

Tribute

His Excellency, the Honourable Peter Underwood AC

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Peter Underwood was an outstanding leader, as a legal practitioner, as a Judge, as Chief Justice and as Governor. He was educated at the University of Tasmania, graduating in 1960. After admission he practised in Hobart at the firm Murdoch Clarke Neasey and Cosgrove until his appointment as a Judge of the Supreme Court of Tasmania in 1984 ended his ‘Hollywood’ days at the Bar.¹ Tributes following his sudden death on 7 July 2014 mention his leadership, courage, energy, enthusiasm, intellect and sense of humour. Reviewing his achievements, what emerges most clearly is that he was a man who relished change rather than resenting it.

I ON THE BENCH

Peter Underwood was not a radical or activist judge. His preferred model of judicial law-making was one of careful and incremental development of the law. He was critical of using legal principle as a shroud for public policy and questioned whether appellate courts were the appropriate vehicle for determining policy matters.² Typically, however, he nevertheless suggested an innovative and principled way in which courts could do this.³

Peter Underwood’s judgments were of the highest calibre, always timely, clear, well researched, logical, well-reasoned and principled. He prided himself on his efficiency and the fact that by his retirement he had produced some 530 written judgments.⁴ The present Chief Justice has

* Professor at the University of Tasmania Faculty of Law, and Director of the Tasmania Law Reform Institute. Peter Underwood was a mentor and friend who provided encouragement and support for her work in sentencing over many years.

¹ His Excellency was nicknamed ‘Hollywood’ in his heyday in practice because of his good looks and style.

² See Justice Peter Underwood, ‘Was There More Than a Snail in Ms Donoghue’s Bottle of Ginger Beer?’ (1999) 8 *Australian Insurance Law Bulletin* 73. See also his later article criticising legislative intervention in the development of the tort of negligence: ‘Is Ms Donoghue’s Snail in Mortal Peril?’ (2004) 12 *Torts Law Journal* 139.

³ See Underwood, above n 2, 89, where he suggested that it should be possible to change the rules to allow interested parties to be heard on matters of policy.

⁴ Chief Justice Underwood, ‘Ceremonial Sitting to Mark the Retirement of the Chief Justice, the Honorable Chief Justice Peter Underwood AO’ (Speech delivered at the Supreme Court of Tasmania, 28 March 2008).

referred to a particularly concise extempore judgment he delivered in 1999 dismissing an application for an injunction by Lenah Game Meats — a licensed brush tail possum processing business which sought to prevent the ABC from publishing video-recorded material showing the slaughter of possums. Subsequently, said the Chief Justice, “it took the High Court 143 pages to explain why he was right.”⁵

His judicial behaviour on the Bench has been described as being characterised by ‘fairness, efficiency, a quick legal mind and courtesy’⁶ but also as being a little scary because of his ability to quickly deconstruct an argument element by element to reveal its flaws. The words, ‘now let me make a note of that’ have been said to inspire terror in even the most senior counsel.⁷ And if counsel were poorly prepared, his usual courtesy had a ‘jagged edge’.⁸

Peter Underwood was active in law reform. He championed a number of important changes and was keen to embrace modern technology, a fact somewhat obscured by his rather creaky reference to the ‘short message service’ in one of his judgments instead of the more familiar coinage, SMS. He was a can-do person, and when he put his mind to something, it inevitably happened. His achievements are so many, to try to do justice to them would require a much longer piece. I will focus on a small sample, some of which I have selected because of my personal knowledge of them. So in many respects this is something of a personal memoir as well as a tribute.

II ENHANCING PUBLIC CONFIDENCE IN THE COURTS

As both a Judge and a Chief Justice, Peter Underwood regarded enhancing public confidence in the courts and the judiciary as of great importance.⁹ A significant aspect of this was furthering a widespread awareness of what the Court does and why it does it. His work in promoting the understanding of sentencing is illustrative. He ran a number of ‘You be the Judge’ workshops in which members of the public were invited to choose a sentence for a case scenario. He also participated in the making of a multi-media package for schools and community

⁵ Chief Justice Blow, Eulogy at the State Funeral of His Excellency, the Honourable Peter George Underwood AC, 21 July 2014.

<http://www.supremecourt.tas.gov.au/publications/speeches/blow_cj/eulogy_governor>.

⁶ Ibid.

⁷ Peter Lyons, ‘Peter Underwood and the Theme from Jaws’ *Justinian*, 15 July 2014, quoting the former Solicitor General, Leigh Sealy.

⁸ Ibid.

⁹ Justice Peter Underwood, ‘Appointment as Chief Justice’, (Speech delivered at the Supreme Court of Tasmania, 2 December 2004).

groups that was co-ordinated by the Legal Aid Commission.¹⁰ Additionally, he placed great importance on the publication of the full text of comments on passing sentence on the Supreme Court's website on the day that the sentence was handed down. This practice began in 1999 when the Honourable William Cox was Chief Justice but it is fair to say its chief protagonist was Peter Underwood. Today it is possible to access all sentencing comments from cases since 2008 as well as most recent sentences. This is still not possible in the higher courts of many other Australian jurisdictions.

Sentencing was always a great interest. When I approached him with an idea for a sentencing research project which involved jurors in real cases, he embraced the idea enthusiastically and assisted with the design of the method and protocols for the study. He resigned as Chief Justice shortly after the study began but he continued to show great interest in it and he presented some of its finding at interstate conferences with me and on one occasion also with my colleague Dr Julia Davis.¹¹ Troubled about how to refer to him when he was presenting with us, not as Governor and no longer Chief Justice, we asked him what we should call him. 'Just call me darling', was the response. So we did, first explaining our dilemma to those assembled — providing us with an introduction which seemed to delight the audience.

With our latest project, a national study which uses jurors to gauge public opinion on sentencing sex offenders, he provided valuable support by ringing and contacting some of the heads of jurisdiction to encourage them to give in principle support. His involvement has played an important part in our success in securing funding of more than \$800,000 for these research projects.

III BEHIND THE BENCH: REFORM OF CIVIL AND CRIMINAL PROCEDURES

As Chief Justice, Peter Underwood considered it his role to maintain high standards of judicial administration and to constantly review the procedures of the Court to ensure that they were relevant and effective. He believed that the Court must accept that it is accountable to the community and this meant that it was obliged to administer justice in a fair, efficient and cost effective matter.¹² One of his significant achievements was the reform of criminal procedure to streamline

¹⁰ The workshop materials are still available on the Supreme Court website: <http://www.supremecourt.tas.gov.au/decisions/sentences/you_be_the_judge>.

¹¹ One of these papers was published: Kate Warner, Julia Davis and Peter Underwood 'The Jury Experience: Insights from the Tasmanian Jury Study' (2011) 10 *The Judicial Review* 333.

¹² Underwood, above n 9.

proceedings. This more than halved the time taken to dispose of cases from charge to verdict and sentence. To do this he managed to obtain the agreement of judges, prosecutors, defence counsel, magistrates and police and persuaded the government to pass the necessary legislation.

As a Supreme Court judge he had pioneered the use of modern technology in the courts. He was the first judge to take a laptop to the Bench. Under the careful eye of Sir Guy Green (Chief Justice from 1973-1995) and the Honourable William Cox (Chief Justice from 1995-2004) he, together with Justice William Zeeman (1990-1998) progressed the development of case management and mediation in the civil courts, revolutionising the litigious process and reducing delays and cost. But these changes were not enough and he continued to critically assess the existing system. In a paper questioning whether the current system of adversarial civil trial is the best means of resolving disputes, he stated, 'only those who believe in the tooth fairy believe that the process is designed to ascertain the truth'.¹³ He questioned whether the process of a civil trial has to be the same for all disputes and challenged the adversarial nature of the trial and its traditions of orality and continuity. Provided that the process is fair and impartial and the outcome is a reasoned and disciplined judgment, he asked 'is there any reason why the trial should be a basically continuous process and is there any reason why every process should be basically adversarial?'.¹⁴ He later revisited these arguments in the context of a discussion of Alternative Dispute Resolution ('ADR'), noting both the benefits and downsides of the growth in ADR. He suggested a joining of the best of ADR and the best of the trial process as a way forward to greater access to justice.¹⁵

IV LAW REFORM

He was active in the law reform arena, open-minded and always willing to debate and make constructive suggestions for changes to the law. An example is rape law reform. In December 2004, important changes were made to the definition of consent in the Criminal Code which Justice Underwood, as he was then, had assisted to design. The Criminal Code Amendment (Consent) Bill 2003, containing the reforms recommended by the Task Force on Sexual Offences, was introduced by the Minister for Justice, Judy Jackson and had passed the House of Assembly. It became clear that it would run into difficulties in the Legislative Council. Rather than requiring evidence of force or threats or some other vitiating

¹³ Justice Peter Underwood, 'The Trial Process: Does One Size Fit All?' (2005) 15 *Journal of Judicial Administration* 165, 168.

¹⁴ *Ibid* 169.

¹⁵ Chief Justice Peter Underwood, 'Alternative Dispute Resolution as a Judicial Tool: A Comment', The Seventh Worldwide Common Law Judiciary Conference, London, April 2007) <<http://www.supremecourt.tas.gov.au/publications/speeches/underwood/adr>>.

circumstance to prove absence of consent, the object of the amendments was to enable absence of consent to be proved by showing that nothing was said or done to communicate consent. In other words: to move to an affirmative model of consent. His Honour met with the Minister for Justice and a small group to work out how to achieve this objective without using mandatory jury directions, which had been a stumbling block when the Bill was circulated. The solution that was reached had the imprimatur of a judge and was passed in the Legislative Council. Rather than a mandatory jury direction, the definition of consent was amended.¹⁶ The result was a new model of consent which was the most progressive in Australia. Of course, he did not always agree with changes the government of the day proposed, and even as Governor, would make his views clear.

V LEGAL EDUCATION

Peter Underwood was passionate about legal education. For many years he ran the Supreme Court Practice and Advocacy unit of the Legal Practice course. He recruited judges to conduct advocacy exercises and senior practitioners to act as the students' legal opponents. He was an inspiring teacher who strongly believed in learning by doing. His classes were always interactive and he delighted in engaging the audience by roving around the room and asking questions. He was extraordinarily generous with his time and would readily agree to guest lectures. He was particularly keen to assist with mooting and witness examination competitions. He continued to assist with the Legal Practice Course and the training and preparation of the Jessup moot team and witness examination competitors whilst he was Governor. He was a natural teacher and put students at ease with his ready wit and encouragement. On one occasion, when his mobile phone rang in the middle of a student's cross-examination of a witness, he answered it and pretended it was the Queen, asking her to call him back.

Peter Underwood was a strong supporter of judicial education, believing that judicial office carries with it an obligation to undertake continual appropriate professional development or learning. He saw this as embracing not only learning designed to improve the skills needed for judicial duties but also learning to improve judicial awareness of societal change and public expectations of the judiciary.¹⁷ Consistent with these views he was active in the Australasian Institute for Judicial

¹⁶ The 2003 Bill sought to achieve an affirmative model of consent by requiring the trial judge to direct the jury that a complainant should not be regarded as having consented if she or he did not say or do anything to communicate consent. Instead s 2A(2)(a) was inserted into the definition of consent which provides that a person does not freely agree if the person does not say or do anything to communicate consent.

¹⁷ Underwood, above n 4, 2.

Administration ('AIJA') as a board member and was its President for two years when he was Senior Puisne Judge. The objects of the AIJA include research into judicial administration and the conduct of development and education programs for judicial officers, courts administrators and legal practitioners. Later, when he was Chief Justice, he chaired the National Judicial College of Australia, another provider of continuing education for judicial officers. In a speech to the Judicial College he challenged the idea that judicial education imperilled the independence of the judiciary.¹⁸ He argued for a 'massive cultural change right across the judiciary' to embrace not only learning the skills required to discharge the judicial office but also learning directed towards improvement of societal change through race, gender and disability awareness programs.¹⁹ What judges needed he said, was not judicial education, 'but they do badly need to willingly embrace the idea of life-long learning in a collaborative style' acknowledging that this will require 'a huge cultural change'.²⁰ He practised what he preached, was a frequent participant at judicial conferences and an organiser of the annual Supreme Court and Federal Court Conferences for many years, where his brainstorming sessions with a roving microphone were legendary.

VI OTHER CONTRIBUTIONS

His contributions outside the law have been many. He was an effective Chair of the Board of the Tasmanian Symphony Orchestra from 1997 to 2006. Colin Jackson, in his eulogy at the State Funeral, recounted that it was Peter Underwood's vision, motivation and leadership which resulted in the building of the Federation Concert Hall. He added that without him, there probably would not be a Tasmanian Symphony Orchestra.

As Governor he served the State with great distinction. He dealt deftly and decisively with the hung Parliament in 2010 when the Labor Party and the Liberal Party had an equal number of seats, taking the unusual step of issuing a statement setting out his reasons for commissioning David Bartlett as Premier. And as Governor, he was not afraid to speak his mind. In his 2014 Anzac Day speech he spoke frankly of his feelings about the dangers of the glorification of war and of the need for peace. He expressed his support for honouring the memory of the Anzacs by the creation of an Anzac Centre for the Study of Peace, Conflict and War which would work towards understanding conflict and reducing the risks of war. He was prepared to do this, aware that it would give rise to controversy and criticism.

¹⁸ Chief Justice Peter Underwood, 'Educating Judges: What Do We Need?' (2006) 7 *The Judicial Review* 423.

¹⁹ Ibid 426.

²⁰ Ibid 429.

After his death, there were many moving tributes to him. What emerges from them is enormous respect for a man who has touched the lives of many. He gave enormously and was always generous in his thanks to those who worked for him or helped him in any small way. His lively and self-deprecating sense of humour was very much part of him. It is evident in his many speeches. In his speech farewelling former Chief Justice, the Honourable William Cox, he spoke of their days at university together and observed that his own academic performance compared rather unfavourably with that of his fellow students Guy Green and Bill Cox. He added that if the Old Nick Company had been a degree course, Peter Underwood would have graduated with first class honours.²¹ And in his own retirement speech he recalls an embarrassing faux pas in his first trial as a judge. The many amusing anecdotes about him show a man who could take a joke at his own expense.²²

In 2001 he was awarded an Honorary Doctor of Laws by the University of Tasmania for his services to legal education, the arts and the administration of justice. He was clearly pleased with this honour and from then on, he frequently donned his robes and took part in the University's graduation ceremonies. The Law School, along with many other organisations and people, his friends and his large family, will miss him greatly.

²¹ Justice Peter Underwood, 'Farewell to the Chief Justice William John Ellis Cox' (Speech delivered at the Supreme Court of Tasmania special sitting, 26 November 2004).

²² See, eg, Lyons, above n 7 and Sarah Heathcote, Eulogy at the State Funeral of His Excellency, the Honourable Peter George Underwood, AC.