Farewell Speech upon Retirement

SIR GUY GREEN KBE AO*

It is now almost exactly 22 years since that day in 1973 when, with considerable trepidation, I took my seat as the Chief Justice of Tasmania in the old Number One Court in Macquarie Street.

During the period since then we have seen many changes in the Court. It has grown from a court of five Judges to one of seven, a modest growth rate indeed compared with that of other organisations and institutions during that time. We have moved from the premises in Franklin Square where, although the Judges' chambers had a certain Victorian grandeur about them, the facilities otherwise were inadequate. The move we made from the Criminal Courts in Campbell Street to our present courts was even more welcome. At Campbell Street everyone including the Judges had to work under conditions which could only be described as Dickensian. I must say that even the possibility that the primitive conditions under which we had to work might one day result in the building being classified as one of the treasures of the National Trust did not at the time afford much comfort to those who had to endure them.

The facilities in these buildings are vastly superior, but we are now moving into yet another stage and taking a good look at how we can improve the way we look after people who are involved in the processes of the Court, including especially jurors and witnesses.

But as well as changes to its physical environment, the way in which the Court operates has also changed over the last twenty years. Its procedures, internal organisation and registry have undergone many reforms. But change and reform are not ends in themselves and developments of that kind are only significant if they result in improvements in the way in which the Court performs its function and delivers its services. As to that I would like to say two things. First, contrary to popular mythology, in the Supreme Court of Tasmania today there are no significant Court-generated delays in the hearing of civil or criminal trials or appeals. There may sometimes be delays in the processes leading to cases reaching the Court but once they get to the Court they can be set down for hearing virtually as soon as the parties are ready. Secondly, I think that it is right to record the view endorsed by observers from outside this State that Tasmanian litigants are well served by the Supreme Court of Tasmania. Notwithstanding that it is one of the smaller courts in the

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* Extract of a speech delivered on 1 September 1995 by Sir Guy Green, now Governor of Tasmania, upon his retirement from the position of Chief Justice of the Supreme Court of Tasmania.

country, the quality of its work is at the very least comparable with that of any other court in Australia, save of course for the High Court of Australia, with which I would not have the temerity to compare even the Supreme Court of Tasmania.

Over the last twenty years we have also witnessed significant improvements in the law and the legal system generally. The profession has changed considerably. It is larger, more diverse and better organised. The Law Council of Australia has changed from being merely a coordinating committee into an integrated national professional body of real significance. Our own Law Society is organised on much more business-like lines and the profession, through the Law Society and the Bar Association, is playing a more active role in legal education, law reform and public debate about legal issues than has ever been the case before.

In the past one of the most troubling aspects of the administration of justice has been the inadequacy of legal aid for those unable to pay for their own legal representation. In the 1960s, although the legal-aid scheme in Tasmania was one of the best in Australia, it was woefully under-resourced, and only worked at all because the profession was prepared to run it on a voluntary basis and practitioners were prepared to accept legal-aid briefs for what was often little more than a nominal fee. Today the scheme in Tasmania is well funded and well administered by full-time staff so that virtually no one is unrepresented in a criminal trial except by choice, and legal aid is available for a range of other cases which would have been unthinkable in years gone by. Of course, much still needs to be done, particularly in relation to the very difficult problem of the cost of litigation for middle-income earners, but nevertheless we should acknowledge the tremendous advances which have been achieved so far.

Another significant development has been re-examination by the judiciary throughout Australia of the question of just what is the scope of responsibilities of a Judge. It used to be thought that the only duty of a Judge was to determine cases in accordance with the law and the judicial oath. That remains the core function of the judiciary, but the question is now being raised of whether in addition Judges also have a distinct set of constitutional responsibilities which are concomitant with their status as members of the judicial organ of the state.

Judges undoubtedly have a duty to uphold the fundamental principles of our constitutional arrangements and of the philosophy of the rule of law. But the issue is whether they are only competent to uphold and defend those principles by the way in which they decide particular cases or whether they are also entitled, or even obliged, to do so by extra-curial means, such as by making public statements, engaging in public debate about legal and constitutional issues, or

even by mounting campaigns to influence decisions by governments or parliaments. Twenty or thirty years ago a majority of the Judges in Australia would undoubtedly have thought that the judiciary had no such role, but I suspect that today a majority would take the opposite view. Certainly there have been changes in the way in which the judiciary organises itself which reflect significant developments in perception by Judges of the scope of their functions. When I was appointed as Chief Justice, the judiciary in Australia comprised a group of individuals who rarely met and whose main channel of communication was through the pages of the law reports on those occasions when they (respectfully) expressed their agreement, or (even more respectfully) expressed their disagreement, with one another's judgments. But since then, Australian Judges have started meeting more and more often at conferences and in other forums, and recently the Chief Justices and the Judges of Australia took the very significant step of forming themselves into permanent associations. I would predict that the creation of those organisations will turn out in the future to have been a very important initiative. Not only will they provide a structured means for the exchange of ideas and information between Judges and Courts, but even more importantly, they will be the vehicle through which the judiciary can make a much needed contribution to debate about important constitutional and legal issues.

This is not an occasion when I want to dwell upon negative aspects of the law or the legal system. But we must not be complacent and it is necessary to record that along with positive and encouraging developments of the kind to which I have referred so far, in recent years we have also witnessed the emergence of some less welcome trends. I refer to two in particular.

This first arises out of the increased scrutiny to which the legal profession and the Courts have been subject by the media and governmental and parliamentary enquiries in recent years. The fact that the law and its institutions are being closely examined is not objectionable in itself - rather it should be welcomed. But what is disquieting is that such examinations often proceed on an erroneous, or at least incomplete, understanding of the principles and operation of the legal system and an uncritical acceptance of popular stereotypes of Judges and lawyers, which can only be described as caricatures. An example is provided by what the editor of the Australian Law Journal refers to as the 'myth of the gavel' - that symbol of the Courts so beloved of those who write about the law but which in fact has never been used in any court in Australia. Of course that particular example is of trivial significance but it is symptomatic of a level of ignorance about more important aspects of the legal system which is capable of seriously distorting public debate about legal issues.

The other disquieting development particularly in some of the mainland States is an increased tendency to divert the judicial

function away from the ordinary courts and invest it in bodies which are unconstrained by rules of evidence or procedure, which comprise members who are not legally trained, in which lawyers have no, or only a limited, right of audience and which are not seen to be independent because they can readily be abolished or because their members do not have security of tenure. This retreat from the established institutions of the law is in fact a retreat from the law itself because history shows that an essential condition of the maintenance of the rule of law and a judicial system which is rational and just, and in which like cases are treated alike, is that the law is administered by independent, permanently established courts which are manned and assisted by skilled professionals, and which decide cases in accordance with principles and processes which are known in advance and consistently applied.

Throughout my term of office I have been sustained by the firmly held conviction that the most significant characteristic of our society which distinguishes it from the majority of the countries of the world and which justifies our claim to be a civilised society is that we have a legal and constitutional system which gives concrete expression to the philosophy of the rule of law and in a real and practical way operates so as effectively to vindicate the rights and protect the liberties of each individual member of our society. I regard it as a very great privilege to have been part of and to have served in some small way that great heritage of which we are the fortunate beneficiaries.

It will be a great wrench for me to leave this Court although I should hasten to say that I do not regard myself as leaving the law altogether. I think that the people of Tasmania would justifiably feel a certain disquiet if they thought that they had a Governor who regarded himself as being outside the law.

But the personal reservations I feel about leaving the Court have in large measure been overcome by the knowledge that I am leaving it in the excellent hands of my brother Judges and their new Chief Justice Mr Justice Cox, who I know will be assuming that office with the fully justified confidence and support of all the Judges, the profession and the people of Tasmania.