

**ADDRESS GIVEN AT THE FINAL SITTING OF THE RT HON DAME SIAN
ELIAS, GNZM, 12TH Chief Justice of New Zealand**

Supreme Court, 85 Lambton Quay, Wellington

Friday 8 March 2019 at 11.30 am

Sian Elias¹

Te whare e tu nei e tu rangatira, tena koe
Tena koutou i o tatau tini mate. Nga mate kei runga i a koutou.
Nga mate kei runga i a matou, otira i a tatau. Haere Haere Haere
E te kanohi ora.
E te iwi Te Atiawa. Tena koutou. Kei te mihi atu.
E Kura, te reo o te mana whenua, tena koe.
Otira ki a koutou katoa, tena koutou, nau mai, haere mai ki tenei hui o te
Kooti Mana Nui.

I have started by acknowledging this house of justice, those who have gone before us, and Te Atiawa as tangata whenua. I have acknowledged Kura and thanked him for his beautiful mihi and the great honour he does our gathering and me.

I have welcomed all of you to this sitting. I am touched that so many of you have come. I have apologies from many more, including the Governor-General, Dame Patsy Reddy and the Attorney-General who have sent their regrets that they are not able to be here today.

I want to acknowledge and welcome in particular his Excellency Sir David Gascoigne; the Hon Andrew Little, Minister of Justice; the Hon Aupito William Sio, Associate Minister of Justice; and the Secretary of Justice, Mr Andrew Kibblewhite. I acknowledge the presence of the heads of all the benches of the courts of New Zealand, with the exception only of the Chief Judge of the Employment Court, whose flight from Queenstown was cancelled this morning.

I want to express my appreciation to the retired judges of the courts of New Zealand who have come to this sitting. Their presence is a reminder of the continuity of the courts and the tradition in which judges serve today.

I will not take time to acknowledge individually all the holders of high office who are here. It would take too long and I would inevitably leave

¹ Rt Hon Dame Sian Elias, 12th Chief Justice of New Zealand.

one or two out. But I would like to express my deep appreciation for your presence.

But one individual I would like to single out for special acknowledgement is the Hon Margaret Wilson, an Attorney-General I worked with for some years and who brought about the establishment of the Supreme Court, in which we sit. She and I also entered Law School together in Auckland in 1966. 6 women enrolled that day in a class of 200. Some of our lecturers thought civilisation was coming to an end. On this International Women's Day I wonder what they would make of the way we are now and the fact that at this ceremony all the speakers are women - and that is not by design. It is by virtue of the offices they hold.

I would also at the outset like to acknowledge and express my appreciation to our Australian judicial colleagues who have made the journey to be here today: the Chief Justice of Victoria, the Hon Anne Ferguson, the Hon Justice Kim Hargrave of the Victorian Court of Appeal; the Deputy Chief Justice of the Family Court, the Hon. Justice Robert McClelland and retired Chief Justices of the Australian jurisdictions, the former Chief Justice of Australia, the Hon Murray Gleeson and Mrs Robyn Gleeson; the former Chief Justice of the Federal Court of Australia, the Hon Michael Black (who was present at my swearing-in as Chief Justice); the former Chief Justice of the Australian Capital Territories, the Hon Terrence Higgins. That you should have taken the trouble to come for this special sitting means much to me personally and speaks of the special connection between our jurisdictions.

Finally, I count myself very fortunate to have here today so many members of my family: Hugh and our sons Ned and Ben and their families. My mother, Mair Elias and my sister, brother, and brother-in-law. My father, who was at my swearing-in in 1999 hasn't lived to see my term end, but he is one of those presences I acknowledged at the outset.

With those acknowledgements and introductions I turn to the business in hand today. As is our custom in the Courts, I start by inviting those Queen's Counsel who are present to enter their appearances.

Address:

I am not going to keep you long. After so long in office and so many speeches and judgments if it has not been said already, it probably isn't worth saying - and it is too late now anyway.

Thanks and reflections on the profession

Madam Solicitor, Ms Beck and Ms Davenport. Thank you for your

addresses on this occasion. They were over-generous but, when I have stopped feeling overwhelmed, will be expressions of appreciation which I will savour very much in recollection.

I want to express my appreciation to the bodies that you represent.

First, the Crown. Anyone who knows anything about the administration of justice understands that in our system the role of the Solicitor-General and Crown counsel is a principal protection for the rule of law. I and the judges appreciate very much, Madam Solicitor, your intelligent and scrupulous discharge of the independent responsibilities you have when advising and acting for the Crown. It is I think the most onerous responsibility in the profession because you have to speak for the rule of law to those who are powerful and who conscientiously believe their motives and actions are right. Nothing is as warping as a sense that you are on the right side. The responsibility of the Solicitor-General and those who act for the Crown is to hold the line in those sensitive circumstances. To be firm in protecting the interests of the Crown, but always to be fair and to keep an eye on the wider picture and the longer time frame. It is great comfort that in New Zealand we have a fine tradition of independence in the office of Solicitor-General and that you work carefully in that tradition.

Ms Beck, as you near the end of your term as President of the New Zealand Law Society, I am very pleased to have the opportunity to congratulate you on the discharge of your responsibilities in very difficult circumstances. I have had close contact with you over the past 4 years and have more insight than many into how lucky our profession has been to have someone of your capacity and experience in the hot seat at this time.

Ms Davenport, you have only recently taken up the role as President of the Law Society, but are someone well known in legal circles and a long time office holder in the Bar Association. The Bar has a critical role even in a largely fused profession in ensuring that legal representation is available to all-comers.

Our profession is not of course divided in its loyalties. Those who practice at the bar alone are also members of the wider Law Society. These connections are vital in maintaining the standards and effectiveness of the profession. I have said before in ceremonial sittings that we do not take enough time to speak about the importance of the profession to the rule of law. Sir Owen Dixon thought it more important that there be independent lawyers even than that there be independent judges. I have had occasion in the past to express agreement with that view and to say that the depth of talent and decency we have in the profession demonstrates its fitness to ensure that ours is a society under law, without which no one has security. On this occasion I want to express appreciation

for the work of the profession in making ours a just society. My life in the profession has been happy and fulfilling and I have great admiration for the work you do and the burdens you carry in representing the hopes of those you represent, often at times of great strain for them. The judiciary appreciates very much the work of the profession. We know its essentiality to our own and to the values we share.

Judging:

The work of a judge in our common law tradition is in many respects transitory. That is in fact comfort in judging. Because the common law does not stand still and is a method of change, the constant reassessment means that errors seldom cause too much harm. As Benjamin Cardozo once pointed out constant reassessment means that errors eventually come out in the wash. That constant reassessment also means that whatever contributions are made from time to time by any judge are unlikely to endure. I am not someone who subscribes to the “big man” or “big woman” theory of law. Law is the work of many hands. It is a great movement in which all of us play our parts: judges, the registry staff, the judicial support staff, as well as the counsel who fashion the arguments and the academics who criticise the results. These institutions and traditions are strong. The movement of law includes law reformers and legislatures. It includes all those who show their expectations of law by looking to the courts in the belief that they will obtain right according to law. These expectations are themselves based on community law-mindedness which is the only sure protection for the rule of law.

A distinctive NZ jurisprudence?:

It has been a particular privilege during my time as Chief Justice to sit on the High Court, the Court of Appeal and from its setting up in 2004, on the Supreme Court. The establishment of a final court of appeal has been a highlight of my years in law. It has opened up possibilities for New Zealand law that were not available to the judges who served before us.

Twenty years ago when I was sworn in as Chief Justice, I suggested that in New Zealand law we needed to speak with our own voice. A newspaper questioned whether my remarks were a coded reference to abolition of appeals to the Privy Council. Well, of course that was part of it. But it was more than that. It is important to be respectful of our own tradition and where it needs to adapt if our legal order is to be fit for purpose. The setting up of a Supreme Court at the apex of the court system was undertaken in part to ensure that we did not lose sight of our traditions.

When the Supreme Court was set up there were suggestions that it would be free to set its own course and maintain its own jurisprudence. In some

ways this is romantic thinking. In our work we usually do not give any thought to whether we are making a distinct contribution to New Zealand jurisprudence. We are too busy trying to do what is right according to law in the case in front of us. Anyway that is not the nature of the enterprise. A court does not organise the cases it hears. It does its bit with the cases brought to it. Nevertheless, there are differences in an apex court. Some of them we are still identifying and working through.

A final court should not sleepwalk in its function. It has to be conscious always of how this bit of law fits with the architecture of the whole. It has to endeavour to make statutes and common law march together and be coherent. It has to believe in its role. If it cannot explain what it is doing and why, who will? If its members don't believe in the Court, who will? It is always necessary in the work of a final court to leave room for second thoughts. As Lord Reid said in his celebrated "fairy-tale" speech, second thoughts are not always best, but they generally are.

Although I think we have made a good start, the establishment of an institution like this is a work of many years. I will watch its work with great interest and enjoyment.

There are huge satisfactions in this work. I mention two only. Oliver Wendell Holmes wrote of the satisfaction of judging as being "the trembling hope of coming near to an ideal". It comes often when reading the thinking of a judge, often long dead, who has grappled with the problem exercising you or something very like it. It comes with the spark of recognition when your minds seem to snap and doubts recede under illumination.

The second satisfaction I mention is working with colleagues of the calibre I have had on the Court from its inception. They have beautiful minds, even if they are sometimes wrong-headed - and they are very dear friends indeed.

I will miss them as I will miss the day to day contact with all judges.

Just society:

We have always had high expectations of law in New Zealand. Much of the talk at Waitangi was about the expectation that law will yield justice. A constant theme throughout our history has been the confidence that the law will yield justice. That sets a high expectation for any legal system to live up to.

I sometimes feel that in my work, as counsel and as judge, I have never got out of the 1840s. But much of what was done in those times was

imaginative and decent and the journey we embarked on then is not yet finished.

We know that the expectations of Waitangi were not always fulfilled. But as I said at my swearing-in as Chief Justice nearly 20 years ago, what matters more is not the times we may have slipped from the path but the belief with which we started out. It remains a compass for us. Even in the worst of times, those who had borne great injustices such as Te Whero Whero, Te Kooti and Rua Kenana urged their people to hold fast to the law as a shelter. That is a great tradition within which to serve in law in this country.

It is impossible to explain why justice matters. It is a concept essential to the human spirit. But it is fragile. If the law is seen as discriminatory and unequal, if we do not value the principles which underpin our common law tradition, we risk losing law.

We have to be ambitious for a just society. It is no use having an independent profession or independent judges if few can afford to get to court or obtain legal representation. A legal order is no use if the law is unjust or cannot adapt to prevent injustice. It is unlikely to be fit for purpose if judges and lawyers have no insight into the lives and legal needs of the communities they serve.

My journey as Chief Justice:

My journey as Chief Justice has been a very small part of the greater movement I have described. I have been privileged indeed to participate in it over the past two decades.

A Chief Justice is not a manager or even a leader in any usual sense. One of the obligations of the Chief Justice is to ensure space for the independence of each judge in judging.

The work of the courts is the work of many hands. Or, as I have had occasion to say over the last month or so of farewells, it is a great movement. Very many people are committed to helping make the system work. Clerks, associates, registry staff. I want to pay especial tribute to two who have worked for me for very many years. They have shown huge personal loyalty, but what I have appreciated more is that they are utterly committed to our legal order and their principal service is to it. Those two are Kieron McCarron my legal assistant and now Registrar and Lynette Maru, my indefatigable associate. In my work I have not wanted to let them down, just as I have not wanted to let down the expectations of others who put their faith in law and in the institutions we have.

Those who have sustained me in my work with their values and expectations that what is right will be accomplished included a number of people with whom I worked in law and who attended my swearing-in as Chief Justice but are no longer with us. They include Archie Tairaoa, Nganeko Minhinnick, John McGrath, Robert Chambers and very many more. People like these who have cared about justice and worked for it in their lives have been an unseen audience I have not wanted to disappoint in the work I have done in my turn.

I am very happy to relinquish office. I have had a truly wonderful time with amazing experiences and great personal satisfaction in the judicial work, but it is high time to stop. I am delighted as we all are in the new Chief Justice.

End:

I started my introduction by acknowledging this place. It is not one of our historic courtrooms, which still echo with the footfalls of the past. It is not a place built to convey the majesty and power of the law or to command obedience. It is not indelibly stained with sad episodes in our history where doors have been shut and hopes dashed. It is instead a place built to express the hope of justice through law and the confidence that a new Court will administer the laws in this country with knowledge of its own history and traditions. Cicero once suggested that the foundation of all law is the natural propensity we have to love our fellow man. I think of this place as one of love and justice. I have been very privileged to have served in it.

No reira, tena koutou, tena koutou, kiora tatou katoa.
