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OCCASIONAL ADDRESS

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Chancellor, Vice Chancellor, Dean, past and present members of the judiciary, alumni.

I thank the University of Western Sydney Law Alumni Association for inviting me to present tonight's occasional address.

When I was at Law School, I could never have imagined the life which was before me as a lawyer. I was always attracted to the role of an advocate, but I had no appreciation of the opportunities which would be given to me to participate in so many fascinating issues, and to play a part in some major events in other people's lives. The Bar took me to places and allowed me to share the company of people which would not otherwise have been available to me.

My early days at the Bar brought many challenges but the opportunity offered to me as counsel assisting the Maralinga Royal Commission into British Nuclear Testing in Australia was unparalleled. It was truly the brief of a lifetime. Although primarily concerned with the effects of the nuclear testing program on the health of indigenous people and service personnel, it allowed me to examine in detail the history of a significant post-war period of Australian life in which, although the development of nuclear warfare was central, many great issues emerged. One of the most significant was the social consequences of the treatment of Indigenous Australians by the

authorities in the 1950s, and the need to define an effective response in the 1980s. The cruelty shown to Aboriginal people, who were rounded up and put on trains going west from Maralinga to anywhere and thereby dispossessed of their land, with their tribal and social structures destroyed, remains as but one of the legacies of that era of Australian life. The anger expressed by the late Justice Jim McClelland, sitting in the dust with Aborigines at Maralinga, and the recommendations of the final report of the Royal Commission, could never repair the damage done to so many individuals.

The Royal Commission had many other fascinating aspects. The opportunity to work with and question some of the greatest scientists of the day, including Lord Penny, the leader of the British expedition, would be allowed to few people. I also came to know Mark Oliphant, truly a great scientific mind and a man blessed with an unusual insight into the human condition.

I learned many things from the Commission, not limited to the events requiring investigation. I was exposed for the first time to the political process, both national and international. Justice Jim McClelland, a dashing figure with an acerbic tongue, well understood the role which publicity could play in achieving effective outcomes for the Commission. I maintain a vivid recollection of drafting an opening statement for him when we sat in Brisbane, gently chiding the British government for its reluctance to provide classified documents from its archives. The reluctance, I later learned, was based on Jim's former active sympathy for the revolutionary ideals of Leon Trotsky. The Judge manifestly disagreed with my gentleness and, tearing up the draft, prepared a stinging attack, not only on the government of Margaret

Thatcher but on the whole notion of the British empire. To ensure his statement would not go unnoticed, he finished by remarking on Henry VIII's matrimonial difficulties.

I was appointed a judge of the Supreme Court in 2001. I had assumed that with my appointment the opportunities for me to be concerned with issues beyond the resolution of a particular case would be significantly confined. I was wrong.

In 2005 I was fortunate to be part of an Australian delegation which participated in an international conference of Chief Justices and senior judges in Manila in the Philippines. Forty five countries were represented, the primary focus being the Asia-Pacific region. However, Chief Justices from countries outside that region also attended as observers, including the Chief Justices of Russia, Turkey and Albania and many others. It was undoubtedly one of the most significant gatherings of senior judges to have taken place outside of the developed world.

The conference was initiated by the then Chief Justice of the Philippines who was soon to retire and was later appointed as the Philippines Ambassador to the United Nations. The theme of the conference was the essential requirements for effective judiciaries to meet the needs of the 21st century – in short, judicial reform.

Notwithstanding the diversity of cultures, inherited values and accepted legal doctrines, those present were able to embrace fundamental principles of universal application relevant to the judiciaries of every country in the 21st century. Central to those principles is an independent judiciary dedicated to upholding the rule of law.

It has become fashionable in some contemporary thinking to assume that providing individual freedom to members of a community will spontaneously ensure that the society in which they live will adopt democratic principles and accept the rule of law. Those of you who are familiar with the legal history of common law countries will readily appreciate the naivety of such a view. The long history of conflict between the monarch and his or her judges in England, to say nothing of conflicts with the parliament, bears testament to the difficulties faced by societies seeking to embrace the rule of law where a judiciary independent of the legislature and the executive is universally accepted. However difficult it may be to create such a society, there can be little doubt from the sentiments expressed by those at the Manila conference that these values are now embraced by many countries.

Another fundamental concern of the delegates at the conference was the practical mechanisms by which developing countries may be able to provide access to justice to all members of their community. In many places this involves defining practices and procedures for people burdened by significant poverty. In the Philippines a lack of courts and judges meant that many people were incarcerated on remand for terms beyond the maximum term provided for their alleged offence. That problem is now being addressed by a fleet of buses, modified as courtrooms, which take the court to the gaols. Known as "justice in a bus" it is but one of the innovative processes discussed at the conference.

In Malaysia, a person can only vote if their citizenship can be established through a valid birth certificate. That certificate can only be obtained from a court which has determined having regard to the available evidence, that the person is entitled to a

Malaysian birth certificate. Malaysia has problems with illegal immigrants far greater than anything causing public concern in our country. The Chief Judge of Sabah and Sarawak appreciated that many Malaysian citizens could not vote because they did not possess a valid birth certificate or, due to their isolation, could not obtain one.

The Chief Judge's solution to the problem was to draw upon the experience of the Philippines and develop a program known as "Justice in a Jeep." He fitted out 4-wheel drive vehicles as courtrooms. The vehicles travel to remote areas and hold proceedings, enabling many people to obtain valid birth certificates.

Access to justice problems also confront many developed countries. There may be differences of scale, but the rule of law is little more than hollow rhetoric if an individual is unable, because of the cost, to access the courts to request that legal principles are applied to the resolution of a particular dispute. Malpractice, dishonest dealing, corruption and crime are all encouraged when individuals and corporations do not have ready access to an independent and effective judicial system.

In recent years I attended a conference in Tonga where the Chief Justice of Samoa spoke of the development of customary law in his country. As I listened to him I was reminded of the early days of equity as the judges struggled to develop principles which would provide a just solution to a problem while ameliorating the perceived harshness of the common law. Every exchange I have with judicial colleagues of the Asia-Pacific region reminds me that the law is not static. Society is in constant change. Legal systems respond to those changes. The response is often reserved and comes when the demand for change is expressed by many in the community. In

many cases the need for change is only apparent when a retrospective assessment confirms that what may have been first thought to be an irritant or inconsequential has become an entrenched problem. Sometimes it is the courts that respond by changing their procedures, gradually adapting and altering the rules by which litigation is conducted. Other times, when the problem develops a “political” dimension, the legislature intervenes. When this occurs, the changes are likely to be abrupt. Parliaments rarely intervene to merely refine systems. They are more likely to intervene to impose radical change.

The Manila Conference gave birth to an organisation which has come to be called the Asia-Pacific Judicial Reform Forum or “APJRF”. Its membership comprises the judiciaries of almost 50 countries and its meetings are often attended by other countries with observer status. The topics discussed at its meetings provide a constant reminder of the significance of the rule of law to the maintenance of a stable society and of the role which lawyers and judges must play if the rights of individuals in our various societies are to be protected.

The Forum met in Kuala Lumpur in 2007. The meeting was hosted by the judiciary of Malaysia. Three events occurred in the week of its meeting, each one a reminder of the role which an independent judiciary can play in a society. The first event occurred in Malaysia. The Court of Appeal, the highest court in Malaysia handed down its decision on the question of whether a woman could have her conversion from Islam to Christianity legally recognised. She sought to have the religious designation on her identity card removed. Although she had converted to Christianity at age 26 and had been baptised in 1998, legal recognition of her conversion was

required before she could lawfully marry her Christian partner in Malaysia. The court divided. The two Muslim judges ruled that jurisdiction over the woman's case lay with Malaysia's Syariah or religious court. Justice Richard Malanjum, Chief Judge of Sabah and Sarawak and a Christian, wrote a forceful dissent in which his Honour upheld the woman's claim. His Honour remarked that "[w]hen considering an issue of constitutional importance it is vital to bear in mind that all other interests and feelings, personal or otherwise, should give way and assume only a secondary role if at all."

The second event which occurred that week involved Thailand. There were a number of judges from Thailand present at the conference. They were required to leave early in order to hand down a decision of the Constitutional Court of Thailand. That decision was to change the face of the Thai parliament. On 30 May 2007 the Constitutional Court handed down a decision the effects of which were to dissolve three major political parties and to invalidate the April 2006 election. The proceedings were brought by the Attorney-General who claimed that those parties had committed electoral fraud. The verdict was delivered orally and was broadcast live on national television. It took 9 hours to read. The Court brought in guilty verdicts in relation to key executive members of those parties.

The Court temporarily disqualified from political participation 111 members of the Thai Rak Thai party, including Thaksin Shinawatra (former Prime Minister of Thailand), 19 members of the Pattana Chart Thai Party and 3 members of the Pandin Thai Party.

The third event that week concerned the Acting Chief Justice of Pakistan. At the time of the meeting in Kuala Lumpur, the Chief Justice of Pakistan, Justice Chaudhry had been suspended by the Pakistan President on the grounds of alleged violation of judicial conduct, corruption, seeking favours and interfering with the work of the Executive. The Acting Chief Justice had been appointed to investigate the Chief Justice, no doubt with an expectation from the government that the allegations would be confirmed. The issue created considerable unrest in Pakistan. There were major public demonstrations by lawyers in support of the Chief Justice. The Acting Chief Justice knew that he was stepping into a matter of great difficulty and anticipated pressure from the Executive.

During the course of the meeting in Kuala Lumpur, the Acting Chief Justice spoke. His words were a stark reminder of the obligation which falls upon a judge to act with integrity and impartiality. He told the gathering that for him, judicial independence was of fundamental importance. Although he recognised the pressure to which he would be subject, he told the meeting that he was not about to depart from the judicial oath by which he had always abided. In due course his report came down. The Chief Justice was reinstated and remains the Chief Justice of that country today. Of course there are many other difficulties in Pakistan.

In October this year the APJRF met in Beijing. As I am sure many of you have visited China will understand, that country is undergoing enormous change. The decision to “open China” and allow a form of private capital to develop the country has created a society where the pace of change is almost unparalleled in human history. It is a country undergoing both an industrial revolution and a program of urbanisation and

at the same time absorbing the changes brought by the information age. The task of managing the changes and ensuring a stable progression to a developed economy cannot be underestimated. The contribution of the courts to that change is significant. China is comprised of diverse provinces, some with different histories and inherited values. The government has recognised the significance of a strong legal system and effective court processes. It has given the Supreme People's Court the task of developing laws and trial processes suitable for the whole of China. The judicial reform program of the Supreme People's Court is controlled by judges who devote their entire time to developing reforms, consulting across China and bringing forward recommendations to the central government. The task of developing a competent judiciary administering laws appropriate for Chinese society and the commercial dealings both within China and with other countries has been enthusiastically embraced but it cannot be completed overnight. The Chinese judiciary are moving toward consistent principles to ensure fair trials and independent judicial decision-making.

There are many other problems facing the judiciaries of developing countries in the Asia-Pacific region. The Chief Justice of Afghanistan was present at Beijing. His court has lost 12 judicial officers in the violent struggle for stability in that country. Not surprisingly there are difficulties in recruiting competent lawyers to serve as judges. The quality and integrity of the judicial process is a constant problem which he faces. Since he has become Chief Justice he has constructed a program designed to raise the quality of the judiciary both by relieving some judges of their commissions and appointing others who are competent lawyers and who have received effective training in resolving issues in the courtroom.

A judge of the Supreme Court of Cambodia was also present. Justice Kim Sathavay survived the horrors of the Khmer Rouge but lost almost every member of her family. Her recently published biography entitled "A Shattered Youth: Surviving the Khmer Rouge" is a chilling account of her experiences under the Pol Pot regime. Pol Pot set about killing the educated members of Cambodian society including many lawyers. The contemporary consequence is a significant reduction in the pool of people available to carry out work in the court. Justice Kim carries an extraordinary workload as the judiciary seek to return stability to the dispute resolution processes in that country.

Many judiciaries in the Asia-Pacific region have only recently been tasked with independent decision making. Whatever be the form of their executive government, a lack of developed traditions can create tensions and difficulties for judges in carrying out their tasks. Many remain unsure as to what is expected of them by members of their community. Without a strong tradition of judicial independence, some lack confidence in resolving disputes against the interests or wishes of those holding executive power. The process of developing new traditions will take time. The support of international bodies such as the Forum are essential to their development.

Many developing judiciaries are inadequately resourced. This often occurs because the establishment of an independent judiciary brings about a sudden realisation to the citizens of a country that they have a tribunal to which they can turn for a fair and just resolution of their disputes. The resources which the Executive provides to the

judiciary often prove inadequate in the face of a greatly increased volume of litigation. When judges are inexperienced and resources are inadequate, significant delays in resolving cases can occur. Those delays have a potential to compromise the effectiveness of the emerging judiciary. The Forum members commonly discuss the issues of delay and efficiency. They look to the experience of others to identify mechanisms whereby the performance of their own systems can be improved.

I understand that many of those present tonight graduated some years ago. Others are recent graduates. Each of you will have started on your own career path. No doubt many of you are developing practices in commercial, property and other areas of the law fundamental to our community. I apprehend that many of you will not have occasion to reflect upon the role which the law plays in underpinning the fundamental structure of our society. That is not surprising because fortunately in Australia it is not often that those fundamental issues are called into question. However, it behoves all of us to remember that without an independent judiciary sworn to uphold the law and do justice within the community, the universal aspiration of a peaceful existence marked by individual liberty can be threatened and lost. No doubt these issues were discussed when you were at law school. Their significance must never be forgotten.

In the course of these remarks I have attempted to provide some insight into the problems faced by judiciaries of the Asia-Pacific region. It is but a brief glimpse. However, in reflecting upon those problems it is important to appreciate that similar issues must constantly be addressed within the judicial system in our own country. There is a constant need to ensure that the resources provided to the courts and the

education available to the judiciary are appropriate to meet the demands imposed. There is no doubt that in my time in the law, the task of a judge has become more complex and the burden consequently increased. There is always a need to ensure that the resources available to our courts are adequate to meet the community's expectation of a just outcome without delay.

And against the possibility that some may believe that the independence of the judiciary is not a contemporary issue for Australian judges, can I remind you of what the Chief Justice of the High Court said last week in *South Australia v Totani* [2010] HCA 39:

“Courts and judges decide cases independently of the executive government. That is part of Australia's common law heritage, which is antecedent to the Constitution and supplies principles for its interpretation and operation. Judicial independence is an assumption which underlies Ch 111 of the Constitution, concerning the exercise of the judicial power of the Commonwealth. It is an assumption which long predates Federation. Sir Francis Forbes, the first Chief Justice of New South Wales, stated the principle in uncompromising terms in 1827 in a letter to the Under-Secretary of State for War and the Colonies:

‘His Majesty may remove the judges here, and so may the two Houses of Parliament at home; but the judicial office itself stands uncontrolled and independent, and bowing to no power but the supremacy of the law’.”

The Chief Justice continues:

“It is a requirement of the Constitution that judicial independence be maintained in reality and appearance for the courts created by the Commonwealth and for the courts of the States and Territories. Observance of that requirement is never more important than when decisions affecting personal liberty and liability to criminal penalties are to be made.”
