perhaps a quote from Shakespeare or a citation (in the original Greek of course) from The Odyssey, they will gravely shake their heads. "He was never the same after he received his degree in letters from the University of Newcastle", they will say.

#### THE STATE OF PRIVACY TODAY

And now I return to where I began. What is the position more than ten years later, in the protection of privacy in our country? This, you will recall, was the subject I addressed on this very stage in my first encounter with this University that sunny Autumn day in 1976.

In the intervening ten years the dangers have not gone away. The power of computers to collect unprecedented

quantities of information about all of us and to retrieve it with diminishing cost and increasing speed, continue to challenge our privacy. The growth of the cashless society continues to leave a trail of data which, once analysed, may reveal to snoops matters formerly in the private zone. Far from diminishing, in the last ten years the powers of electronic surveillance and telephonic interception have increased. The technology of surveillance has bounded ahead. The law has either not kept pace or has positively increased the powers of interception. The power of increasing numbers of officials to intrude into our lives has likewise been increased by legislation enacted by Federal and State Parliaments in the interval. The institutions of protection, urged by the Law Reform Commission in its report on privacy, have not been established. It is true that a Data Protection Agency was proposed in a Bill recently defeated once again in the Senate. But the price of securing that agency was the adoption of a national identity card. As it used to be said of love and marriage, you can't have one without the other. No I.D. card; no data protection agency. Some citizens resist the idea of a universal identifier in Australia. My family dentist, a refugee from Auschwitz, says that the best thing about coming to Australia was that there was no risk of being stopped on the corner of the street with the demand "Papers!" Of course, if there are no compulsory papers of universal identification, there is no risk that such a situation would come about in our country.

The melancholy fact is, therefore, that the past ten years have seen the further erosion of individual privacy in



Australia without effective response. There are powerful forces who urge more and more invasions. But who speaks up for privacy in our country? Parliament once again has failed to put in place the necessary protections for our citizens. The issue of individual privacy, so precious to the future shape of our society and of our liberties, has instead become ensnared in Australia in party political warfare. Where most other developed countries have already established legal protections, we in Australia lag seriously behind.

PARLIAMENTARY FAILURE AND THE BILL OF RIGHTS

Is it any wonder that some citizens, despairing of the efficiency of Parliament to attend to the real problems of the times, urge the utility of a Bill of Rights so that the other basic institution of our government, the judiciary, may have a charter of fundamental freedoms from which, where necessary, to design laws for today? It should be remembered that that was the way, in the United States, where Congress failed, that great Republic faced the problems which the elected representatives had sadly and repeatedly put into the too hard basket. Civil rights, abortion, equal electorates, rights of criminal-accused, the death penalty, privacy protection itself - all of these issues were solved in the Court not in Congress. To the extent that Parliament fails, our institutions must provide other solutions. I believe that this is why increasing numbers of our citizens look to the judges and to a Bill of Rights in this country. Of course, it would be better if Parliament could attend to our many pressing problems. But the failure of Parliament to address effectively the urgent needs of law reform - such as the protection of privacy reveals how

our assembly of the people's representatives (diverted no doubt by the endless fascinations of party politics) has neglected the needs of the time. Those democrats who urge against a Bill of Rights must look to the actual parliamentary performance to understand the scepticism of their antagonists and their insistent calls for a Bill of Rights to fill the institutional vacuum.

I bring this dissertation to a close. In my time, connected with universities, I have heard or given more than 70 graduation speeches. Seventy times the graduation speaker has solemnly risen to deliver his earnest message. It is sobering thought as I stand before you tonight that I cannot recall to mind a single one of those messages - save, of course, for the first one I gave in this place when I came here in the Autumn of 1976. It is a great honour that the University has done to me. To the University of Newcastle, on my own behalf and on behalf of my fellow graduates, I say in the words of the prayer of Grace: "For what we have received and what we are about to receive, may the Lord make us truly grateful".