

DINNER ADDRESS TO THE MEMBERS OF THE QUEEN'S CLUB

“Tradition and Change”

**The Hon Andrew Bell,
Chief Justice of New South Wales**

1 March 2023

- 1 I begin by acknowledging the Gadigal of the Eora Nation and pay my sincere respects to Elders, past and present, and extend those respects to all Aboriginal and Torres Strait Islander people.
- 2 Thank you for the invitation to speak. There are many old friends in the audience – but for those of them who last heard me speak at University, I am sorry to say that I have had respectability thrust upon me, so I won't be quite as unplugged as in older days!
- 3 Since my appointment as Chief Justice and, indeed for a number of years before that, I have been conscious of the fact that the Supreme Court of New South Wales will celebrate its bicentenary in a little over a year, on 17 May 2024, to be precise. We are well advanced in our plans for that occasion.
- 4 There were some earlier courts in New South Wales before the Supreme Court was established by the 3rd Charter of Justice and first sat 17 May 1824, but those courts ran into difficulties. Various Governors dismissed various judges and magistrates (not a good precedent); the first judge was a man named “Bent” (not a good name for a judge); and his successor was a man named Barron Field who wrote the first and possibly the worst book of Australian poems ever published. I know this because I have read enough of them to have formed this withering judgment! I particularly recommend that you don't read the five stanza effort entitled “Kangaroo” and that you definitely avoid his “Sonnet on Affixing a Tablet to the Memory of Captain Cook and Sir

Joseph Banks against the rock of their first landing in Botany Bay” which just trips off the tongue! But I digress (as I tend to do).

- 5 The reason for my reference to the Supreme Court’s relatively imminent bicentenary is that I have chosen for my address tonight the topic “Tradition and Change”. I am interested in both concepts including the role they play in institutions such as the Supreme Court and, no doubt, the Queen’s Club.
- 6 In short, tradition and change are not alternatives – tradition should not be a handbrake on desirable change but, equally, all change must respect and value tradition. As one of my predecessors, and a great public intellectual, Jim Spigelman, once observed, “[t]here is an embedded wisdom in institutions which have grown and developed over long periods of time.”
- 7 Within institutions, change tends to be incremental. The same is true of our common law tradition. It has long been accepted that judges do make law from time to time, but they don’t make too much of it, and don’t do it too quickly. The day to day task of the courts is the application of settled law or statute to the facts of a particular dispute.
- 8 But even though judges are, quite properly, bound by a system of precedent and the decisions of courts higher in the appellate hierarchy, much has changed in the legal profession and the judiciary over the last century in particular, as I shall point out.
- 9 Now speaking of tradition and change, and before I get too philosophical on you all on a Wednesday night, an apology may be in order because it was the demands of the increasing work of the Supreme Court coupled with the establishment of the Federal Court in the mid-1970s that saw the Queen’s Club lose its then beautiful clubhouse on the corner of King and Macquarie Streets – Halsbury House, as it was known – compulsorily acquired and then demolished in order to allow the rather unattractive joint law courts building to be erected, coated in pebblecrete as it is – which is always a good look for a Court or a swimming pool!

- 10 But the Queen's Club traditional home was replaced with the excellent facilities in which we meet tonight which have now been occupied for about 50 years. Old traditions continue in a changed environment.
- 11 Now I know about this because my old friend Jennifer Giles required me to read both the 1970 history and the 2012 centenary history of the Club for tonight's purposes, and I always do what she tells me! She is one of the longest serving judicial officers in the State.
- 12 My favourite line in the first history was the reference to the House Committee minutes of 5 May 1914 when it was resolved not to keep any liquor for sale at the Club but that (and I quote) "[i]f any member or guest required anything, the boy to be sent to The Oxford for it." This rule apparently remained for some 34 years.
- 13 By the way, Cressida Campbell's *Shelf Still Life* which adorns the cover of the centenary history of the Club and which hangs proudly in the Sitting Room (where we were recently standing) is a most beautiful picture by that immensely talented Australian artist.
- 14 Let me pull some strands together and get back to my topic of tradition and change, having digressed again.
- 15 In 1912, when this Club was established, women had only had the right to vote in New South Wales for 10 years and would not get the right to stand for election to the New South Wales Legislative Assembly until 1918.
- 16 That came about as a result of the passage of the *Women's Legal Status Act* of that year which provided that:

"A person shall not by reason of sex be deemed to be under any disability or subject to any disqualification

- (a) to be elected and to act as a Member of the Legislative Assembly;

- (b) to be elected and to act as Lord Mayor or alderman of the Municipal Council of Sydney, mayor, president, alderman, or councillor of any municipality or shire under the laws relating to local government;
- (c) to be appointed a judge of the Supreme Court of New South Wales, or of a district court of New South Wales, or chairman of Quarter Sessions, or a stipendiary or police magistrate, or a justice of the peace;
- (d) to be admitted and to practise as a barrister or solicitor of the Supreme Court of New South Wales, or to practise as a conveyancer, any law or usage to the contrary notwithstanding.”

This Act, which still did not permit women to sit on juries or in the Legislative Council, was still a little more forward looking than the *Representation of the People Act*, passed in the UK in the same year as the *Women’s Legal Status Act*, and which granted the vote to women over the age of 30 who met a property qualification. The same Act, which you might be amused to learn was also known as the Fourth Reform Act, gave the vote to all men over the age of 21! So we were some way ahead in New South Wales, at least in the statute books.

- 17 But the legislative change brought about by the *Women’s Legal Status Act* in New South Wales did not bring about rapid societal change in either politics or the law. It would not be until 1983 when one of your members, Rosemary Foot AO, became the first woman to hold a leadership position in a major political party in Australia. I had the great pleasure of serving on the Board of Sculpture by the Sea with Rosemary for a number of years in the early 2000s.
- 18 In the law, as far as barristers were concerned, a woman named Ada Evans, who had qualified to practice law in 1902 overcoming serious obstacles at the University, could not be admitted to practice until the 1918 *Women’s Legal Status Act*. In point of fact, she was not ultimately admitted to the Bar until 12 May 1921.
- 19 The legal profession remained deeply conservative for most of the last century. Notwithstanding the passage of the *Women’s Legal Status Act*, our

current Governor and your patron, her Excellency Margaret Beazley AC KC, was only the 37th woman to go to the Bar when she started practice in 1975. In this context, I should also call out Beatrice Gray who is here tonight and was, I think, the 16th female barrister admitted or at least called to practise in New South Wales.

- 20 The first female Supreme Court judge was not appointed until 1987: she was the Hon. Jane Hamilton Mathews AO who sadly passed away in 2019, at the early age of 78 years. She was a wonderful woman who it was my privilege to know. She had a number of 'firsts' on her CV: the first female articulated clerk at Dawson Waldron (now Ashurst); the first female Crown Prosecutor in New South Wales; the first to be appointed the District Court (in 1980); and the first woman to be appointed to the Supreme Court in 1987.
- 21 Change was slow, and the rate of change was slow but it has pleasingly accelerated over the last two decades.
- 22 There are now almost 600 female barristers, and 55 female silks.
- 23 What is perhaps more striking is the number of female solicitors.
- 24 More than two thirds of solicitors under the age of 30 in New South Wales are female. The last three Presidents of the Law Society of New South Wales have been female practitioners, with the last two being from rural and regional New South Wales.
- 25 The current President of the New South Wales Bar Association, Gabrielle Bashir SC, leads a Bar Council comprising a majority of female barristers. Both the New South Wales Director of Public Prosecutions, and the Senior Public Defender are also distinguished and, I might add, formidable female practitioners.
- 26 In terms of the judiciary in New South Wales, 10 new judges were appointed to the Supreme Court in 2022, representing a turnover of almost 20% of the

Court's judges and comprising an equal number of male and female judges. This broad balance in terms of gender has been a pattern in Supreme Court appointments for the last 9 years and has also been reflected in appointments to other courts in New South Wales, with the Land and Environment Court having a majority of female judges, the Local Court now at gender parity and the balance between male and female judges in the District and Supreme Courts having changed radically in recent years, with 10 of the last 17 appointments to the District Court being female.

- 27 So that is one very significant aspect of change in the legal profession and the judiciary which I thought would be of interest to this audience.
- 28 This change is also reflected in the fact that the offices of Chief Justice of the High Court of Australia, Victoria, Queensland and the ACT as well as the Presidency of the Courts of Appeal of New South Wales, Queensland and Victoria are all held by distinguished female lawyers.
- 29 Whilst the day to day work of the courts is unchanging insofar as it involves the resolution of civil disputes, challenges to the exercise of public power and the determination of criminal charges, the *nature* of the work of the courts has changed over the decades as society has changed.
- 30 Another very significant aspect of change which has greatly affected the legal profession in recent years relates to the increasing use of technology in our court system. By this I don't simply mean the increased use of audio-visual technology which proved so important during the pandemic but also such developments as digital filings and the growth of judgment databases and the power of various search engines. All these developments have ramifications for access to justice.
- 31 Looking forward, and not very far forward, one of the great challenges for the judicial system, the legal profession and society more generally will be the rise of Artificial Intelligence.

- 32 But what of the role of tradition amongst the changes I have referred to?
- 33 In New South Wales, we maintain a number of traditions that courts in other States have either partially or largely dispensed with, or which may be considered problematic and or out of date and out of touch. Let me give you some examples.
- 34 There are a number of occasions throughout the year when the Supreme Court holds ceremonial sittings. These include the swearing in of new judges, the retirement of appellate judges, admission ceremonies for new lawyers, and one off occasions to mark significant historical or landmark events such as the Court's forthcoming bicentenary.
- 35 Ceremonial sittings of these kinds are, in and of themselves, very important occasions, in my view. They are open to the public and now, invariably also live streamed.
- 36 In the case of new judges, their oaths of office are taken in public before their peers and in the presence of representatives of the legal profession as well as interested members of the public. Their appointment as a judge, and the significance of it, is publicly proclaimed. The importance of the rule of law and open justice is invariably reinforced in the speeches given on such occasions.
- 37 Where ceremonial sittings are held to mark a judge's retirement from office, the occasion presents an opportunity to reflect on the fact that the onerous demands of being a judge and assuming responsibility for people's liberty and rights is one that entails significant public service and sacrifice.
- 38 Whether at a swearing in or swearing out, a public demonstration of respect for the judiciary, its independence and the public service involved in judicial office, reinforces important aspects of the rule of law.
- 39 Another example of our traditional ceremonial sittings are the admission ceremonies for new lawyers which I conduct each month. New lawyers are

required to make an oath or affirmation in which, after their admission has been moved by a person who is already a member of the legal profession, they publicly swear or affirm that they will truly and honestly conduct themselves in the practice of a Lawyer of the Supreme Court of New South Wales and that they will faithfully serve as such in the administration of the laws and usages of this State according to the best of their knowledge, skill and ability.

40 As I say in the speech I give on such occasions, these unique formalities involve a public assumption of responsibility by new lawyers, literally witnessed by their peers and family members and members of the Bench in open court.

41 The traditional admission ceremony is also an opportunity to emphasise and reinforce to each new cohort of young lawyers that they have joined a profession and not a business, and to explain what that important distinction entails.

42 It seems to me that these traditional aspects of the legal profession are of great importance.

43 At each of these ceremonial sittings, judges of the Court wear full bottom wigs, red robes and a hood with ermine or other fur, a black cummerbund and stole, and a jabot. There is no differentiation between what is worn by male and female judges on these occasions, and the “kit”, as it were, has not altered since the Court was established in 1824. You can see this if you were to visit the Banco Court where the portraits of former Chief Justices are displayed, almost without exception in such judicial robes.

44 Given that the Court has modernised in the various ways I have instanced, why do we still dress like this for ceremonial occasions? It is a question I am often asked, especially on stifling summer days.

45 The answer I give is that, on such occasions of civic importance, the fact that we wear the same robes – in some cases literally – as have been worn by our predecessors symbolically represents the continuity of the rule of law in New South Wales for almost 200 years. As we look around the world, that is something to be cherished and not taken for granted.

46 But change can be accommodated within traditional settings. Let me give you one interesting example. When the Supreme Court of New South Wales celebrated its 175th anniversary on 17 May 1999, the Hon. James Spigelman AC KC was Chief Justice. That sitting commenced the then Chief Justice observing that:

“as acknowledged in the judgments of the first Chief Justice of this Court, Sir Francis Forbes, for thousands of years before the arrival of British justice the Aborigines made and enforced laws in this land. It is appropriate that we recognise that prior tradition on this occasion. Accordingly, I call on Aunty Ali Golding, a Biripi Elder from Taree who has been adopted by the Eora people and has lived in Redfern for the past 21 years, to deliver a traditional Aboriginal greeting.”

47 Aunty Ali Golding then delivered a warm and gracious acknowledgement and welcome to country.

48 The incorporation of this aspect of the ceremony was unprecedented. Jim Spigelman told me only last week when I was talking to him about this that “you could have heard a pin drop”. But it was entirely appropriate and the acknowledgement of country has, as we know, become a most important feature of many public gatherings, an opportunity to reflect on the past and pay respect to indigenous peoples.

49 Another example of continuity and change in the legal profession’s traditions relates to the issue of silks, the rank of senior barristers who, traditionally, have been known as Queen’s Counsel or King’s Counsel.

50 Historically, in New South Wales it was the Governor-in-Council, acting on the advice of the Attorney General, who exercised the Crown’s prerogative in the appointment of learned and experienced counsel to the ‘Inner Bar’. This

changed in November 1992, and since that time, silks in New South Wales have been designated SC rather than QC.

- 51 Whilst most other States followed that lead and introduced a system of SCs, Queensland, Victoria and South Australia reverted to QCs at various points in time. Following the death of the Queen's last year, all of those QCs became KCs. That switch of nomenclature prompted renewed debate on the topic in New South Wales. At the silk bows ceremony late last year to mark the appointment of new silks in New South Wales, I expressed the view that:

"in 2022, the designation "SC" is completely appropriate and suited as a means of recognising and signalling excellence in a mature, independent legal profession in which the decisions of English courts have no superior status in terms of precedent than those of any other common law jurisdiction. ...

The designation SC rather than QC or KC is also consistent with the motto of the New South Wales Bar Association, adopted in 1959, namely "Servants of all, yet of none".

Prior to the Queen's recent death, this State last had KCs at a time when its Bar was a fraction of its current size, at a time when, according to the Law Almanac, it had only two female members ... at a time when the great wave of post-war migration to this country was in its infancy, and at a time when our society was not the richly diverse multicultural one it has become in the ensuing 70 years. The profession and the nation have changed."

- 52 Not everyone agreed, but the debate highlights what I have been speaking to you about tonight, namely tradition and change. It is still appropriate in a profession to recognise its leaders with the appointment of silk but the style of designation has been altered to reflect the changed circumstances of contemporary Australia.

- 53 I leave you with where I began, namely recognising the interaction of tradition and change and reiterating my view that the two are not alternatives but exist in a dynamic and symbiotic state.

- 54 Can I close by thanking you for your warm hospitality and excellent company.