

**“THE QUIETEST BRANCH”: ADDRESS BY JUSTICE CHRIS MAXWELL,
PRESIDENT, COURT OF APPEAL,
AT A FAREWELL SITTING 22 JUNE 2022**

Thank you all very much for your most generous remarks. I deeply appreciate what you have said. I do want to say, though, that the good fortune of these 17 years has been almost entirely mine.

It is my pleasure to acknowledge the presence of Justice Michelle Gordon and Justice Simon Steward of the High Court of Australia, and two former judges of that Court, the Hon Ken Hayne and the Hon Geoff Nettle, both former judges of the Court of Appeal.

I want to make special mention of my successor as President of the Court of Appeal, Justice Karin Emerton. I do not at all want her to feel that she inherits any particular burdens or expectations. Knowing Karin as I do, she will be herself. She is a calm, thoughtful, independent-minded person and the reins of office will pass into her very capable hands after my official retirement at midnight on Friday 15 July which, as you have heard, is just a day before my 17th anniversary.

I also want to acknowledge the presence of the former Commonwealth Attorney-General, the Honourable Gareth Evans. As you heard, in my early days I was at Gareth's side, both in opposition and in government. I owe him a great debt for inspiring me about law reform, about intellectual rigour and about making the most of opportunities.

I warmly welcome other senior judicial and administrative figures from across the jurisdictions and I welcome colleagues and friends from within the law and beyond. I am just delighted that you are here. I am sorry you have had to sit through the detailed accounts of my purported achievements but we will be in the Library soon enough.

I hope you feel, as I feel, that this is a joint celebration.

I am especially pleased that I have with me, in the jury box, members of my immediate family and of my extended family. Inevitably, there are family members who are interstate and overseas. I wish they were here and I am glad that they will be able to join us on the live stream, even in other time zones.

I want to pay a special tribute to my wife, Sarah, whose loving support, encouragement and wise counsel have sustained me through all these years.

The other special tribute goes to Georgie Hawkins. Georgie and I have worked together for almost 24 years. We came to the Court of Appeal together, as novices, and we supported each other as we learned on the job, including by our mistakes.

Georgie has been unfailingly loyal, and untiringly devoted to ensuring the efficient and harmonious functioning of the Court of Appeal, and she has taken great care of Court of Appeal staff. Thank you, Georgie, I simply could not have done the job without you. Thank you in particular for everything you have done to make today a success.

I also owe a great debt to my associates. As you know, each judge is entitled to the help of an associate and, as President, you get two. So I have had double the benefit. I have had 20 associates over the 17 years and each of them has brought, in their own way, intellectual acuity and ethical awareness to the appeal work, expertise and initiative to case management, and insight and common sense to the various external engagements we have had.

I have found being an appellate judge an exhilarating experience. It has been an intellectual adventure of a kind I simply did not anticipate. I have discovered a wholly new curiosity about law and about adjudication.

In pursuing that curiosity, I have come to recognise that judging has a crucial moral dimension, whether we are dealing with explicitly moral concepts like moral culpability in sentencing or unconscionability in consumer law or responding to the indeterminacy which the law throws up so often, where the rules simply do not give you the answer. But that is a topic for another day.

I have felt the excitement of learning through uncertainty, through asking questions. And I have discovered the pleasures of collaborative work, as you will hear.

But the greatest thrill has been to discover the richness and diversity of the justice system, and to experience the joy of participation in it.

The longer I have been here, and the more I have learnt about what goes on in the different jurisdictions, the more my admiration has grown for those who strive to deliver justice, and the prouder I have felt to be a part of this system.

I don't know if this has ever struck you but, of the three arms of government, the judicial arm is much the quietest. That is, I suppose, a good thing, as it means we are doing our work unobtrusively and, for the most part, uncontroversially.

Hundreds – perhaps thousands – of Victorians have some form of contact with our courts and tribunals every day, whether as litigants or witnesses or jurors or family members. My abiding impression is that the overwhelming majority are satisfied with their experience. Certainly that is universally what jurors say when asked at the end of a trial about their experience.

Self-evidently, we can only maintain that level of service to the community because of the dedicated efforts of people across the justice system. And that, I am afraid, is a story too rarely told.

It is a story which needs to be told – by those of us who have the chance to observe it at first hand, and by governments, which have the responsibility and the capability to keep the community informed about such important matters.

Recognition of a job well done is good for morale, both personal and institutional, as we all know. And the more our fellow citizens understand what extraordinary work is going on every day, the greater will be their sense of security and well-being.

We made exactly that point in a recent judgment on a sentence appeal from the County Court, when we said:

“We wish to acknowledge the great care with which the sentencing judge approached this extremely difficult sentencing task. ...

It is the experience of this Court that work of this high standard is typical of what sentencing courts are doing every day. That criminal justice is being administered with such care and capability should give the Victorian community great confidence.

The task of arriving at a just sentence... is one of great public importance and considerable difficulty. It would enhance the community’s sense of well-being if there were greater public recognition of the skill and diligence with which that responsibility is discharged.”

What a precious thing it is to have independent, impartial adjudication. What reassurance it gives all of us to know that, if a dispute cannot be resolved informally, there is a person clothed with State power who is available to resolve the conflict. And that is as important whether you are in the civil claims list at VCAT or in the Commercial Division of the County Court or the Supreme Court.

And how fortunate we are to have a criminal justice system of such unflinching integrity. The skill and compassion with which our magistrates deal with their busy lists of summary criminal matters is a key part of the untold story. Another is the unheralded work of judges and juries and practitioners in jury trials.

Ten years ago I joined forces with Paul Coghlan (then the head of the criminal division in this Court and a former DPP) to write an article for “The Age”, in which we said this:

“Every Victorian can feel secure in the knowledge that the system guarantees a fair trial, before an unbiased judge and jury, to anyone charged with a serious offence. The care with which trials are conducted, coupled with the supervisory role of the Court of Appeal, make this guarantee a reality.

It goes without saying - but it needs to be said - that judges and juries are unaffected by external pressures, that juries carry out their task responsibly and conscientiously and that, as a result, the rule of law is maintained. If we need any reminding of how precious that is, we need look no further than those legal systems in which criminal justice is politicised and proof of guilt is a mere procedural formality.”

It falls, of course, to the head of jurisdiction to support each of those independent adjudicators in carrying out their duties. The demands faced by a head of jurisdiction are, frankly, staggering and, for the most part, unrecognised. Another untold story. The head of jurisdiction must be, at once, counsellor and adviser, supervisor of conduct and

manager of efficiency, strategic planner, financial analyst, government negotiator and surefooted spokesperson in the media at all hours.

I want to pay a special tribute to the current leaders, most of whom are here today: Chief Justice Anne Ferguson, Chief Judge Peter Kidd, Chief Magistrate Lisa Hannan, the President of VCAT Michelle Quigley, the President of the Children's Court Jack Vandersteen, the State Coroner John Cain.

I want to pay my own special tribute to Marilyn Warren, who is here today. She welcomed me as a rather uncertain new President. And she inspired me by her example of vision and courage. The hallmark of Marilyn's Chief Justiceship was her leadership of change. She recognised that change was necessary, and she demonstrated to us all that change was possible.

The hallmark of Anne Ferguson's leadership has been her resilience, decisiveness and adaptability in the face of the unprecedented challenges of COVID. Through her steadiness and clarity of purpose, Anne gave us all a sense of security in those most uncertain times, a confidence that the job could still be done.

I have also come to understand what extraordinary work goes on within the complex infrastructure of the justice system. A number of other leaders here today deserve to be acknowledged for their unswerving commitment to providing better justice for Victorians, and I want to express my personal thanks to them and to those who work with them and, of course, to their predecessors:

- the Registrar of the Court of Appeal, Mark Pedley, and his predecessors, Robyn Lansdowne and Ian Irving who are also here;
- Matt Hall, CEO of the Supreme Court;
- Louise Anderson, CEO of Court Services Victoria, the courts administration agency, and previously CEO of this Court;
- The Director of Public Prosecutions, Kerrie Judd QC;
- Dan Nicholson, Executive Director, Criminal Law at Victoria Legal Aid;
- Samantha Burchell, Executive Director of the Judicial College of Victoria;
- Arie Freiberg, Chair of the Sentencing Advisory Council;
- Fiona McLeay, Legal Services Commissioner;
- Laurie Atkinson, Director of the Law Library of Victoria and Supreme Court Librarian;
- Stephen Cordner, formerly the Director of the Victorian Institute of Forensic Medicine, with whom I co-convened the Forensic Evidence Working Group; and
- Greg Byrne, formerly of the Department of Justice, with whom I co-chaired the Jury Directions Advisory Group.

I wish there were more time, as I would like to say much more about each of them and about what they and their institutions do.

I learnt soon enough that every engagement with lively minds like these opened up new possibilities, new ideas, new ways of thinking about what we do and how we might do it better. And I also learnt that, once an idea looked like it might be worth pursuing, people from across the system were very ready to work together to see what might be achieved.

As I have often put it, we are lucky to have leaders in the Victorian system who, when you suggest a working group to try and solve a problem, will step up without hesitation.

The first, and probably the best, example concerns the reform of jury directions. Early on in my time at the Court of Appeal, Frank Vincent and then Geoff Eames came to see me to say, “Look, Chris, the law of jury directions is just impossibly complicated and that is pretty much the fault of appellate courts, including ours. If we try and solve it one appellate decision at a time, that is going to take rather a long time”. Frank's view – endorsed by Geoff – was that the only solution was legislative simplification.

After initial consultations revealed wide support for change, we informed the Department of Justice. The Attorney-General then gave a reference to the Victorian Law Reform Commission, which recommended legislation.

At that point, the Court and the Department joined forces to establish the Jury Directions Advisory Group. That Group worked collaboratively over nine years, with sustained contributions from appeal judges and trial judges, the Office of Public Prosecutions, the Criminal Bar Association, Victoria Legal Aid and legal academics with expertise in jury research. It was all underpinned by the policy work of Greg Byrne and his departmental officers.

Crucially, because the case for reform reflected consensus across the system, the legislative proposals won bipartisan support and the three Bills – in 2013, 2015 and 2017 – all passed with cross-party support. They are all now consolidated in the *Jury Directions Act 2015*.

That is the system working at its best – and we, all of us here, can feel a sense of pride in that. The benefits speak for themselves: shorter trials, simpler directions, fewer appeals, fewer retrials and, I might add, happier trial judges.

What that experience highlighted for me was that appellate judges have the opportunity – and, I came to think, the responsibility – to contribute to improving the justice system. We are, after all, uniquely placed to see what works and what does not. Not only are we spared the intense pressures imposed on trial judges, but the process of appellate review exposes us to myriad instances of the system in operation.

Another responsibility of appellate judges is to provide clear reasons. Each side must be able to understand the outcome and what we say should provide guidance to other courts and to practitioners.

In four cases out of five, the judgment of the Court of Appeal is a joint judgment – a single judgment in the names of all (or both) of the judges who heard the appeal. When the Court speaks with one voice, those objectives of clarity and certainty are advanced.

And we know that the joint judgment is almost certainly better than any of us could have done writing alone. Because it is an amalgam, a bringing together of the experience and knowledge of the individual judges, a collaboration in pursuit of justice.

I am proud to have been part of such a court and I thank my colleagues – and those who went before us – for their commitment to excellence.

We are, not, of course, alone in that pursuit. We have plenty of expertise available to assist us. As I grew to understand the nature of appellate judging, I looked for guidance in legal scholarship, something I had never done in 20 years at the Bar. And I was struck by how much we as judges had to learn from academic writing.

This reflects, of course, the different vantage points we occupy: the judge's encounters with a particular area of law are typically contingent and haphazard, the question for decision shaped by the facts of the case. The academic, by contrast, takes a systematic approach to case law, synthesising and distilling in order to identify trends and elucidate the thread of principle.

But it is the legal profession – the barristers and solicitors who appear in the Court every day – who are the foundation, the backbone of what we do. We rely on them to identify and elucidate the question for decision, we rely on them for their learning, their analysis and argument to point the way to the answer, and we rely on their passion for justice and their fidelity to their duties as officers of the Court.

I have valued greatly the opportunity to work over many years with the leaders of the Victorian Bar and the Law Institute of Victoria and – since 2017 – to work with groups of barristers and solicitors in a shared effort to advance gender equality within the legal profession. You would marvel – as I have – at the passion and idealism of the lawyers who have participated, united in their determination to eliminate gender discrimination and sexual harassment from our profession.

That work continues, as must the work to improve cultural diversity. We have a responsibility to make the courts and the profession truly representative of the multicultural community which we serve.

A sitting like this is the gift of the legal profession to a retiring judge. I am deeply grateful. It is fitting therefore that I conclude by repeating what I said in this Court yesterday, to a group of newly-admitted lawyers:

“Each of you will be a champion of the rule of law, as we each try to be. In every piece of work you do as a lawyer, you will be upholding the foundational principle of the rule of law - that everybody is subject to the law, no matter how powerful. And you will be giving expression to its

core values: equality before the law, fair trial, fair hearing, independence of the legal profession, the separation of powers”.

It is our first responsibility as lawyers and judges to maintain the rule of law. After 17 years here, I feel confident that, should anyone take it upon themselves to challenge or undermine the rule of law, they will have a fight on their hands.

Thank you for listening. I look forward to seeing you in the Library shortly.
