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NEW SOUTH WALES YOUNG LAWYERS' CONFERENCE

LUNCHEON ADDRESS SYDNEY

MONDAY 21 SEPTEMBER 1998

ACTING JUDGES - A NON-THEORETICAL DANGER

The Hon Justice Michael Kirby AC CMG

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YOUNG LAWYERS AND HOPE

I seize every opportunity I can secure to meet young lawyers. Last week I gave a lecture by telephone link with a law class at the Queensland University of Technology. Next year we hope to do this annual event by video-link or video supplement. As you would know, the High Court has pioneered the use of video-links in the law in Australia. A large proportion of the special leave applications before the Court are heard by video links established between the judges in Canberra, and lawyers and their clients in Brisbane, Darwin, Perth, Adelaide and Hobart.

* Justice of the High Court of Australia. President of the International Commission of Jurists (1995-1998).

Also last week I addressed an equity class at the Law School at the University of Technology, Sydney where a former Associate of mine is the lecturer. I find such encounters a useful stimulus to reflection on legal principles. One can count on young people - even young lawyers - to speak more directly with fewer "with respects". They look at legal principle with eyes that are often informed by different values. These are the values which will carry our legal system into the coming century. No judge, however lofty and grand, can afford to get too far out of touch with contemporary values. Because in our legal system judges, inescapably, have choices to make, their values inevitably affect their choices. They affect the construction that they give to the Constitution or the Acts of Parliament. They affect their perception of whether common law precedents, designed in earlier times, are apt for new problems in our times. Some commentators, and not a few politicians, would prefer to think of judges as pilots, flying a jumbo jet eternally switched onto automatic pilot. It is not so. Under our system the judges have, as they should have, their hands firmly on the controls. Every day of their lives, they are making decisions vital to the safety and well-being of our society.

COURTS, THE INTERNET AND THE FUTURE

Young people also know more about technology than most judges. Young lawyers use the Internet as a matter of course, and comfortably. Last week a British Minister, Mr Geoff Hoon, predicted that litigants of the future will resolve many disputes from their

homes over the Internet rather than going to court. He outlined¹ British proposals which envisage "virtual" court hearings in which people can communicate with the judge and lawyers over the Internet via their television sets. According to his prediction, many of the traditional trappings of justice, including legal documents, books, papers, and formal court hearings, are likely to disappear or to be conserved to particular circumstances and defined cases. The British Government Consultation Paper asks a crucial question:

"Is it the physical courtroom with associated trappings that is important to most people, or is it the confidence that their dispute is being addressed by an appropriate impartial person?"

The British Government clearly considers that there is a large unmet need for legal and judicial services that we have to re-think so that they will be provided by what are called "affordable jargon-free legal help at the fingertips of large numbers of clients across the world wide web". Older members of the judiciary and the legal profession may be horrified at the prospect of litigation outside a courtroom with its live witnesses, a judge in wig and gown and the paraphernalia that is so familiar. But the experience of the High Court with the video-links has been that there is no diminution in the

¹ *The Times* (London), 11 September 1998 at 6. See Lord Chancellor's Department (UK), Consultation Paper, *Civil Justice*, 1998. The Consultation Paper is accessible on the Department's website: www.open.gov.uk/led/index.htm

effective use of judicial and lawyer time. On the contrary. The Court's statistics reveal that hearings by video-link tend to be shorter. Somehow, video-link seems to encourage a more economical presentation of argument. The living presence of human beings somehow breathes into all concerned proximity and oratorical flourishes that disembodied electronic form appears to control and minimise.

If I reflect on the technological changes that have occurred in the law in my own lifetime, and those now in prospect, I cannot by any means dismiss the British proposal. There seems, for example, much merit in the suggestion of a website to act as an online civil justice service - as a first port of call for anyone seeking information or advice on legal problems. Perhaps this will be a way to bring justice and law to the people in the twenty-first century. That was, after all, the fundamental objective of King Henry II seven centuries ago in England. Lawyers must move with the electronic times.

THE HIGH COURT AND THE INTERNET

The High Court of Australia is a world leader in the judicial use of the Internet²:

² The High Court's website can be found at www.hcourt.gov.au

- ❖ Within minutes of the delivery of the Court's judgments they are accessible and can be downloaded throughout the world.
- ❖ The transcripts of oral argument before the Court are on the Internet within hours of completion of argument.
- ❖ Summaries of cases pending and those which stand for judgment are included in the Court's website.
- ❖ Decisions are now given, in medium neutral form, so that they can be referred to without necessary citation of a page in a printed report.
- ❖ The range of comparative law material used by the Court is vastly increased by access to legal materials in all parts of the world. No longer are Australian lawyers captive solely to the decisions of the English courts. There is a world-wide treasury of the common law to which we now have ready access.
- ❖ The Court has instituted a "virtual tour" of its premises which can be seen by every Australian citizen with access to the Internet and by people all around the world.
- ❖ In about six months, as soon as security issues have been resolved, it will be possible for lawyers to tap into the High Court's case management system to find precisely the state of

play in any case. Thus it will become possible to find exactly when a party's submissions are filed. Those submissions will be accessible virtually instantaneously.

The picture of cobwebbed Australian courts living in the past, so well beloved of some sections of the media, is often quite different from the reality. The High Court sets the standards; but all Australian courts are rapidly moving into the electronic age. For example, the Federal Court of Australia has established the first permanent all digital court room in Sydney. Evidence can be presented electronically. The court is connected to the Internet. Transcripts can be retrieved in near to real time³. If the lesson of science and technology in this century is any guide, the most exciting developments lie ahead. They will include access to justice, in at least some cases, through the Internet. For my own part, I do not doubt that, in the fullness of time, artificial intelligence will be also brought to bear for the solution of at least some legal problems.

ESSENTIAL CONTINUITIES

Having predicted a big technological future for our discipline, it remains to insist upon the enduring continuities which give law its

³ Reported *The Australian* 15 September 1998, p. 30

quality as a vocation committed to justice. It is no accident that the central question in the British Government's Consultation Paper is concerned with how they can preserve the indispensable prerequisite of a just legal system. This is access to an "appropriate, impartial person". For the foreseeable future it will have to be a "person". Someone with the *will* to do justice according to law. No machine yet on the drawing boards can be programmed to have that will. But who is the "appropriate impartial person"? Who is to be trusted with making decisions on behalf of the community and other citizens? Making such decisions on questions crucial to the Constitution and legal ordering of society? Making the decisions in highly charged criminal cases? Making them in important civil claims where reputation, funds, and the allotment of power are at stake.

Under our system, many decisions are made of great legal importance by police officers, company directors, public servants and media personalities that have profound effect on our society and the people who make it up. But ultimately, we are all answerable to the law. And, ultimately, the law is upheld and enforced by judicial officers (magistrates and judges) who must be trained for, and independent and neutral in, the decisions they make. These are precious features of our legal system. We must hang onto them. No matter how the medium of access and performance is changed, the quality of manifest independence and integrity of the decision-maker is absolutely central to the integrity of our legal system and, ultimately, to its acceptability to the people of Australia. In

December this year, I will complete 25 years of service as a judge. There is only a handful of judicial officers in the country who have served in judicial office for a longer time. Mind you, I fall far short of the unattainable service on the High Court of Sir Edward McTiernan (46 years) and Sir George Rich (37 years). Now that the life tenure of such judges has been abolished, there will be no more terms of that length. But it is, I believe, a proud boast that never in my twenty-five years have I received a telephone call from a Minister telling me how to decide a case. Or from an official in the government. Or from a captain of industry. Or from a union official. Or a media magnate. In Australia, it just does not happen that way. We must keep it so. My service for the United Nations in many foreign countries has taught me how important this principle of independence and integrity is. It is not true of most countries of the world. Indeed, it is rare. So it is precious.

In Australia, the attacks on judicial independence do not come from the unwanted telephone call. They come in different forms. Sometimes they arise out of well-intended innovations designed to serve public needs.

ACTING JUDGES - FROM EXCEPTIONAL TO REGULAR

I regard the proliferation of acting judicial appointments, particularly in New South Wales, as an illustration of this problem. At the outset, it is appropriate to say that some arguments have been voiced that the system of acting judicial appointments in the

State courts is unconstitutional. Certainly, given the terms of the Australian Constitution, it would appear impossible to have acting federal judges. None has ever been appointed. Those who exercise the judicial power of the Commonwealth under Chapter III of the Australian Constitution must be appointed under the conditions laid down by the Constitution and the laws validly made under it⁴. Since the decision of the High Court in *Kable v Director of Public Prosecutions (NSW)*⁵ critics of the schemes of acting appointments have begun to suggest that it is not possible to appoint acting judges to courts which must be of a character suitable to receive federal jurisdiction under the Constitution. I make no comment on that argument. One day, it may come for decision to the High Court, be fully argued and decided then.

Assuming the schemes for the appointment of acting judges in the State courts to be constitutionally permissible, what has concerned many observers is the extent to which the number of appointments of acting judges has so rapidly increased in recent years. From a truly exceptional form of judicial appointment, usually preliminary to permanent confirmation when a sitting judge retired and a position became available to be filled, the situation has now

⁴ Australian Constitution, s 72.

⁵ (1996) 70 ALJR 814; 138 ALR 577.

been reached in New South Wales, at least, that acting judicial appointments constitute a most significant part of the judicial branch of government.

Whilst respecting the integrity of those who serve, the good intentions of the Attorney-General and his predecessor in the appointments, and the laudable desire of courts to clear their lists, the position reached is clearly causing concern. In the period from 1 July 1998 to 30 June 1999, forty-nine acting judges of the District Court have already been commissioned to serve:

- 10 retired judges
- 1 retired judge now a solicitor
- 21 solicitors
- 16 barristers
- 1 academic

There are smaller numbers in the Supreme Court. The appointments in that court conform to an entirely different legal regime. Whereas the acting judges of the District Court⁶ are, if practitioners or academics, typically not required to act as a judge during the whole period of their commissions, acting judges of the Supreme Court⁷ receive a commission for a fixed period. In that

⁶ Under the *District Court Act 1973* (NSW), s 18.

⁷ Under the *Supreme Court Act 1970* (NSW), s 37.

period, they must fit any work of their practice around their judicial duties. In the District Court, typically, the position is the reverse. The judicial duties are fitted into practice or other obligations of professional life.

Whilst it is reported that the District Court appointments have resulted in a reduction of a backlog of cases recently assumed by the District Court from the Supreme Court⁸, the fundamental question is how that backlog accumulated in the first place. To some extent, at least, it appears to be the product of the failure to increase the judicial establishment so that it can dispose of cases in an orderly and efficient way as befits the judicial branch of government. And so that extraordinary and inappropriate appointment arrangements are not required.

I will refrain from repeating⁹ the criticisms of principle addressed to the adoption of a semi-permanent supplement of the tenured judiciary with large numbers of acting judges. I will make no reference whatever to the international principles of fundamental rights which stand against what is happening. I realise that appeal

⁸ R Ackland, "Clearing the legal logjam", [the backlog is estimated at 3,000] *Sydney Morning Herald*, 4 September 1998 at 19.

⁹ M D Kirby, "Independence of the Judiciary - Basic Principle, New Challenges", unpublished address to the International Bar Association Conference, Hong Kong, 12 June 1998.

to fundamental principles is regarded with contempt by some media commentators¹⁰. Unlike the judiciary which must live every day with fundamental principle, reference to such considerations is often dismissed in the media and elsewhere as an appeal to "lofty theoretical grounds"¹¹ or to considerations "more theoretical than actual"¹².

ACTING JUDGES - PRACTICAL CONCERNS

So let me try to explain, quite bluntly and practically, why the development we are witnessing is causing concern to many informed observers:

1. It undermines the tenured judiciary. Tenure has commonly been regarded as essential to judicial independence¹³. When you think of the many countries which do not have this feature of the judiciary and the long constitutional struggle that lies behind Australia's achievement of it, it seems a trifle reckless

¹⁰ See eg Ackland, above n 6.

¹¹ Editorial, "Making judges more efficient" in *Sydney Morning Herald*, 30 July 1998 at 15.

¹² Ackland, above n 6.

¹³ *Valente v The Queen* (1985) 2 FCR 678; *The Queen v Beauregard* (1996) 2 FCR 56.

to throw it away so readily and to denounce those who resist as "assorted purists ... snorting"¹⁴ when they are actually defending a hard-won right which belongs not to lawyers but to the people - and especially litigants - against incursions from executive governments.

2. When it said that the dangers are "theoretical", what is meant is that critics cannot always point to an actual case where a judge has tailored his or her decision to avoid the displeasure of a government or a client. In the nature of things such cases would be hard to find and virtually impossible to prove. But judicial impartiality is not only a matter of avoiding actual bias. Australian law defend people who come to our courts from the appearance or reasonable apprehension of bias¹⁵. Of its very nature, that cannot be proved empirically. It rests on appearances and inferences. But Australian law is rightly very strict about this matter. If a barrister would love to be a permanent judge, may he or she not be tempted (or appear to be tempted) to avoid a decision that might upset the appointing government? If a solicitor generally acts for

¹⁴ Ackland, above n 6.

¹⁵ *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-294; *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 368.

insurance companies (or workers) might he or she not be tempted (or appear to be tempted) to avoid making decisions that could upset actual or potential clients, their law partners or their interests? With sections of the media baying for law and order and stiffer penalties, might an appointee, hoping for a permanent seat on the bench, not be influenced by the need to avoid an unpopular sentencing or bail decision, however merited it might seem on the evidence and argument? These are not really theoretical questions. Every informed member of the legal profession knows of stories that are circulating. I certainly know of acting judges who were very disappointed not to secure a permanent appointment. Ambition for permanent appointment in an acting judge is potentially a very dangerous thing.

3. The acting judges doubtless do their best. But they are riding on the reputation for integrity hard won by the tenured judiciary who have a permanent investment in actual and manifest impartiality. If the acting appointments were limited to a few recently retired judges, called back for a period to full-time service on an acting basis or (as in my youth) people given acting commissions in anticipation of quick confirmation, there would be fewer expressions of concern. What is worrying is the growth of numbers and the fact that this is now becoming, apparently, a semi-permanent feature of our judicial scene. The exceptional has become the ordinary. There will always be excuses for avoiding proper funding of the judicial

branch. Flexibility of available personnel can be bought at too high a price. It is legitimate for judges who have given a full-time commitment to be concerned about damage to the judicial institution that can be caused by the number and variability of appointees who, in a sense, draw their store of reputation from the reputation of the permanent judiciary. It is especially inappropriate to have acting judges who are part-heard as lawyers appearing before other acting judges all of them returning to their chambers or offices to bump into their "judges" and have to deal with them, and negotiate with them, in the course of their private legal practices. This never happened in the past. Now it is happening all the time.

I do not regard these as theoretical problems at all. If they become systematized and endemic they will undermine our hard-won principle of manifest judicial independence. Perhaps more importantly, they will provide bandaids and temporary expedients for problems of case control and good court management. They will remove the pressure for permanent solutions for the efficient disposal of the business of the courts. Papering over problems of judicial administration by the use and expansion of what should be truly exceptional devices (such as acting appointments) is no real alternative to the proper funding of a judiciary of adequate numbers, proper resources and greater accountability, transparency and efficiency.

This is why many informed people say to executive government: Encourage the use of assessors who are solicitors or barristers. Sanction a litigant's refusal to use them or accept their decisions if you must. Facilitate conciliation by experienced legal practitioners in the hope of avoiding the need for a trial. Promote additional and alternative dispute resolution by agreement. But leave the judiciary a tenured, manifestly independent institution. Do not pretend to the citizens that busy part-time practitioners, scurrying back to their offices and chambers, are true judges. They are not. And they should not be held out as such.

STANDING UP FOR PRINCIPLE

As young lawyers, you will have the obligation to explain to a sometimes cynical and skeptical community how important is the principle of judicial independence. Of how it is just as important in Australia in State as in federal courts. Of how comparatively rare it is, in practice, in the world today. Of how, until now, we have enjoyed it as a settled given in the Australian judiciary. And of how we may endanger it by continuing down the path of appointing more acting judges. If those ignorant of hard-won constitutional freedoms treat your warnings with contempt, or accuse of "snorting" or self-interest, you still have a duty to place your concerns before the community. It is a duty that comes with study of the law, with knowledge of its history and institutions, and with loyalty to our constitutional arrangements. Never be deflected by the ignorant and the wrong. To speak up for fundamentals, and to defend the

independent judiciary of this country, is a duty of all lawyers, and especially young lawyers, who must pass this legacy on, undamaged. It is, indeed, the duty of all informed citizens.