

**2016 Jack Goldring Memorial Lecture
University of Wollongong, 26 October 2016
Professor the Honourable Kate Warner
Governor of Tasmania**

Moving on from the legal academy

As did Michael Kirby and the dwindling number of us who were children in the 1950s, I first met Jack Goldring on the wireless. As John Goldring, he was one of the stars of the Quiz Kids, a radio program presented by John Dease on Sunday evenings. The tedium of the drive home from my grandparents' small farm south of Hobart each Sunday was relieved by listening to this show. The whole family were fans and we kids could only dream about being so clever. My favourite contestant was Alanna, but John was my brothers' favourite. Interestingly both Alanna and Jack became professors at Macquarie University, Alanna Nobbs, a professor of Ancient History and Jack of course of Law.

Jack's illustrious career has been well documented by previous speakers at this annual lecture and by his obituary writers. So I will not go into his legacy in detail. Instead I have chosen to focus on some aspects of his work as an academic before talking about transitioning from academia to the judiciary in Jack's case, and in my case to the position of Governor.

A few decades after the Quiz Kids, I met Jack at ALTA conferences and Committee of Law Deans' Meetings. But it was at an Australasian Law Teachers Workshop in the Blue Mountains in 1996 or 1997 that we became better acquainted. At this stage Jack was Dean here at Wollongong and it is the legacy of his contribution to the founding of this Law School that this Lecture commemorates.

I have to say the Blue Mountains ALTA workshop was memorable for a number of reasons. First, because it was the first time that I had really spent time reflecting on how I taught and how students learn rather than on the content of what I taught and what students learn or don't learn. I found the week enormously rewarding, recommended the workshops to colleagues and, as Head of School, strongly supported staff attendance at the workshops.

I began teaching in the 1980s when the traditional model of legal education held sway. The model of teacher was to transmit your knowledge of the subject matter to students who were conceived as empty vessels to be filled with that information.¹ Conscientious teaching was regarded as being up-to-date with the relevant case law and research. Little thought was given to the most basic of the pedagogic aspects of teaching. No support was given to support training in legal education – law teachers were expected to pick up the relevant skills on the job.²

There is another reason the workshop is etched on my memory. On the penultimate day all participants prepared and presented a 20-minute segment of a class which experimented with the techniques and information explored at the clinic. We had to try a few different methods of breaking up the class (such as questioning, buzz groups, brainstorming and so on) and at least two devices (blackboard, hand-outs, overhead projection, video and so on). As well as presenting, participants were asked to provide extensive feedback by way of detailed forms looking at aspects of the presentation. This built on an earlier session on how to give and receive constructive feedback with role-plays of constructive and destructive feedback. Oral comments were also invited from the participants. The 20-minute segments were video-recorded and at the end of the workshop we were all given a copy of our own segment for later review. Jack, as one of the instructors, was present during my presentation.

I don't remember the formal written or oral feedback from my presentation. However, shortly after it I guess I must have asked Jack what he thought. His response? He was rather disappointed with my presentation and he had higher expectations of me. I had mixed feelings about this – flattered that he thought I would have been better than I was but at the same time somewhat deflated by his assessment. The upside was that I have always been pleasantly surprised by good peer or student assessments of my teaching. And also perhaps made more effort to improve. However, I have to admit that I did not ever review the video of my teaching segment as we were intended to! The fact that I felt I had gained so much from the workshop and recommended it so strongly to

¹ Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26 *Sydney Law Review* 537 at 539.

² Keyes and Johnstone, n 1 citing the 'Pearce Report' at 191.

others suggests that I was not too badly bruised by Jack's comment. However, it remains my clearest memory of the workshop.

Jack was a great advocate of the law teaching clinics and workshops. Following the first national law teaching workshop in 1987, AULSA (the Australasian Universities Law Schools Association, now the Australasian Law Teachers Association) asked Jack, then at Macquarie, to organise another workshop for 1988 which he did with a small committee and thereafter they became annual events.³ For ten years he was one of the organisers, if not an instructor. Advanced workshops were later added to the annual offering.

In 1997, in his last year as an academic, with Marlene Le Brun, Jack Goldring took law teaching workshops one step further by presenting a 'Training the Legal Trainer Workshop' in India. The initial aim of ALTA Law Teaching Workshops was to assist individual academics improve how they taught law. The idea of developing a train the trainer model was to first, introduce Indian law teachers to ideas about effective teaching and learning in law, and then to help them design training programs that they could offer to their colleagues in their home institutions and regions. These workshops resulted in a core of four to six Indian law academics having sufficient confidence to offer teaching workshops in India. The article, setting out the Indian project begins with the Native American Proverb:⁴

Tell me, and I'll forget.

Show me, and I may not remember.

Involve me, and I'll understand.

In Australia the ALTA Law Teaching Workshop created a network of academics with a strong interest in legal education, led to the establishment of the *Legal Education Review* and various conferences that focus on specific aspects of law teaching. The need for Law Teaching Workshops declined after professional development for academics became more organised and formalised with the introduction of

³ Ben Boer, 'The Australasian Law Teaching Clinic: Its Past, Present and Future' (1989) 1 *Legal Education Review* 145.

⁴ M Le Brun, J Goldring with V Nagaraj and L Corbin, 'Exporting Australian Legal Education to India: A "Train-the-Trainers" Workshop for Indian Law Teachers' (1998) 9 (2) *Legal Education Review* 101.

Graduate Certificates in Tertiary Teaching/Higher Education. But the legacy of a strong core of academics with a scholarly interest in the practice of teaching and legal education has remained. Jack Goldring was one of the pioneers who encouraged Australian law schools to improve their teaching performance. Together with people such as Marlene Le Brun and Richard Johnstone, he played a vital role in encouraging the application to legal education of the body of literature on education in such areas as teaching strategies; learning objectives; assessment; learning styles; skills teaching, the use of technology in teaching, evaluation and more.⁵

Jack Goldring's involvement in the 'Training the Legal Trainer Workshop' in India just before he became a judge reflects a long interest he had in international students and his fascination with India. He had travelled to India as a student and returned many times. When things had been particularly tough at Macquarie, Jack took time out to chair the Committee of Review of Private Overseas Student Policy from 1983-1984. The Goldring Report rejected a user-pay, market-based approach to the education of overseas students and advised that the introduction of fees for overseas students should be slower and more moderate than had been suggested and that it should be supported by generous scholarships. The terms of reference required the Goldring committee to recommend changes to the private overseas program which, and I quote, 'will have the effect of achieving Government objectives including the encouragement of private overseas students to study in Australia without reducing the opportunities for Australian residents and without increasing public sector outlays.'

In contrast to the Goldring report, the Jackson Report on Australian overseas aid,⁶ which was released at the same time, recommended that overseas student charges should gradually be increased to full cost levels and it criticised Australian tertiary institutions, particularly universities, for their lack of entrepreneurial zeal in developing their universities into a major export sector, in other words treating overseas students as a

⁵ Eugene Clark, 'Australian Legal Education a Decade after the Pearce Report: A Review of McInnis C and Marginson S, Australian law schools after the 1987 Pearce Report, 1994' (1997) 8 *Legal Education Review* 213 at 216.

⁶ Australia. Parliament. *Joint Committee on Foreign Affairs and Defence. Subcommittee on the Jackson Report on Overseas Aid*, Canberra: The Committee, 1985.

strategic commodity to be marketed. At this time international students, if they were not sponsored by the Australian Development Assistance Bureau (ADAB) were supported by their parents and were charged an Overseas Student Charge (OSC) which was about a third of the full cost of educating overseas students. University education was still free for domestic students in 1984; HECS fees were not introduced until 1989.

The Goldring Report opposed full cost recovery, noting the broader advantages that international students brought to Australia in terms of political, educational and cultural benefits, particularly in the context of our relations with countries of the Asian and Pacific region and also noting that many of these benefits cannot be measured in monetary terms. The Committee also commissioned a survey to find out more about the background of overseas students in Australia. It found that apart from a small minority, the students did not come from wealthy families, and the majority were from low to middle class income families in Australian terms and that any significant increase to the OSC would, together with living costs, be a significant proportion of the family income. Instead of full cost recovery, the Report recommended the continuation of a carefully calculated OSC.⁷

In a letter to the Canberra Times (4 July 1984) explaining his Committee's recommendations, Goldring wrote:

Our report criticises the self-centred attitude which has characterised policy decisions in relation to international students in the past. Australia must recognise its role as part of the world community while preserving to the greatest degree possible the interests of its residents. Our recommendations attempt to take this into account. The policies advocated by the Jackson Committee ... with respect do not.

Full fees were introduced in 1985 for international students. And today there is a big gap between charges for domestic students and international students. International student fees accounted for 16% of

⁷ Stewart Fraser, *Australia and International Education: The Goldring and Jackson Reports – Mutual aid or uncommon advantage?*

the revenue of public universities on average in 2014, for some universities it was up to 20-30%.⁸

In 2014 the international education sector's contribution to the economy was almost \$17 billion. Universities are becoming increasingly reliant on international student fees to boost funding for research and enhance their investment in infrastructure. So rather than taxpayers subsidising international students' education as we were in 1984 at the time of the Goldring Report, international student fees are subsidising public universities. And we are increasing recruitment drives in developing countries such as India. We can only begin to feel comfortable about this if what we are offering our international students is an excellent educational and cultural experience.

Are we doing enough for our International students? Are we doing enough to protect them from exploitation? How would Jack Goldring have reacted to the exploitation of international students, mainly Indian, by the 7-Eleven convenience store chain? After the story was exposed by the ABC 7.30 Report last year, the Fair Work Ombudsman prosecuted 7-Eleven and the business was forced to repay hundreds of thousands of dollars in wages.

The Fair Work Ombudsman receives a couple of hundred complaints from international students each year, but is aware that this is not the full story. The four factors that make international students vulnerable to workplace exploitation are youth, language barriers, loyalty to their employers (often of the same nationality) and concerns about losing their visas. A recent online poll of more than 500 Vietnamese students found that two thirds reported being paid under the minimum wage and the media has reported many stories of exploitation. And under-payment is not the only complaint; 12-hour shifts with no meal breaks and abuse are also reported.

The Redfern Legal Centre, which provides legal services to International students, reports a large increase in the exploitation of international students. It seems that a strategy of some employers is to push students to breach visa conditions and then once there is a breach, hold them to ransom. Cleaning, hospitality and construction industries were named as

⁸ Australian Government Productivity Commission, *International Education Services*, Productivity Commission Research Paper, April 2015, p 21.

the worst offenders. And it is not just economic exploitation to which international students are vulnerable. That international female students are more vulnerable to gender-based violence and transactional sex than domestic students is supported by a recent ARC funded study by Helen Forbes-Mewett and Jude McCulloch from Monash University.⁹ As they put it, ‘intersecting inequalities relating to gender, race, and class are often compounded by the status of “international student”.’¹⁰

Moving on from the legal academy

As we all know, Jack Goldring took the unusual move of leaving the legal academy for the Bench. But first he returned to law reform as full-time Commissioner of the New South Wales Law Reform Commission for two years in 1997 and 1998. One of the reports which he worked on at this time was a review of the then s 409B of the *Crimes Act 1900*, which dealt with prior sexual history evidence and evidence of reputation in sex offence cases, a topic which he would soon have to grapple with in practice.¹¹ For it was shortly after that he was appointed to the District Court of New South Wales, a bold move on his part because the appointment of judges in Australia is believed to require years of preparation in courtroom practice to be able to manage trials and cope with the instantaneous decisions on procedural and evidentiary issues. There have been departures from this reluctance to appoint judges from academia and those appointments have been overwhelmingly successful.¹² The appointment of Jack Goldring to the District Court was no exception to this pattern of success. Michael Kirby notes that he soon won the plaudits of observant practitioners for his just and efficient conduct of complex trials.

For those who take this step from academia to the Bench, I am full of admiration. To be an appellate judge is one thing. But to run trials another. As David Weisbrot remarked in the obituary he wrote for Jack, ‘it is a rare honour for a career academic to be appointed to a famously

⁹ H Forbes-Mewett and J McCulloch, ‘International Students and Gender Based Violence’ (2016) 22 *Violence Against Women* 344-365.

¹⁰ Forbes-Mewett and McCulloch, n 9, 344.

¹¹ NSWLRC, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87, November 1998.

¹² The Hon Michael Kirby AC CMG, ‘JL Goldring, legal education and a most unusual occupation’ (2014) 38 *Australian Bar Review* 226 at 230.

busy trial court'.¹³ Michael Kirby, in the 2013 Goldring lecture, listed eight academics other than Jack who have been appointed to the bench in Australia.¹⁴ I could add at least one other.¹⁵ What is striking about this list is that they are all, without a single exception, males. This is consistent with evidence about gender differences with respect to confidence in applying for jobs. You may be familiar with the statistic that men apply for a job when they meet only 60% of the selection criteria but women only apply if they meet 100% of them.¹⁶ Women, it is said, don't feel confident unless they have ticked off every item on the list of criteria. While the Hewlett Packard report on which this statistic is based does not meet the criteria of scholarly peer reviewed research, it seems there *is* strong evidence of a confidence gap between men and women and that women are more likely to under-estimate their abilities and performance than men.¹⁷

I know for one that when suggestions were made that I should apply for a judicial position I did not have the confidence to plunge into such a different role and felt that I lacked the trial experience to do so successfully. Being a judge was not something I felt I could do without extensive induction and training.

Jack Goldring on the other hand seemed to move into the role confidently and seamlessly. I would very much like to know more about this transition. Shortly after his appointment, in 1999 he delivered a paper on continuing legal education for judges in which he noted that his background was not at the Bar, but in legal education and law reform. He also noted that these days, and it is even more so today, a Dean is as much a manager as a teacher and scholar, and one who faces a daily task of allocating and managing scarce resources and dealing with interpersonal relationships.¹⁸ In the paper he uses the insights he had gained from

¹³ Cited by Rosalind Croucher, *Jack Goldring – A Man for All Seasons*, Jack Goldring Memorial Lecture 2-15, 9 October 2015, 12; see also Virginia Bell, Jack Goldring Memorial Lecture 2014, 2.

¹⁴ Kirby n 12, 230.

¹⁵ Justice Ralph Simmonds of the Supreme Court of Western Australia.

¹⁶ This comes from a Hewlett Packard 'internal report' and has been often cited, for example by Sheryl Sandberg, *Lean In: Women, Work, and the Will to Lead* (2013) in turn citing G Desvaux et al, 'A business case for women' *McKinsey Quarterly*, Sept 2008, p 4.

¹⁷ Katty Kay and Claire Shipman, 'The Confidence Gap', *The Atlantic* (May 2014).

¹⁸ John Goldring, 'Process and content of continuing legal education for judicial officers' www.aija.org.au/ac1999/GOLDRING.pdf accessed 10 October 2016.

educational research on how people learn, the difference between passive and active learning, the reflective practitioner and so on and applied this to continuing judicial education, noting that others were speaking on the topic of judicial induction programs. But he did note that professional competence for a judge is a mixture of skill (or 'art') and knowledge, including: legal knowledge; courtroom technique, management technique, new awareness (meaning cultural and gender awareness) and technology. How did he get over his lack of courtroom technique and trial management? Quite clearly, he was a man who had truly exceptional intellectual ability, skills and knowledge.

Judicial induction program

In Australia, the induction program for new judges (the National Judicial Orientation Program) is a five-day residential program offered annually or biannually.¹⁹ However, many judges are required to take on their role before attending the program. Currently the February Program is fully subscribed so if you are appointed as a judge now you will have to wait until the October program.²⁰

There is, of course, a striking contrast between initial training requirements for judges in civil law jurisdictions and common law jurisdictions. In civil law countries recent law graduates are trained to be judges rather than, as in common law countries, selecting judges from the senior ranks of the profession some decades later, when any training given is at best perfunctory.

There are some indications that this may change in the future as a result of pressure to increase judicial diversity including gender diversity. One of the suggestions of the 2010 UK Advisory Panel on Judicial Diversity, chaired by Baroness Neuberger (the Neuberger Report), was to encourage employed lawyers and academics to apply for a judicial role by providing courses in developing judicial skills.²¹ It was argued that such a course would provide a means of self-assessment for those considering

¹⁹ <https://njca.com.au/program/national-judicial-orientation-program-2/> accessed 10 October 2016.

²⁰ <https://njca.com.au/program/national-judicial-orientation-program-19-24-february-2017/>

²¹ *The Report of the Advisory Panel on Judicial Diversity 2010*, https://www.ucl.ac.uk/.../Report_of_the_Advisory_Panel_on_Judicial_Diversity.pdf accessed 10 October 2016. (The Neuberger Report).

whether or not they had the skills required to be an effective judge and would provide an opportunity to build confidence among those who may have less court experience. Successful completion of the course was not envisaged as a means of obtaining judicial appointment. But it would provide an opportunity for participants to learn more about 'the requirements of the role, to practise some of the necessary skills and demonstrate the level of their commitment to embarking on a judicial career'. It was argued that it might be helpful to those returning from career breaks and provide an attractive career option. The Report also recommended extension of the Judicial Work Shadowing Scheme which provides practitioners considering applying for judicial office with a snapshot of judicial life by spending time shadowing a judge.²²

It does not appear that these recommendations have been acted upon; a judicial training course has been developed but appears to be hard to access.²³ However, the arguments for the need for judicial diversity continue. Would a more diverse judiciary make any difference, and would it make any difference to judicial decision-making? There are many articles on this topic, particularly on the issue of whether women judges would make a difference. And there is some interesting empirical research on the issue including the Feminist Judgments Project and the Australian Feminist Judgments Project in which some academic, feminist lawyers decided they would rewrite a series of famous cases from a feminist perspective. Sometimes they reached the same conclusion and sometimes they reached a different conclusion. So it seems that feminist judges, if not all women judges, may make a difference to substantive decision-making. This issue, including synthesising and summarising the arguments why and how women judges would make a difference has been recently discussed in an excellent article by Rosemary Hunter.²⁴ Hunter concludes that a more diverse judiciary may result in substantially different decision-making but it will only do so under certain conditions:

²² The Neuberger Report, n 21 at 28.

²³ Sir Geoffrey Bindman QC and Karon Monaghan QC, *Judicial Diversity: Accelerating Change* (Labour Party 2014), p 68.

²⁴ Rosemary Hunter, 'More than just a different face? Judicial diversity and decision-making' (2015) 68 *Current Legal Problems* 119-141.

Those conditions are a combination of opportunity (in terms of both subject matter and legal space), plus personal commitment and/or external encouragement.²⁵

The arguments in favour of increased gender diversity in the judiciary apply equally to other forms of diversity: race, ethnicity, sexuality and class background. Given Jack Goldring's interest in student diversity, as evidenced by the successive surveys he did of the social background of law students in 1976 and 1986, and his arguments for providing access to legal education to those who lacked social and economic advantages,²⁶ he would probably have been equally interested in judicial diversity.

From academia to the Government House

I too have moved on from academia and law reform, but not altogether. When I was offered the position of Governor I was concerned about two ARC grants I was leading and two post docs who were employed on the project. There was a precedent. Professor David de Kretser, the Governor of Victoria from 2006 to 2011, spent a day per week at Monash. A medical scientist, his Monash profile states he took time out from his scientific career to serve as Governor during which time he managed to find small amounts of time to keep up his research interests.²⁷ At the end of his term he resumed his research at Monash. So I too am devoting one day per week to work on the two ARC projects on jury views on sentencing and to supervise two postgraduate students.

So what does a legal academic, a criminal lawyer and criminologist bring to the role of Governor? There are three aspects to the role: the legal and constitutional, the ceremonial and the community role. Before I elaborate on each of these aspects of the role, I will first say that it is the community aspect of the role that is the most time-consuming. And one of the most time-consuming aspects of the community role is speech writing. In the financial year 2015-2016, I delivered 208 speeches. Given that I decided early on that I would, where possible, say something of substance in these speeches, preparation is time-consuming. And it is certainly very different from giving an academic paper at a conference.

²⁵ Hunter, n 24, 140.

²⁶ Kirby, n 12, 233-237.

²⁷ [http://monash.edu/research/explore/en/persons/david-de-kretser\(78fcefd9-72d9-4699-a7ed-298ea63251b8\).html](http://monash.edu/research/explore/en/persons/david-de-kretser(78fcefd9-72d9-4699-a7ed-298ea63251b8).html)

As an academic I knew quite a lot about a little, and now I find a need to know a little about an awful lot.

The legal and constitutional role

State constitutional law has never had much of a profile in Australian legal education and is very much overshadowed by Federal Constitutional Law. And as a criminal lawyer I have had a lot to learn about the legal and constitutional role of a State Governor. However, I have found this and Constitutional law in general fascinating. I eagerly read CEFA's (the Constitutional Education Fund of Australia's) releases and new constitutional law articles, particularly those authored by State Constitutional Law expert Anne Twomey.

The Tasmanian Constitution is an unsatisfactory statute and has been described by George Williams as a 'combination of the mundane and the missing'.²⁸ Moves are afoot to reform our state constitution, and the Tasmanian Branch of the Australian Association of Constitutional Law has formed a Working Group on Constitutional Reform. Following a symposium in February this year, which I attended, a consensus statement was issued urging the Government to consider constitutional reform. This statement noted, amongst other things that the Constitution provides no express power for the Parliament to legislate for the people of Tasmania or the basis upon which it should make such laws. Moreover, it is the least reviewed, reformed or entrenched State constitution in Australia.²⁹ Terms of reference for the Tasmania Law Reform Institute have been proposed, and these include clarifying the powers and duties of the Governor.

As I said, exploring the constitutional and legal powers of the Governor has been an interesting exercise. I will touch on appointment of Governors, the Executive Council and the reserve powers.

Appointment: State governors are appointed by the Queen on the advice of the Premier. This was settled by s 7(5) of the *Australia Acts 1986*, which in effect provide that the advice to Her Majesty concerning the appointment or removal of State Governors, 'shall be tendered by the Premier of the State'. This was preceded by a lot of controversy. Should the State Premiers have a direct relationship with the Queen or should

²⁸ Expert Symposium, Hobart, Tasmania, 22 February 2016.

²⁹ (2016) 35(1) *University of Tasmania Law Review* (forthcoming)

advice be channelled through the Commonwealth Government? The fact that this was resolved in favour of the Premiers may have implications if Australia becomes a Republic.³⁰

So the Governor of Tasmania derives legal authority from s 7(1) of the *Australia Act 1986*, which provides that Her Majesty's representative in each State shall be the Governor, and the Letters Patent of 1986, clause II which provides that there shall be a Governor and the appointment shall be during 'Our Pleasure and by Commission under Our Sign Manual'.

The Executive Council consists of the Ministers of State and, the Letters Patent of 2005 tell us that the Governor presides over the Executive Council and that the Executive Council advises the Governor on the day-to-day work of the government. Typically, there are Regulations to be made, appointments to be made, resignations to accept and a myriad other things. Whenever a statute provides that the Governor has the power to do something it has to go through the Executive Council. This is because the term 'the Governor' in a statute generally means the Governor acting on the advice of the Executive Council.³¹

Does that mean the Governor is obliged to act on the advice of the Executive Council? An often-quoted writer on constitutional law (Walter Bagehot) has said that the Monarch, and it follows Vice-Regal representatives, have 'the right to be consulted, the right to encourage and the right to warn.'³² So this suggests the Governor has the right to call into question advice tendered and to suggest reconsideration, but in the last resort the advice tendered must be accepted.³³ Sir Guy Green, Tasmanian Governor between 1995 and 2003, has a different view. He argues that, reserve powers aside, it is correct to say a power can only be exercised if the Governor has been advised to exercise it, but it does not mean that a Governor must always act on the advice.³⁴ There is an obligation on the Governor to see that the processes of the Executive Council and the action being taken are lawful and to refuse to act when they are not. So if the proposed action is clearly unlawful, or there is a

³⁰ See Anne Twomey, *The Chameleon Crown: the Queen and her Australian Governors*, 2006.

³¹ *Acts Interpretation Act 1931* (Tas) s 43.

³² Walter Bagehot, *The English Constitution*, London, Chapman and Hall, 1867.

³³ *FAI v Winneke* (1982) 151 CLR 342.

³⁴ Sir Guy Green, 'Governors, democracy and the rule of law' (2006) 9(1) *Constitutional Law and Policy Review* 11-16.

failure by a Minister or the Council to provide information about an aspect of the advice that was crucial to the determination of whether an action is lawful, a governor could refuse to act on the advice. The rule of law trumps the principle of responsible government. So, for example, if regulations are clearly ultra vires or an appointment or dismissal is not authorised by the empowering legislation, the Governor can do more than warn. He or she can refuse to make the regulations, appointment or dismiss an office holder.

On one occasion, early in my term, I was advised by the Attorney-General that I would be asked to dismiss the Director of Public Prosecutions. The *Director of Public Prosecutions Act 1973*, s 10 provides that the DPP may be removed from office by the Governor on a number of grounds including being 'guilty of misbehaviour'. The Director had been convicted of causing death by negligent driving, sentenced to four months imprisonment, which was wholly suspended. Was the conduct which led to the conviction misbehaviour? The advice was, in effect, that as this conduct could lead to an erosion of public confidence in the office of the DPP, it constituted misbehaviour.³⁵ I accepted the advice.

The Reserve Powers are notoriously controversial. The dismissal of Gough Whitlam in 1975 never seems to be out of the news for long, with the latest question being over the Queen's knowledge of the Governor-General's intentions and the denial by the National Archives of access to the so-called 'Palace Letters'.

Dismissals aside, the Governor has the undoubted power to act when there is a hung parliament and to decide whom to call upon to form government. Following an election, the convention is that the Governor invites the leader of the party most likely to secure the confidence of the House of Assembly to form a government. The result is usually clear. However, if no party enjoys an absolute majority, the Governor must begin the delicate exercise of facilitating negotiations for a coalition government or for agreement among minority parties to support the majority leader on the floor of the House.

³⁵ David Killick, 'DPP ELLIS sacked with no payout over road death; 24 January 2015, <http://www.themercury.com.au/news/dpp-ellis-sacked-with-no-payout-over-road-death/news-story/640dd680382263b927f05232d106373a>, accessed 25 October 2016.

Hung parliaments are always a possibility in Tasmania. The last one was following the March 2010 election. The Liberals under Will Hodgman had indicated that they would not form a coalition with the Greens, and Labor too had promised it would not enter into any deals. David Bartlett, the Labor leader, also promised that whoever had the most seats should form a government, or in the event of a tie, the party with the most votes would have the right to do so. There *was* a tie. Labor and the Liberal Party each won 10 seats in the 25-seat House of Assembly. As the Liberals had the most votes, on 31st March both leaders claimed that this meant that Hodgman had the right to form a ministry. On 1st April, the Labor caucus unanimously agreed to relinquish power, and Bartlett then advised the Governor that Hodgman should be sent for. The election result was declared on 7th April. The Governor had seven days to commission a government.

After speaking to Labor and Liberal leaders, the Governor announced his decision to re-commission Bartlett on 9th April. He released detailed reasons for his decision, saying that Bartlett did not have any right to promise or give power to Hodgman and that Hodgman was not in a position to form a stable government because, whatever Bartlett had said to Hodgman about not blocking supply or moving or supporting a no-confidence motion, Bartlett refused to give that undertaking to the Governor.

The Governor explained that in the exercise of his duty to commission a person who can form a stable government, the Governor will take formal advice from the current holder of that commission but is not bound to act on that advice. The commissioning of a person to form government is entirely the Governor's prerogative and 'it is not within the gift of any political leader to hand over, or cede to another political leader the right to form a government, whatever the result of the election'. So even though on 7th April, Bartlett advised the Governor to call upon Hodgman to form government and Hodgman said he could form government, the Governor called on Bartlett because he was not satisfied that he had the support of the Labor party not to block supply or move a vote of no-confidence except in exceptional circumstances. This gave rise to a constitutional obligation on the part of the holder of the commission to form government (this was the Labor government until 7 days after the formal declaration of the election). The Governor did not send for Mr McKim, the leader of the Greens, as Hodgman had advised him on 8th April

that he did not seek the support of the Greens, and the Governor regarded it as a matter for the Assembly as a whole to test or maintain support for the ministry. The day before the decision was finalised, (8th April), the Greens said that as no party had shown a willingness to negotiate a deal with them, they would neither initiate nor support a motion of no-confidence against the Labor government until a deal with either party could be arranged.

On 13th April, to meet the deadline imposed by the *Constitution Act 1934*, Governor Underwood swore in an interim Cabinet, consisting of David Bartlett as Premier, Lara Giddings as Deputy and A-G, and Michael Aird as Treasurer. After a week of negotiations, Labor Premier David Bartlett agreed to appoint Greens Leader, Nick McKim as a Minister and Cassie O'Connor as Cabinet Secretary. Hodgman accused Bartlett of breaking his promise to hand over power, noting that in a letter to the Governor, he contradicted a public statement made on 1st April where he had said he would not move any vote of no-confidence against Liberal Government.

The Governor's decision was controversial: Richard Herr argued the decision was a correct one as it served the interests of stable government. Michael Stokes disagreed, saying too high a bar had been set for the Liberals compared with Labor and Labor had not proven it could deliver stable government in the new Assembly.

The next election is due in 2018.

The community role

Many of my duties fall under this heading: municipal visits; opening conferences; hosting receptions; launching books, attending a wide variety of community events: shows, art exhibitions, concerts and school assemblies. And the Governor does have a community leadership role, one which makes sure that people feel part of our community and are valued. It seems promotion of community causes is acceptable and that Governors may make speeches of substance and some originality and need not be confined to empty platitudes. At the same time, it is accepted that a Governor should be apolitical and not publicly challenge current government policy and so generate tension and distrust between the Governor and the political executive. As Sir Zelman Cowen said, doing these things 'calls for careful judgement' on the part of a

Governor/Governor-General.³⁶ It has been said that, in addressing issues of social justice, Sir William Deane did so more directly than did his predecessors. My remarks last Saturday at a Welcome to Australia Walk Together event in Hobart, urging people to call out as racist calls for a total ban on Muslim immigration, were, according to some, in a similar category.

There is a need for careful judgement, caution in fact. As an academic, one is encouraged to speak one's mind and to take a role in debates about social, economic and moral issues and to strive to make our country more just and equitable. But as Governor the role is more constrained and so, as I have learnt, the transition can be a difficult one. Public servants are trained to be cautious in their comments. In relation to whether something should or should not be said, the rule is 'if you have to think twice don't say it'. But with an academic background, one may incautiously cross the line without even thinking twice!

Despite its constraints, the role positively allows some latitude in issues to focus upon. I have chosen:

- education: improving attainment and raising educational aspirations in our state to address the fact that our Year 12 completion rates compare so poorly with the rest of the country and our literacy and numeracy results are below the national average;
- the empowerment of women and gender equality and linked with that:
- sexual and domestic violence, because there is persuasive evidence that the underlying causes of gender violence lie in gender inequality.

In relation to education, I chair the Advisory Committee of the Peter Underwood Centre for Educational Attainment. The aims of this Centre are to improve attainment and raise aspirations through research and activities such as aspiration programs. I also have many opportunities to visit schools and speak to and with students and teachers.

³⁶ Peter Boyce, *The Queen's Other Realms: The Crown and its Legacy in Australia, Canada and New Zealand*, 2008, 136.

Sexual, domestic and family violence has long been an academic and law reform interest of mine. It is surprising how often I can make these issues relevant. For example, in February this year I addressed the Royal Australian and New Zealand College of Obstetricians and Gynaecologists' Scientific meeting in Launceston, which was also attended by midwives. I was asked to talk about the role of front-line health care services for vulnerable populations. I spoke of how pregnancy and the period following birth are a time of increased vulnerability to spousal violence and of the relationship between pre-natal spousal abuse and post-natal trauma symptoms in a child. I made the suggestion that public hospitals in particular consider using a family violence screening device and perhaps routine screening together with introducing training for such screening.

A couple of months later, when we visited the Launceston General Hospital I heard that the midwives were looking into using a family violence screening tool after hearing my presentation to the College of Obstetricians and Gynaecologists. I followed this up by sending them a report which I had launched on improving men's awareness of the effects of family violence on children, highlighting the section which makes recommendations in relation to 'front-line' health professionals and the need for them to have a greater awareness of the latest evidence of the harms to children of exposure to family and domestic violence.³⁷ Clearly the recommendations that antenatal programs for fathers include gender equitable parenting and information in relation to the support services in relation the community for dealing with the range of emotions associated with becoming a father were also relevant to this audience.

More recently, at the National English Australia Conference for English language teachers, I discussed the particular vulnerability of international students to sexual assault, the barriers to disclosure: language, cultural, shame and fear of being sent home. I described the ARC study into this problem that I mentioned earlier and suggested that as front-line service providers they may be the only Australian an International student really knows and trusts. As well as requests for a copy of my speech, I had this feedback from the conference organiser:

³⁷ Peter Lucas et al, *Increasing Men's Awareness of the Effect on Children Exposed to Family and Domestic Violence*, 2016 (Salvation Army and University of Tasmania)

Your address was greatly discussed during the conference. Delegates found it thought-provoking and absorbing and the feedback was hugely positive. One keynote speaker said it was the first time he'd heard an opening address that combined 'sex, rape and knock-knock jokes in such an engaging speech pitched so well to the audience'.

I have also given two stand-alone public lectures on the issue of gender violence and its links with gender inequality, the Webber Lecture at The Hutchins School, a boys' private school in Hobart, and the Sandy Duncanson lecture at the University of Tasmania. In the Webber Ethics Lecture my focus was on the ethics of personal relationships and sexual violence – and in the Sandy Duncanson lecture I spoke about the limits of law reform in tackling the issue of gender violence.

And as the first female Governor in Tasmania, I am often invited to speak on gender equity, the gender pay gap, and women in leadership. The range of audiences is diverse: International Women's Day gatherings with a cross-section of ages, local government groups, unionists for example. Usually I am speaking to women but sometimes to a broader cross-section, such as when I recently spoke at a Tasmania Police Commissioned Officers' Mess Dinner on gender equity and diversity in the workplace.

So what can I do about gender equity as Governor?

Because I am often asked to speak to diverse groups in the community, I can highlight the gender pay gap and the inequalities in leadership positions. And I can talk about the benefits of workplace gender equality, applying the Australian Government Workplace Gender Equality Agency arguments about this to the particular profession or workplace I am addressing. As well as the argument that gender equality attracts the top talent, and that failing to access the entire talent pool is a waste of resources, there are strong arguments that organisations with gender equality perform better.

By way of concluding, this brings me back to an issue that I raised earlier in speaking of Jack's transition from academia to the bench, namely judicial diversity. Currently only 28% to 37% of judges are females (depending on jurisdiction). I have said that the legal system may or may

not perform better or differently with a higher proportion of female judges. But as Rosemary Hunter suggests this is not the only reason for judicial diversity. The presence of non-traditional judges is important symbolically, it signals equality of opportunity for those from non-traditional backgrounds and is also important for what they can do behind the scenes and extrajudicially.³⁸

What needs to be done to achieve a higher proportion of female judges in Australia? Only 8% of silks are women, so recruiting judges from the Bar is not going to close the judicial gender gap. I have argued in many of my speeches that normalising flexible work arrangements for men and women and breaking down the male breadwinner model is essential to stop the attrition of women from the legal profession and to allow them to serve at a high level in the decision-making vocations that law offers including but not only the upper echelons of the legal profession. Introducing judicial training and shadowing programs as recommended by the Neuberger Report would be a good initiative to help facilitate the selection of a broader cross-section of candidates to the judiciary.

Jack Goldring, scholar, teacher, reformer and judge worked to attract a new and different cohort of students to the study of law.³⁹ I believe he would be equally interested in attracting a more diverse cohort of lawyers to the upper echelons of the profession and to the judiciary.

It has been a great privilege to give a lecture in memory of a man whose 'fine mind and warm heart were ornaments to the legal profession'.⁴⁰

Thank you.

³⁸ Hunter n 24, 123, 141.

³⁹ Kirby n 12, 233-237, 240-242.

⁴⁰ Kirby n 12,241.