NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

RECEPTION 3 MAY 1996

CCL - EARLY DAYS AND DAYS AHEAD

The Honourable Justice Michael Kirby AC CMG

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EARLY DAYS REMEMBERED

I am honoured by this reception which marks my appointment as a Justice of the High Court of Australia.

The gathering takes my mind back to my early, impressionable days as a young lawyer. I had the privilege to work with many fine leaders of the legal profession in the New South Wales Council for Civil Liberties ("CCL"). When the CCL was established, on the turn of the years 1964-5, it gathered together a group of fine citizens, by no means all of them lawyers, dedicated to the ideals of the rule of law, protection of human rights and respect for minorities. I was roped in. I think

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* Justice of the High Court of Australia. President of the International Commission of Jurists. Member of the UNESCO International Bioethics Committee.

that this happened because, as a superannuated student politician of Sydney University, I had taken on the task of giving free legal representation of students who came into trouble with the law. My reputation as a *pro bono* "easy touch" was naturally something that soon caught the vigilant attention of the founders of the CCL, ever avid for free legal assistance.

The minutes of those first meetings tell of the fine citizens who took the initiative to establish the CCL. They included Dr John Hirshman, Mr (later Professor) Ken Buckley; Miss Berenice Grainger who later married Ken Buckley. They became a most formidable duo of the CCL. Dr Dick Klugman who served a time in Federal Parliament. The late Maurice Isaacs. Robert St John, who later took Silk and became a Judge of the Federal Court of Australia. Jack Sweeney QC, later also a Judge of that Court. Mr Neville Wran, later a Silk and Premier of New South Wales. Marcell Pile QC, a true gentleman who became a District Court Judge. Mr Maurice Byers QC, later Sir Maurice and Solicitor-General of Australia. Mr Trevor Martin, that fine spirit of the law who was to become a District Court Judge and a philosophical mentor for the CCL. Mr Colin Marks, solicitor. Jim Staples who was to be a Deputy President of the Arbitration Commission and who was let down by the legal profession when his appointment was effectively terminated and judicial independence was challenged. Gordon Johnson who did so many cases for the cause of justice. Mary McNish, who is still playing such a vital role in the CCL. Professor Ted Wheelwright

of Sydney University. Mr Torre Sudano, later a District Court Judge. Dr Joan Child. Jim McClelland, later a Federal Senator, Minister and Judge. Hal Wootten, whose remarkable career has spanned the Bar, the judiciary and academe. Mr Jeffrey Miles, now the Chief Justice of the Australian Capital Territory. Caroline Simpson, now a Judge of the Supreme Court of New South Wales. And myself, and later my brother David Kirby, now a Silk.

The meetings of the CCL were always lively. The problems were incessant. The challenges were great for they were orthodox and unquestioning times. The cases were too numerous. The lawyers who would act without fee were limited in number but not in dedication. It was a lively, energetic, happy group with a real commitment to the rule of law and to ensuring that our society became a better and more tolerant place. Interestingly, the CCL had a variety of political and social outlooks. When the call went out to leaders of the Bar to help in particular cases, they usually responded. This was the environment in which I learned the craft of lawyering. I learned it from fine lawyers, dedicated optimists and committed idealists. I will never forget that time. It was crucial to my professional and spiritual development.

THE CASES

I took part as a solicitor in numerous cases which marked the early days of the CCL. They included the *Flock* inquest into the death of a young man shot by the police. We summoned a coroner's jury - a rare event. Only the combined talents of Kevin Holland QC and Jim Staples saved me from the perils of misprision of felony after we had met a young accused who had fled from the police gunfire.

Then there was *Crowe v Graham* [1967] 2 NSWR 207; (1968) 121 CLR 375. That was a case of a publisher of what was deemed an indecent publication but was distinctly underwhelming by today's standards.

And then there was *Corbishley's Case*. See *ex parte Corbishley; Re Locke* (1967) 67 SR (NSW) 396; [1967] 2 NSWR 547. That case taught me many things. Mr Corbishley was charged with a minor offence. He had the misfortune to come before Mr Locke SM whose fame persists even to this day. Justice Holmes, in the Court of Appeal, said that it would need "... a Fielding or a Dickens to describe in words and a Hogarth to portray pictorially ... what happened that day". Mr Locke's court was an unusual place. But Mr Locke, convicting him in a most unjust procedure, at least gave Mr Corbishley a bond. In the endeavour to correct the magistrate's serious departures from due process, the Council for Civil Liberties authorised action. I,

Mr Corbishley's solicitor, lodged both an appeal to the Quarter Sessions (as the District Court was for this purpose then called) and a statutory prohibition to the Supreme Court. The statutory prohibition would have succeeded. Perhaps it could have succeeded. But the Court of Appeal said that, an appeal having been lodged to the District Court, the matter should proceed there to the Quarter Sessions, where doubtless Mr Corbishley would receive justice. It was Mr Corbishley's melancholy fortune to run into a District Court judge who conducted the trial scrupulously but then confirmed the conviction and actually increased the sentence. Without warning, he sentenced Mr Corbishley to three months imprisonment.

As I went out to Long Bay Gaol and looked at the baleful eyes of Mr Corbishley, I reflected on the capacity of the law, sometimes, to be blind to justice. Mr Corbishley asked how it was a possible that a man who had suffered, as he had, in a way that it would take a Fielding or a Dickens to describe in words and Hogarth to portray pictorially could actually suffer an increase in his sentence for having troubled to appeal to challenge his injustice. It was not a question I could easily answer. The case taught me that even conscientious lawyers, as I hope I was one, can make mistakes of a procedural character. The law should cure procedural slips whenever it can. It should address its attention, whenever possible, to the central issue of justice under the law. The case also taught me of the

need to establish principles which protect appellants against double-jeopardy.

I lay in wait. I waited many years. My patience was saintly. But then in *Parker v Director of Public Prosecutions & Anor* (1992) 28 NSWLR 282, the Court of Appeal had the opportunity. And I struck. The principle was established that wherever, in a District Court appeal, the judge is contemplating an increase in sentence, and particularly the imposition of a custodial sentence which was not imposed by the magistrate, a warning must be given. This is to permit the appellant to seek leave to withdraw the appeal. That principle, which reflects a convention usually followed until (and after) *Corbishley* and universally followed by the best judges of the District Court, is now a rule of law. I have observed how the same rule has now been accepted in several jurisdictions of Australia copying *Parker*. It shows that civil libertarians must have a long memory and endless patience.

I would not wish you to think that I have saved up memories of other rank injustices over my professional life which I am merely waiting the chance to cure. But I have. And I will.

THE CAUSE OF JUSTICE

In my swearing in speech as the fortieth Justice of the High Court of Australia, I naturally referred to the great judges

and spirits of the law who had gone before. I am proud indeed now to join that Court. The High Court of Australia is one of the great courts of the common law world. When it has been most severely tested, as it was in 1951 in the *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, the High Court of Australia has taken a strong stand for basic civil rights. Its decision on that occasion was the more remarkable because, at the same time, in South Africa and in the United States of America, similar challenges were presented to the highest courts. Yet they did not defend the basic right of a person to believe, and to be, what he or she wished. I have always considered that the *Communist Party Case* was one of the highest points in the history of the High Court of Australia. There have been others and there will be more to come.

But they have not all been high points. I mentioned in my address in Canberra that the "good old days" were not so good in the law in Australia if you happened to be an Aboriginal or a Torres Strait Islander. Nor were they so good if you happened to be a woman. Or gay. Or a conscientious objector. Or the publisher of the mildly erotic. Or a communist. Or a migrant struggling in court with the English language. Or an Asian Australian struggling against the then White Australia policy. These were the challenges that called forth the CCL. They rallied people of a like conviction in liberty and in freedom under the law. There will be more such challenges in the future. It is

essential that the courts and the CCL should continue to respond to them.

As I look back to 1964 and my early days in the CCL, I marvel at the prescience and dedication of the fine people who served in the CCL at that time. I have not named them all. But I honour them all, their memory and their fearless work. I honour them as mentors who taught me much about the law and about life.

Yet at that time, in all of those intense and busy committee meetings of the CCL and cases fought, never once did anyone raise the human rights and civil liberties of homosexual and bisexual Australians. It was just not on the agenda. No one discussed the issue. No one at that time saw it as an issue of human rights. And few indeed were the people of those days who saw the issue of women's rights as a civil libertarian question. Equal opportunity was just not on the agenda. Discrimination against women was not a lively subject of our discussions. Just a few people at that time had the foresight to look into the future and to see the importance of such topics. I pay tribute to the late Dr Peter Wilenski. He was my companion in student politics in the early 1960s. He saw issues of the rights of Asian Australians and the rights of women much more clearly than others. He talked of those issues. He thereby taught others. We need such teachers.

The central question I wish to pose tonight is this. What are the issues which we today do not see but which in 20 or 30 years will be seen as crucial questions for basic civil rights? Is the book of civil liberties closed? It hardly seems likely. In the future we may have the same enlightenment about personal use of drugs, about the rights of sex workers, about the liberties of people living with HIV/AIDS, about transsexuals - and about great issues of technology such as the Human Genome Project. We must keep our eyes and minds open for abuses of civil liberties. Their character may change with the years. But they remain the challenges for the CCL and the continuing justification for its existence.

I look around this reception. I see many dear friends and honoured colleagues. I see many who have fought the good fight to keep our society a pluralistic, tolerant one in which the laws made by the majority are upheld but in which the human dignity of minorities is respected and protected by those laws. We can revere our institutions, as I do, but still ever strive to improve them. We can love our country, but still seek to make it a better place for all. I honour the CCL for the work it has done. I have no doubt that its best years lie ahead.