OPENING OF FAMILY LAW CHAMBERS, SYDNEY*

The Hon Justice Michael Kirby AC CMG**

> "When I was about ten … a phrenologist visited my birthplace, Jeparit … and 'read my head'! He said I would be a barrister and public speaker. I knew what a public speaker was … But what was a barrister? I went home and was told. From that day on, my course was charted and my mind clear."[1]

BACK TO OUR ORIGINS

As we are lawyers of the common law tradition, we live with history. We are surrounded by it. The books on our shelves recount the history of thousands of cases and of attempts to provide wise, lawful and just outcomes. History is "philosophy teaching by examples"[2].

The history of the Bar of our tradition is an ancient and honourable one. The first barristers, as pleaders of a lower order than the serjeants, began to emerge in England by the beginning of the fifteenth century[3]. They took their name from the *barrae* or benches on which they sat in the Inns of Court during the training moots. When the British colonies beyond the seas were established, the only legal system the rulers knew was that of the common law. However, that system depended on a group of lawyers able to enter into effective dialogue with the bench.

In Australia, specifically Sydney, the problem, at the start, was the nature of the penal settlements. For some reason, English barristers were reluctant at first to leave the narrow lanes and cobbled streets of London. The only pleaders who could be found in Sydney Town were disbarred lawyers whose passage to Circular Quay had not exactly been voluntary.

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* Text for a talk at the opening of the Family Law Chambers, Goulburn Street, Sydney, 6 May 2004.

** Justice of the High Court of Australia.

1 R G Menzies, *Afternoon Light* (1967), 316.

2 Dionysius of Haricarnassus, quoted in W J V Windeyer, "History in Law and Law in History" (1973) 11 *Alberta Law Review* 123 at 124.

3 W J V Windeyer, *Lectures on Legal History* (1938), 118-119.

In the early years of the penal settlement, three such "agents" offered their services to needy clients. In default of anything better, they soon attracted a grateful clientele. Two of the ex-convicts were Irish, Edward Eagar and George Chartres. They had been convicted of fraud and sentenced to death, only to see the sentence commuted to one of transportation to the Great South Land. However, it was George Crossley, formerly an English attorney, who soon won the respect of the establishment, struggling to survive in rustic circumstances[4]. His advice was valued by Governors Bligh and Macquarie. For a decade, he appeared before the early military tribunals of Sydney. Doubtless, like judges and magistrates today who have to deal with the added problems presented by self-represented litigants, the appearance of George Crossley was seen as a great blessing.

In earlier times, histories of the Bar in Australia rarely mentioned these earliest forebears. Perhaps today we can honour them as the earliest advocates in our country[5].

The first judge in New South Wales, Jeffrey Bent, refused to allow Crossley and his colleagues audience. It was not his only stand of principle. He was a prickly man. Bent's successor, Barron Field, took a similar position. The imperial authorities were willing to permit former convicts to appear but only so long as there were fewer than two admitted lawyers in a settlement. It needed a time for the clash between the judges and the "agents" to be resolved. Ultimately, this happened when the *Act for the Administration of Justice in New South Wales and Van Diemen's Land* came into force in 1824[6]. That Act permitted the King by a Charter or Letters Patent to "authorise and empower the judges of the said Supreme Courts in New South Wales and Van Diemen's Land respectively ... to make and prescribe such rules and orders touching and concerning ... the admission of Attornies, Solicitors and Barristers"[7]. By the third Charter of Justice for New South Wales, made by Letters Patent in October 1823, the Supreme Court was authorised to "approve, admit and enrol" persons admitted to practice at Westminster, Dublin or Edinburgh. Only mid-century were local Australian qualifications provided for and recognised.

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4 K G Allars, Entry on George Crossley, *Australian Dictionary of Biography*, vol 1 (1966), 262-263.

5 A C Castles, *An Australian Legal History* (1992), 106-107.

6 4 Geo IV c 96 (1823).

7 The Act is reproduced in J M Bennett and A C Castles, *A Source Book of Australian Legal History* (1979), 42 at 49.

The first barristers were admitted by the Supreme Court of New South Wales in 1824. One of them was William Charles Wentworth, whose name has been honoured ever since in legal chambers[8]. Wentworth was the first Australian lawyer to be permitted by his colleagues to wear the silken gown. However, the first counsel to be commissioned as Queen's Counsel were not recognised until the 1850s.

Histories of the organisation of the New South Wales Bar record the diverse arrangements made for their accommodation in the nineteenth century. To those of my age who were brought up in the hegemony of Wentworth and Selborne Chambers, it is a healthy corrective to read how the Bar in Sydney was placed for most of the nineteenth century. Today, we have largely returned to those arrangements.

Most chambers in the nineteenth century had only two or three barristers in residence. In many cases, barristers practised on their own with chambers in or adjoining their homes. The Bar was scattered over quite a large section of Sydney Town. Chambers were found as far from the Supreme Court as York Street and George Street. Most were found in the area bounded by the perimeter of Hunter and King Streets. The majority of barristers were not in Phillip Street, as they are today. Most had their chambers in Elizabeth Street. The proximity of courts was the defining consideration. In effect, the outer boundary was set by the distance that it was reasonable for a barrister to walk with his clients.

By the end of the nineteenth century a greater concentration of chambers appears to have occurred with many being found in Wentworth Court. This was a terrace situated where Martin Place now stands, between Elizabeth and Phillip Streets, Sydney. At that time, Elizabeth Street ran uninterrupted from Hunter to King Street. There were lanes that allowed busy lawyers to walk between the streets. Wentworth Court boasted of a Miss Church, described as a "typewriter". How astonished she would be with word processors and electronic text of our age. The Presbyterian Cemetery Necropolis office was there as well as law stationers[9]. I have vivid recollections of the Law Book Company's antique showroom in Phillip Street in the 1950s, a successor to that facility. At one stage the new Law School had facilities on the top floor of Wentworth Court[10]. Even one or two solicitors were admitted.

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[8] Another admitted that day was Dr Robert Wardell. See entry by C H Currey, *Australian Dictionary of Biography*, vol 2 (Reprint 1989), 570-730.

[9] J M Bennett (ed), *The History of the New South Wales Bar* (1969), 201.

[10] *Ibid,* 34-38.

By the turn of the century, the accommodation arrangements in Sydney were largely as I found them when I first attended the Sydney Law School in Phillip Street in 1958. There was Chancery Chambers, named after Chancery Square (as Queen's Square was known before it took its present appellation). There was Denman Chambers, where H V Evatt and his brother Clive had their rooms. Many a time I went there to brief Eric Miller QC, a towering figure of the Bar in the middle of the last century. Further along the street was the old Selborne Chambers, the first to be served with gas and electricity. Nearby were Chalfont Chambers, Wigram Chambers and University Chambers to which the Law School moved as it expanded. It is important to remember the diversity of the Bar's accommodation arrangements when we reflect on the position today.

A great change occurred when Wentworth Chambers were constructed in Phillip Street and opened in 1957. This and the new Selborne Chambers, opened in 1963, afforded the Bar more modern and convenient accommodation[11]. When Wentworth Chambers was opened, Chief Justice Sir Kenneth Street made a speech, monocle firmly in place over his right eye. There were more homburgs and flowered hats on that occasion than on the average day at Randwick. I am sorry that I cannot offer the monocle. But, then, the judges and barristers in attendance have given away their homburgs and flowered hats.

Before long the Sydney Bar was bursting its at seams. In 1965 new chambers were opened in Macquarie Street. Later, new chambers spread to Elizabeth Street. Soon the process of diversification was underway again. Family Law Chambers are the latest in that process. But they have to be seen in their historical context. As courts have moved, it was inevitable that chambers would move. The barristers' perimeter is still largely defined by walking distance.

FAMILY LAW

Most members of these new chambers will spend the greater part of their time in cases concerning family law. I pay my respects to the judges of the Family Court of Australia and the Federal Magistrates whose professional lives are so deeply involved in this speciality. I respect the advocates who have chosen this particular field. It is highly technical one, requiring a good command of a wide range of federal statutory law but also of the law affecting real and personal property, trusts, equitable principles and the law governing children. Increasingly in recent years international law has become important. Family law presents universal problems. Quite often international conventions must

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[11] *Ibid.*

be given effect[12] or international law can influence the way contemporary courts approach the interpretation of local legislation[13].

From time to time, the High Court gets a glimpse of the field of family law. When we do, we can see the complexities with which lawyers in this field must grapple. Often we can also see the personal stress that may accompany litigation of this kind.

It is fashionable in some Australian legal circles to regard commercial disputes as the most important in the law. This assessment is sometimes reinforced by the very large amounts of money involved and hence the ability to secure legal talent of the highest order. However, this does not mean that, objectively, such disputes are the most important in our society[14]. Objectively, many commercial disputes are simply a complex variety of debt recovery. From the point of view of most citizens, the areas of the law of the greatest importance are criminal law, industrial law and family law. These are fields of law directly touching the lives of a great many Australians.

Family law in particular concerns issues where feelings often run high. Parenting orders with respect to children and judicial division of property in circumstances of the breakdown of relationships almost inevitably engender deep feelings. They also involve extremely important issues for law and society. Lawyers who have chosen to work in this field deserve the respect of their fellows. I certainly honour those who have selected, or come upon, such an important and taxing specialty. Professionalism and independent advice to the client, as well as honesty and dispassion when dealing with the courts, are special reasons for preserving the role of lawyers - and particularly an independent Bar - in family law disputes.

Because family law involves such personal issues it is important that barristers working in the field should recognise how significant their conduct will be for the lives of their lay clients. Decades after an unmemorable case is concluded, parties, sitting at the dining table with their children and grandchildren will talk of their lawyers. "Mr Kirby, my barrister, said". "Mr Richardson, my senior counsel, advised me …". We should never forget that the impressions we leave on long forgotten

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[12] Such as the *Convention of the Civil Aspects of International Child Abduction.* See *DeL v Director-General, NSW Department of Community Services* (1996) 187 CLR 640. See also *U v U* (2003) 211 CLR 238.

[13] See M D Kirby, "Nicholson CJ, Australian Family Law and International Human Rights" in (2004) 5 *Melbourne Journal of International Law* (forthcoming).

[14] *Minister for Immigration, Multicultural and Indigenous Affairs v B* [2004] HCA [2004] HCA 20 at [129].

clients remain part of the precious reputational capital of the legal profession. In my youth I would see barristers loudly telling jokes to each other in the presence of clients in ways I considered inappropriate. They were coping with their own stress. But it was often ill-advised. For the client, litigation is rarely amusing. It is costly and hurtful. Whoever we may be, whether a beginner or a Justice of the High Court, we must remember the human dignity of those who pass through our doors.

MAINTAINING THE STRENGTHS

Until now, barristers' chambers in Sydney have been named in accordance with well settled traditions. The most popular, much to be encouraged, is the tradition of naming chambers after High Court judges. In Sydney, no fewer than thirteen chambers have been named in this way[15] although two such chambers appear to be no more[16]. Next most popular are the chambers that take the names of famous figures of Australian history[17]. After that, there are chambers with names of English or American legal connotation[18]. Some chambers have been named after other famous lawyers[19]. Some take their name from their geography[20]. If one leaves aside Crown Prosecutors' chambers, these new Family Law Chambers represent the first that have elected a name indicating a legal specialty. This is something new. But the specialty is wide and encompasses a broad church.

In the practice of medicine, specialisation has long been normal. It would be unthinkable to permit an orthopaedic surgeon to operate on an eye. Recognising specialist credentials has come more slowly to the legal profession. Perhaps this is because skills in lawyering are usually enhanced by knowledge outside one's familiar fields. Doubtless this is also true in medicine. I am sure that members of Family Law Chambers

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[15] Samuel Griffith, Edmund Barton, H B Higgins, Latham, Sir Owen Dixon, William Owen, Windeyer, Garfield Barwick, William Deane, McHugh.

[16] The former Lionel Murphy Chambers in Sydney are no more. Neither are the Fullagar Chambers in Parramatta.

[17] Arthur Phillip, Lachlan Macquarie, Wentworth, Forbes, James Dowling, Sir James Martin, Hargrave, Henry Parkes, Denman. The former Robert Menzies Chambers are no more.

[18] Blackstone, Selborne, Mena, Marbury.

[19] Wardell, Frederick Jordan, Ada Evans, Jack Shand, Carl Shannon, Maddison, Nigel Bowen, Maurice Byers.

[20] St James' Hall, GIO House, Elizabeth Street, University, Culwulla, Queen's Square, Martin Place, Trust, Lismore, Hunter Valley, Hamilton.

will always see the value of keeping abreast of the broad movements in the general law, as all of us should do.

Whilst we are returning to the diversification of chambers such as existed a century ago, I also hope that the organised Bar can renew the efforts to strengthen its corporate identity. That identity lies not only in responding to common opponents and important legal changes. It goes beyond an annual dinner, a journal, a newsletter and occasional socials. It involves an appreciation of the intimate interaction in our legal system between the advocates and the judiciary. It also derives from the shared experience of barristers engaged in tasks involving at once intellect and public performance. It includes helping each other.

A special feature of the Bar in my day was the willingness of more experienced barristers to spend hours, if necessary, assisting the novice. I remember how Philip Powell and others would do this, without complaint, for all the juniors in chambers. It was a tradition that must be maintained. The open door policy was another great tradition. During the Great Depression, and long thereafter, when briefs arrived in counsel's chambers the problem in the brief was often shared with all members of chambers. There was a pooling of ideas. The whole chambers pounced upon the brief. Nowadays, ethical concerns would probably prevent or tame this conduct. But the sharing of problems, to the benefit of clients, is a feature of all professional life. In medicine they call it Grand Rounds. For us it is the Open Door. It can be maintained with due respect for client anonymity and privacy. It contributes to professional experience that continues throughout life.

In my day the sharing of experience over lunch in the Bar Common Room was another great opportunity[21]. This is no more. Perhaps it could not survive the expansion of the Bar's numbers and the diversity of its accommodation. But it would be no bad thing if some modern equivalents could be devised to bring barristers together more often in social interaction. In such ways, the traditions and integrity of this vital branch of the legal profession are maintained.

I am glad to be involved in the opening of these new chambers. The décor is modern and friendly. The convenience to the new court buildings in Sydney is undoubted. The desks of the barristers are clean and ready for action. To those who will work in and with these chambers I extend my appreciation. I do so as a Justice of the High Court and as a citizen. To the members of chambers, I offer congratulations and good wishes for success in practice and happiness in life.

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[21] Eating together regularly is a long tradition of the Bar dating to the Inns of Court. In the past, it has tended to reinforce mutual respect, trust, fidelity and exchange of knowledge. Windeyer, above n 3, 115-117.