Farewell Speech of the Honourable Mr Justice William Frederick Ormiston

On 23 February 2006 William Frederick Ormiston retired as a Justice of Appeal of the Supreme Court of Victoria. In his reply to the addresses from the Solicitor-General, the Chairman of the Bar and the President of the Law Institute, his Honour took the opportunity to lament the bureaucratic inhibitions imposed on the Supreme Court.

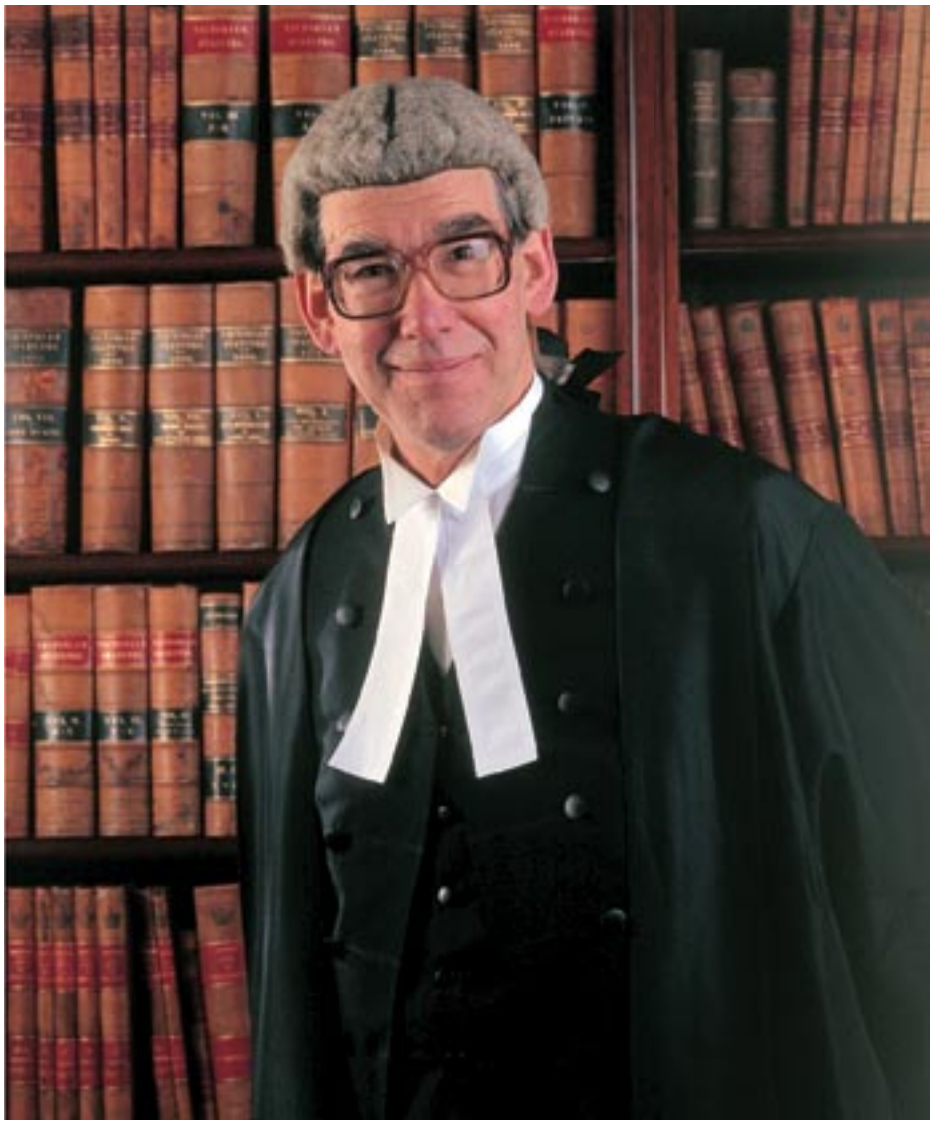
His is not the only voice that has recently expressed concern at the subordination of the Supreme Court to the bureaucracy of the public service. The court does not have its "own" staff. All of the staff, it seems, belong to the public service. Even the CEO of the Supreme Court owes a loyalty not only to the Chief Justice but to the Secretary of the Department of Law.

THANK you, Ms Tate, Ms McMillan, Ms Gale, for your very kind expressions of goodwill on my retirement and for your very generous comments about my career, especially on the Bench of this Supreme Court. I have simply tried to do my best and I apologise that in doing so I have taken too long or have been unduly abrupt or crabby with counsel, who no doubt were doing their best with intractable material.

If I have achieved anything, I ascribe it largely to luck. I have had the good fortune to have had a tolerant family, very excellent teachers and invaluable friends and colleagues both at the Bar and on the Bench. I began life as a spoilt only child, but that made it easier, when John Batt said regularly, some 55, 60 or so years ago, that it was time to do our homework, for me to believe that there was no choice, and so I had to do the same. I was lucky at school in that having no sporting talents other than enthusiasm, I found study easier than sport. Having left school I had the great good fortune to be taught at Melbourne University by teachers such as Professor Zelman Cowen, Professor David Derham, Harry Ford, Dr Norval Morris and Mr Arthur Turner, among others, and then at London University by Professor Gower, a young barrister called Robert Goff, Professor De Smith and Sir Jack Jacob. But then I have also been fortunate enough to have had colleagues who not merely knew and understood much law, but who were genuinely devoted to it. So I shall mention a few friends and colleagues in the law, excluding those who are presently sitting. Of those who went from school to university with me I mention my old friends John Batt and Jim Merralls, both of whose knowledge was and is encyclopaedic. Then, from my university days right through my time at the Bar and ultimately also as colleagues from the outset of the Court of Appeal were my good friends John David Phillips and Clive Tadgell. When I came to the Bar I had the special privilege of reading with Dick Griffith, whose generosity included instilling in me a knowledge and love of the whole range of legal literature. On the Supreme Court itself, when I first came to the court, I had such good friends as Peter Murphy, Ken Marks and Sam Gray. Again, I had the good fortune to have as my first Chief Justice Sir John Young and, as the first President of the Court of Appeal, Jack Winneke. So you may see that I was truly spoilt in having such close friends and colleagues for whom an understanding of the law was second nature.

Through this all my wife Sarah and my sons, in particular Simon and Charles, had to put up with my comings and goings, my odd hours, a view of the bald patch on the back of my head and a distant lost look at times when I should have been concentrating on them, rather than on some legal problem. I cannot begin to thank them for their tolerance and understanding.

Then I wish to say something in particular about my staff, who likewise have been supportive and understanding and have had to put up with my temperamental outbursts as the frustrations of judging and at those who control the courts



Mr Justice Ormiston.

got under my skin. Tony Tonkin, Terry Bates and Doug Spence, as my associates, have largely borne the brunt, but smiled benignly as I expostulated and ultimately subsided. My tipstaves too, Jock Mann, who had his own eccentricities, especially about getting me my lunch and afternoon tea, certainly no fresh tea, always the tea bag; Trevor Peters, Bruce Ellaway and John Van't Hoff have likewise had to put up with my outbursts and demanding requirements. The same can be said for my secretaries, though at one remove, in particular Gemma Tobschall and Sharon Denton. Finally there is my driver, John Smith, who has likewise looked tolerantly on my ups and downs, but regrettably his loyalty to me and the court for over 20 years will not, it seems, be fairly recognised or rewarded.

Which brings me to the first critical matter I wish to raise on this, my final opportunity to say something in heat and without fear of repercussion, or at least I hope so. I have always had the highest regard for the court staff, in that I also include of course people such as the Prothonotary and his staff, the Registrar of the Court of Appeal, Philip Cain (and the Registry staff) and the Library staff, especially James Butler who is, I believe, a court librarian *sans pareil* in Australia. But what has concerned me in recent years is an attitude by some to these members of my staff, especially my associates, my tipstaves and my driver, which seems not to recognise the importance of faithful staff in the running of a body such as the Supreme Court. Their role, their experience and their loyalty has provided me, and countless other judges, with that support which has meant that I have been able to concentrate on the judicial function I was appointed to carry out, that is, of deciding cases. The less I had to be distracted by minor matters such as the payment of bills and the making of appointments and the sitting at the end of phones waiting for the interminable music to stop, the more I have been able to concentrate on reaching the correct decision in each case.

Associates have a special loyalty towards the individual judges who have chosen them to act in that role, as in effect their aides-de-camp, but I have considered every other one of my staff to have acted in the same way and to have provided support to the judges as a whole, and for that the judges have been and should be duly grateful. Because the associates, tipstaves, secretaries and driver that I have had each worked for me for a number of years, I knew that I could rely on them and that others could rely on them because their loyalty was to this Court. They have not been mere public servants, answerable only to the state of Victoria, and waiting to be deployed from department or business unit to department or business unit as the bureaucracy would dictate, but they have seen their role as supporting the judges and the Court. They have had no ambition to move beyond the Court to take on other roles, to go into practice or to take on other posts in the bureaucracy.

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It is therefore distressing to me to have learnt recently how little thanks they are to get when I leave, and how little it is understood that their loyalty is to the Court, not merely to some state polity. Nor do I have much time for the concept of part-time or temporary associates who come and go, loyal no doubt to the judges

who have employed them, but with very little experience of the other judges or of the Court as it functions as a whole, for they move away within one or two years to their appointed callings, either as barristers or solicitors. They may well be, and frequently are, bright, qualified lawyers — some of my best friends have held such offices in the past — and many are very conscientious, but I do not believe that those persons should be engaged or used as surrogate judges to do a judge's research or judgment writing except as a most basic level. I would deprecate strongly the thought of any associate drafting a judgment. That is the task that we judges have been engaged to do and for which we are paid not inconsiderable salaries. It is not a task to be delegated.

The result of recent changes is, I very much regret to say, that the old style associate and tipstaff, without legal training, are being seen as unsuitable to give judges so-called "modern" support. By contrast, the new cadre's lack of experience is already evident, and their knowledge of the law is frequently superficial and not burdened by the kind of experience that a judge should bring to the task. As the old staff are pushed out of the Court and into "redeployment" in the Public Service, if they can tolerate it, so the administration of the Court will deteriorate for want of loyalty and of experience in its day to day running.

Some of you have enquired why I should wish to leave the court at this time, before I reach my statutory retiring age of 72, and a small group have been kind enough even to suggest and to try to persuade me to stay in office until that time. Now I will acknowledge that I have gained great satisfaction from my time as a judge, whether hearing trials or deciding appeals. In more general terms I have likewise gained much pleasure from studying the law in all its aspects, whether in acquiring, as has been essential, an understanding of the rules of court and of evidence, or in studying, on the other hand, the historical basis of some common law or equitable principle. More especially I have enjoyed the company of my fellow lawyers for 44 years; 22 years at the Bar and 22 years with my colleagues on this Bench. I think it will be a shock next Monday to realise that I shall not be wending my way in, as usual, to my chambers, where, as barrister or judge, there was always somebody who would put up with my chatting about the law or who would merely pass the time of day. I shall miss the collegiate aspect of both institutions, though I may come back to the Essoign Club occasionally for lunch.

I must explain briefly what has persuaded me to go. The truth is, though I have still enjoyed writing judgments, or some of them, that task has at my age become much more burdensome to me. Whatever understanding I felt I had at last gained of some aspect of the law has been constantly threatened by new legislation or by new case law, including that of my own Court. I have begun to feel that I was desperately climbing up a large sand hill, where the sands keep on sliding away so that I keep treading at the same level, with the pinnacle just as high, but somehow of a constantly changing appearance. For example, I once knew something about the Companies Act, simply and beautifully drafted in 1957, but the modern gargantuan, *The Corporations Act 2001*, defies consistent and intelligent analysis, especially when the section numbers keep chopping and changing.

The next burden, one that has really started to depress me, is the volume of reading required for each appeal. Every night, as many of you know, I have packed away in my bags volumes of appeal books, pages of submissions and lever-arch file after lever-arch file of ever-changing authorities. Moreover, it seems that we are under instructions from on high to read every exhibit and every page of transcript for certain appeals, whether civil or criminal, such that I have been spending more of each weekend than before, and well beyond one o'clock every morning, just to get myself ready for a particular appeal or appeals, so finding it harder and harder to get around to writing the judgments already reserved. So I have just become too slow for the task. The profession and the public rightly have called for prompter and more succinct and practical

JUSTICE Ormiston's complaint comes on the heels of an earlier complaint by Justice Phillips whose farewell speech was published in the Autumn 2005 issue of *Bar News*. Among the statements in that farewell speech was the following:

> What is evolving is a perception of the Court as some sort of unit or functionary within the Department of Justice, a perception that is inconsistent with this Court's fundamental role and underlying independence.

The views expressed by Justice Phillips were endorsed on 2 June 2005 by Justice Batt, not a man known for excessive flamboyance or hyperbole. Justice Batt said:

> At his farewell less than three months ago, Mr Justice Phillips spoke eloquently about the importance of judicial independence and the threat of its erosion that has gradually been occurring, particularly by the Supreme Court's being treated as if it were an administrative unit within the Department of Justice. I could not improve upon what he said, but wish to associate myself publicly with his remarks and to say that, even since then, I have noticed what seems to me, though I hope I am wrong, another instance of similar treatment of the Court.

One cannot but ask how a judiciary which does not control its own funding, whose staff is controlled by the executive through the Department of Law and which is categorised as an administrative unit, "Business Unit 19", can, without constant effort, difficulty and self-sacrifice, properly fulfil its vital role of preventing abuse of government power, of standing between the individual and government and ensuring that we have government under the law, not law according to government.

The categorisation of the Supreme Court as an administrative unit within the Department of Justice involves a psychological downgrading of the status of the Court. It is at one with the decision some decades ago to replace judges' gold cards with free train tickets.

The Chief Justice, as published in *The Age* of 24 February did say:

> The bureaucracy does not tell justices what to do. The Court, as part of our structure of government, is independent. As part of Victoria's constitutional arrangements, the Supreme Court is the third arm of government.

This beautifully spun message does not (as might first appear from the sub-editor's headline "Chief Justice Rejects Interference Claim") negate or deny

judgments and I cannot keep up with that demand. It is better that I pass the baton on to those who are younger and fitter than I am.

But the third burden, one that I find truly intolerable, is the constant interference by the bureaucracy. I shall not expand on this for I have mentioned one aspect already, and J.D. Philips said all that could be said last year. It is enough to say that, whatever I might have continued to do, constant nagging irritations from the Department (and its representatives within the Court) and its ignorant meddling, though most "plans" have been recycled a number of times in my judicial career, thereby rarely containing little more than superficial window dressing, has become a constant distraction which I can no longer tolerate. I could go on and on, but the fate of Business Unit 19 (as once was the unhappy description of the Court) has left me in despair. So I will feel an enormous burden has been lifted from my shoulders when Friday night arrives.

You may ask what I will do and to that I must confess that I am unsure what other modest talents I have. Certainly nothing that requires eye and hand coordination, but I shall try to adapt new gadgetry and ideas to some interests and pleasures I had when I was young. For example, I can use my new computer to revert to listening to those hardy old series, "Much Binding in the Marsh" and "Take it from Here", as transmitted on-line from BBC Radio 7. But I shall also try to use it to learn or brush up a language or two. I once had an ambition to be an architect, but I couldn't draw a circle or even a straight line, and my mathematics suffered accordingly, but I shall still travel the world with architecture handbooks in my luggage, whereby I can combine my interest in both that subject and in history by visiting cathedrals, churches, castles and chantries. Then, if my wife allows me, I can spend more time watching the cricket as I used to, but this time using Foxtel to bring me cricket from, say, South Africa or India. And those books that everybody has spoken about; I have actually removed most of those law books and sold them, not at very great sums, if I might say so, but it is amazing what books I have discovered, bringing them all down from on high to below, all those little books on 18th century poetry and the like, or on music or on art; books that I had forgotten all about. So I am going to get great pleasure just at picking those off the shelves and reading them again, or perhaps for the first time. And I might try a little writing, though I think my reminiscences would be unutterably boring and full, I am afraid yet again, of interminable sentences!

Enough of complaints and my desires in old age. I must finish by saying how important I believe is the administration of justice and this Court's role in it. In particular the Court of Appeal in practical terms supervises justice at the highest level in this state and, if it occasionally goes wrong, then so far that has been relatively rare. But the range of cases that are heard are important to the community in every sense. There is hardly any form of civil claim that cannot be considered by the Court, even at times it is confined to legal review of what is resolved in some tribunal. But to my way of thinking the administration of the criminal law, and in particular its proper review by the Court of Appeal is essential to a civilised and just community. What is decided by the court on a day to day basis is critical to the balance between citizen and State, between citizen and citizen and between proper discipline and the reasonable freedom of individuals, so that the rule of law can be maintained in a way which preserves the public's interest in general. There are many judges who will maintain that respect for the law and who will continue to sit on this Court. I know that they will do their best to ensure for the people of this State that the law is duly administered, without fear or favour, for all affected by it.

Thank you all so very much for coming and allowing me to indulge myself today once again. I am sorry that my reasons have again been so long. I am touched greatly by your generosity and good wishes.

Adjourn the court *sine die*.

the validity of the complaints made by Ormiston JA. Rather it highlights the concern which we should have at any psychological or other pressures inhibiting in any way the independence of the third arm of government.

The response of the Attorney-General (apparently speaking as a member of the executive and not as the first law officer of the Crown) to Justice Ormiston's complaints reveals the (somewhat alarming) attitude of government. *The Age* quotes the Attorney-General as follows:

> Despite Justice Ormiston's somewhat vague and non-specific comments about a hard-working public service, he has served the judiciary well over a long period of time and is entitled to express his view at his farewell. The government will continue to work with the Courts to ensure they remain relevant in the twenty-first century.

The first sentence can only be categorised as totally inaccurate and as patronising in the extreme. Apparently the Attorney-General does not believe that there is any truth whatsoever in the adage: "He who pays the piper calls the tune." The second sentence suggests that the Courts are becoming irrelevant and will only remain relevant with the assistance of the executive. This is a worrying suggestion at a time when most lawyers are aware of the increasing need for a stronger and independent judiciary if the rule of law is to survive.

There are three arms of government, executive, legislature and judiciary. In this country, where there are only two significant political parties, both strongly disciplined, the executive (generally) exercises de facto control of the legislature. The judiciary is the only arm of government which is truly independent of the executive. Consequently, it represents the only restraint on executive action, the only body which can in any way stem the erosion of individual rights by a government concerned to "protect democracy" regardless of the price.

Every bureaucratic or psychological impediment, which makes the role of the judiciary more difficult, strengthens the power of the executive and undermines the rule of law.

A unanimous Bench of three members of the Court of Appeal, first Justice Phillips, then Justice Batt and finally Justice Ormiston, appears to have found that such impediments exist. This is a matter which should alarm thinking members of the legal profession.

It is an issue on which the Bar Council should formally record its concern and one which it should, as a matter of urgency, raise for discussion with the Attorney-General.

Gerard Nash QC