

The Honourable Justice Kenneth Crispin
Speech upon his Retirement from the Supreme Court of the ACT

10th October 2007

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Ladies and gentlemen, let me begin by thanking you all for the great honour that you have done me by coming here to attend this farewell sitting today. I am especially grateful to Terry Higgins CJ, the Attorney-General Simon Corbell MLA, the President of the Bar George Brzostowski QC, The President of the Law Society Rod Barnett for their joint, outrageous flattery. Jonathan Swift once complained that lawyers were brought up in the art of proving that black is white, white is black according to how they are paid. It was a heartening today to find that even the most distinguished lawyers may charitably deploy this art without charge.

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Today is a somewhat bittersweet occasion, and whilst I know that judges are supposed to be impervious to human feelings I must confess to being buffeted by competing emotions.

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First and most obviously, I had hoped to share this day with Justice Terry Connolly. Terry was a warm and compassionate man who was a good judge and a good friend.

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Today also marks the end of the period that has been the culmination of my legal career. I have been very conscious of the privilege of working in this court since Gary Humphries had a rush of blood to the head in 1997 and decided to inflict me upon an unsuspecting public. I am pleased that Gary could be here today when the burden of responsibility that he then assumed will at last shift from his shoulders.

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But it is time to reflect and it is time to move on.

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It is customary to give retiring judges the luxury of boring people witless by talking about themselves and pontificating about the law and life in general. And since this is no time to abjure self-indulgence I propose to ignore the silent groans for a few moments. In many respects, I have been a very fortunate man. I was a skinny kid with eczema covering his arms and legs. I attended a school in which difference was the cardinal sin. I was also an asthmatic and since I soon ran out of breath all my fights had to be over quickly one way or the other. It was good grounding for a later legal career.

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Yet I enjoyed the care of supportive parents and my older brother Peter, whose interest in chemistry made him seem like a teenage Merlin. My father was a man of strong Christian faith and the sense not to notice some of my teenage indiscretions. My mother was a kindly woman who had suffered much and was always anxious to protect me. Shortly after my appointment as a judge she rang one day to tell me it was time I got my 'flu shots and

concluded the call with the words “That’s a good boy”. It was a sentiment that the man I’d just sent to prison wouldn’t have shared.

5 My wife Pam breathlessly burst into my life after spinning off from a dance
in which participants got the wall flowers on their feet by finding new
partners whenever the music stopped. She picked me as the first available
male and I was instantly enchanted. When the music stopped again I
declined to be relinquished, ignored the black looks from her earlier partner
and spent the rest of the evening basking in her smile. We were engaged
10 within 3 months and married the next year, she a girl of 19 and I a mature
man of 21. Of course she was not then the Reverend Doctor Pamela, but it
was I suppose predictable that she would pursue an interest in theology. Life
with me inevitably has had her asking “Why God? Why?”. But 40 years
later she still retains that look of stoical patience and tolerant amusement that
15 has made it all possible. And I am still enchanted.

We’ve been blessed and, at times, infuriated by our four children. Jacqueline
sadly died shortly before her 2nd birthday. Her siblings Judith, Steven and
Tim share the blame for turning my hair grey, but each has grown into a
20 mature and quite wonderfully interesting individual. In some respects they
are very different from each other, yet each in their own way is a very fine
person and I am immensely proud of them all. I am very pleased that they
were able to join me today.

25 When I went to the Bar in 1973 there were no legal workshops and I obtained
minimal qualifications by correspondence while working in the Public
Service. I had no relevant experience and had to ask where the Supreme
Court was, so that I could get there to be admitted. It was a desperate move.
People told me that I was mad and they were right. I ventured into Chambers
30 with a nervously defensive truculence born of playground hostility, only to
find that the aloof silver-tails were less pervasive than I had expected, and as
incredible as it then seemed to me, they were warm blooded lawyers.

35 One Barry Mahoney, later Mahoney QC and then Judge Mahoney, who has
kindly attended today to share this occasion with me, responded to my
question about pupillage by telling me I needed a better suit. When I
protested that I couldn’t afford such sartorial splendour, he gave me a
substantial sum of money with a stern admonition not to return with any
change. I had never imagined that I would receive such kindness from
40 someone I had just met. It gave me more than a suit: it gave me acceptance
and it gave me a degree of hope that stayed with me for years. I owe debts of
gratitude to him and to other lawyers I met throughout my years that I can
never hope to repay.

45 By the time I was appointed a judge I had been appearing in court for almost
25 years, but some things still came as a surprise. The first was what I call
the “Goldilocks Syndrome”; the uncanny feeling that any minute a real judge

was going to turn up and demand to know who'd been sitting in their chair. You get no prizes for guessing that the judicial Papa Bear who was lurking in the darker realms of my subconscious greatly resembled Justice John Gallop.

5 I must say that while I have never acquired his legendary status I did learn a great deal from him. Shortly before Christmas one year, I was called upon to sentence Santa Claus, or at least a young drug offender who had got a job in a department store wearing a Santa suit. I was entranced to learn that he was living with a table-top dancer who had allegedly introduced him to heroin. I had always wondered whether Santa was married, but I had never imagined that Ms Claus would prove to be a table-top dancer.

15 The wonderment of the moment sadly seemed to allude the prosecutor. He cross-examined aggressively, scoffing at the suggestion that this man could have been seduced from the paths of righteousness by a young woman. Then Ms Claus walked in. The prosecutor took one look at her and stuttered into silence as the suggestion became instantly plausible, and at the same time the testosterone that had been fuelling his aggressive submissions was instantly diverted. It was only later when I complained that she had forgotten to bring her table that I observed how much a new judge can learn from their more experienced colleagues. His Honour gave me one of those "It's elementary dear Watson" looks and gently asked "Why did she need a table? You sit behind a Bench, don't you?".

25 The second was the phenomenon depicted in the film "Dead Poets' Society"; simply looking in the other direction makes a big difference. While barristers turn their backs on the public gallery, judges are confronted with the naked emotion on the faces of those less directly involved in the human dramas played out in courts. There may be a young mother with a handkerchief held up apprehensively in front of her mouth, an older man with white knuckles and tightly drawn lips, or a grandmother with tears streaming down her face. It is a reminder of the intrusive power of the law and the responsibility that must accompany its exercise in what Sir Joe Brennan has described as the lonely room of conscience.

35 Sadly, the decade in which I have been a judge has seen the law in many Australian jurisdictions buffeted by fear, and knee jerk responses have often been embraced as if they had been handed down from Mount Sinai. It is fashionable to chant mantras like "Tough on Crime" but judges must do justice, not merely appease simplistic demands for toughness. The fashionable fad of mandatory sentencing inevitably subverts that duty.

45 Let me tell you briefly of two people whom I sentenced for armed robbery within a short period of each other. One was a man with a record of violent crime who held up a bank whilst on parole. He fired a shot into the wall and then pointed the gun at the teller's head, demanding that she open the safe. When she protested that it was time locked he told her he would count to

three and kill her if it was not opened. She fainted at the count of two. He was sentenced to 12 years imprisonment.

5 The other was a girl of 19 who had no previous convictions. She had been sexually abused as a child and turned to heroin as a means of assuaging the trauma. Shortly before the robbery she had been brutally raped. She then decided that suicide was the only solution. The question was how to do it. The obvious answer appeared to lie in an overdose of heroin that she thought would let her slip painlessly into a sleep from which she would never
10 awaken, but she had no money. So she took a syringe of her own blood and walked into a service station and said to the attendant "Give me some money. I don't want it all, \$200 will be enough".

15 She responded well to psychiatric care and rehabilitation after her release on bail, but there was still concern that she might suicide if sent to prison. Should I have adopted the refrain "if you do the crime you can do the time", and sentenced them both to the same sentence? Was my decision to give the young woman a suspended sentence just, or was it simply an act of weakness? Does justice exclude the scope for mercy? For how many years
20 would the mandatory sentencing proponents have required me to incarcerate her?

25 Much of the rhetoric is misleading. Crime is not out of control, the streets are not full of criminals who escape conviction on silly technicalities and sentences are not evermore lenient. In fact, the prison population of Australia has increased from 62 per 100,000 members of population in 1975 to 163 per 100,000 in 2005. Crime is driven substantially by drug dependency and mental illness. Neither of these problems are amenable to correction by
30 simplistic slogans and we as a society have often failed to address them adequately, or even sensibly.

35 I have been concerned about the plight of mentally ill people and the paucity of facilities in Australia has long been a disgrace. In 1973 New South Wales had 12,700 psychiatric patients or 317 per 100,000. In 2005 there were 1,902 or 28 per 100,000. At the same time the prison populations have burgeoned. A report in 2003 revealed that 78% of male prisoners and 90% of female prisoners suffered from a serious psychiatric disorder within the previous 12 months and 5% have attempted suicide.

40 The much lauded revolution in community based care has apparently involved a substantial transfer of responsibility from hospitals to prisons. I suspect that even the most ardent law crusaders would rather see dangerously ill people treated and supervised than left at large until someone is killed and the bereaved relatives are left to draw cold comfort from the ensuing prison
45 sentence.

In this Territory the legislature stood against the tide providing statutory

recognition of human rights and resisting the clamour to jettison principles of fairness and compassion. I fervently hope that the sanity will prove contagious. Sadly the Commonwealth Government has not been an island of reason in the flood of hysteria over terrorism. The gravity of the problems posed by terrorism cannot be overstated. The carnage caused by suicide bombers and the anguish of the survivors is transported into our living rooms with excruciating clarity by television.

Few of us will ever forget the horrendous image of the twin towers collapsing or the tragic aftermath of traumatised people working their way through makeshift morgues or leaving photographs of missing loved ones on billboards. Nearly 3,000 people died. In this context there is obviously a need for stringent measures and it may seem unreasonable to complain of legislative overreaction. Yet one may observe that nearly 10 million children die each year from malnutrition and other preventable diseases without evoking rhetoric of a war on poverty. Australia has also faced greater dangers in the past from violent enemies. Why then are we now engaging in a panic stricken rush to jettison rights and freedoms?

Our Federal Government has actively condoned the imprisonment of one Australian in a concentration camp without charge for more than 5 years. We are apparently now entitled to be presumed innocent until an American soldier thinks we must have done something bad, even though he cannot articulate what it might be. Our Government has also supported trials in which soldiers would hear charges of offences allegedly committed against other soldiers in hearings behind closed doors. The Nazi war criminals arrested at the end of World War II were given fair trials in open courts with the press present. Does anybody really imagine that David Hicks was a more dangerous man than Rudolph Hess or the other Nazi criminals tried at that time? Or have we as a nation simply failed to really hear the integrity of our forefathers?

We have seen Dr Haniff's deportation followed by an assertion that a reasonable suspicion that a person may not be of good character may be founded solely upon his relationship to another person. How far will this be pressed? Will we begin casting out the grandparents of non-citizens charge with offences? Should the finger of suspicion have fallen on little Pumpkin because her father is a wanted fugitive? More recently we've been told that police should be able to invade our privacy without first obtaining warrants because courts cannot be trusted to maintain due confidentiality.

All this is said to be necessary, yet as William Pitt told the House of Commons as early as 1783, "necessity is the plea for every infringement of human freedom". Only the rhetoric is new. Western politicians have learned to talk tough whilst meekly surrendering freedoms that earlier generations fought and sometimes died to protect. They sometimes sound like Monty Python's Sir Robin who concluded that discretion was the better part of

valour and bravely hid in the cupboard. There is nothing tough or brave about surrendering hard won rights or freedoms in the face of danger. Our laws should reflect the values that we hold dear, the kind of society that we wish to maintain and the kind of people that we claim to be.

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Having got that off my chest it remains only for me to thank the many people to whom I owe debts of gratitude. I am grateful to Black CJ of the Federal Court and to Rod Madgwick J, to the Honourable Jeffrey Miles and to the Honourable John Gallop who have joined me on the Bench for this last occasion. I am grateful to the Commonwealth Solicitor-General David Bennett QC for his attendance, and to many other distinguished guests whom time does not permit me to name individually.

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I have been particularly fortunate to serve with the Resident Judges and to receive the assistance not only of the Master but of the additional Judges who selflessly forsake the Federal Court from time to time in order to charitably assist this Court and, in particular, the Court of Appeal. Not everyone is able to realise their ambitions and I suspect that even fewer are able to realise them in the company of people they admire and like. I have found on this court able colleagues and good friends. I will miss their collegiality, cheerful banter, wise advice and patient correction.

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The profession too has often helped me, as well as the forensic supplicants they represent. I have continued to be impressed by the profession's deep commitment to justice and public service. I owe a debt of gratitude to many people who have gone well beyond the bounds of duty and the dictates of courtesy to assist me. There are many friendships that I hope to maintain.

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For much of the time in this court I was assisted, supported and occasionally flagellated by Jill Circosta who was a fearsomely effective Registrar. She has been succeeded by the gentle but also efficient Annie Glover.

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My personal assistant Trish Jones has been a tower of strength, encouragement and friendship. She was my secretary when I was the Director of Public Prosecutions and when my immediate successor, Terry Braddon QC resigned I was able to seize the moment and poach her before the present incumbent Richard Refshauge SC was able to assume office. Trish has cheerfully gone the extra mile for me and members of my family on countless occasions.

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My associates Rebecca Ashcroft, Maria Mitchell and Ondina Matera, Helen Drew, Elissa Clark, Danielle Chifley, Emma Bell, Anne Martens, Nadia Tarbet and Michelle Worthington have all patiently listened to my anecdotes, shepherded me into the right courtrooms and tactfully censored any vulgar outbursts in draft judgments. I have also now realised the collective noun for associates, and you can appreciate this when you have a look at them all lined up over there. It is a "bevy" of associates. They have left me confident that

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the future of the legal profession is in safe hands.

5 The court staff have also been wonderful. Time does not permit me to mention them all by name but I do want them to know how much I have appreciated both their professional help and their personal warmth. I will miss their cheery smiles and greetings. Many departmental offices have also offered me unstinting assistance over the last 10 years. I am very grateful to them all.

10 For the Greek philosopher Epicurus life was like a banquet and he maintained that a person who had eaten his fill should not begrudge the end of the meal but graciously push back his chair so that another may take his place at the table. I might yet find some way of sneaking into the kitchen for a midnight snack from the legal fridge, but the time has come for me to push back my
15 judicial chair. I do not know who will take my place but I wish him or her bon appetite. Thank you all.

20 **ADJOURNED**

[11.23 am]