

CELEBRATING THE BICENTENARY OF THE LEGISLATIVE COUNCIL OF NEW SOUTH WALES

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Lieutenant Governor and Chief Justice of New South Wales

Parliament House, Sydney

24 August 2024

- 1 Mr President, Mr Speaker, Premier, Members of the Executive Council, Parliamentarians, distinguished guests, all.
- 2 I acknowledge the Gadigal, the traditional owners of these lands and waterways, and pay my sincere respects to their Elders past and present and extend those respects to all Indigenous Australians.
- 3 It is a pleasure and honour for me to be here tonight and to give this address. I pass on the apologies of Her Excellency, the Governor, and am wearing my metaphorical hat as Lieutenant-Governor rather than my more familiar wig!
- 4 The fact that I am here is not without irony as the then Lieutenant-Governor, William Stewart – who was one of five members of the first Legislative Council – was absent for its first meeting. He had a perfectly reasonable excuse – he hadn't arrived yet from England. The first item of business at the first meeting of the Council was whether it could proceed with business in the Lieutenant-Governor's absence. It was resolved that it could.¹ There were no other items of business!

¹ 'Minutes of Council: No. 1', in *Minutes of Proceedings of the Legislative Council, from 1824 to 1831, Inclusive, and Votes and Proceedings of the Legislative Council from 1832 to 1837, Inclusive*, (Government Printing Office, 1847) at 2, available at

- 5 Just to give you some historical perspective, one of the Council's first members (all appointed) was Frederick Goulburn who was the Colonial Secretary and had fought under the Duke of Wellington against Napoleon at the Battle of Waterloo in 1815.
- 6 Another of its first members, James Bowman, was John Macarthur's son-in-law and a surgeon and inspector of the general hospitals in the colony. In 1828, he was also the defendant in the first action in the Supreme Court of New South Wales for the tort of "criminal conversation", also known as the tort of adultery.² According to the report of the case, it (the case, not the adultery) commenced in the "forenoon" and reached its conclusion at 10 o'clock at night with a verdict being delivered after an adjournment for three quarters of an hour with a verdict for Mr Hart, the wronged or cuckolded husband. He was awarded £50.
- 7 Since that time, I am sure that the Legislative Council's members have been entirely scandal free!
- 8 Although this is an evening of celebration, it is sobering but necessary for us all to recall that, on 26 August 1824, only one day after the first meeting of the Legislative Council, Governor Brisbane declared martial law in the area now known as Bathurst.³ The *Sydney Gazette* quoted the Governor as saying that "the Use of Arms against the Natives beyond the ordinary Rule of Law in Time of Peace" is necessary to achieve "summary justice".⁴ This was nothing less than the explicit suspension of the rule of law in New South Wales and what was achieved was the antithesis of justice.
- 9 The Council was, of course, conceived of in the Third Charter of Justice, authorised by the *New South Wales Act* of 1823, an enactment of the

<https://www.parliament.nsw.gov.au/hansard/Documents/HHP/pre1991/votes/1824_1881/182425-X-LC-XX-0000-0026.pdf>.

² *Hart v Bowman* [1828] NSWSC 104.

³ Trove, *New South Wales Proclamation* (Sydney Gazette, 26 August 1824) available at <<https://trove.nla.gov.au/newspaper/article/2183166?searchTerm=Brisbane>>.

⁴ Trove, *New South Wales Proclamation* (Sydney Gazette, 26 August 1824) available at <<https://trove.nla.gov.au/newspaper/article/2183166?searchTerm=Brisbane>>.

Parliament at Westminster.⁵ It also made provision for the establishment of the Supreme Courts of New South Wales and van Dieman's land. There were two copies of the Third Charter of Justice, despatched on different ships from England. The *Hibernia* arrived in Hobart shortly before the *Guilford* arrived in New South Wales and so it was (somewhat irritatingly) that the Supreme Court of Tasmania claims to be a week older than the Supreme Court of New South Wales. We New South Wales lawyers have developed arguments against this inconvenient historical truth but, for the Legislative Council of New South Wales, there was no such competition or controversy. It was our first legislature.

- 10 Tonight, we celebrate its bicentenary and we do so with pride in the continuity of one of our important institutions of State. As with the bicentenary of the Supreme Court earlier this year, the celebration of the bicentenary of the Legislative Council has not been celebration for celebration's sake but, rather, the opportunity has been seized by the President (and his predecessor) as well as the Clerk to showcase the Council's rich history and its important role in our civic society as a house of review.
- 11 This commenced with a conference last year entitled "*The Spark: The Act that brought Parliament and the Supreme Court to NSW*", coinciding with the execution of the Third Charter of Justice. It has continued with the Bicentenary Seminar Series including a seminar in April entitled "*Then & Now: People, Power and Representation*".
- 12 More recently, only last month, I had the great privilege of attending "*Pride & Precedent: Law, Representation and Reform*" in this very room, at which, amongst others, the leader of the Government in the Legislative Council, the Hon Penny Sharpe spoke as did former Deputy President of the Council, the Hon Trevor Khan, as well as my colleague and friend, Justice Richard Weinstein. That was a showcase of the work done to decriminalise homosexuality in the State, afford protection through anti-discrimination

⁵ *New South Wales Jurisdiction Act* (4 Geo. 4. c. 96).

legislation, equal recognition of same sex families and efforts to redress past injustices. That discussion and the reforms that were celebrated illustrated the collaborative and progressive nature of so much of the important work that is done in this Parliament – a far cry from popular “Punch and Judy” impression of parliamentary proceedings. It was very inspiring.

- 13 In August 1924, a gala dinner was hosted for the Legislative Council’s centenary. The gala was attended by the Premier, Sir George Fuller, the Chief Justice of NSW, Sir William Cullen, and the Governor, Sir Dudley de Chair.⁶ The Premier described the Legislative Council’s significance thus:⁷

“...with our first council, there has been set up an institution which guarantees... equity and Justice... and guards the individual interests of every citizen against violence and oppression. Our franchise, broad and liberal, enables every adult man and woman to have a direct voice in the selection of those who are to govern them.”

Stopping there, while the franchise was broad and had been attained in 1902, the *Women’s Legal Status Act* of 1918 had permitted women to be admitted as to the Legislative Assembly, to local councils and as lawyers and judges. Women were not, however, able to be appointed or elected to the Legislative Council until 1926. The original draft of the 1918 Bill had included the Council as well as the Assembly but the inclusion of the Council was rejected in the upper house on a technicality by reference to the principle that any measure to alter the constitution of the Council had to originate in the Chamber, and the Bill had originated in “the other place”.

- 14 The problem was rectified in 1926 by what, to our eyes, was a rather remarkable piece of legislative drafting – the *Constitution Act 1902* (NSW) was amended by inserting at the end of section 16 the following paragraph:⁸

⁶ Trove, *The Legislative Council: Centenary Celebrations* (Richmond River Express and Casino Kyogle Advertiser, 27 August 1924) available at <https://trove.nla.gov.au/newspaper/article/122581643?searchTerm=%22legislative%20council%22%20AND%20centenary>.

⁷ Trove, *Commemorative Dinner: A Brilliant Function* (Sydney Morning Herald, 26 August 1924), <<https://trove.nla.gov.au/newspaper/article/16181488?browse=ndp%3Abrowse%2Ftitle%2FS%2Ftitle%2F35%2F1924%2F08%2F26%2Fpage%2F1225302%2Farticle%2F16181488>>.

⁸ *Constitution (Amendment) Act 1926* (NSW) s 2.

“The word “person” in this section shall be construed as including a woman whether married or unmarried”.

Happily, we have moved on and now, of course, 20 of the 42 current members of the Legislative Council are female.

- 15 The Legislative Council’s powers were initially advisory only. Under the Third Charter, the Chief Justice enjoyed an effective power of veto in circumstances where he considered that any laws passed with the advice of the Legislative Council were repugnant to the laws of England. This power was used, and in a way that I think reflects well on our first Chief Justice, Sir Francis Forbes, and shows his liberal spirit. He twice struck down laws of Governor Darling designed to restrict the freedom of the press which were passed after the then Governor’s tendency to autocracy was criticized and he attempted to clamp down on criticism of his actions in what was, at the time, a very dynamic and active press.⁹
- 16 The first Act passed with the advice of the Council was the *Currency Act* which recognised Spanish dollars as a valid tradable currency in the colony, and enabled bills of exchange and promissory notes in Spanish dollars to be enforceable in the courts.¹⁰
- 17 The Act had an interesting backdrop. Governor Macquarie had invented a pragmatic solution to the absence of any official internal currency in the colony. He removed the centre of 40,000 Spanish dollars – creating 40,000 ring-shaped “holey dollars” and 40,000 “dump” or “core” dollars. The removal of the centre not only doubled the amount of coins, but also rendered the coins unusable overseas – thereby removing the “flight risk” of Spanish dollars, and securing a stable currency for the colony’s fledgling economy.¹¹

⁹ Mason and Reid (eds) *Constant Guardian: Changing Times – the Supreme Court of New South Wales 1824-2024* (Judicial Commission of NSW, 2023) at 20-22.

¹⁰ *Currency Act 1824* (5 Geo IV no. 2).

¹¹ State Library, Dictionary of Sydney available at <https://dictionaryofsydney.org/entry/spanish_holey_dollar>.

- 18 If you want to see an example, of the “holey dollar”, it is Macquarie Bank’s logo!
- 19 In 1843, the Council’s members became partly elected – introducing Australia’s first, albeit highly restricted, form of representative government.¹² That was the initiative of one of, if not the, finest Attorney General and parliamentarians and public servants New South Wales has ever known, John Hubert Plunkett, who also served a term as President of the Legislative Council.¹³
- 20 Twelve years later, in 1855, the Legislative Assembly was formed, leading to NSW’s bicameral system and an enhanced but still imperfect form of representative government. At this time, only men aged 21 and above who owned property could vote.¹⁴
- 21 At the centenary banquet in 1924, described by the *Sydney Morning Herald* as “*A brilliant function*”, the Speaker of the Legislative Assembly, Mr Levy, noted that there had “never been any serious conflict between the two Houses in New South Wales, and that was something to be proud of”.¹⁵ This was said at a time when, in fact, there were growing tensions between the houses as to the functioning of the Legislative Council. The day after the centenary celebrations, a news article in the *Lithgow Mercury*, no less, reported that:¹⁶

“an attack was launched from the Labor side of the House on the Legislative Council, which came in for some hard names. Those taking part in it were Messrs Lang, Dunne, ... and Burke. The last named said the Council was an excrescence on the body politic of [the] State”.

¹² Parliament of New South Wales, *The History of the Council* available at <<https://www.parliament.nsw.gov.au/lc/roleandhistory/Pages/The-history-of-the-Council.aspx>>.

¹³ The Hon AS Bell “Unheralded Nation Builder: Another dimension of John Hubert Plunkett” at https://supremecourt.nsw.gov.au/documents/Publications/Speeches/2024-speeches/chief-justice/2024_Plunkett_Lecture.pdf

¹⁴ Parliament of New South Wales, *The History of the Council* available at <<https://www.parliament.nsw.gov.au/lc/roleandhistory/Pages/The-history-of-the-Council.aspx>>.

¹⁵ Trove, *Commemorative Dinner: A Brilliant Function* (Sydney Morning Herald, 26 August 1924), <<https://trove.nla.gov.au/newspaper/article/16181488?browse=ndp%3Abrowse%2Ftitle%2FS%2Ftitle%2F35%2F1924%2F08%2F26%2Fpage%2F1225302%2Farticle%2F16181488>>.

¹⁶ Trove, *Legislative Council Centenary* (Lithgow Mercury, 27 August 1924) <<https://trove.nla.gov.au/newspaper/article/220699514?searchTerm=%22legislative%20council%22%20AND%20centenary>>.

A precursor of the Hon PJ Keating's uncomplimentary description of the upper house in the Federal Parliament, one might think.

- 22 The Council survived two attempts to abolish it by Jack Lang in the 1920s, following the precedent which had been set by Queensland in 1922 when the upper house voted itself out of existence.¹⁷
- 23 Lang's second attempt to abolish the Legislative Council ended up in the Supreme Court¹⁸ in the landmark decision of *Trethowan v Peden*.¹⁹ Sir John Peden was the then President of the Legislative Council. The Government was represented by Dr Evatt KC and Mr Kitto – both of whom would become High Court judges (and for Evatt, later Chief Justice of NSW). Nonetheless, the Court held that the bills were unconstitutional – a decision which was subsequently affirmed by the High Court and Privy Council.²⁰
- 24 One aspect of the decision which has not received much application by the court in modern times was Justice Ferguson's observation that "there is nothing in the Constitution forbidding the Legislature [of NSW] to do insane things".²¹ I will refrain from saying anything further about the force of that comment.
- 25 Another famous case involved the redoubtable and late lamented Michael Egan, an almost decade long Treasurer of this State and proud member of the Legislative Council who I had the pleasure to meet on a number of occasions through mutual friends. His opponent in that case was Max Willis, then President of the Council, an office he held for almost 7 years. He was brother of a former Premier, Sir Eric Willis.

¹⁷ [Constitution Act Amendment Act 1922 \(Qld\)](#).

¹⁸ Mason and Reid (eds), *Constant Guardian: Changing Times – the Supreme Court of New South Wales 1824-2024* (Judicial Commission of NSW, 2023) at 153.

¹⁹ *Trethowan v Peden* (1930) 31 SR (NSW) 183.

²⁰ *Attorney General (NSW) v Trethowan* (1931) 44 CLR 394 (HC); *Attorney General (NSW) v Trethowan* (1932) 47 CLR 97 (PC).

²¹ *Trethowan v Peden* (1930) 31 SR (NSW) 183.

- 26 The case, *Egan v Willis*,²² is of continuing significance. In 1996, Michael was physically ejected from Parliament and forced onto Macquarie Street by the Usher of the Black Rod, there to meet camera crews who had been tipped off. The reason for his ejection was that he refused to produce State papers to the Legislative Council relating to Sydney's then water crisis. It has been said that the physical ejection from the Council was actually a bit of a "set up" as it allowed the Treasurer to bring a case of trespass to his person in which, incidentally, the important legal question as to whether the Legislative Council could compel the production of documents, and forcibly remove those who failed to do so, could be agitated by way of the defence of justification – which it was, initially in the Court of Appeal and then in the High Court.²³
- 27 The decision is a leading case, not on the law of trespass to the person but on the powers and privileges of the Legislative Council. Justices Gaudron, Gummow and Hayne said that:
- “The arrangements made for New South Wales for the period following 1855 provided the elements of what now should be identified as a system of responsible government. There was an assumption of a measure of examination of the executive by the legislature as well as legislative control over taxation and appropriation of money. The consideration that the government of the day must retain the confidence of the lower House and that it is there that governments are made and unmade does not deny what follows from the assumption in 1856 by the Legislative Council of a measure of superintendence of the conduct of the executive government by the production to it of State papers.”²⁴
- 28 Tonight, we celebrate our democracy and an important civic institution, the Legislative Council, in an appropriately bi-partisan way. “Bi-partisan” is probably not the most apposite word to use as the Council has, for many years, been a broad church with a multiplicity of parties and interest groups represented. That is no bad thing.
- 29 Those prepared to enter public life, especially political life, deserve the community's admiration and gratitude. It is gruelling, can be uncertain and

²² (1998) 195 CLR 424; [1998] HCA 71.

²³ An “insider's” account of the case will be published in a forthcoming issue of *Bar News* in 2024. See also Stephen Gageler, “Egan v Chadwick” (1999) 22 AIAL Forum 37.

²⁴ (1998) 195 CLR 424; [1998] HCA 71 at [46].

intrudes into private life. It is, however, absolutely worthwhile and a noble calling for, without citizens prepared to put themselves forward for election, we could not have a functioning democracy. That we have a functioning democracy, and have had one for such a long period, is one of the great strengths of this State and country. Election results are accepted and power is transferred peacefully.

- 30 The Premier's acknowledgement of his predecessors' contributions at the recent opening of Sydney Metro was reflective of a mature and functioning democracy, underpinned by mutual respect.
- 31 May I presume to thank all of those here tonight who currently serve or who have served in the Legislative Council and the "other place" (although it is not their party) for that service.
- 32 Can I now invite all who are able to do so, to stand and toast the Legislative Council of New South Wales.
- 33 "The Legislative Council."

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