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PRAISE AND CONCERN
AT THE NSW LAW
SOCIETY 125TH
ANNIVERSARY

Extract based on speech given at the 125th Anniversary Dinner of the Law Society of New South Wales, Hilton Hotel, 30 July 2009.

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The Hon. Michael Kirby AC CMG
Past Justice of the High Court of Australia

It was the formation of the Incorporated Law Institute of New South Wales in May 1884 that is usually taken as the starting point of the institutional life of the community of lawyers in New South Wales. It is to commemorate that event that we have come together to celebrate on this occasion.

I am proud that between 1959 and 1967, I served in solicitors' offices, first as an articled clerk, and then as a "solicitor, attorney and proctor". Those years prepared me for the practical challenges of a life in the law. There is nothing quite like sitting across a desk, talking with a client, to focus the mind on a legal problem.

Mind you, I had difficulties getting into the profession. This was despite outstanding results in the school leaving certificate examinations. I applied to all the big firms, including Clayton Utz where the President is now a partner. All of them rejected me. I think I have forgiven them. However, that experience converted me to equal opportunity in employment and elsewhere. I hope things have improved in recruitment of new entrants to our profession in the intervening years.

* Based on a speech given at the 125th Anniversary Dinner of the Law Society of New South Wales, Hilton Hotel, Sydney, 30 July 2009.

CHANGES FOR THE BETTER

The changes for the better that have occurred in the past 30 years in the legal profession in Australia have certainly included:

- * The increased number, and greater role, of women;
- * The enlarged rights of audience before courts for all qualified lawyers and the reduction of strict hierarchies within the profession;
- * The building of a national legal profession that is now underway;
- * The increase in *pro bono* lawyering;
- * The development of a global and regional attitude to law in the place of the old State and Territory parochialism;
- * The growth of alternative dispute resolution, especially mediation and arbitration;
- * The creation of Young Lawyers' Associations;
- * The establishment of excellent professional law journals and newspapers such as the *NSW Law Society Journal* and *Lawyers Weekly*; and
- * The introduction of continuing education and professional development in the law.

CHANGES CAUSING CONCERN

However, against these improvements, some developments in the practice of law have been less desirable. Amongst these I would include:

- * *Palace of marble*: The creation of much more expensive offices for lawyers, especially in the CBD of capital cities. Things were very modest in my earlier days. Offices were small and relatively humble. Briefs were much smaller. There were no two-trolley

silks. Copied documents had to be re-typed. Trials were shorter, in part because many of them were performed before civil juries. A five-day trial was regarded as very long. Now, five-month trials are not unknown. Someone pays for the extravagant legal offices with harbour views, precious paintings and generous space. Clients, not lawyers, pick up the tab. The result has been to position many ordinary citizens out of the possibility of securing good legal advice.

- * *Country and regional lawyers:* Recent years have seen a shrinkage in the proportion of the profession of lawyers serving clients in regional, rural and remote Australia. Figures show a drop in retention of lawyers in country areas from 15½% in 1998 to 13% a decade later. We must try to arrest and reverse this. In the past, country practice was often cross-subsidized by the monopoly in land title conveyancings.
- * *Personal injury compensation:* Another area of cross-subsidisation, but in the reverse direction, is the legislation of recent years capping personal injury recovery. I understand the political reasoning that led to these reforms. They were designed to minimise increases in the cost of workers' compensation and green slip motor vehicle insurance prior to State elections. The net result, however, has been a decline in justice to injured fellow citizens.
- * *Time charging:* Another change that has radically altered professional cost structures in the law is time charging for professional services. This methodology was introduced after the

1970s. As Chief Justice Gleeson often rightly said, it is a costs methodology that rewards slow thinkers and inexperienced practitioners.

Every lawyer knows that complex litigation cannot properly be presented by most self-represented litigants. It is just too difficult. This is a cardinal fault of our legal system. It has become worse, not better, in the past fifty years. And time charging has not helped.

* *Entry into law schools:* There were always severe requirements for admission to law courses. But these requirements have become unrealistically difficult in recent years. The cut-off in Higher School Certificate results, necessary for admission to city law schools in Sydney, is now likely to exclude people with school leaving results like most of those who sat with me in the old Sydney Law School when I arrived in 1959. For a TER score of 99.6%, I would have made it. Despite the rejection of my application for articles by the top legal firms, I could boast of such a score. But many who went on to be leading advocates and judges would never have been admitted to the law school. Which is a worry.

* *Women's glass ceiling:* Despite the improvement in the opportunities for women in legal practice, there remain serious defects in this regard. They result in a large attrition rate notwithstanding demands for equal opportunity. In the High Court, during my thirteen years' service, there was no real increase in the number of women addressing the court from the central podium.

- * *Age and life after 50:* Many large firms today retire their partners from active practice by about 55. This is a wasteful attrition. True, it provides opportunities for younger practitioners. But we should have the talent to organise the legal profession in Australia so as to tap the wisdom and experience of its older members. The President of the NSW Law Society (Mr. Joe Catanzariti) has criticised this wastage and I agree with him.

- * *Defective legal education:* There have been great strides in legal education in the past half-century and most developments have undoubtedly been for the good. Yet, some have been regrettable. One is the decline in the teaching of legal history in Australian law schools. Another is the decline in teaching jurisprudence and the neglect of statutory interpretation which is now the name of the game.

- * *Work life balance:* The law has always been a profession of workaholics. I myself am scarcely well-qualified to criticise this. Finding the correct balance between work and other activities of life is a constant challenge in a profession where work sometimes becomes the overwhelming meaning of life. Those who love the law cherish its daily stimulus of puzzles and problem-solving. But often they inflict unreasonable wounds on their families and those closest to them. Educating lawyers in achieving the happy mean is a future challenge of great importance for Law Societies and Bar Associations in Australia.

- * *Absence of a rights charter:* Another challenge is the almost unique failure of the Australian legal system, outside Victoria and the Capital Territory, to deliver a general charter of rights to people living in Australia. It took court decisions, not parliamentary action, to shake our country into correcting a deep injustice to its indigenous peoples. Despite 150 years of elected parliaments in Australia, the denial of land rights to our indigenous people was not corrected by parliaments. Sometimes we need a circuit breaker in case we become (and lawyers are not exempt) ignorant and blind to injustice. The same blindness has affected the rights of women, Asian Australians, gays, people with disabilities, prisoners, refugees and other vulnerable groups.

Lawyers, who know best the defects in the law, should explode the fiction that parliament is always vigilant to injustice. We have seen too many contrary instances in Australia to persist with that fairytale. It behoves lawyers to point this out. And to explain the ways the modest idea of a human rights *Charter* works in the United Kingdom and New Zealand so that the panic merchants are put in their place.

The glory days are here and now. In the Australian legal profession, we have the knowledge and the means to draw upon our past; to tackle the defects of the present; and to create a better future for the profession of law and justice under law for all Australians.