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DISTRICT COURT JUDGES OF NEW SOUTH WALES ANNUAL CONFERENCE

16 April 1993

JUDICIARY, MEDIA AND GOVERNMENT*

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The Hon Justice Michael Kirby AC CMG**

THE PASSING JUDICIAL PARADE

We, the judges of today, are merely the latest actors in the passing parade of the judiciary. We have our short time on the centre stage. Then the scenery moves and we are stars no longer. Perhaps for a time our works are spoken of with fond recollection by members of the legal profession and by litigants whom we have treated justly and according to law. Perhaps a judgment is read or a witticism remembered. But we should not deceive ourselves as to our legal immortality. We are part of the permanent government of our country. Ours are usually the cameo rôles whilst the major actors of politics fight out the great issues of the day downstage. Their brilliant lines are spoken and then they are no more, terminated in the modern equivalent of the last scene of *Hamlet* - a general election.

Think back on the judges of our youth. In the case of the District Court of New South Wales, it is easy for us who practised before them to recollect their names. It is the nature of the work of the District Court that the notorious trials - the stuff of afternoon newspapers - were generally fought before the judges of the District Court. When I was a boy, there were fewer of them. Their

names were household words, faithfully recorded in *The Sun* or *The Mirror* and repeated in the radio news.

In the early 1950s when Chief Judge Staunton was admitted to the Bar, there were but 20 judges in the New South Wales District Court. The Chairman was Judge A S Lloyd. There were 5 judges designated for the Metropolitan District: Judges Stacey, Holt, Holden, Curlewis and Redshaw. The names of the remaining judges conjure up images in the mind of a practitioner of my age. Large figures of the law when we, impressionable youths, took our first steps into their courtrooms. Judges Berne, O'Sullivan, McKillop, Brennan, Stephen, Amsberg, Fitzpatrick, Clegg, Harvey Prior, Rooney, Bruxner, Furnell, Levine and Hidden. All notable men and characters. Fresh in recollection for their idiosyncrasies. Most of them honoured in memory for their faithful, diligent service.

By the time I had been admitted as a solicitor in 1962, there were 23 Judges of the District Court. The Chairman was by then Judge Des Monahan. Only three judges were designated for the Metropolitan District (Judges Holt, Holden and Curlewis). The new judges appointed are also names familiar to us all. Judges Cameron-Smith, Cross, Donovan, William Perrignon, Lewis, Clapin and Thomas.

By 1967, when I was admitted to the Bar of this State, there were twenty-five judges. Sir Adrian Curlewis was shortly to receive his Knighthood. The new judges were Pilcher, Phillip Head, Alf Goran, Macintosh, John Newton - that fine gentleman - and David Hicks. Phillip Head, I had briefed many times and Alf Goran too, so recently passed away. The mention of their names brings back the images of them as people and as judges. In most cases these are happy, honourable recollections.

And now the Court numbers fifty-seven judges and the indomitable Chief Judge, seemingly indestructible, still a towering

figure of the law brimming with new ideas. Only the Chief Judge and Judge Harry Bell were appointed when I received my first commission to judicial office in December 1974. So we have been in the trenches for a long time together. Many of you I briefed as a young solicitor. I remember many a battle in the Compensation Commission with John Sinclair, John McGuire, Ron Solomon, David Freeman, Barry Mahoney and Don McLachlan. With some of you I was at Law School: Roger Court, Joe Phelan, Rod Cragie. Several of you, when at the Bar, have appeared before me in the Court of Appeal. Such is the passing of time that everyone appointed after Judge Geoffrey Graham (now edging to the top third of the team) was appointed after I took up my position as President. And if you did not appear at the Bar Table, chances are that your judgments have come under review. This is not, by any means, a reason for surprise. Any judge doing his or her duty must expect appeals and sometimes judicial review. The courageous judge who occasionally pushes forward the boundaries of the law in the quest for justice is more likely to come under such scrutiny than the timid judge who is always looking behind and safeguarding the text against correction.

You share with the Court of Appeal the fascinating exposure to the law in all of its magnificent variety. Not for us the comfortable, familiar activities of a specialised court or tribunal with a statutory charter or a confined assignment in which we can constantly polish our expertise. The burdens of variety are great but its marvellous stimulus is its reward.

I pay tribute to the high standards which have been set by this Court in the past and which you have the privilege to maintain. There is no more worthy ambition than that, thirty years from now in a new millennium, a callow youth who is coming to the law for the first time this year will rise on a similar occasion, heavy with the

cares of office, to recall your names and to pay tribute to your memory.

A DISGRACEFUL BLOW TO JUDICIAL INDEPENDENCE

The year past has not been a particularly good one for the Australian judiciary. For the first time in the history of our country since Federation, ten undoubted judges of your rank have effectively been dismissed from judicial office. I refer to the purported termination of the appointments of the judges of the Compensation Tribunal of Victoria.[1] By an expedient that is becoming all too familiar in Australia their tribunal was abolished. Treated like any other public servant in the same position, they were given letters of thanks for their "service to the State" and a "package" to compensate them for their inconvenience. They were then sent on their way. The promise which Parliament had given them, upon their appointment, was the same as that which you and I enjoy. They would hold office until their statutory retirement, save for removal in the constitutional manner hammered out in the aftermath to the Glorious Revolution in England. They would not be removed except upon address to the Governor passed by both Houses of Parliament in the same Session praying for their removal on the grounds of proved misconduct or incapacity. This promise of Parliament was purportedly put at nought by the Victorian Parliament using the simple expedient of abolishing the judicial body on which they served. I say "purported" because the case is now before the Supreme Court of Victoria. The "dismissed" judges are suing the Government of Victoria. Their case has attracted international attention. It produced a letter of protest to the Victorian Premier and Attorney-General by the distinguished Centre for the Independence of Judges and Lawyers in Geneva.

I say the technique used in the case of the Victorian judges is

familiar. It was the course adopted by the Federal Government for the effective removal from office of Justice Staples upon the abolition of the Australian Conciliation and Arbitration Commission and the establishment of the Industrial Relations Commission.[2] At the time this happened I protested. There were few who supported my protests. But a good proportion of those who did were judges of the District Court of New South Wales. In the manner of the law, unhappy precedent tends to build on precedent.

When the Local Court of New South Wales was reconstituted from the Courts of Petty Sessions of this State a hundred Magistrates were transferred to the new Court. Five were not. This led to two cases that came before me judicially.[3] The Court of Appeal held that the Magistrates omitted had no right to be appointed to the new Court. But they did have a legitimate expectation, grounded in the strong convention derived from the independence of judicial office, to have their applications for appointment to the new court considered in a just way, freed from procedural unfairness. This determination was over-ruled in one case by the High Court of Australia[4] in a majority decision. It is one of the few cases where reversal hurt. The issue at stake was greater than the particular case. Needless to say the Government of Victoria has called the High Court's decision in its aid to justify its right to terminate the Victorian judges. It is not my purpose to consider the legal rights of the judges. I simply call attention to a disgraceful chapter in the history of political interference in the independence of the judiciary of this country. It happened in the year past.

Again, I protested this action. This time there was greater alarm for these were undeniably judges exercising judicial functions. Again, judges of the District Court joined in the letters of protest. Where judicial independence is concerned it behoves the

judiciary to speak out for they are not defending themselves so much as the judicial institution and the rule of law.

In this State, it is to the credit of the Parliament that it has enacted an amendment to the *Constitution Act* which is to entrench the protection of judicial officers in this State from further erosion of their independence in this way.[5] The entrenchment is by a "manner and form" amendment to the *Constitution Act*. The measure specifically addresses the technique of the removal of judges by the abolition of their court or tribunal. It accords to the international principle for the independence of the judiciary. Where courts or tribunals are abolished, their judges must be appointed to a court or tribunal of equivalent rank or higher. This constitutional amendment deserves a fair passage. It does no more than to provide State judicial officers with the protection already enjoyed by Federal judges under the *Australian Constitution*[6]

It is a tragedy for the judiciary of Australia that the need for such a constitutional amendment has been demonstrated in Victoria so recently and in such a shocking way. The other tragedy is that the protests of judges, and some lawyers, did not excite popular support. In the media - ever vigilant for its own perceived privileges - the protests of the judges were all too often presented as self-interested or unworthy of serious attention. Where truly fundamental constitutional issues are at stake, we should not look with any confidence for the support from the print media of Australia. The electronic media, with a few honourable exceptions, is so bent on entertainment that it resists more than a fleeting attention to fundamentals.

PROCESSING PROPOSALS FOR LAW REFORM

Still more recent events have illustrated the lessons which the

judiciary of Australia must draw from the way in which the media deal with serious issues that come before the judges in their courtrooms. Every judge of the country will have his or her own story. I will tell you mine.

One of the most admirable innovations of the present Government of New South Wales has been the invitation to the judiciary to identify problems in the law which seem to call out for legislative attention. This procedure of judicial identification of matters for law reform is one that caught my attention in the decade in which I served as Chairman of the Australian Law Reform Commission. In default of a parliamentary or governmental system, the Commission began to collect and publish in its *Annual Reports* judicial and other proposals for reform of Federal legislation.[7] But in New South Wales, Attorney-General Dowd introduced a better system. It was modelled upon the procedures adopted in civil law countries where courts regularly report to the Government and Parliament on needs for law reform identified by the opinion of the judges, in cases coming before them. Within the Supreme Court any case with a judicial proposal for law reform is transmitted by the judge making it to the Chief Justice and by him to the Attorney-General. So it is, or should be, in the District Court and in every other court and tribunal of the State. In this way, we mobilize intelligent and trained judicial officers to identify judicial proposals which can then be considered by the Government and Parliament for reform of the law. Happily, many of the proposals have been promptly acted upon.

For example, it was anomalous that large awards of the Compensation Court could not be appealed for factual error to the Court of Appeal whereas quite trivial factual questions in small judgments could be raised in District Court appeals. Taking up

proposals for reform of the law[8] the Government amended s 32 of the *Compensation Court Act* 1984. Such appeals now lie on the facts. I cannot say that all of the Judges of Appeal are pleased with the extra burden. But a serious anomaly, and the injustice that went with it, has been removed.

Similarly, and more recently, the Judges of Appeal communicated their deep and unanimous concern about the increase in the filing fee for lodging appeals in the Court of Appeal. That fee now stands at $1,750. For large corporations and insurers this is a business cost. But to ordinary citizens the filing fee is often a significant price for opening the court doors. Following judicial representations, the Government is now proposing to alter the fees to allow a special fee for a "holding appeal". This way, possible appellants will at least be allowed an extended period within which to receive advice on the prospects of appeal. Delays in the provision of judgments and transcripts often oblige an extended time if advice on appeal is to be available to the parties.

I pay tribute to the Government, and to Parliament, for attending to judicial proposals for reform. Judges do not have a right to command action by the legislature or the Executive Government. But serious proposals for reform and suggestions of injustice in the law may, at least sometimes, be deserving of attention.

In March 1993 in a compensation appeal, one such case came before the Court of Appeal. The case concerned a worker who was killed on his journey home from work in the early hours of the morning. He was riding a motor cycle which crashed, apparently at high speed, into a street sweeper truck. The impact propelled the worker a great distance into a side street. He was killed. His widow and child recovered compensation in the Compensation Court.

The employer (ie the insurer) appealed, contending that compensation was unavailable because, in the terms of s 10(1A) of the *Workers Compensation Act* 1987 the personal injury was "caused, partly or wholly, by the fault of the worker".

Within the Court, a question arose as to the meaning of this statutory expression. Could it really be that, in an amendment added in 1989, Parliament had returned the law, in the particular case of journey claims for workers' compensation benefits, to the old common law rule by which the slightest contributory negligence completely disqualified the claimant from recovery?

In accordance with the instruction of Parliament[9] and the modern practice (including of the common law)[10] the Court of Appeal was taken by counsel into the Ministerial Second Reading Speech of the Parliamentary Debates. As it happened, the Minister who introduced the amendment to the *Workers Compensation Act* was Mr John Fahey, then Minister for Industrial Relations and Employment. He made it plain that he did intend that even minor fault on the part of the worker would disqualify him and, in the case of death, his dependants. He acknowledged the difficulty of drawing a line of 1% fault or "50 or 75% of fault". The provision was justified upon the basis that employers have "no influence over a worker's safety on those journeys".

As it happens, two of my colleagues (Mahoney and Handley JJA) found sufficient evidence to justify the primary judge's decision in favour of the widow. I could not bring myself to that conclusion. If even the slightest fault would warrant disqualification of the worker (or his widow), I was not convinced that fault to the degree explained by the Minister, had not been shown. For reasons of procedural irregularity, it was my proposal that the matter should be returned to the Compensation Court for rehearing.[11]

I ask you to note that I was not in favour of the widow's claim. In the course of my reasons I considered it appropriate, and in line with the procedures for law reform, that I should call the apparent injustice of such a case to the notice of Parliament. Perhaps illustrated in such a concrete way, the need for reform would become plainer than it was when the amending Bill was proceeding through Parliament in 1989. I opened and closed my reasons by calling attention to the apparent need for reform:

> *"The avoidance of a return to the artificial distinctions which existed prior to the abolition of the common law of contributory negligence favours the introduction of legislative reform which would modify the potential of s 10(1A) to cause serious injustice to vulnerable people."*[12]

The judgment was delivered on 19 March 1993.

LESSONS FROM THE MEDIA

Imagine my astonishment a week later when I opened the *Sydney Morning Herald* of 26 March 1993 to read a major headline on the third page:

> *"APPEAL JUDGE ATTACKS FAHEY OVER 'UNJUST' LAW."*

Beneath the headline were touching photographs of the deceased worker, Mr Ruszkowski with his daughter and a large, tender photograph of his widow. She now contemplates the prospect of a High Court appeal. By any account, the case is a tragic one. It took me a time to realise that this was a report of a decision delivered by myself seven days earlier. And then I read the extraordinary account of my judgment:

> *"The President of the Court of Appeal, Justice Michael Kirby, has attacked the Premier, Mr Fahey, for being the architect of what he described as most unjust legislation. In a damming judgment on a workers' compensation case, he said changes Mr Fahey made to the*

Workers Compensation Act when he was Minister for Industrial Relations in 1989 'seemed so contrary to ordinary notions of justice that the mind of all but the most hardened observer would be offended by its operation'."

What should a Judge do in such a case of distorted reporting? The convention has been to do nothing. That is what I, at first, resolved to do. But one of my colleagues suggested that I should ask the newly appointed Media Liaison Officer to contact her equivalent in the Premier's Office to request that the Premier should be assured that the judgment was not, as claimed, an attack on him personally but criticism of the legislation. I directed that this to be done. A copy of the Court's reasons be supplied to the Premier's office. So it was.

That night, on the radio and television, the Premier, Mr Fahey (apparently without reading the Court's judgment) launched into a spirited attack on me, obviously provoked by the *Herald* headline. The next day it was reported in the *Sydney Morning Herald*:

"FAHEY HITS BACK AT KIRBY'S COMPO ATTACK."[13]

Amongst the choicer parts of the Premier's remarks were those reported in a *Canberra Times* item under the heading:

"FAHEY LASHES OUT AT KIRBY COMMENT.

Justice Michael Kirby should run for Parliament if he wanted to launch political attacks over workers' compensation legislation, the NSW Premier, John Fahey, said yesterday. Mr Fahey lashed out at the Court of Appeal president after the State Government was criticised from the Bench for removing the so-called 'journey provision' from workers' compensation laws."

At least this item made it clear (as some of the earlier ones did not) that my remarks had been made in Court in a judgment. But, as usual, there were mistakes in the report. No one had suggested that

the "journey provision" had been "removed". But the Premier's remarks were plain:

> *"I just regret that the judge has used his position from the Bench to make a social and political comment."*

After this initial response the news of the Supreme Court's Media Liaison Officer's approach to his staff reached Mr Fahey. I then began to hear that he was claiming on radio that I had "apologised" to him. This is the transcript of an interview on Radio 2UE at 5 p.m. on 26 March:

> *"JOHN STANLEY: You weren't happy about [Justice Kirby] having said that. You said he launched a political attack on you. But I understand that there has been a development in that late today.*
>
> *PREMIER JOHN FAHEY: I have received a message of apology from his Honour on that issue and I accept that. He has made it clear that there was no attack on me personally and that it was reported that way by a mischievous reporter in The Herald. I certainly accept that and I also recognise that a judge has a right to bring forward matters that may be of concern to him. There is a way of doing that and the Attorney will certainly examine his judgment on that issue and give me advice on whether there is an appropriate measure that should be taken."*

Mr Stanley said (and the Premier agreed) that it would be interesting to see how the "*Herald* reports this tomorrow". Well, it reported the item as one could expect by now:

> *"FAHEY HITS BACK AT KIRBY'S COMPO ATTACK".*

Meanwhile, there was an attempt to stimulate the Court to action. Far from accepting the rôle of communicating the facts to the Premier, officers, apparently of his staff, caused a fax to be sent to the Supreme Court calling on me or the Media Liaison Officer to contact a reporter at a television station, presumably to repeat my so-called "apology". There were only two problems with this fax. First, the Christian name of the reporter from whom it purportedly

came was incorrect. Secondly, the fax number at the foot of the message from the reporter (who would presumably know his own name) was that of a fax number in the Premier's office.

I remind you that I was appointed in 1974. In my time in the Australian Law Reform Commission I had a lot to do with the Australian media. I confess to having been hardened by the years in my dealings with the media. I do not lose my sense of proportion in dealing with the incident I have just described. The *dénouement* of this tale arrived on my desk soon after 31 March 1993. On that day, the editor of the *Sydney Morning Herald*, Mr Milton Cockburn, wrote to me in these terms:

> *"I have been advised by [a reporter] that you expressed concern over our story last Friday concerning the decision on the journey provision in the Workers Compensation Act.*
>
> *I agree that the heading on the article was inappropriate and that the introductory paragraph (which was not that filed by [the reporter]) could have been more delicately phrased. I apologise for any embarrassment this may have caused you."*

This is clearly an honourable step for the editor to have taken. It is one which I appreciate. But it might have been more pertinent for the apology to have been extended also to Mr Fahey and shared with the paper's readers.

The case illustrates five points which I believe are worth calling to notice:

1. The first is the debased standard to which media reporting so often descends in Australia today. Generally speaking, the media are not now really interested in communicating information in a neutral and informative way. Picking up from the electronic media (and especially television) our print media, in so few hands, have now descended to the levels of the

broadsheet. Issues are now personalised, politicized and trivialized. Just as my observations on defects in compensation law were presented in a banner headline on succeeding days as an "attack" on Mr Fahey personally;

2. The media are often mischievous. They have their own agenda. That agenda is often directed at the peculiar and very Australian sport of "attacking" public people. Thus I was taken to "attack" Mr Fahey. He was required to "hit back" at my attack. We were played off against each other. Sadly, Mr Fahey responded to this mischievous sport. From a lawyer, I would respectfully have expected something better;

3. Note also that a different person is responsible for writing the headline and writing the story. The story in its content may be informative enough. But the headline and the opening paragraph must apparently be more catchy. That, it seems, is what is now thought of as "good journalism" in this country;

4. Note also the way in which the private office of Ministers now assumes a heightened importance. These anonymous and unelected acolytes of Ministers seek to manipulate the media, the Minister himself and other citizens coming into contact with their high tension circle. Doubtless they act out of what they perceive to be the best interests of the person in their charge and that person's political survival. But the result is sometimes a dealing that is less than wholly honest. The judiciary especially is ill-equipped to respond to the passing frenzies in which such unfortunate persons often live out their lives; and

5. Judges have a professional disability when it comes to dealing with events such as I have described. If they seek to correct plain factual error, they will be presented as "apologising".

I did not apologise to the Premier. I had nothing to apologise for. Or attempts by judges to correct the media record will more than often be manipulated and presented as suggested errors or further folly on their part. We have seen some notable recent illustrations in Australia. They teach, I think, the wisdom of the convention that judgments and court pronouncements must (subject to appeals or review) stand or fall as they were spoken or written. One day, with a truly informative media, it may be possible for judges in Australia to explain by the media what they have done. But the nature of the Australian media today makes that an unlikely prospect without real changes in the manner and form of reporting.

TINKERING NONCHALANTLY WITH FUNDAMENTALS

These are rather hard times to be a judge. I do not refer to the salaries and conditions but to things more deep and lasting. The era of attacks on basic institutions is with us. We who are members of the continuing government must, by our lives and work, illustrate and demonstrate the value of the high tradition that we seek to maintain.

I recently read some of the comments on judges of Mr George Masterman QC in an address which he delivered recently in New Zealand.[14] With some of his remarks I fully agreed. Others involved a repetition of gossip and rumours that are best kept to the hot-house atmosphere of Cousel's Chambers. Others represented nothing more than personal opinions of quoted personages. They seemed scarcely worthy of high credence. But in this potpourri of opinions and comments, I was surprised to read the author's conclusion that:

> *"While it can be accepted that a particular appointee [to the bench] may be qualified and fit to be appointed, for*

example, a judge of the Federal Court, there probably exists at least 50 other possible appointees who also would be so qualified and fit."[15]

And in a footnote:

"Indeed in the case of an appointment to the NSW District Court, it could well be said that there could be at least 100 or more possible appointees qualified and fit to be appointed."

The serious question about the procedures for the appointment of judges - upon which there are legitimate viewpoints to be expressed - is dressed up in an apparent trivialization of the issue and a thinly veiled denigration of current office holders with the suggestion that they are really two-a-penny. There are hundreds of people who could do just as well! Personally, I doubt that this is so. The sad reality of this moment in the 800 year continuous tradition of our judiciary is that fewer, and not more, candidates of excellence are willing to accept the life of lonely, burdensome responsibility on the Australian Bench.

Why is this so? Recently it fell to a Melbourne Silk to explain what is happening. Mr D Meagher QC, in an address in London in July 1992, now published[16] put it well:

"The compensation once offered was a high level of prestige and satisfaction and the discharge of an important public service. I can recall times when our superior courts were acknowledged as amongst the finest in the world, and an offer of appointment was then seen as a fitting end in a career at the Bar. Once appointed, judges were treated with a high level of respect, and portrayed to the public as persons of great dignity. There was recognition of their worth by the conditions of their employment, by the grant of civil honours, and by public expressions of gratitude and support by the Government. Controversial decisions were supported by the Attorney-General, and any deficiency in the law was seen as a problem to be rectified by the legislature, and not by criticism of the Bench.

Regrettably, those times have passed. With the possible exception of our High Court, our judges are no longer treated with this degree of respect. They are the

constant butt of criticism, being accused of failing to discharge their duties with expedition or to public satisfaction. They are no longer honoured in their courts and treated with indifference. Indeed, throughout the States of Australia, there is a legislative and executive strategy of removing their jurisdiction and placing it in tribunal to which, so it is said, more appropriate appointments may be made. ... [T]he government has treated the judiciary more as a political competitor than a separate arm of government whose proper function is vital to the health of a democracy."

If we stand back from our profession in its present state, it does seem likely to me that changes will certainly come about in the appointment of judges. I predicted this, and much more, a decade ago in my ABC Boyer Lectures. Modesty prevents me from saying how many of my predictions of those far away broadcasts have now come true.

Perhaps picking up Mr Masterman's theme, the Commissioner of the Independent Commission Against Corruption (Mr Ian Temby QC), another Silk, took the occasion of his final report on the Metherell affair to raise the question of the manner in which judges are appointed. Naturally enough, this comment in a detailed report, was portrayed in the *Financial Review*[18] as:

"ICAC SLAMS NSW PROCEDURES ON JUDICIAL APPOINTMENTS."

The possibility of the introduction of new procedures even for the appointment of Justices of the High Court of Australia has come under academic attention recently, doubtless stimulated by the extraordinary events which occurred in the confirmation of Judge Thomas to the Supreme Court of the United States. In a recent text, *Australian Constitutional Perspectives,*[19] Mr James Thomson has provided a whole chapter on judicial appointments to the High Court.[20] In his Foreword to the text, Sir Anthony Mason commented that it seemed unlikely to him that this topic would loom larger on our constitutional landscape in the years to come.[21] But he went on to remark that:

"There is a dynamic which brings most constitutional problems onto the public stage sooner or later."

Dynamic indeed. Mr Thomson's conclusion cautions against "doctrinaire principles or rampant politics" in judicial appointments.[22] I would endorse those conclusions. Do we really want to go through Thomas-like hearings? Many of our institutions - indeed our constitutional monarchy itself - have evolved over centuries. We must be extremely cautious in tinkering with them. Sometimes, like constitutional monarchy, the jury and the judiciary, they work well enough. They defy doctrinaire analysis. We must always consider soberly their proposed replacements before we cast them aside nonchalantly. We must be sure that we are improving our polity and not destroying its fundamentals.

There would be some who would have all judges appointed to their offices like any other public servant. Advertisements. Appointments Committees of bureaucrats. Jobs only on application. Candidates scrutinized for conformity to the current philosophical and social orthodoxy. But the strength of our judiciary has been, in the past, the fierce independence of its members. This has been nurtured in their training in the independent legal profession where they grow up without a devotion either to political allegiance or to safe, pedestrian ways of thinking. In a sense, it has been this independence of background that has underwritten the independence *of thought* of our judiciary. That mode of thought has been essential to the assurance of our inherited and developed liberties. Whilst I support some changes - including for a greater participation by women and people from a variety of ethnic backgrounds on our Bench - I would caution most earnestly against reducing our judges to simply another group of highly paid public servants. They are not and should not be so, least of all in their own eyes.

BELOVED OF THE PEOPLE

So, as we gather to mark the passing of another year, we can reflect upon achievements. We can conjure in our minds the prospects of new buildings, facilities and procedures. We should ever be conscious of the needs for improvement. We should be open-minded to ideas for true reform. We may take comfort from the long tradition in which we serve. We can take strength from the memory of our fine predecessors who, faithfully and quietly, performed their vital work for our society.

We are the latest companions on the judicial journey. From where I sit and view the judiciary of this State, I can say to the Judges of the District Court: If you perform your duties according to the oaths which each of us took you will merit the support of Parliament - though you will not always receive what you merit. You will deserve the understanding interpretation of what you do by the media - though you will not always receive what you deserve. You will warrant the support of the Executive Government - though you will not always receive what you warrant. And you will enjoy the love and respect of the people.

FOOTNOTES

* Text of an address to the Dinner of the Annual Conference of the District Court of New South Wales, Sydney, 16 April 1993.

** President of the New South Wales Court of Appeal.

1. See (1993) 67 ALJ 83, 243.

2. See M D Kirby, "The Removal of Justice Staples and the Silent Forces of Industrial Relations" (1989) 31 *Journal of Industrial Relations*, 334; J Kitay and P McCarthy, "Justice

Staples and the Politics of Australian Industrial Arbitration", (1989) 31 *Journal of Industrial Relations*, 310; M D Kirby, "Judicial Independence in Australia Reaches a Moment of Truth", (1990) 13 *UNSWLJ* 187, 203.

3. *Macrae & Ors v Attorney-General for New South Wales* (1987) 9 NSWLR 268 (CA) and *Quin v Attorney-General for the State of New South Wales* (1988) 16 ALD 550; 28 IR 244 (NSWCA).
4. *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1.
5. See *Constitution Act* 1902 (NSW), Part 9, esp s 56(1) introduced by *Constitution (Amendment) Act* 1992 (NSW), sch 1 (4).
6. Section 72.
7. See eg Australian Law Reform Commission, *Annual Report 1981* (ALRC 19) 45 ff (Appendix A) and similar sections in subsequent *Annual Reports*.
8. This followed the stringent rule laid down in *Azzopardi v Tasman UEB Industries Limited* (1985) 4 NSWLR 139 (CA).
9. *Interpretation Act* 1987, ss 33, 34. Note eg *Lisafa Holdings Pty Limited v Commission of Police* (1988) 15 NSWLR 1 (CA), 17.
10. See eg *Pepper v Hart* [1992] 3 WLR 1032 (HL).
11. See *AArdvark Security Services Pty Limited v Ruszkowski*, Court of Appeal (NSW), unreported, 19 March 1993.
12. *Ibid*, p 15.
13. *Sydney Morning Herald*, 27 March 1993, p 5.
14. G Masterman, "Political Influences in the Legal Process - Who's Influencing Whom?", as yet unpublished paper for the New Zealand Law Conference, in *Papers* of the Conference, 311.
15. *Ibid*, 322. See also fn 34.

16. "Appointment of Judges" (1993), 2 *Journal of Judicial Administration* 190.

17. See M D Kirby, *The Judges*, (Boyer Lectures 1983) ch 6, pp 70ff.

18. 1 April 1993.

19. H P Lee and G Winterton, "Australian Constitutional Perspectives", Law Book Co, Sydney, 1992.

20. *Ibid*, chapter 8.

21. See p vii.

22. *Id*, 273.