

50 YEARS IN THE LAW: A CRITICAL SELF-ASSESSMENT***THE HON JUSTICE MICHAEL KIRBY AC CMG****50 YEARS

In 1958, after two years of the combined Arts/Law course on the main campus of Sydney University, I began my legal studies. They were undertaken in a shabby collection of buildings that then formed the University of Sydney Law School. Sandstone was out. Large lecture halls in Phillip Street, in the legal precinct of Sydney, were in.

The following year, 1959 was the first year of my articles of clerkship. Daily life settled into an orderly routine. During the day, I was 'instructing' counsel in trials before a wide range of courts. In the early morning and late afternoon, I would attend lectures and tutorials at the law school. It was in that year that my fellow student Murray Gleeson and I agreed to share lecture notes and the writing up of cases and research. Thus began a joint enterprise that was terminated by his retirement from judicial office in August 2008.

After graduation in law in 1962, I worked at first as a solicitor in a large firm, specialising in litigation. But in July 1967 I was admitted to the

* Based on an address to the legal profession of the Northern Territory in the Supreme Court, Darwin, 16 January 2009 and at the State Supreme Court and Federal Court Judges' Conference, Hobart, 26 January 2009.

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New South Wales Bar. In November 1974, I was asked whether I would consider appointment as a Deputy President of the Australian Conciliation and Arbitration Commission. I was 35 years of age. I agreed and was welcomed to that office in Sydney in December 1974. My commission dated from 1 January 1975. At an early age, I therefore enjoyed the rank, title and salary of a federal judge. Only Mary Gaudron, appointed a year earlier, was younger. At my induction ceremony, the President of the New South Wales Bar Association, Mr T.E.F. Hughes, QC, welcomed me on behalf of the Bar. He claims that he declared that I was noted for my “urbanity”. The official transcript of the ceremony recorded that the reputation was for “vanity”.

In early February 1975, after some initial reluctance, I accepted secondment to be the first Chairman of the Australian Law Reform Commission. In 1983, I was transferred from the Arbitration Commission to the Federal Court of Australia and in 1984 I was appointed President of the New South Wales Court of Appeal. In 1996 I took up my appointment to the High Court of Australia. Shortly before my 70th birthday, on 2 February 2009, I will conclude my service on the High Court. This will come to an end my judicial service in Australia.

At the time of my resignation, I will be the longest-serving judicial officer in the nation. At my farewell in Canberra on 2 February 2009, the final speech will be given by Mr T.E.F. Hughes, QC, still in active service at the Bar. Perhaps he will reveal exactly what he said at that welcome ceremony in 1974. Human nature likes symmetry. Having the same

distinguished speaker at my judicial coming in and at my judicial going out closes a circle.

The measured, ordered character of life of a judicial officer does not suit everyone's taste. Witness the greater difficulty today in recruiting judges when compared to 1974. For me, there is uncertainty over what lies ahead both in the law and in life. In quiet moments, the mind journeys back to the years past and reflects on the unusual career and opportunities that I have enjoyed. Naturally enough, periods of introspection arise when any human being tries to add up the successes and counts the shortfalls and seeks to estimate where the balance lies. A long-time professional judge is not necessarily the best person to evaluate his or her balance. The danger is that the triumphs will be exaggerated and the shortfalls minimised or not even noticed.

I will identify ten features that give me satisfaction and acknowledge ten where I recognise shortfalls, mistakes or at least events that I would airbrush from the record if I could, rather like the face of Beria removed from the photograph at Lenin's tomb after Stalin's heirs arranged his demise.

Every judge knows that judicial serve is temporary and comparatively brief. This fact was brought home to me in a vivid way on the first day of my service as a High Court Justice. Arriving in my new chambers in Canberra, I inserted a magnetic tape to record some letters. On the tape, I heard the voice of my then already long-dead predecessor

in the chambers. It was that of Sir Keith Aickin, dictating his reasons in *Onus v Alcoa of Australia Limited*¹. The tape had survived the 13 years that Sir William Deane had occupied the room. It brought home to me the transiency of judicial service. Now my chambers will pass to Justice Virginia Bell. I will leave no tapes.

It may be of interest (and I hope not further evidence of “vanity”) if I reflect on my own recollections of my professional journey. The ultimate judgment on my judicial career does not belong to me. Indeed, it does not belong to the present. The judgment in my ultimate appeal belongs to other judges and other times. But judges cannot escape assessment and a professional recognition that, upon every issue and every person, there are arguments for and against every viewpoint.

SUCCESSSES

1. *Independent and impartial judgment.* It will cause no surprise if I begin with a reference to international human rights law. Article 14(1) of the *International Covenant on Civil and Political Rights* provides that:

“All persons shall be equal before the courts and tribunals. In the determination of . . . his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.

¹ (1981) 149 CLR 27 at 46-58. The story is told in M.D. Kirby, “What is it really like to be a Justice of the High Court of Australia?” (1997) 19 *Sydney Law Review* 514 at 515-516

This principle, at least in general terms, coincides with the requirements of judicial independence and impartiality expressed in, or implied from, Chapter III of the Australia Constitution². The principle does not exist only for the benefit or protection of the judiciary itself but for the people, including those who come before the courts and tribunals of the nation.

Departing from judicial service in Australia, lasting such a long time, I can say that never once has any person or institution attempted to divert me from my responsibilities, still less succeeded in doing so. Occasional editorials, media commentaries and ministerial speeches might have been interpreted as attempting to influence outcomes. However, all such endeavours can be ignored.

The same measure of independence and impartiality does not exist in most countries of the world. It is an admirable and precious feature of the judiciary in Australia. It is a condition of things that the judiciary itself and the legal profession, but also politicians, officials and citizens, must preserve. I am proud to have served in an uncorrupted system. Never have I suspected, or feared, that a judicial colleague or practising lawyer was corrupted or that the system accepted improper realities because that was just the way things were.

² *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [27]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363 [81], 383 [116]; *Forge v ASIC* (2006) 228 CLR 45 at 93 [121]

2. *Attitude to parties:* As a young lawyer I closely observed judges at work. This is the way that most professions teach the next generation of recruits. Whilst most judicial officers were polite and appeared keen to understand the facts and the submissions of law, there were occasional exceptions. Some judges seemed unjust because they would give no reasons for their rulings and decisions³. Others failed to observe basic rules of procedural fairness⁴. Still others appeared needlessly unpleasant and aggressive to the lawyers or litigants appearing before them.

Because such actions were alien to the mutual respect that I always experienced at home and in my education, they always shocked me. However clever the judges concerned might be, there was never an excuse for such behaviour. More importantly, I knew that, in my own case, it might interfere with my capacity to present the best possible arguments for my client. So it was behaviour to be avoided as alien to the trust involved in public office.

Before I became a judge, particular Australian courts of high authority were known for their brutal treatment of the advocates before them. Some of the High Court judges whom I saw in action in my youth were, it seemed to me, needlessly rude to the barristers whom I had briefed, or who later led me. There was no doubting the intellectual

³ *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 667

⁴ See *Ex parte Corbishley; re Locke* (1967) 67 SR (NSW) 396, per Holmes JA

brilliance of the judges concerned: Kitto J, Taylor J and sometimes Barwick CJ. But I felt that they reduced the prospects of obtaining assistance for their tasks by the way they seemed sometimes bent on humiliating the advocates before them. There was no way that I could ever act in a similar fashion. Even when there was dissatisfaction about the presentation or conduct of litigation, this could be expressed firmly without diminishing the legal representatives or endangering the appearance of judicial impartiality.

Before my appointment to the Court of Appeal of New South Wales, some members of that court too were reputed for their discourtesy towards counsel⁵. There are inhibitions that restrain those on the receiving end from complaining about any such conduct. Yet occasionally, complaints were made, only to be rebuffed⁶. The High Court would occasionally intervene⁷. Whilst it would be an exaggeration to describe the Court of Appeal before my appointment as President as a “slaughterhouse”, it is true that sometimes, when particular judges were participating, things became needlessly tense and unpleasant.

I cannot claim particular credit for changing the atmosphere in the Court of Appeal after my appointment as President. To some extent, my arrival simply coincided with the departure of the worst offenders. Judges naturally exhibit the whole range of human temperaments and emotions.

⁵ Ian Barker, “Judicial Practice” in I Freckelton and H Selby *Appealing to the Future: Michael Kirby and His Legacy*, (Thomsons, 2009), 563 at 564 (to be published)

⁶ *NSW Bar Association v Livesey* [1982] 2 NSW 231

⁷ *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 300

But they have no privilege to misconduct themselves or to misuse the judicial office. Appearing in court is always a stressful activity. Lawyers and litigants are often stressed. Sometimes, without great fault, they know less about the law, procedures and even the evidence than the judges do. It remains for the judge to attempt to get as much help as is possible in order to reach a just and lawful outcome. This will rarely happen by demonstrating that the advocate or litigant is a fool, is ill prepared or will not just concede that the case is doomed.

Rudeness or aggression from the Bench are more dangerous, in my view, than sleeping during part of the hearing⁸. No such conduct is acceptable; but at least the sleeping judge can later read the transcript. The rude or aggressive judge will all too often prevent the best argument and evidence from being received. In collegiate courts when things get fraught, it is usually the role of the presiding judge, or of another member of the court, to throw out a lifeline or to lower the temperature. Chief Justices Brennan and Gleeson, in their differing ways, were adept at this. I cannot recollect either of them being personally rude to a party or their representatives.

All judicial officers are specially tested in dealing with self-represented litigants. In the High Court, especially before the new court rules permitted such applications for special leave to be determined on the papers⁹, many such parties appeared before the Court to make

⁸ *Cesan v R; Mas Rivadavia v R* (2008) 250 ALR 192; [2008] HCA 52

⁹ High Court Rules, 2004, rule 41.10.5

their oral arguments. It often fell to me to explain to applicants for refugee status the gateway of “jurisdictional error” which they had to establish, in order to demonstrate an arguable case so as to secure special leave. Given that I have never myself been entirely sure that I understood the boundaries of that concept, this was not a simple task. It would not be made easier by exhibiting discourtesy or impatience towards the litigant.

3. *Intermediate appellate courts:* When I was appointed President of the New South Wales Court of Appeal in 1984, it was the only full-time, intermediate appellate court in Australia. It was my opinion, strengthened by experience, that appellate judging was a slightly different task from presiding in trials. Moreover, establishing an independent appellate court removes any risk of the appearance of partiality towards a colleague judging another’s efforts in case the other would shortly be sitting in judgment of one’s own.

In an article published three years after my arrival at the Court of Appeal, I suggested the need for consideration to be given of the establishment of similar courts in other Australian jurisdictions¹⁰. Within a relatively short time, separate appellate courts were established successively in Queensland, Victoria, the Australian Capital Territory and Western Australia. Similarly, in the Family Court of Australia a permanent appellate division was created. In the Northern Territory, a Court of Appeal, was created upon which would serve by rotation non-resident

¹⁰ M.D. Kirby, “Permanent Appellate Courts – The New South Wales Court of Appeal Twenty Years On” (1987) 61ALJ 391

judges of the Supreme Court of the Northern Territory who were also judges of the Federal Court of Australia. Moreover, Priestley JA, my colleague in the New South Wales Court of Appeal, would regularly serve on the Northern Territory Court of Appeal. His appointment, and interchange of service with Justice Angel planted the idea, later espoused by Chief Justice French¹¹, that Australia should move, at the intermediate court level, to a wider exchange of judicial commissions. This was an innovation that was earlier introduced in the industrial relations field, so that the presidents of State industrial tribunals, by convention, were appointed by the federal Executive to hold dormant commissions as presidential members of the Australian Industrial Relations Commission. There would seem to be no constitutional problem in a similar or broader arrangement being adopted between the Supreme Courts of the States and perhaps more widely.

I cannot claim that it was my publication or other interventions that led to the expansion of more permanent appellate courts in Australia. The main influence was the example of professional excellence established by the published reasons of the New South Wales Court of Appeal and the professional reputation it earned. On the other hand, the spread of that example had at first been very slow in coming. Perhaps my writings and explanations of the advantages of permanent appellate courts helped to nudge the process along. Whilst I understand the reluctance in some quarters to reduce, or abolish, the participation in

¹¹ R.S. French, "Judicial Exchange: Debalkanising the Courts" (2006) 15 *Journal of Judicial Administration* 142

appellate work of judges whose primary duties are in trials, I remain of the opinion that strong reasons of principle support the creation of permanent appellate courts. So does efficiency and professionalism in the discharge of that work.

4. *Institutional law reform*: One body for which I can certainly claim a measure of credit is the Australian Law Reform Commission (ALRC), which, after 1975, I helped to establish. Perhaps even more important, in the long run, was the spread of the acceptance of institutional law reform more generally and of the value and necessity of permanent law reform agencies in Australia. The ALRC has been utilised by successive federal governments. It has continued to perform work of a very high calibre. Its reports enjoy a high rate of implementation by world standards. Its reports are frequently referred to in argument before the High Court of Australia. This occurs not only in cases concerned with statutes originally recommended by the Commission¹² but more generally, by analogy, on relevant aspects of the law¹³.

When the ALRC was created, there was a great deal of hostility both towards the Commission and to the idea of law reform. Chief Justice Young¹⁴ of Victoria, otherwise a very fine judge, was unwelcoming to institutional law reform, certainly of the federal and full

¹² e.g. *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd* (1993) 176 CLR 332 at 340 (concerning the *Insurance Contracts Act* 1984 (Cth))

¹³ e.g. *Coventry v Charter Pacific Corporation Ltd* (2005) 227 CLR 234

¹⁴ J. Young "The Influence of the Minority" (1978) 52 *Law Inst Journal* (Vic) 500

time variety. He condemned what he saw as the professional commitment of law reformers to see faults in the legal system. There were similar attitudes at that time towards any formal system of judicial education.

With the passage of 30 years, and partly because of the procedures of open consultation and discussion pioneered by the ALRC and the careful work of bodies engaged in judicial education, all this has changed. Thus, a majority of the present Justices of the High Court have, at one stage of their professional careers, served as part-time commissioners or consultants for the ALRC (French CJ, Heydon J, Kiefel J and myself). Likewise, the use of law reform reports in judicial reasoning in Australia is now very high¹⁵.

A generation of lawyers has now come to maturity in Australia, accepting the existence and legitimacy of institutional law reform. Hostility is now confined to a very few. The need constantly to update the law is broadly recognised. Moreover, the need to address technological issues and sensitive moral questions, in consultation with experts and the community beyond the legal profession, is well accepted. Conferences and seminars for the judiciary, addressing contemporary issues, are now commonplace. All of this has produced something of a change in Australia's legal and judicial culture to which I have contributed.

¹⁵ M.D. Kirby "Are We There Yet?" In B. Opeskin & D. Weisbrot (eds.) *The Promise of Law Reform* (Fed, 2005) 439; B. Opeskin, "Measuring Success", *ibid*, 202

5. *Academic and international links:* Other changes that have occurred have concerned the use now made of academic materials and the links that exist between the judiciary and the academic branch of the legal profession. Not so long ago, Gummow J lamented the lack of reference, in most Australian judicial reasoning at that time, to academic literature and to international analogies. In particular, he remarked upon the fall in the citation of United States authority, when compared to the earlier days of the High Court¹⁶. He contrasted the citations of scholarly literature in the 1930s by Dixon J (and he might have added Evatt J) with the practice that was then followed, with its primary focus on English judicial reasoning to the exclusion of other sources.

I was taught legal theory by Professor Julius Stone. From my earliest days in the law I accepted Stone's instruction that judges, especially in appellate courts, have "leeways for judicial choice"¹⁷. I accepted Stone's analysis which left me and other converts singularly dissatisfied with the positivist, linguistic, purely verbal analysis of legal problems.

I have always felt comfortable with academic lawyers and have never felt a professional hostility to them or a need to denigrate or ignore their contributions to our discipline. The ultimate measure of the previous attitude was reflected in the former rule that academic works should not

¹⁶ W.M.C. Gummow, "Legal Education: Comment" (1988) 11 *Sydney Law Review* 139 at 143

¹⁷ J. Stone, *Legal Systems & Lawyers' Reasoning* Maitland (1964) 304; M. Krygier, "Julius Stone, Leeways of Choice, Legal Tradition and the Declaratory Theory of Law" (1986) 9 *UNSW Law Review* 26 at 28-30

be cited in judicial proceedings during the lifetime of an author, lest the author might change his or her opinion and recant before death. We have now abandoned this somewhat unreasonable requirement. Not everyone in the law appreciates the special capacity of scholars to assist judicial reasoning. Moreover, such assistance varies between people and disciplines. But academic lawyers are often amongst the most talented graduates of their era, having an interest in conceptualising the law and in moving beyond the citation of a plethora of cases with which common law techniques tend to be most comfortable. Shifting gears from cases and instances to a search for the underlying principles behind a stream of authority is the special value added of the legal academy. This talent is often encouraged amongst judges by maintaining links with overseas lawyers, judges and universities, including those of the civil law tradition whose methodology is so different from our own.

One of my privileges in recent years has been to attend the annual constitutionalism seminar with judges of 25 final national courts (including the House of Lords, the Supreme Court of the United States and the Supreme Court of Canada) and academics at the Yale Law School. Interchanges of this kind should exist more frequently in Australia and include Australian academics. Such meetings help release the judicial mind from parochial attitudes and the wilderness of local case law. I pay tribute to the academic lawyers of Australia and elsewhere who have contributed so greatly to my own thinking. Like Lord Cooke of

Thorndon¹⁸, I have never hesitated to acknowledge the assistance of ideas derived from wide reading in the academic literature. One of the blessings of appointment to the High Court is the provision by the library of an unparalleled access to printed legal literature, now supplemented by online services.

6. *Policy and principle:* Connected with the last consideration has been the reference, in recent years, to considerations of legal principle and policy that have influenced the decisions in the particular case. The legitimacy, indeed necessity, of such sources was expressly recognised by the High Court of Australia in *Oceanic Sunline Special Shipping Co Inc v Fay*¹⁹.

Because I was trained by Julius Stone in a heyday of the positivist approach of “strict legalism” I could never take seriously the notion that legal problems can usually be solved by nothing more than increasing the magnification of the spectacles focused on the words of the Constitution, a statute or previous statements of the common law, read on their own. In their private conversations, judges commonly acknowledge, and weigh, the policy choices that influence their selection of one verbal solution over another. The open acknowledgment of such considerations and the willingness to spell them out in judicial reasoning is an important

¹⁸ *Hunter v Canary Wharf Ltd* [1997] 2 WLR 684 at 718-719 per Lord Cooke of Thorndon; cf at 697 per Lord Goff of Chieveley

¹⁹ (1988) 165 CLR 197 at 252. See also *Northern Territory v Mengel* (1995) 185 CLR 307 at 347

contribution to transparency, candour and truthfulness in the judicial process.

It has been suggested that an explanation of the changed approach in the High Court when Mason CJ presided was the advent of a majority of Justices who had been taught at the Sydney Law School by Julius Stone (Mason, Jacobs, Murphy, Deane, Gaudron, Gummow, Kirby, Gleeson). The return in more recent times to the techniques of legal positivism may reflect a decline in the number of Justices who were taught by Stone. In her recent book, *The Constitutional Jurisprudence and Judicial Method of the High Court of Australia*²⁰, Rachael Gray remarks:²¹

“The legalistic and pragmatic elements in the approach of the Gleeson court stand in contrast to the realist and natural law influenced jurisprudence of the Mason era, which at times saw the High Court balance the interests of individuals with governmental powers. . . . Only two members of the Gleeson court (Kirby J and at times Gummow J) demonstrated a relatively consistent tendency to consider in detail the idea that Ch III may protect individual liberties.”

²⁰ R. Gray, *The Constitutional Jurisprudence and Judicial Method of the High Court of Australia: The Dixon, Mason & Gleeson Eras* (Presidian, 2008)

²¹ *Ibid*, 78-79

A peril of acknowledging considerations of principle and policy is that the judge who does so is more likely than one who does not to attract criticism as an “activist”. Such criticisms represent code language for objection to the values that the judge discloses and a preference for the undisclosed values of those who explain decisions in purely linguistic terms.

However, the genie is now out of the judicial bottle. In the long term it seems unlikely to me that future generations of lawyers will be content with a return to linguistic analysis any more than to the declaratory theory of the law. I hope that, by my reasons in the proceedings in which I have participated as an appellate judge, I have contributed to a greater understanding of the leeways for choice that judges face and must solve. Such considerations do not go away because judges keep them a secret.

In countless decisions, I have endeavoured to express the choices as I see them and to explain candidly the considerations of legal principle and policy that lie behind the approach chosen²². People may or may not

²² See e.g. recent decisions in *Chang v Laidley Shire Council* (2007) 234 CLR 1 at 23-27 [71]–[86] (policy of planning law); *Foots v Southern Cross Mine* (2007) 234 CLR 52 at 93-94 [130]–[133] (policy of bankruptcy legislation); *Australian Finance Direct Ltd v Director of Consumer Affairs (Vic)* (2007) 234 CLR 96 at 117-122 [49]–[60] (truth in lending legislation); *IATA v Ansett Australian Holdings (in liq)* (2008) 234 CLR 151 at 207-208 [173]–[179] (policy of private contract and priority in corporate insolvency); *Minister Administering the Crown Lands Act v NSW Aboriginals* (2008) 82 ALJR 1505 (interpretation of legislation on Aboriginal land rights).

agree with my analysis and conclusions. But I have always attempted to leave them in no doubt as to the main considerations (including those of legal principle and legal policy) that had influenced me on the way.

7. *Purposive interpretation*: Connected with the last consideration is the shift in judicial reasoning in statutory (as well as constitutional) interpretation over the past twenty years from a strictly literalist approach to a purposive one, which takes more closely into account the legislative history, background materials and contextual considerations that help a court to arrive at the true object of a written law as distinct from the imputed “intention” that the judges attribute to the legislature.

In terms of the doctrine of the High Court of Australia, a “purposive” approach is now the settled law²³. In *Chang v Laidley Shire Council*²⁴ under the heading “Advances in Statutory Interpretation”, I explained²⁵:

“Traditionally, the English law and its derivatives (including in Australia) adopted a fairly strict, textual, literal or “grammatical” approach to interpretation. However, in more recent years, in part because of a growing understanding of how ideas and purposes are actually communicated by words, this Court, English courts and other courts of high authority throughout the common law world

²³ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Insurance Ltd* (1997) 191 CLR 85 at 112-113; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], 384 [78]

²⁴ (2007) 234 CLR 1

²⁵ (2007) 234 CLR 1 at 16 [43] (footnotes omitted)

have embraced a broader, contextual reading of statutory language and other texts having legal effects²⁶. Specifically, this Court has accepted that it is an error of interpretative approach to take a word or phrase in legislation and to read that word or phrase divorced from its immediately surrounding provisions (and any other relevant indicia of meaning such as legislative history, stated purposes and admissible extrinsic materials). Once it was thought necessary that there should be an “ambiguity” in the word or phrase before that wider search was proper, or even permissible. Recent authority of this Court has rejected that requirement²⁷.”

There were, of course, substantial arguments against this embrace of purposive interpretation. I am fully aware of those arguments²⁸. They included considerations of constitutional principle as well as efficiency and economy in the deployment of source materials. However, having accepted the approach (as the High Court has) it has always seemed important to me that it should be applied consistently. Otherwise, parties, their lawyers and the watching public may conclude that the decision-maker has arrived at a conclusion in a case for unstated reasons and then given effect to that conclusion for unstated reasons.

²⁶ Reference was made to *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563

²⁷ Referring to *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408

²⁸ *Pepper v Hart* [1993] AC 593 at 613-615; cf at 625-645

In *Foots v Southern Cross Mine*²⁹ I remarked: “Approach tends to affect outcomes . . . approach is therefore critical”. Once the purposive and contextual approach is adopted, it necessitates the disclosure of any considerations of purpose and context that have affected the decision-maker. I recognise that different eyes will read different texts and see different meanings, different purposes and different uncertainties or no uncertainty at all. But, so far as doctrine is concerned, the purposive approach that McHugh JA advocated in *Kingston v Ke prose Pty Ltd*³⁰, following English authority³¹, is now the settled approach of the High Court of Australia³². All Australian courts must observe it. So should the High Court itself, until the doctrine is changed by the Court or altered by valid legislation. I have tried to explain and be faithful to these principles. So, in my experience, has the judiciary of Australia more generally.

8. *Media outreach*: One element of my judicial life I accept to have been unusual. I refer to the willingness to engage, to some extent, with the general media. In the ALRC, it would have been impossible to tackle the novel and wide-ranging inquiries committed to the Commission without the use of the media and the help they provided for public and professional discussion and debate about the content of the law and the issues of legal policy involved in its reform.

²⁹ (2007) 234 CLR 52 at 94 [132]

³⁰ (1987) 11 NSWLR 404 at 423-425

³¹ *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 272-3, 275, 280, 291

³² Since *Bropho v Western Australia* (1990) 171 CLR 1 at 20

When I moved to full-time judicial duties, against a background of nearly ten years service in the ALRC, perhaps understandably I continued to attract media attention. In the way the Australian media typically operates, they would attend conferences that I addressed, graduation ceremonies, book launches and other events of no special interest, simply because I was, for them, a recognised 'name'. Such attention carries attendant risks. In a country that, since convict times, loves to hate 'tall poppies' media attention in Australia tends to oscillate between fascination and condemnation, with a healthy sprinkling of antagonism and mockery thrown in.

As a judge, I did not court media coverage. But if I was met at public events, I would try to explain why I was there and what I was saying. As it seemed to me, it was preferable that I should do so than that some garbled summary be given by someone else.

The coverage of the courts in Australia generally is poor, including of the High Court. In part, this reflects hostility towards courts and judges in some media circles. There is a reciprocal dislike, suspicion and distrust of the media amongst some judges. It is a pity that it is generally the bizarre, unusual, semi-amusing or embarrassing features of the judiciary that tend to get reported. The difficult and faithful work of the judges is not adequately known or explained. Where I have had a chance, I have attempted to explain and illustrate that work in simple language with concrete illustrations. In my ALRC days I acquired a few skills.

On the whole, I think my efforts to open a conversation between Australia's judges and the community they serve through the media has been useful. Generally speaking, the reporters have been honest and truthful in reporting what I said. There is no doubt that the law and the courts need to improve their communication with the public through the media, which is the means by which the public secures most of its information. This includes electronic media and popular radio and television.

I acknowledge that there are dangers in engaging in that conversation and that selectivity must be observed. Not everyone is good at it. Taken all in all, my endeavours to speak to the public through the media have probably been useful. They may point, in some respects, to the way ahead. In particular, I support the availability of monitored and edited television and sound recording coverage of public hearings before our courts (including the High Court) and improvement in media services generally for the third branch of government.

9. *User-friendly reasons:* My interest in the explanation of complex legal ideas was stimulated in large part by my service in the ALRC. It was there that I learned the importance of the layout and presentation of legal materials. I took what I had learned to the Court of Appeal. I also tried to copy some of the skills of Lord Denning, MR, in explaining the facts of cases and in making the issues for decision as clear, interesting and simple as I could.

The judges of the High Court of Australia in the past have been lawyers of enormous intellect and unchallenged integrity. However, with a few exceptions, their prose style was often very dense. The meaning of what they were saying was sometimes impenetrable, even for a trained lawyer. In the *Communist Party Case*³³ appear, both in the minority reasons of Latham CJ and the majority reasons (especially of Dixon J), passages of sublime legal writing. Yet many continuous pages of the text of the judges' reasons in that case are uninterrupted by a single new paragraph. This makes the judicial message very difficult to comprehend without great efforts of concentration and willpower. So far as possible, judicial reasoning should be attractive and accessible.

This is why I brought over into the courts from the ALRC techniques of presentation of legal reasoning that are now not as uncommon as once they were. Many judges today use headings to map the distinct sections of their reasoning. In addition, I use (as others now do) sub-headings, indented arguments or issues, graphs³⁴, maps³⁵ and the deployment of white space on the page. This is not a surrender to 'dumbing down' the reasons of the High Court of Australia. It is, however, an acknowledgment of the difficulty of getting people actually to read judicial reasons and to absorb at least the main points contained in them.

³³ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 141 per Latham CJ, 187-8 and 193 per Dixon J

³⁴ (2006) 228 CLR 45 at 99, 100, 109 (four figures)

³⁵ *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 456 (map)

The judicial communicator who pays attention to the layout and presentation of reasons is rewarded by attention. He or she is especially appreciated by law students who are the legal practitioners of the future. In busy professional days, complex reasons are likely to prove more helpful if they signal where the discerning reader will find the passages most useful for later citation and use.

In some proposals for improvement during my High Court years, I enjoyed success, as in the insertion of media neutral citations of High Court decisions back to 1903, within the media neutral reports of the Court now available on the internet. In other proposals (such as for example the inclusion of paragraphs to support headnote holdings in the authorised reports) I did not succeed. The use of paragraph numbering and the reference in the header to the opening pages of the report had been decided before my arrival in the High Court. The process of improving the provision of reasons of the courts goes on. So too in affording access to judicial speeches, articles, book reviews and so forth. On the whole, I believe that my interest and role in that process has been beneficial for the legal profession and the public more generally.

10. *Personal matters:* The final feature of my life for which I would claim some success is not strictly judicial at all. I refer to my acknowledgment of my sexuality and the public recognition of my partner, Johan van Vloten. This was slow in coming, in conformity with the rule of 'don't ask; don't tell' that prevailed in earlier times. Thus, in my farewell to the Court of Appeal and in my speech on my welcome to the High Court,

my partner had to make do with an acknowledgement amongst my unnamed “loved ones”³⁶.

That ambiguity is now over. Indeed, one of the developments that virtually coincides with my retirement from the High Court is the long delayed amendment of the *Judges Pensions Act 1968* (Cth) which affords protection to my partner and equality in my judicial emoluments to those of other federal judges with spouses and partners³⁷.

Some of the most affecting letters that I have received as I approach retirement have been from lawyers, law students and other citizens of minority sexuality and also their families, friends and heterosexual citizens who express their appreciation for my action on this issue. As we learned in Australia with the White Australia policy, nothing changes until the stereotypes are challenged. There have always been homosexual members of the judiciary and of the legal profession. Many of them are, and have been, in positions of responsibility and power. In the future, I hope that it will be easier for openness to occur on such issues, without concern about the stigma of discrimination or disadvantage. This will not happen overnight. But I trust that the step that Johan and I took will be seen, in time, as beneficial to the image and actuality of the judiciary of Australia that serves all people. I should say that, with a handful of notable exceptions, the issue has never appeared to be a

³⁶ M.D. Kirby, Swearing in and welcome speech, 6 February 1996 (1996) 70 ALJ 274 at 276. See also (1996) 70 ALJ 271 at 273

³⁷ *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Act 2008* (Cth), s 31

problem for the judges and indeed for most public figures in Australia with whom I have dealt over the years.

These, then, are ten features of my life as a judge, leaving aside particular cases and decisions, in which I would claim some measure of success. But what about the features where I did not succeed?

SHORTFALLS

1. *Experience at the Bar.* Compared with most judges, my experience as a barrister was relatively short. In lapsed time, it was seven years, but in truth five because, in each of two of the years, my partner and I travelled overland through India and explored the world.

Before admission to the Bar, I practised as a solicitor for five and a half years, most of that time as a solicitor-advocate. As well, my three years of articles were engaged full-time in varied litigation. By the end of my time at the Bar, in my principal specialty of industrial relations, I was appearing quite regularly and alone before full benches of the federal and state industrial commissions and also in the Supreme Court of the State and the High Court. The fact remains that this is an atypical experience for an Australian judge.

I support the way in which most of Australia's judges are chosen from the practising profession of barristers³⁸. It is a way of ensuring that judicial decision-makers come to office generally with years as experienced private practitioners of the law with knowledge about the practices of the courts. This tradition has strengthened the independence of mind of our judiciary. The Bar does not need to be the only source for judges. Legal academics, experienced solicitors and occasional public servants of great ability have proved excellent judges. But the main source is, and will continue to be, the cohort of practising barristers. I wish that I had enjoyed a longer career at the Bar, with the responsibilities and opportunities that such a career affords.

At the time of my appointment in 1974, I had just been elected a member of the New South Wales Bar Association. I never won a commission as Queen's Counsel, something that my brother, David (who did), never ceases to remind me of. In this, I am not alone amongst those appointed to the High Court or presently serving. But it has not been usual in the past.

The years during which most lawyers would have cut their teeth in intense trial and appellate advocacy, I was engaged in establishing the ALRC and working closely with some of the best and brightest judges advocates and academics in Australian law. It was a different life's experience. If it would have been possible to re-live my life with a longer

³⁸ J. Gleeson and R. Higgins (eds), *Rediscovering Rhetoric: Law, Language and the Practice of Persuasion* (2008, Federation Press) at 194-216

service at the Bar, I have no doubt that it would have strengthened some elements of my judicial and other decision-making. It might have enhanced the weight given to pragmatic over conceptual thinking about the law, its operation and legal outcomes. Yet sometimes the atypical experience may have caused me to question particular rules and practices as long practice might occasionally discourage.

In my judicial reasons, I have, from time to time, specifically acknowledged the impact on my thinking of academic writing in preference to the pragmatic experience of case law³⁹. Yet even after a relatively short time at the Bar, my total experience before the courts afforded me an unconscious automatic pilot, governing the way court hearings are conducted. It switched on again the moment I was appointed to take the central seat in the Court of Appeal.

I enjoyed my years as a barrister. Perhaps if my years had been longer I would have joined the majority of the High Court in maintaining the immunity of advocates from liability in negligence⁴⁰, although such was never the law in civil law countries nor in Canada nor the United States and the old immunity has been overruled, both in the United Kingdom⁴¹ and in New Zealand⁴². It is a sign of the charity of the independent Bars of Australia that, notwithstanding my decision on that issue and my other defects, those Bars appear to have forgiven me. The

³⁹ *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 590 [199]

⁴⁰ *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1

⁴¹ *Arthur J.S. Hall v Simons* [2002] 1 AC 615

⁴² *Chamberlains v Lai* [2005] NZSC 32

Australian Bar Association has resolved to confer on me honorary life membership. So has the New South Wales Bar Association, my home Bar. In the circumstances, these are honours that I shall specially cherish.

2. *Trial judge experience:* Another objective weakness was the comparative lack of judicial experience at trial. I undertook a handful of such cases as a judge in the Arbitration Commission and when first appointed to the Federal Court. In the High Court, I performed my fair share of single judge hearings, mainly on matters of practice and procedure. However, my career did not take me into general trial judging. I listen with admiration to the stories told by my brother, David, a judge of the Supreme Court of New South Wales, of the latest murder or other trial over which he is presiding. Directing such a trial – or a large civil trial, of which there are many more than in the early days - is an enormous challenge and responsibility. It requires particular skills, most notably an excellent memory for the detailed facts of evidence and of the differential submissions of the parties arising in a tense drama that is constantly unfolding unpredictably.

In missing out on experience as a trial judge, I am not alone, either in the High Court or the Court of Appeal. I have always endeavoured to keep in mind the practical considerations that I remember from the 15 years I spent in day-to-day involvement in trials and hearings. Mine was never a backroom practice of legal advising.

Judges bring differing experiences to the Bench, I brought what I had to offer. Other things being equal, it is preferable that an appellate judge should have had experience presiding in trials. I was always conscious of the special difficulties and responsibilities that such work presents in our profession. I have attempted to be respectful of the decisions that trial judges have to make, even when my view of the applicable legal principles has led me to overrule what trial judges did in a particular case⁴³. It is easy enough to make mistakes when one has the benefit of months of deliberation. In criminal appeals, the 'proviso' exists to ensure that the appellate court keeps its eye on substantive issues rather than any demonstration of technical defect in the conduct of the trial alone⁴⁴. I depart judicial office with a profound respect for the trial judges and magistrates of Australia and a consciousness of the difficulties under which they often work.

3. *Presiding on appeal:* By and large, I think I was a successful presiding judge, both in the Court of Appeal of New South Wales and of Solomon Islands, where I served before my appointment to the High Court of Australia. In the Solomon Islands court I sat with distinguished and experienced appellate and trial judges from Australia, New Zealand, Papua New Guinea and Solomon Islands. I developed skills in working harmoniously with judges; in sharing equitably the burden of writing the

⁴³ See e.g. *Gassy v The Queen* [2008] 82 ALJR 838 at 850 [48]-[49]; cf *The Queen v Burrell* [2008] 82 ALJR 1221 at 1235-1236 [79]-[88]

⁴⁴ See e.g. *Weiss v The Queen* (2005) 224 CLR 300; *Festa v The Queen* (2001) 208 CLR 593; *Nudd v The Queen* (2006) 80 ALJR 614

opinions of the court; and in directing proceedings in an efficient and equitable manner.

When I was appointed to the High Court of Australia, I had to get used to sitting in the most junior seat. After more than two decades in the chair, successively of the ALRC and the Court of Appeal, I was suddenly the judge most junior. I may have been considered impertinent by some in the number of questions I asked and the lack of becoming deference that I displayed. To some extent I was just continuing to do what came naturally. Perhaps I should have bitten my tongue.

Justice Stephen Breyer of the Supreme Court of the United States had a similar experience when he was elevated to that court from chief judge of a United States circuit court of appeals. He confessed to me that one result of that move was a feeling that he had lost half his judicial personality. I understood exactly what he was saying.

My skills as a chairman go back to schooldays. They were refined during the countless committee meetings over which I presided at universities, first in student societies and later as a university deputy chancellor and chancellor. In very many overseas bodies of the United Nations and elsewhere, I have chaired meetings with success. Elevation to the High Court substantially deprived me of the chance to indulge that talent fully. This extracted an opportunity cost in my performance.

To the end, I always asked a lot of questions from the Bench. I had resolved, at the start, never to pretend that I knew an area of law when I did not. No-one can arrive in the High Court of Australia or an intermediate appellate court in Australia knowing every department of the law that will arise. However, I missed the central seat. Saying this is no reflection on the very experienced presiding judges under whom I served in the High Court, one of whom, Gleeson CJ, had also presided (as had Street CJ before him) with great skill in the New South Wales Supreme Court.

Law is a very hierarchical profession. Removal from the central seat undoubtedly reduced my chances of influencing reasoning and outcomes in cases and arranging opinion writing for the court methodically and equitably. It lessened my effectiveness as an appellate judge. This is not a complaint. It is a fact based on experience and observation.

4. *Dissent rates*: It is important not to exaggerate disagreement in the High Court by reference only to unanalysed data about reported dissenting opinions. In the High Court, if allowance is made for the large and growing numbers of dispositions on the papers and decisions on oral applications for special leave (about which there are typically no or relatively few disagreements between the Justices) the aggregate level of dissent in the decisions made by a Justice will uniformly be very low. The fact remains that, by comparison with the past, my disagreement in the disposition of proceedings that have gone to a full hearing stands *in toto*,

as about 35 per cent. It is important to say that this means that in about 65 per cent of such proceedings, I agreed with the majority as to the outcome.

Dissent is a precious feature of the judicial tradition derived by Australian appellate courts and tribunals from the practices of the judges of England⁴⁵. Because of the universal system of special leave, necessary now to secure a place in the High Court's appellate list, it has always seemed to me more surprising that there are not higher levels of dissent, more evenly spread, than presently exist. A case does not generally secure special leave from the High Court's panels unless there was a disagreement in the intermediate court; disparate outcomes in diverse jurisdictions; or where the matter has seemed arguable to at least one or two or more judges of the High Court.

In the Court of Appeal, my aggregate dissent rate was about 17 per cent of all proceedings. This was a figure that approximated the dissent rates of McHugh J and Heydon J in the High Court (about 14 per cent). In most of the other cases in the Court of Appeal (that is in about 80 percent of all cases) I wrote with the concurrence of at least one and often all of the other participating judges. Dissent is hard work. It is easier by far to agree if one can conscientiously do so.

⁴⁵ M.D. Kirby, "Judicial Dissent – Common Law and Civil Law Traditions" (2007) 123 *The Law Quarterly Review* 329

The procedures for equitable assignment of the writing of the principal opinion of the court in place in the New South Wales Court of Appeal helped to reduce unnecessary disagreement and to encourage dialogue and concurrence amongst the judges. So, I suspect, did the sheer pressure of the caseload. On the other hand, levels of dissent depend, in part, upon differing values. Those who have studied the High Court have described the shift in values and reasoning between the Court under Dixon CJ and Mason CJ and then the Court under Gleeson CJ⁴⁶. Had I served on the “Mason court” I suspect that my rate of dissent would have been quite low and certainly not exceptional for that time.

Nevertheless, there might have been more that I could have done to try to build consensus with my colleagues in the High Court. I have to concede that, whenever I proposed changes (even quite substantial changes) to the draft reasons of others, there was rarely, if ever, any difficulty in accommodating such modifications. In the Court of Appeal, even with my much lower rate of dissent, McHugh JA would occasionally suggest to me that the President should not be dissenting so often. It is true that, very occasionally, an appellate judge should sink doubts about a particular outcome or reasoning in the overriding interests of securing a unanimous (or at least clear) opinion of the Court in the particular case. However, at least in my view, such instances are very rare and exceptional. The reasons of the Supreme Court of Canada in the Quebec

⁴⁶ R. Gray, *above* n 20, 78

secession question may illustrate such a case⁴⁷. Generally, in our legal tradition, the judiciary, the legal profession and the community expect judges to state their own opinions honestly. Arguably, this is what the judicial oath and affirmation require.

When one reads of the talent of Justice William Brennan of the Supreme Court of the United States in building a majority consensus in that court, one naturally wishes that such skills had been vouchsafed to oneself. Life in a collegiate court would then be both easier and more successful. However, I suspect that even William Brennan would have had difficulty had his colleagues numbered Scalia, Thomas and Alito JJ, and perhaps Roberts CJ; certainly so Rehnquist CJ. However that may be, I know enough about the way busy courts use majority reasoning in their work to realise the exclusionary price that is paid for judicial dissent.

I wish that the times had been more favourable for my participation in majority reasons in the High Court. To the extent that I may occasionally have not worked hard enough to secure consensus, I see this as a shortfall. On the other hand, those who express disagreement must always respect the right of others to hold a different opinion. There is a limit to the acceptability of attempted persuasion of colleagues in a collegiate court of small numbers. In the Australian tradition, it does not generally work. After repeated attempts in a particular court to accommodate the approach of others have failed to secure concurrence,

⁴⁷ *In re Secession of Quebec* [1998] 2 SCR 217. Perhaps *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 was a local case in point.

the judge concerned (and everyone else) must realise the probable futility of trying. Where a fault line of differing values exists in a court, it will often appear quite quickly during the hearing of the argument or in later discussion. To attempt to erase it will normally be unsuccessful. To persist will be gauche and disrespectful of the independence of others.

All the same, the incidence of dissent in my opinion in the High Court is not a badge of honour. I dislike intensely the media label of “the Great Dissenter”, although it was earlier bestowed by lawyers on that fine judge, Oliver Wendell Holmes Jr. Would that I could have earned a label I would have prized: Ronald Reagan’s description as “the Great Communicator”.

5. *International human rights law.* A recurrent theme of my reasons in the High Court has been the relevance and utility of international human rights law as a contextual stimulus to Australian judicial reasoning. This is a controversial subject, although the controversy is now largely confined to Australia and the United States⁴⁸.

In most countries, including in constitutional adjudication, it is now quite common for national courts to have regard to international human rights law as it expresses the universal values of civilised nations. It is important to remember that this was the approach that lay behind an essential step taken in the reasoning of the High Court of Australia in

⁴⁸ M.D. Kirby, “International Law – The Impact on National Constitutions” (2006) 21 *American Uni International Law Review* 327

*Mabo v Queensland (No 2)*⁴⁹. Such use of international law, in expressing the common law of Australia and in elucidating the meaning of statutes that give effect to international treaties, is now relatively uncontroversial. However, the use of international law in constitutional elucidation is still sharply contested.⁵⁰

There may be glimmerings of hope that at least some members of the High Court of Australia will be more willing to consider international law as a material contextual factor in constitutional cases⁵¹. Yet by and large the objections to this reasoning continue. What may seem clear to me and to many other judges of final courts, engaged in a transnational judicial dialogue⁵², appears just as clearly to be heretical to some Australian judges and lawyers. The enactment of local human rights statutes⁵³ may encourage greater awareness in Australia of the existence and utility of international human rights law and jurisprudence. So far, the most that can be said is that this is a work in progress.

⁴⁹ (1992) 175 CLR 1 at 42 per Brennan J

⁵⁰ *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 383-386 p95]-[100], cf 417-419 [166]-[167]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589-595 [62]-[73], cf 617-630 [152]-[192]

⁵¹ *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 45 [44], 50-52 [66]-[70]; *Roach v Electoral Commissioner* (2007) 231 CLR 162 at 177-179 [13]-[18], 203-204 [100], cf 221-222 [164]-[169], 224-225 [181]

⁵² M.D. Kirby, "Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges" (2008) 9 *Melbourne Journal of International Law* 171

⁵³ e.g. *Human Rights Act 2000* (ACT); *Victorian Charter of Rights and Responsibilities Act 200* (Vic). In December 2008 the federal government initiated a national public consultation about human rights protection.

I have not succeeded in persuading other Justices of the High Court to embrace the *Bangalore Principles*⁵⁴. Certainly, this has not yet been accepted as an overt approach to be deployed in constitutional reasoning. Ironically, greater progress on this score has been made in recent years in the United States Supreme Court⁵⁵, emphasising the isolation of the Australian courts on this subject. This has not been for want of trying on my part. But, so far, my efforts must be counted as a non-success.

6. *Turn from principle and policy*: The reasoning of the High Court in recent years has been said by some observers to evidence a return by the Court to a “form of legalism” that is in some ways distinct from that of the Court in the time of Dixon CJ but with an equal unwillingness to embrace the suggested natural law and realist jurisprudence of the Court under Mason CJ⁵⁶.

To the extent that this change reflects a turning away from Julius Stone’s instruction concerning the ‘leeways for judicial choice’ (and the need to make any such choice by reference to openly acknowledged considerations of legal principle and policy) it is, perhaps, a result of the

⁵⁴ Bangalore Principles on the Domestic Application of International Human Rights Norms (1988) 14 *Commonwealth Law Bulletin* 1196; (1988) 62 ALJ 514 at 631

⁵⁵ *Atkins v Virginia* 536 US 304 (2002); *Lawrence v Texas* 539 US 558 (2003); *Roper v Simons* 543 U.S. 551 (2005)

⁵⁶ See e.g. Gray, above n 19, 78

return of a majority of Justices of the High Court who were not taught by Professor Stone or who did not fall under the influence of his ideas⁵⁷.

With all respect to those of the contrary view, the restoration of features of legal positivism in the High Court's reasoning is not a development to be favoured. This is a reason why I have continued to press the importance of consistency in the approach to the task of reasoning. Although the "purposive construction" of legislation remains the accepted doctrine of the High Court, many recent decisions suggest an arguable return to a more literal and verbal analysis⁵⁸. To the extent that repeated efforts by me to advance the contrary view have not succeeded, this is also a potentially a shortfall on my part. It is one that has occasional consequences for constitutional adjudication⁵⁹.

I can only hope that the continuing adherence of the High Court to the principle of purposive construction will, in due course, restore the candid reference to relevant considerations of legal principle and policy in the adjudication of cases.

7. *Mistakes in decisions*: Every judge who has served as long as I have done will come to realise that particular decisions were wrong, either

⁵⁷ Ibid, 78

⁵⁸ The recent trend may have started with *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 261-263 [24]-[32]; cf 277-285 [86]-[111].

⁵⁹ *Gypsy Jokers Motorcycle Club v Commissioner of Police* (2008) 234 CLR 532; *O'Donoghue v Ireland* (2008) 234 CLR 599

in their reasoning or in their outcome. In my own case some cases stand out.

Thus, in 2005 in *Mallard v The Queen*⁶⁰, I joined in unanimous orders allowing a prisoner's appeal to the High Court which opened the way for a judicial inquiry into his guilt and the ultimate finding that he was innocent of the crime of murder of which he had been convicted more than a decade earlier. After the trial and an unsuccessful appeal to the Supreme Court of Western Australia, Mr Mallard, in 1997, had sought special leave to appeal to the High Court. In that application I joined Toohey and McHugh JJ in refusing special leave⁶¹.

A study of the transcripts shows that the points upon which Mr Mallard succeeded on his second application to the High Court in 2004 were different from those originally pressed in 1997. A primary focus of the original application had been a challenge to the trial judge's exclusion of evidence of a polygraph test. Just the same, as I participated in the later appeal, and was then carefully taken through the evidence that suggested innocence, I naturally reflected on whether more help and closer scrutiny by me of the record the first time round might have prevented the serious injustice involved in detaining Mr Mallard in prison wrongly for more than a decade. Such cases are a judge's nightmare.

⁶⁰ *Mallard v The Queen* (2005) 224 CLR 124

⁶¹ *Mallard v The Queen* (1997) 191 CLR 646

There are many other decisions which later reflection suggests could have been decided, or reasoned, in a different way. Thinking about the prisoners' voting case (*Roach v Electoral Commissioner*⁶²) in which Gummow and Crennan JJ and I delivered joint reasons, I have sometimes speculated on whether the preferable principle should have upheld, as an implication from the detailed voting provisions in Chapter I of the Constitution, a prohibition on the Federal Parliament depriving *any* adult citizen, with mental capacity to cast a ballot, of the franchise; not just prisoners serving sentences of three years or less. Much legal adjudication (and almost all constitutional decisions) involve line drawing. The mind is never entirely at rest in deciding such contested cases, particularly those arising under the Constitution.

In such disputes, there is no decision that one can say with certainty is incontestably right. For all decisions during my judicial service that have been objectively wrong or unpersuasive, I offer regrets. Despite all the efforts of the judges concerned, human justice is bound, on occasion, to fail. A strength of our system is the provision of numerous checks at trial and the facility of appeal and, often, judicial review, to afford chances to rescue an erroneous decision from error. Inevitably, over more than three decades, I will have made mistakes. In the High Court, any such mistakes cannot now be corrected by further appellate process.

⁶² *Roach* (2007) 233 CLR 162 at 182 [27] ff

8. *Media errors:* In the nature of my engagement with the public media, I also accept that I have occasionally made mistakes. In April 2001, I received an honorary degree of the University of South Australia at a graduation ceremony for the School of Education. Most of the graduates were future teachers. None were lawyers. I spoke of my own education in public schools and of the teachers and schools that I honoured.

A reference in the speech to a still controversial subject of federal funding for public education was unwise at the time. Likewise, a reference in 2004, on the centenary of the federal system of conciliation and arbitration, to “industrial ayatollahs” who were determined to change the Australian industrial relations system to remove the necessity of conciliation and arbitration⁶³. I accept that these were mistakes and should not have been said. My only plea in mitigation is that, in many engagements with the media over 34 years, I have not often stumbled. Others may disagree.

Most people today receive information from the electronic media which is instantaneous and often insusceptible to lengthy reflection and correction. This means that it is sometimes tricky and risky. Inevitably, I have made occasional errors. But not many.

⁶³ The changes were ultimately introduced as the Work Choices legislation and upheld: *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1

9. *Attack in Parliament.* The attack on me in the Australian Senate in March 2002 was a sorry episode in the relationship between the Federal Parliament and the High Court. Despite the full apology given to me (which I accepted) the event reduced both institutions. It hurt my family. It damaged my name.

Perhaps if I had not been open about my sexuality and long-term relationship and connected matters, I would not have been attacked in such a way or things would have been handled differently. There is much that might be said about that event and the way it was handled by others. Perhaps one day it will be said⁶⁴. In the age of the internet, no one's reputation can ever entirely escape such a happening, once it occurs. Google is unforgiving in a way that ancient newspapers, files and fallible human memory never were. Watching recently the documentary film *Milk*, I saw some parallels in what happened in San Francisco to Harvey Milk. I must, I suppose, at least be grateful that in Australia we do not generally settle our differences with bullets.

10. *Work/life balance:* Finally, I accept that I have not achieved the optimum work/life balance. I doubt if, on the deathbed, any judge would regret not being able to rush into chambers to finish writing another decision; to write another speech; or to complete a book review on time.

⁶⁴ E. Campbell & M. Groves, "Attacks on Judges Under Parliamentary Privilege: A Sorry Australian Episode" [2002] *Public Law* 626

Appointment to the High Court means living for a time in Canberra. The Court is surrounded by great cultural institutions. I certainly took full advantage of the link with the two universities in the city and the constant parade of interesting visitors. I enjoyed walking to and from work in the changing seasons. The night sky is splendid and a reminder of our individual human insignificance. Yet I failed to see the *Monet* and *Degas* exhibitions at the National Gallery and attended all too few concerts, plays and films.

Objectively, I know that this constitutes a shortfall of personality. It is another illustration of the obsessive characteristics common amongst high achievers in the judiciary and the law. I have resolved to strive for a better balance in the years ahead.

ASSESSMENT

In the words of the Bard, “What’s to come is still unsure”⁶⁵. Perhaps involvement with the new United Nations Appeals Tribunal⁶⁶. Perhaps some university teaching. Maybe an arbitration or two or new engagements with international agencies of the United Nations. Possibly, as one fine judge wrote to me – something completely outside the “great game” of the law.

⁶⁵ *Twelfth Night*, in Feste’s speech

⁶⁶ The Internal Justice Council of the United Nations in November 2008 recommended the author for election by the General Assembly to the new United Nations Appeals Tribunal.

If I look back on my life as a lawyer over 50 years, and as a judge for much of that time, I would certainly change some things. But not all that many. At school, a teacher wrote on my report in 1952: “Michael needs to become more analytical in his thinking”. It was a perceptive comment at the time. I have endeavoured to respond to it. Weighing up the successes and shortfalls, some observers would, I believe, give me marks for trying. Others would just conclude that I have been *very* trying. Perhaps both verdicts would be correct.

No doubt there were other shortfalls that I am blind to. I must leave it to others to assess the balance. Unlike the reported feelings of Sir Owen Dixon, after his judicial years, I feel no inclination, approaching retirement, to regard all the effort that went before as wasted, a failure. In life, my feelings, like those of most judges, have rarely been so extreme.

An article by the legal editor of *The Times* in London in January 2009 declared that judicial appointment in England is not now so appealing⁶⁷. Reporting findings of an investigation by senior judges, to explore why the judiciary is losing some of the best talent of the legal profession, especially women and members of ethnic minorities, the conclusion was clear. Although in England permanent appointment to the judiciary still carries great prestige and authority (even a knighthood or equivalent) the judicial office is often seen as “lonely, fusty and male-dominated, with a culture of male self-confidence and intellectual

⁶⁷ F. Gibb, “Why being a Judge is not so Appealing”, *The Times* (London), 14 January 2009

posturing". Some women solicitors in the City of London, in particular, regarded the judiciary as "even more antediluvian than City commercial law practice"⁶⁸. A sample of the quoted opinions gives the general flavour of reactions⁶⁹:

"It's a very jolly life NOT being a judge. Getting loads of money, making jokes and doing really interesting work ... long holidays, no bureaucracy. Why would you stop?" (Woman silk)

"I'm married and I like to have dinner with my husband and friends rather than talk to a load of High Court judges" (Woman silk)

"The idea of spending the next 15 years of my life being a High Court judge doing rubbish work is frankly too depressing to contemplate." (Woman silk)

"I found being an assistant recorder awful. I decided it was a nightmare." (Male silk)

Appointed judges, unsurprisingly, were generally positive about the judicial office, reporting satisfaction with the prestige of the office, the opportunity to decide matters, the intellectual challenge and the ethic of serving the public. But by definition, they have already taken the plunge and their responses are, in a sense, self-selecting. It is now clear that

⁶⁸ United Kingdom, Judicial Executive Board, *Report*, 2009 (Prof Dame Hazel Genn, Chair)

⁶⁹ Reported comments of silks regarding life as a judge.

demographic changes, by which lawyers, like other citizens, are marrying later, divorcing and remarrying more frequently than in the past, with responsibilities for young or teenage children during their forties and fifties, have led to a common perception that, circuit work in particular (and judges' lodgings) constitute unattractive work prospects.

The adverse comments on judicial life, reported particularly amongst female silks who had tried their hand under the English system of Recorders, are especially damning. Some of these comments may suggest unsuitability of those concerned for the judicial office. Anyone who looks down on taking part in solving peoples' problems and who regards this as "boring stuff" is probably unsuited to be a judge. As I leave judicial office in Australia in February 2009, I feel saddened that not a few of the comments in England would probably have similar reflections in Australia.

Allowing for the atypical features in my own career and for the many unusual opportunities to perform varied work that I have enjoyed, I remain, in this and other things, something of a relic of earlier times. I still regard it as a great privilege to have been an independent judge in a rule of law democracy. It is a great trust. The puzzle of decision-making and of explaining decisions in a convincing way was for me work that had no available intellectual equal.

At the Summer Hill Opportunity Public School in Sydney in 1949 I was asked by two grey-coated careers advisers to write down what I

wanted to become when I grew up. 'A bishop or a judge', I wrote. The Church missed out, which was probably a wise career move in all the circumstances. The judiciary it became. But a puzzle now awaits me: what's next?

50 YEARS IN THE LAW: A CRITICAL SELF-ASSESSMENT

THE HON JUSTICE MICHAEL KIRBY AC CMG