

Farewell to the Hon Justice Kenneth Handley AO

On Friday, 15 December 2006 a formal ceremony was held to mark the retirement of Justice Kenneth Handley as a judge of appeal in the Supreme Court of New South Wales.

After graduating from the University of Sydney with distinctions in arts and with first class honours in law in 1959, Handley JA became an associate to Justice Bruce Macfarlan. His Honour was thereafter called to the Bar, where he read with Sir Laurence Street. His career at the Bar – over fourteen years as a junior and seventeen as a silk – was extraordinarily busy and successful, appearing on innumerable occasions in the High Court and the Privy Council. His Honour was appointed as a judge of the Supreme Court and judge of appeal on 31 January 1990.

His Honour's contribution to the law and the community at large was not restricted to practise as a barrister and his service as a judge: he was an active member of the Bar Council, and served as president of the New South Wales and Australian Bar associations. His Honour also published many articles in Australian and overseas journals, and during his time on the Bench published three books of high repute. He also maintained a life-long association with the Anglican Church, which he has served in many capacities, most notably as chancellor of the Anglican Diocese of Sydney for 23 years and as a member of the Appellate Tribunal of the Anglican Church from 1980 to 2004. Since 1994, his Honour has also served on the council of Cranbrook and has been its president since 1999. His Honour also maintains a commission on the Court of Appeal of Fiji and was a member of the Court of Appeal which determined in February 2001 that the 1997 Constitution of Fiji remained the supreme law of Fiji – which decision ultimately resulted in the dissolution of parliament and the calling of a general election in that country.

At the farewell ceremony for Handley JA, Chief Justice Spigelman spoke on behalf of the court, the Hon Bob Debus MP, attorney general of New South Wales, spoke on behalf of the government, and Ms June McPhie, president of the Law Society of New South Wales on behalf of the state's solicitors.

Spigelman CJ lamented the loss to the court and the community of such a prodigious and accomplished talent who was 'by force of statute required to retire as a fulltime judge of the court'. Spigelman CJ noted that his Honour's 'energy and mental acuity attests that an increase in the age to seventy-five for judges and seventy-eight for acting judges is now appropriate' and welcomed his Honour's decision to continue to serve the court beyond formal retirement as an acting judge. Spigelman CJ also paid tribute to his Honour's insistence on bringing to every endeavour a capacity for hard work, conscientiousness, a strong sense of civic duty, personal loyalty, generosity and trustworthiness. Spigelman CJ described Justice Handley as the 'quintessential lawyer's lawyer' before paying tribute to his prolific work as a barrister and as a judge:

Your Honour's encyclopaedic knowledge of the law is of such breadth as to inspire admiration by lawyers throughout Australia and in England. Perhaps your most notable characteristic, to which anyone who has seen you at work will attest, is your astonishing recall of the detail of cases and of the order of events in times past.

This extends not only to the precise volume of the *Commonwealth Law Reports*, and often enough the very page, on which a principle or a telling phrase is to be found but also to the decisions of the higher courts of England extending to obscure volumes reporting Privy Council cases and Indian appeals of the late nineteenth century.

No-one who appeared in the Court of Appeal over the last seventeen years was in any doubt of the significance of the single volume with its single place mark of a report, not on anyone's list of authorities, which your Honour strategically placed before you as the case commenced or which your Honour called for with precise reference during the course of a hearing....

Your legal learning is, of course, also reflected in the judgments your Honour has delivered over the course of seventeen years, many of which will stand the test of time and which as a collective body of work will long remain a monument of your Honour's term of office. Your judgments manifest your prodigious work ethic, your intensity of application to the task at hand, and your unerring eye for the point.

...

At your swearing-in you concluded with a reference to the prophet Micah, explaining that what you would seek to do as a judge was, then quoting from the Old Testament: 'to act justly, to love mercy and walk humbly with my God'. You have achieved all three in a long and distinguished judicial career and we all look forward to your continued contribution of the same character.

The attorney general noted that he had been lobbied 'three times today, once publicly concerning the statutory age of the retirement of judges' and proceeded to speak of his Honour's reputation at the Bar and on the Bench:

I am advised that you were also extremely fit and preferred walking up the ten or so flights of stairs to your chambers instead of taking the lift. Your former colleague, Justice Meagher, was not known to share your embrace of the stairwell. In one very substantial litigation exercise I am informed involving several prominent banks, you led a team of barristers, including David Bennett, Arthur Emmett and Tony Meagher, vast amounts of work were completed in a dwelling which became affectionately known as 'Camp Handley'. 'Camp Handley' was an egalitarian establishment where everyone did their bit, except David Bennett who took the liberty of having smoked salmon shipped in. You were a talented and quite exceptionally hard-working leader who knew how to get the best out of people. You were known to be a dedicated learned and formidable counsel.

You were appointed to the New South Wales Court of Appeal sixteen years ago. I am told by those who have served with you that when you arrived in the Court of Appeal you repeatedly demonstrated an encyclopaedic knowledge of case law. Your only rival in this respect was the now retired Justice Michael McHugh. Whenever a point arose you would name the relevant cases and their citations and most disconcertingly of all, the place on the page where the governing principle was stated. His Honour the chief justice has also referred to this characteristic. In an age of Google, mobiles and text messages Justice Michael Kirby reminds me that we will never again see such a sharply focused intelligence and recollection of the case books....

You have a loving wife, Di, four sons, David who is the founder of Sculpture by the Sea, Duncan, John and Mark, and four grandchildren. I am told that your wife has taught you everything you know about art and, what is more, taught you to appreciate it as well.

One thing is sure: as the chief justice has just demonstrated, you will not be idle in your retirement. Your energies will be consumed in further appearances in this court but also I hope in your interests of trekking, swimming and art.

In reply Handley JA expressed the view that the speakers had not been ruthlessly honest in their portrait of him:

Speakers and victims on these occasions avoid the ruthless honesty of Oliver Cromwell who wanted his portrait painted warts and all. The much lamented Harold Glass had a very different view. He said that flattery of the judiciary was so important that it had to have priority over all other court business...

Counsel's increasing irritation with a judge's inability to see the obvious merit in his or her argument is masked, as we know, by growing obsequiousness which moves from 'with respect your Honour' step by step to 'with the most profound respect your Honour', which cannot be translated in polite company. A short tempered judge will be told at his much awaited retirement 'your Honour did not suffer fools gladly'. I'm glad no one used that expression of me today. Some years ago the presiding judge in the Court of Appeal gave a short extempore judgment endorsing in fulsome terms the judgment of the trial judge and finishing 'and there is nothing that I can possibly add'. The second judge immediately said 'I agree' and the third judge said he agreed with the second judge. It will not surprise you to know that Mr Justice Meagher was the second judge.

My two really important achievements are not in print. Twice I persuaded colleagues to leave things out. A draft judgment in a family provision case included the sentence 'the deceased left a modest estate of \$800,000'. I said to the author that some would kill for less and, happily, modest came out. In the other case, a family dog charged a bicycle and its rider was injured. His action against the dog owner succeeded and the case came to us, but the court was divided. Roddy Meagher, whose own dog had a well deserved reputation for ferocity, would have allowed the appeal because the accused was only being playful. His colleagues disagreed, but judgment was delayed for a considerable time until I managed to persuade Roddy to tone down a sentence which read 'the accident occurred at X street in Y which the court was informed was a suburb of Sydney'.

My great failure has been to persuade colleagues to write shorter judgments. I am a disciple of Blaise Pasquale, the 17th century French philosopher, who once apologised saying he would have written a shorter letter if he had more time.

His Honour also reflected on judicial life and the importance of senior lawyers being able to pass on their intellectual capital through writing:

I found judicial life fulfilling and did not look back. At the Bar I had years in the scrum which was hard work and I was ready for the quieter life of a referee. If you know most of the rules and are fair most of the time, you don't get booed too often. I have fulfilled my

ambition to stay off the front page of the *Sydney Morning Herald*. It is the old story, if the bridge stays up there's no news. Life in the Court of Appeal is hard work, but we are a happy court with a great collegiate spirit. We respect our differences and know that none of us is as smart as all of us. Judicial life gave me the great privilege of long leave, which enabled me to write my books. Senior lawyers build up a lot of intellectual capital, but it becomes a wasting asset. Scholarly articles and books can capture this intellectual capital, preserve it and pass it on.

His Honour made some revealing comments about statutory bills of rights – a controversial topic currently exercising the minds of lawyers, policy makers and human rights advocates:

I have not had to apply a Human Rights Act and I am grateful for that. There is no such thing as a free human right. Every one comes at a cost which must be borne by the community or other individuals. The reach of laws against terrorism, the legalisation of the abortion pill, scientific experiments with human embryos and of euthanasia raise political and moral questions which cannot and should not be settled by judicial decision. Most people have opinions on these matters and a judge's opinion is no better than that of anyone else.

Judges do not have democratic legitimacy. We are not elected by the people and, except in extreme cases, we are not accountable to them. We have no business deciding political questions. The statutory text enacted by parliament has democratic legitimacy, but under the rule of law its meaning and application are proper questions for a court. The court seeks to be faithful to the text of ordinary legislation and parliament is the master. The position is different with Human Rights Acts because of the wide general language in which they are expressed. They are a blank canvas onto which judges can and do project their moral and political views. The process was described by Humpty Dumpty in *Alice in Wonderland*: 'When I use a word it means just what I choose it to mean, neither more or less. The question is who is the master.' Under a Human Rights Act the court is the master.

Human rights are the flavour of the month for some, but the public should realise they are a sugar coated pill. An accurate title for such an Act would be The Parliament (Transfer of Powers to the Courts) and Lawyers (Augmentation of Incomes) Act. Politicians and others who advocate a Human Rights Act do so either because they do not understand what would happen or because they understand only too well. The latter hope to increase their power and achieve legal and social change through the courts that they cannot achieve through parliament. This is government by litigation and when change occurs in this way no one is accountable, not the judges and not the politicians.