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## JUDGES OF THE SUPREME COURT

THE HONOURABLE LEONARD JAMES KING, CHIEF JUSTICE  
THE HONOURABLE SAMUEL JOSHUA JACOBS  
THE HONOURABLE JAMES MICHAEL WHITE  
THE HONOURABLE CHRISTOPHER JOHN LEGOE  
THE HONOURABLE BRIAN ROTHWELL COX  
THE HONOURABLE ROBERT FINEY MOHR  
THE HONOURABLE RODERICK GRANT MATHESON  
THE HONOURABLE DEREK WILLOUGHBY BOLLEN  
THE HONOURABLE ROBIN RHODES MILLHOUSE  
\*THE HONOURABLE ELLIOTT FRANK JOHNSTON  
THE HONOURABLE GRAHAM CLIFTON PRIOR  
THE HONOURABLE LESLIE TREVOR OLSSON  
THE HONOURABLE MAURICE FRANCIS O'LOUGHLIN  
THE HONOURABLE JOHN WILLIAM VON DOUSSA  
†THE HONOURABLE JOHN WILLIAM PERRY

## ACTING JUDGE

‡THE HONOURABLE ROBERT MARTIN LUNN

## ATTORNEY-GENERAL

THE HONOURABLE CHRISTOPHER JOHN SUMNER, MLC

\*Retired, 26 February 1988.

†Appointed, 3 March 1988.

‡From 29 February 1988 to 1 July 1988.

## MEMORANDUM

In the Supreme Court of South Australia  
Special sitting to mark the retirement  
of the Honourable Justice Johnston

A special sitting of the Full Court was held on Friday, 26 February 1988, on the occasion of the retirement of the Honourable Justice Johnston.

KING CJ: The dominant sentiment which one experiences about this special sitting of the Court is that the occasion for it, namely the retirement of Justice Johnston by reason of his reaching the statutory retirement age, has come all too soon. His distinguished, albeit relatively short, judicial career had hardly got into full stride when it was cut short by the necessity of retirement.

Justice Johnston came to this Court after an outstanding legal career. He was admitted as a practitioner of this Court on 14 December 1940. He is, therefore, the last of the generation of judges who were not post-war admittees, that is to say were not admitted to legal practice after the war. As with so many of his generation, his career and civil pursuits were interrupted by military service during the years of war.

After his discharge from the Army at the conclusion of the war, his Honour embarked upon legal practice and there followed a legal career of great distinction. I refrain from referring in detail to his Honour's legal career and to his contribution to the profession and the community, as I will be followed by the Attorney-General and the President of the Law Society who will doubtless deal with those matters.

I refer to one aspect only. His Honour's eminence in the legal profession was recognised by his appointment as Queen's Counsel in 1970. It was an appointment which was greeted with widespread acclaim by his Honour's colleagues in the legal profession, but it had been attended by a degree of political controversy. It seemed at the time to be a strange subject for political controversy and in retrospect the occurrence of that controversy is barely comprehensible. Two outstanding memories remain. The first is the demonstration which occurred and the esteem in which his Honour was held in all sections of the legal profession. The second was the dignity and composure with which his Honour conducted himself throughout that difficult episode.

Justice Johnston came to this bench relatively late in life on 30 June 1983. His judicial career has extended over less than five years, but in that short space of time he has left his mark upon the Court and upon its work and character. His penetrating mind and vast experience of life are to be discerned in his judgments and have made a considerable impact upon this Court. His Honour's meticulous attention to the evidence and

to detail and his seemingly inexhaustible patience and energy in seeking after the just solution to the case in hand are well known and are in themselves a tribute to his concern for the human beings involved in the case and his passion for justice. His Honour's wise and thoughtful advice in the councils of the judges have had a considerable effect upon our thinking on many issues and its influence will be felt long after Justice Johnston has left us.

At the level of personal relations, I know that I speak for all the judges when I say that his Honour's presence among us will be sadly missed. He has been a warm, friendly, loyal and entertaining colleague and our judicial body will be much the poorer in his absence.

I end as I began by regretting that this occasion has come too soon. His Honour leaves the Court at the height of his powers and one must hope, for the sake of the community generally, that the opportunity will present itself for his Honour to continue to make the contribution which his experience and wisdom equip him to make, to the wellbeing of the community and that he will see his way clear to take any such opportunity. If that occurs, of course, retirement, in the sense of termination of working life, may have to be deferred, but we express the hope that when it comes he and his wife Elizabeth will enjoy a long and happy retirement.

**MR SUMNER:** If the Court pleases. I am pleased to be here this morning as a representative of the South Australian Government and community to endorse the remarks of your Honour the Chief Justice in thanking Justice Johnston for his contribution to the South Australian community and, in particular, for his work on this Court.

Since your Honour's appointment, which I was privileged to be able to recommend to Cabinet and the Governor in Executive Council in 1983, you have served the Court with distinction and there will be many in the legal community who will find this a sad occasion.

I must confess to some mixed feelings myself today in that you are the first judge that I have both welcomed and farewelled at a Special Sitting of the Court. This, however, says more about the shortness of your Honour's tenure as a Justice of the Court than my longevity as Attorney-General. It is a tenure which, I am sure, all here today would agree was too short. The fact is that your Honour's appointment to the Bench came later than most because successive governments, Labor and Liberal, were reluctant to recommend your appointment because of your political beliefs and in particular your membership of the Communist Party. You were eminently well-qualified for appointment well before, in fact, you were appointed. There is little doubt that in the normal course of your career your high standing in the profession and legal ability would have seen you appointed to this Bench much earlier than when it in fact occurred in June 1983.

You were an outstanding advocate. You have been an outstanding judge. As a barrister you were much sought after and, as I said when welcoming you to the Court, you had a commitment to ensuring that citizens in our community had a right to be heard and represented before its courts. You accepted briefs in all jurisdictions and had a reputation

for taking the difficult and often not so well paid case, a tradition I might add which seems to be disappearing in the modern-day Yuppiedom. You had no hesitation in defending the underdog or advocating the unpopular cause.

At least the delay in your appointment had the advantage that the best possible advocacy was available to our citizens for a longer time than would otherwise have been the case. On the bench you have maintained and enhanced your reputation for compassion and humanity. You have been a judge who represented the best traditions of the impartial administration of justice.

There is no doubt that litigants in your court always received a fair hearing. Defeat for litigants is always difficult to accept, but it is essential that they leave a court feeling satisfied that their cases have been dealt with fairly, impartially and free from prejudice. If they do not feel this then respect for our system of justice is lowered.

As a Member of Parliament and indeed as a practising lawyer I, and I am sure others, have often been confronted with the difficult situation, and it is a most difficult situation, of explaining to people why cases have been lost. I am pleased to say that one is not confronted with that often, but when you are the task is made much more difficult when there are allegations, as there are from time to time, that the judicial officer has been overbearing, offhand, inconsiderate or inattentive. That would never have been said of your Honour's court. Litigants would have left your court feeling they had been given a fair go irrespective of the result.

Your Honour's thoroughness in preparation of cases and in consideration of issues is well known. Indeed some might say that you were thorough and meticulous to a fault. In less reverent moments some counsel have used the word "slow".

According to some familiar with the operations of your court, the complexity of an argument or an issue could always be determined by the distance the judicial wig travelled during submissions. When it came to rest over the left ear counsel knew they were in for an extended session.

Your Honour has always sought out the best in people. You have a belief that the real strength of the Australian nation lies with its working people. You have a profound respect for and abiding belief in the goodness of the ordinary Australian. This is manifested in the legal system by your firm commitment to the jury system and more generally in your advocacy of democracy and participation in our country's political, social and economic institutions.

You have always believed that a fairer, more just, more egalitarian society is possible. Although you have had to fight for unpopular causes in your professional and political life you have been secure in your personal value system and have never given way to the attractions of an offhanded detached uncaring cynicism which seems to afflict many people as they leave the idealism of youth behind. For you your ideals remain as important now as they always have been.

In case my laudatory remarks today about you have tended to elevate you to a saint-like status, which I am sure you would eschew, I have been advised that you did have at least one lapse as a barrister but apparently got it completely out of your system by the time you were appointed to the bench. During a trial in 1983 you were recorded to utter the following remark in addressing the jury:

“As for X’s evidence, I suggest to you that is a lot of crap.”

As a person well skilled in the parliamentary procedure and debate I can assure you that I have checked the transcript. The luncheon adjournment was taken shortly afterwards and upon resuming your Honour sought to correct the record with the following explanation:

“Ladies and gentlemen, Mr Borick, my junior, tells me I used an unparliamentary expression before lunch in relation to some of the prosecution evidence for which I apologise. Actually, what I meant to say was that the evidence lacked cogency.”

A more recent anecdote reflects your Honour’s commitment to justice above personal preference. Some two months ago your Honour in hearing submissions on setting a non-parole period was asked by the Crown to consider setting it as a proportion of the head sentence of life. You are asked to assume for the purposes of argument that life ceased at seventy. I am not sure what weight your Honour gave to that suggestion then, but I am sure today it would have been totally ignored.

When your Honour was appointed to the Bench there was overwhelming support for it, both from the legal profession and the wider community. That support was well justified and your Honour has served as a Justice of this Court with distinction. You have indeed been a learned judge but just as importantly a judge of great courtesy and unwavering fairness.

You never lost touch with the ordinary people of South Australia who have been a continual inspiration to you in your personal and professional life and who you in turn served so well as a Justice of this Court.

May I wish you and your wife Elizabeth all the best in your impending retirement. If the Court pleases.

MR BURR: May it please the Court. I am indebted first to the Chief Justice and secondly to the Honourable the Attorney-General, for leaving details of your Honour’s personal life to me for there is much to be said.

To the ultimate benefit of this Court, the legal profession and the community at large, your Honour commenced studying for a degree in law in 1936. Now some fifty-two years later, your Honour faces retirement from the Bench of the Supreme Court, an office very few can hope to achieve, having won the respect, admiration and affection of all.

From the very earliest days your Honour’s career was marked by excellence. Having earned one of only twelve bursaries presented in each year at that time, your Honour completed a degree of the highest calibre in 1940 and was awarded the John Howard Scholarship as the top student in your course. Your Honour’s interest in politics and community affairs also became evident at that time. You were, among other things,

the editor on On Dit, secretary of the Law Students' Society and president of the Student Union.

I think it is fair to say that many of us at university with commendable undergraduate zeal embrace the cause of the underdog but, as the Attorney has mentioned, perhaps for some of us come family, material possessions and a little security and that focus can be lost. Not so with your Honour. Those values of care and compassion for your fellow human beings remained with you throughout your career at the Bar and on the Bench.

After admission in December, 1940, your Honour joined the AIF in December 1941 and during the course of service to your country spent two years as an artillery and education officer in New Guinea. On discharge you resumed your career and joined the Law Society in 1946. Thereafter, you served the Society and hence the profession in many capacities over many years, including the council, the criminal law committee, for some time as its chairman, and the statutory committee. At the time of your elevation to this Bench your Honour was also the first chairman of the legal practitioners disciplinary tribunal.

I know that your Honour had many happy years, and has even more happy memories of your time in partnership, first with your wife Elizabeth and then subsequently with others. Those others have been very quick to confirm with me that well known trait of your Honour's to which you referred on the presentation of your commission to this court, brevity. They speak though of the file notes left by your Honour. I am told that they considered themselves very lucky indeed if your Honour had written down the client's full name, let alone an address or any detail about the matter. Your Honour kept it all up here.

Your Honour too has always had a great love and concern for the Aboriginal members of our community and you have paid anything but just lip-service to that concern. You were a Royal Commissioner inquiring into issues relating to the Aboriginal community in Western Australia and were the first president of the Aboriginal Legal Rights Movement, a position which you held for many years.

I suspect also, a fact little known, is that your Honour was the first secretary of Actors Equity in South Australia, which serves to confirm for me that thespian inclinations do a barrister no harm. No doubt it was essential grooming for your Honour's successful career at the Bar.

Amidst this rather hectic professional schedule, your Honour managed to pursue an enthusiastic, if not entirely successful political career. I understand that there was great excitement in 1953 when your Honour almost recovered your deposit. Some so-called "friends" of your Honour have been unkind enough to suggest that this was because your Honour was one of only two candidates in the electorate. The other was a Labor candidate and you were assumed by some constituents to be the Liberal candidate.

Your Honour's political persuasion almost certainly delayed your appointment as one of Her Majesty's Counsel until 1970, as the Attorney-General has said. It was an honour richly deserved and one which caused



great pleasure in the profession. On behalf of that profession, may I say that it is to be hoped that never again will such matters interfere with the proper promotion of one of our members. As an aside, I mention that I know that your Honour took great comfort at that time from the open display of support and solidarity given by your profession and the Society.

On a lighter note, let me say that it is incumbent upon the President at times such as these to explore the other side of the judge's life, to detect any idiosyncrasies or even expose an Achilles heel, if one is lucky enough. Fortunately for me, when casting about the profession for the odd tale I was delighted to find that your friends, associates and former partners had sworn anything other than a "code of silence". The Achilles heel became readily apparent and, like the young Achilles, water plays a prominent part in that aspect of your Honour's life. I refer to your Honour's nautical skills. However, unlike the young Achilles, your Honour, it seems, has managed to achieve full immersion on a number of occasions.

Some here today will remember that tragically many years ago Mr Justice Jeffcott drowned at the mouth of the Murray River. I believe that on one occasion your Honour came very close to suffering the same fate when you found yourself without power and under the influence of an off-shore breeze sailing out through the Mouth; next stop Antarctica. You then ran aground and hence lived to tell the tale on yourself. Some folk have been unkind enough to suggest that your Honour and the South Coast Sea Rescue Squadron are more than just nodding acquaintances and that the local propeller engineer viewed your Honour as his very own superannuation fund.

Your Honour is a great lover of cricket and football, the Sturt Football Club in particular, again evidence of your great wisdom and impeccable taste. In fact, I recall that your son Stewart, a very talented footballer, played a number of games for the club's Reserves before serious injury terminated a very promising playing future.

Returning to your Honour's professional life, let me say that your Honour's blending of great learning, skill, enthusiasm and compassion has ensured for your Honour a unique place in South Australia's legal history. Your Honour used your great abilities to represent all walks of life, frequently without fee or reward. For your Honour no case was too big or too small, no person too insignificant, no challenge too great. All clients received your utmost dedication and understanding and all litigants before your court saw justice and the law in comfortable harmony.

Your Honour's influence on this profession of ours will linger for many years to come. You have nurtured the careers of many practitioners and shared a philosophy with them which will bear much fruit. A number of your former partners, associates and acquaintances are already members of the judiciary in South Australia. Others will surely follow.

Whilst it is perhaps doubtful, as the Chief Justice has mentioned, that your Honour will seize the opportunity, your Honour has earned a rest. Potok, in his work *The Chosen* says it better than can I,

“Human beings do not live forever. We live less time than it takes to blink an eye, if we measure our lives against eternity. So it may be asked what value there is to a human life. I learned a long time ago that the blink of an eye in itself is nothing. But the eye that blinks, that is something. A span of life is nothing. But the man who lives that span, he is something. He can fill that tiny span with meaning so its quality is immeasurable though its quantity may be insignificant. A man must fill his life with meaning. Meaning is not automatically given to life. It is hard work to fill one’s life with meaning. A life filled with meaning is worthy of rest.”

The opportunity now presents itself to your Honour to find time to indulge your other loves in life, literature, football, theatre, cooking your favourite roast, listening to your Shirley Bassey records and the Saturday morning crossquiz which, I am embarrassed to hear, your Honour always manages to solve, with some help from your wife. It also provides your Honour with the opportunity to undertake the vital task of editorship of the South Australian State Reports. The Society is delighted that your Honour has accepted that fresh challenge.

May I, on behalf of the Society and the profession, wish your Honour and your wife of forty-six years, Elizabeth, every health and happiness in your retirement. If the Court pleases.

JOHNSTON J: Chief Justice, fellow members of the Bench, judicial officers of other jurisdictions, practitioners, ladies and gentlemen. I first express to you, Chief Justice, and you, Mr Attorney, and Mr President, my appreciation of your remarks which are too little deserved.

The tradition of holding a ceremonial sitting of the Court upon the retirement of a member of the Court is one now long-established, dating back at least until 1916 and probably earlier. For reasons associated with the stability and good standing of this Court, those who have been the subject of such special sittings have been judges who in the overwhelming number of instances have rendered to the Court long service. It is now more than 150 years since this Court was established and in that from some points of view fairly lengthy time there are comparatively few judges whose terms have not extended beyond ten years and many for much longer periods. Many of those whose terms did not so extend died in office.

In this connection I mention something which testifies partly to a considerable increase in the size of the Court but also testifies to this tradition of long service. I was the fifty-first judge appointed to this Court. Of the fifty who preceded me, I actually appeared before thirty and as an articled clerk carried the books for my principal when he was appearing before a further three. Nor has this tradition of long service been eroded by the introduction of the statutory retiring age. The five judges who have retired or resigned from this Bench during my period of office—Justices Mitchell, Sangster, Wells, Walters and Zelling—were all long-serving judges with an average span of sixteen years in office. I am therefore, for this and indeed for other reasons, little deserving of

the honour which the speakers do me and which all of you here present do me by making the time to be here today.

I am, of course, very conscious of the fact that these occasions honour the office as much or more than the holder of the office. I am also conscious of the fact that those judges who many years ago established this tradition had the wisdom of so arranging the ceremonial sitting that it occurred just before the end of the tenure of office and not just after the tenure of office. That had the effect of course, of giving to the retiring or resigning judge the benefit of that great principle of the common law which can be roughly expressed this way. There have in the past occasionally been judges less than satisfactory; there will possibly be some in the future, but it has never occurred in the present.

I mention that the retiring age has not eroded the practice of long-serving judges. It has, however, affected somewhat the feeling and the spirit of the ceremony. I remember back in the old days when the judges were not obliged to retire when the ceremonies were held in number one court. There was a distinct air of doom pervading and anyone who walked in off the Square, at least if he carried a little learning of Mr John Donne, might well have been inclined to ask "For whom the bell tolls?" But now, however, there seems to be quite a lively air, a feeling that there may be life after the last judgment.

I have greatly enjoyed my life in the law, (I have greatly enjoyed my life as a matter of fact)—my life in the law largely because of the people I have met and done cases with.

There is a particular joy in doing long cases in my opinion. You tend to remember them and you come to know the person on the other side very very well. I can remember the first long case I did, *Robinson v Adelaide Stevedoring Company*. I cannot see him, but I think Geoff Hollidge is here somewhere today. That was such a case. Although I very very seldom see Geoff Hollidge, I count him as my friend and have done so ever since that case.

I have greatly enjoyed and I think profited from my experience as a judge and there are many people I should thank for this. First of all, Mr Attorney, you and your colleagues for offering me the appointment; secondly, my fellow judges, those who sit here now and those who sat during my term. All of them have been friendly, supportive and co-operative.

I would like to say something about the Bench of this Court, and I do not mean to make comparisons with other courts. I have no knowledge of any other court. In my judgment this Court possesses what in my experience is a rare and precious quality, a quality which becomes increasingly important in social life as the problems posed by it become increasingly complex, that is the capacity to disagree without rancour, upset or damage to relationships. I think that this capacity is an outstanding feature of this Court.

I thank the counsel who have appeared before me, the staff of the Court in all of its sections, and all of whom I have found to be, without exception, courteous and efficient. I thank the reporters who do a difficult

task with dedication and professionalism, my tipstaff Tony McGinty, and in particular my secretary, Nita Kalogiannidis, who has put up with me now for almost four years. Finally, I thank my parents, my son and my friends and particularly my wife. In the more general sense, I express my thanks to the society to which we all owe a very great debt of gratitude.

My experience as a judge has confirmed for me certain things which I believed to be true and now believe even more to be true. The first is the independence of the judiciary, by which I mean not only the independence of the judiciary as a whole but the independence of mind and spirit of every person who occupies a judicial office.

It is in my view absolutely essential that a judge should take no part in debate on political issues or social policy (apart perhaps from some which are very close to the administration of the law). Those are things which have been confirmed in my mind.

The next matter that I come to now is something which some of you may not even believe. It would not surprise me if you didn't, but I have found it is even more revolting to wear these (full bottomed) wigs than it is to look at them. I have also found, and I speak now to the younger members of the profession, that it is you who must carry on the battle against this sort of paraphernalia. I can inform you that you have one or two allies in high places; beyond that my lips are sealed.

I was concerned that I would be liable to come to too early a conclusion in a case. In that I was wrong. I found my problem was not in coming to a decision too early but in coming to one at all. I thought sentencing would present me with great problems, and I was right there.

I would like to make two points. The first is that so often in sentencing there are three victims before the court: the victim of the offence, the peace and equanimity of the community, which has been wounded by the breach of the law; and the person in the dock, who so frequently is a victim of his or her intellectual and other incapacities or the victim of society. To make those three things match up is very difficult indeed.

I venture to say that we need a much greater variety of sentencing options. In my view and from what I can find out from others, the community service order has been an outstanding success. I think that examples of such creative thinking in relation to sentencing provisions can be multiplied many times, and people who have had some experience have a duty to bend their mind to the task and help those who have to make the decisions to come up with those options.

I think there is abroad in the community a willingness at the present time to look at new and innovative sentencing options. Of course in the ultimate each option must be judged by its effectiveness, by whether it actually leads to rehabilitation, at least in a significant number of cases. I think it is widely accepted now that effectiveness is the touchstone of all such schemes. Effectiveness must be monitored. Such monitoring ought to be applied not only to new schemes that are put forward and put into operation but also to old schemes. The effectiveness of the gaol as an instrument of deterrence, as an instrument of rehabilitation, ought to be monitored. It has been going for a long time. It has had its opportunity

to prove itself. I think there is insufficient attention given to the question of monitoring its effectiveness. Does it deter? Does it rehabilitate?

Mr Attorney, there were two reasons really why I accepted your offer in 1983. One was that it was a new personal experience, a new challenge. The other was that I thought that it was important that a person who was a member of the Communist Party should, if he could, take the opportunity of showing to the public that a person of that persuasion could take a high public position and carry it through with some sort of dignity and some sort of responsibility. Whether I have done that or not is for others to judge. If I have not, I have badly let down both myself and others.

Some people seem to think that fundamental social change takes place about every 200 or 300 years and is usually associated with some sort of a big bang. But I do not think that is the position at all. I think it is much more the case, particularly in times that are leading up to and following great social change, that the process is going on all the time. It is in the air we breathe, the food we eat, it is around us everywhere, it appears in every issue. And I think that we are living in such a time and that is why some people see such disarray in the law and in society. And in a certain sense it is disarray but in another sense it is the upheaval of the old and the beginnings of the new and, as I say, it is fought out at every level and in every place.

I think if you look at the pages of the South Australian Law Reports and the law reports of other jurisdictions, you will find those struggles being fought out in those cases very often.

I have been given the great honour by many very ordinary people to conduct their cases over the years and I thank them for the opportunity to do so. And I thank you Mr Attorney for the honour of being able to participate in the judging of some of those cases in more recent years. Thank you all.