

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
RECEPTION FOR LYSICRATES PRIZE FOUNDATION
GOVERNMENT HOUSE, SYDNEY
WEDNESDAY 16 MAY 2018*

1. Good evening. Before I begin, I would like to acknowledge the Gadigal people of the Eora nation on whose land we are meeting, and pay my respects to their elders past, present and emerging. I also acknowledge the Honourable Justice Margaret Beazley the President of the Court of Appeal, my fellow judicial officers, Mr Peter Deakin QC and other members of the legal profession in attendance this evening.

2. I am delighted to be involved once again in the work of the Lysicrates Foundation, and honoured to accept the role of Patron of this new informal group, the Legal Friends of Lysicrates and James Martin. I first became involved with this organisation when I was invited by Danny Gilbert to deliver the inaugural Sir James Martin Oration. The preparations for that address have led to an enduring respect for Sir James. His legacy has inspired generations in politics, law and, of course, the arts.

3. Many of us here this evening are lawyers, and the area in which Sir James has had a lasting impact on our work is through his commitment to the rule of law – as Chief Justice, Premier and Attorney-General. He made substantial efforts to institute responsible government under a Constitution for the colony of NSW, to render it self-governing and free from the powers of the so-called

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oppressive Colonial Office at Westminster.¹ Once responsible government was attained, he fought hard to maintain it.

4. His strong personality saw him clash with colonial figures such as Governor Sir Hercules Robinson – who, in a fiery and public exchange of letters in the *Herald* had rebuked Martin for “passing judgment publicly upon your superior officer”. Of course, Martin could not stand this treatment at the hands of an English Governor,² and he responded to the Governor that “[a] long residence in Crown colonies has caused you to forget the position which the Judges of the Supreme Court hold ... [y]ou are in *no respect* my superior officer ... and you have no power to interfere with me in any way in the discharge of my public duties. In the performance of those duties I am in no way responsible to you”.³

5. His performance as Attorney General and Premier was no less combative – in 1871 the Governor, the Earl of Belmore, sent a despatch to the Secretary of State for the Colonies, Lord Kimberley. It related to the Secretary’s disapproval of the Governor’s release of two prisoners from custody. Sir James penned a minute noting that Cabinet was of the opinion the release was justified as there was insufficient evidence to ground a conviction, and further noted that “the Cabinet desire to place on record their opinion that, in the administration of criminal justice in this Colony, it is neither expedient nor constitutionally regular that their advice to His Excellency should be sought to be overridden by the Secretary of State”.⁴

6. Finally, in his capacity as judicial officer, he wrote the leading decision in *R v White*, holding that it was a crime at common law to attempt to bribe a

¹ J M Bennett, *Sir James Martin* (Federation Press, 2005) 48.

² *Ibid* 293.

³ Martin to Robinson, 20 July 1875, *S.M.H.*, 21 July 1875, 7, quoted in *ibid* 283 (emphasis added).

⁴ Governor the Earl of Belmore to the Secretary of State for the Colonies, Despatch No. 85, 5 June 1871.

Member of Parliament.⁵ He stated that “a legislator who suffers his vote to be influenced by a bribe does that which is calculated to sap the utility of representative institutions at their foundation”. This decision was followed in the High Court in 1923 in *R v Boston*,⁶ and has been influential in the development of the common law governing corruption and misconduct by politicians in modern times. However, he also maintained “a strong sense of compassion in administering the criminal law”.⁷ In relation to capital punishment, for example, he stated “[w]e do not punish for revenge but to deter and reform. Of course, where we execute, reform is out of the question”.⁸ In these views it must be said that he was well ahead of his time.

7. All of these episodes in Martin’s life and career share the recurring theme of a commitment to the rule of law, fundamental human rights and an acute sense of justice. These are persisting motifs which challenge those of us who operate in and around the legal system. At the start of this year I gave an address to solicitors to mark the opening of the law term, and I spoke about the place of lawyers in politics.⁹ At that time I reiterated that lawyers are the custodians and guardians of the rule of law. The profession holds the privileged position of being able to understand the law. For that reason, it is well situated to navigate the complexities of legislative drafting, understand the concrete implications of policy decisions, and use this knowledge to the advantage of society.

⁵ (1875) S.C.R (NSW) 32.

⁶ (1923) 33 CLR 386.

⁷ Bennett, above n 1, 279.

⁸ *Ibid.*

⁹ See T F Bathurst AC, ‘The Place of Lawyers in Politics’ (Speech delivered at the Opening of Law Term Dinner, Sydney, 31 January 2018)
<http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Bathurst_20180131.pdf> 22.

8. It remains my view that lawyers cannot and should not ignore matters which impact on the rule of law and matters affecting the ability of all persons in this country to get fair and impartial justice. For them not to do so would, in my view, be an abdication of responsibility. Sir James Martin provides a fearless example of a “lawyer-statesman” who took on this responsibility, even though it was sometimes at great personal cost.

9. The other important legacy that Sir James has left, which continues to inspire people like John and Patricia today, is his support of cultural activities. Sir James has been described as a “brilliant talker”, whether it was modern democracy, Greek and Roman texts, modern poetry or philosophy. He boasted “a most extensive collection of rare and valuable books, piled round the walls from floor to ceiling, in every department of literature”.¹⁰ And of course his lasting legacy, the Monument of Lysicrates which he commissioned, paid for and placed in his gardens, now stands in Sydney Botanic Gardens and has been fully restored thanks to John, Patricia and the Lysicrates Foundation.

10. Sir James Martin is one thread in the strong ties that have long existed between the legal profession and the arts. More often than not, this is because lawyers make fantastic fodder for those in the arts looking to curry favour with an audience for some cheap laughs. Lawyers have been the butt of literary gags for ages – from Dickens’ description of Chancery as being “roasted at a slow fire ...stung to death by single bees ... drowned by drops”¹¹ to Shakespeare in Henry VI: “kill all the lawyers”. Of course, lawyers have irritated those in the arts with equal vigour, from our arguments that TV Programme Guides¹² or the Yellow and White pages¹³ constitute “original

¹⁰ Grainger, *Martin* (1970) 116.

¹¹ Charles Dickens, *Bleak House* (1853) Ch 5.

¹² *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458.

¹³ *Telstra Corporation Limited v Phone Directories Company Pty Ltd* (2010) 194 FCR 142.

literary works” to the hilarity that ensues when a courtroom full of judges and lawyers listen to rap songs in complete silence to determine copyright claims.

11. Jokes aside, lawyers have always shared a special connection with the arts. The Arts Law Centre of Australia is one example – a foundation which provides free and low-cost legal advice to Australian artists. The Lyscriates Foundation and particularly this new “Legal Friends” group is another. Robyn and I attended the Lyscriates Event this year, and it was a fantastic success.
12. It is a testament to the hard work of the Azarias’ since 2014 that this year it was held for the first time in the Sydney Opera House. The Prize offers an unrivalled opportunity for young playwrights to showcase their work and receive the necessary encouragement to finish their play. It is also an opportunity for a wide range of people in the community to enjoy the arts, beyond the usual cohort of theatre-goers. In this way, the foundation truly does follow in the tradition of Sir James Martin – one of the most illustrious figures in the history of this state – who came from a poor Irish family in County Cork, grew up in the servant’s quarters of Parramatta government house and walked 20km every day to attend school at what would eventually become Sydney Grammar.
13. I thank you all for attending this evening, for showing your support to the work of the Foundation, and I look forward to hearing from Patricia later this evening about what the future holds for the Foundation and its Legal Friends. Thank you.