

THE SUPREME COURT OF NEW SOUTH WALES

FRIDAY 2 FEBRUARY 1996

FAREWELL SPEECH

The Hon Justice M D Kirby AC CMG

President of the Court of Appeal

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Thank you Chief Justice, Mr Attorney and Mr Lyall for what you have said. And also for what you have left unsaid. So far as I know, no-one has ever been charged with perjury for exaggerations and falsehoods uttered on these occasions. Justice Glass once told me that flattery of judges is never to be stopped, whatever the press of the court's business.

Yet I imagine that we would all have been surprised if the speeches had descended to the style of a rodomontade - we would have been surprised, that is, if we had known what a rodomontade was!

As you have heard, I came to this Bench in 1984. I have served here for 11½ years. Only ten of the Judges of the Supreme Court serving on my appointment remain. Remarkably, the majority of this Bench has appeared before me as counsel in the Court of Appeal. Of this Court as it existed when I was first welcomed to judicial office in December 1974, only Justice Mahoney remains. Legal practitioners now appear before me who were squawking in swaddling clothes when I first ascended the Bench. The advocacy of some has improved in the interim; though not all. Judges and lawyers who were famous names then - full of fight and "bearded like the pard" - have retired and many have passed on.

These festivals are part of our corporate life by which we note and renew our legal cycle. They remind us of our brief opportunity, by our labours, to leave our profession and our community a better place.

It is natural that, at such a time of transition in my life, I should look back at the failures and successes of my service here and give a brief account of my stewardship. Failures and shortcomings I will leave to others to collect. For that purpose the Bar Common Room at lunch today will be still as good a place to start as any. Judicial farewells tend to be well attended, presumably to make absolutely sure that the departing judge really goes.

So what do I count as important in my time in the Supreme Court and the Court of Appeal?

* First [and this is the work of my colleagues] our Court of Appeal is clearly recognised, under the High Court of Australia, as the outstanding appellate court of this country. Since my appointment, Australia has seen the establishment of permanent appellate courts in Queensland and Victoria. In the Northern Territory too there is a Court of Appeal to which Justice Priestley makes a notable and regular contribution. I pay tribute to my colleagues and to our predecessors (some of them here) who devoted themselves to the successful establishment of the Court of Appeal of this State. I thank the many Judges of the Supreme Court who have acted as additional Judges of Appeal. I have tried to contribute to the Court's institutional success and example;

* Secondly, I sought to strengthen collegiality in the Court of Appeal and within the Supreme Court. My arrival involved a testing transition for me. But I had remarkable and patient teachers. Justice Hope with his noble spirit. Justice Glass with his didactic,

daily instruction for me and Justice McHugh. Justice Samuels with his elegant command of our language, now to be deployed again in the service of the State, alas part-time. Justice Mahoney, a great legal technician and guide. I can report that I leave the Court with a strong sense of institutional unity and collegial friendship. It was not always so;

* Thirdly, I was determined to improve relations with the legal profession. On my arrival, the Court of Appeal was sometimes known for matching the sharpness of its mind with the acidity of its tongue. Grown men and women of the legal profession were known to tremble like leaves in autumn in its presence, some to faint and even cry. A court gets the most out of advocates and parties who are treated with politeness. Our Court daily demonstrates that efficiency and rigour are not incompatible with courtesy;

* Fourthly, I wished to bring to the Court the lessons I had learned in the Law Reform Commission. Of the need for the common law and equity to adapt and develop to rapidly changing times. Of the requirement to conceptualise legal issues and to see the single case in the context of the history and theory of the law. Great is my debt to my period in institutional law reform. Never again would "academic" be used in the Court of Appeal as a word of derision. On the contrary, the search for legal principle and legal policy [which, with legal authority make up the trinity of the sources of our law] would often be illuminated by academic texts, law journals and law reviews. No longer would the Court impose the somewhat inconvenient requirement that the authors of such works should die before they could be cited;

* Fifthly, I was insistent that the Court should look beyond the traditional English sources of judge-made law. In an early case I

tried this out on Mr R P Meagher QC, telling him that I had seen relevant authority in a recent decision of the Supreme Court of Iowa. His immortal response was: "Your Honour is such a tease". But nothing is stable in this uncertain world. He has been known of late to cite international human rights norms in support of his opinions. I am now patiently waiting for him to use feminist legal theory to overrule Lord Eldon;

- * Sixthly, the reference to such international norms by me was at first thought heretical. Justice Powell (and doubtless others) still think so. But I comfort myself in the memory of my occasional dissenting opinions during my service in this Court. Now, elsewhere, I may have a chance to convert heterodoxy into new legal principle. This, after all, is the way our legal system operates - by an appeal to ultimate persuasion;
- * Seventhly, I was keen to ensure that the Judges of Appeal participated in the vital work of the Court of Criminal Appeal. When I first arrived, they did not. This divide has now been completely ended by Chief Justice Gleeson. The criminal law is the great centrepiece of our legal system. The beneficial involvement of the Judges of the Court of Appeal has, incidentally, reinforced and strengthened the relationships between all Judges of the Supreme Court which I have constantly sought to enhance. We are all part of the one court. I have also tried to improve contacts with other State and Federal Courts;
- * Eighthly, I set out to make the operations of the Court of Appeal more transparent. For the first time, an *Annual Review* was published. It is now included in one published by the Supreme Court itself. The inner workings of the Court have been candidly described

to the profession. A monthly summary of all decisions is produced by the Court and widely distributed;

* Ninthly, I tried, however imperfectly, to engage in selected public debate about the work and problems of the Court, of the law and of the administration of justice. My long service in the Law Reform Commission convinced me that this could be done without diminishing public regard for the judges. It is healthy dialogue. The judicial institution will be strengthened by public knowledge of its concerns;

* Finally, with my colleagues, I have lately been engaged in a concerted effort to improve the throughput of the Court of Appeal as it faces ever-growing lists with unchanging resources. Justice Clarke has taken charge of the list and is proposing radical reforms of the Court's procedures which I hope will have the profession's support. Justice Handley monitors every new case and manages many. Justice Sheller determines expedition applications. Justice Cole has brought from the Commercial Division tremendous verve and imagination, as well as computer skills, in the organisation of the Court's business. My immediate colleagues are a wonderful team. The State, and the wider principle of the rule of law in our country, are served by them better than is known.

What has been done by me would not have been possible without the faithful support of my personal staff and of the Court staff. I single out for mention my long-time Executive Assistant Janet Saleh, my last Associates in this Court, Stephanie Smee, Simon Walker, Nicholas James and Peggy Dwyer - the Registry, library, administrative, printing, court reporting, media liaison and other staff of the Supreme Court and Sheriff's officers.

My daily work with them will now come to a close. But I will never forget their loyalty and devoted service.

My family and loved ones sustain me in all that I do. But some debts are too intense, enduring and private for words on a public occasion such as this.

And so, literally, I now lay down this mantle. Never again will I be President. Never again will I sit as a Judge under the Royal Coat of Arms, which have reminded me that I shared the residual prerogative of the Sovereign to ensure, if I could, that justice is done in our courts for all people. Never again will I wear the crimson and fur, which remind me of the lineage of the judges of our tradition, stretching back for nearly eight hundred years - an institution far greater than any of us. Never again will I sit as a Judge in this beautiful courtroom watching prisoner and new practitioner alike as they come nervously, expectantly, to their important day before before independent court. Never again will I put on the horsehair wig and the traditional robes which remind me to strive to be larger than my mortal self and which stamp on me the anonymity of institutional service.

*"When, to the sessions of sweet silent thoughts
I summon up remembrance of things past..."*

I shall think of this occasion and of all you present and of the privilege I have enjoyed in your company and with your assistance. I go to my new functions with humility, optimism and fresh objectives. But I shall never forget the precious decade that I have been privileged to serve in this Court.

So let us go our ways in our busy lives in the law. The lingering moment passes. It hangs in the air and I wish it could continue. But it will not. Yet, the institutions and our personal friendships endure. Each one of

us must strive to make a contribution. Judge mine in this Court with
charity. Look to the future.