

AUSTRALIAN BAR REVIEW

TEN YEARS IN THE HIGH COURT - CONTINUITY & CHANGE^{*}

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WHAT IS IT REALLY LIKE?

It is almost ten years since my appointment as a Justice of the High Court of Australia. Not long after I had first taken my seat, I addressed a constitutional law class at the University of Sydney. My lecture was titled "What Is It Really Like to be a Justice of the High Court of Australia?". The lecture was later published¹. Now, from the advantage of a decade's service, I will describe the changes I have witnessed.

A barrister who keeps abreast of the case law necessarily enters the minds of the Justices of the High Court and lives, in a sense, with their values, attitudes and habits of reasoning. Inevitably, not a few speculate on what it would be like to live and work in the great

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¹ (1997) 19 *Sydney Law Review* 514.

courthouse in Canberra, by Lake Burley Griffin. There is nothing wrong with aspiration. Some, more ambitious, imagine themselves, decades hence, occupying one of the chambers on the ninth level of that building. However, the numbers called are very few². In the history of the Court, I was but the fortieth Justice. When Justice McHugh leaves the Court on 31 October 2005, Justice Susan Crennan, the forty-fifth Justice will be sworn³. Forty-five is not many in little more than a century. Luck and opportunity play a disconcertingly large part in such appointments, although those who appoint always comfort the people that merit alone is the alchemy that works such elevations.

The basic description of the daily life and work of a Justice, contained in my earlier lecture, has not changed much in the intervening decade. The elements of continuity are, as the Constitution itself dictates, overwhelming. The facilities for the Justices are the same⁴. So are most of the work methods necessary to the production of the Court's basic product, its opinions or reasons (wrongly called "judgments")⁵.

² *Ibid*, 514.

³ In September 2005 Justice Crennan of the Federal Court of Australia was appointed and will be sworn as a Justice of the High Court on 8 November 2005.

⁴ *Ibid*, 515.

⁵ *Ibid*, 516-517. "Judgments" and orders" are referred to in the Constitution, s 73. Those words refer to the formal disposition of proceedings, not to the reasons for that disposition; cf M D Kirby, "The Mysterious Word 'Sentences' in s 73 of the Constitution" (2002) 76 ALJ 97 at 103.

The original jurisdiction of the Court remains unchanged. In 2003 an attempt to limit the invocation of that jurisdiction in migration case, through the use of a privative clause, foundered upon the unanimous decision of the Court in *Plaintiff S 157/2202 v The Commonwealth*⁶. At the conclusion of the joint reasons in that case (in which I participated), five Justices reminded the Commonwealth, and the people, of the indelible character of the constitutional assurance of direct access to the High Court contained in s 75(v)⁷:

"[T]he issues decided in these proceedings are not merely issues of a technical kind involving the interpretation of the contested provisions of the [Migration] Act. The Act must be read in the context of the operation of s 75 of the Constitution. That section, and specifically s 75(v), introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review. There was no precise equivalent to s 75(v) in either of the constitutions of the United States of America or Canada. The provision of the constitutional writs and the conferral upon this Court of an irremovable jurisdiction to issue them to an officer of the Commonwealth constitutes a textual reinforcement of what Dixon J said about the significance of the rule of law for the Constitution in *Australian Communist Party v The Commonwealth*⁸.

⁶ (2003) 211 CLR 476.

⁷ (2003) 211 CLR 476 at 513. In the past decade the writs provided for in s 75(v) of the Constitution have come to be known as "constitutional writs" and not, as was previously the case, "prerogative writs". See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 133 [138]; cf 92 [19], 140-141 [162].

⁸ (1951) 83 CLR 1 at 193; cf *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 381 [89] per Gummow and Hayne JJ.

The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them".

The appellate jurisdiction⁹ continues to be the staple business of the High Court. Unlike its progenitor in the United States, and more like the final courts of most Commonwealth countries, the High Court of Australia is a true court of general appellate jurisdiction, dealing with a vast range of subject matters. That fact stamps on it a character as lawyers' court, serving the whole country and not simply in federal causes.

The work and personal staff arrangements of the Court have remained basically unchanged in the intervening decade during which I have served¹⁰. When I gave my earlier talk, I described the continuity in the High Court by recalling the discovery in the desk, on my arrival in my new Canberra chambers, of a cassette tape. It contained, in electronic form, the voice of Sir Keith Aickin, the original occupant of the chambers in 1980, long since dead.

Recently, in my Melbourne chambers, I was again reminded of that continuity. I found a set of the statutes of the Federal Parliament. I

⁹ (1997) 19 *Sydney Law Review* 514 at 518-519.

¹⁰ *Ibid*, 519-520.

reached for the first volume. On the cover, in gold lettering that would have been embossed soon after the foundation of the High Court in 1903, was the name "R E O'Connor". Justice O'Connor, one of the three foundation Justices, appears in the famous photograph of the first sitting of the High Court, taking his oaths¹¹. The book I had plucked from the shelf was used by him at the very start of Australia's federal journey.

Like all humans, the original Justices were denied the gift of prophecy. Yet they must have known the unparalleled privilege, and opportunity, that they enjoyed, and the responsibility that descended upon them, of making the first decisions and setting the standards for those who would follow. Fortunate was the Commonwealth in those Justices. Fortunate are we, their successors, in the legacy that they left us.

Although most features of the daily life of a Justice remain unchanged in the past decade, some aspects of the work of the Court, and my own life within it, have changed. It is timely to reflect upon the most important of these changes.

¹¹ The obituary for Justice O'Connor, given first by Isaacs J and later by Griffith CJ, is recorded in (1912) 15 CLR v.

TEN CHANGES

The Justices: The High Court of Australia remains a Court small in number. The present number of Justices, seven including the Chief Justice, was first attained in 1914. In the past decade three former Justices have died, Sir Garfield Barwick in 1997 and Sir Harry Gibbs and Sir Ronald Wilson, both in 2005¹². Partly in consequence of the celebrations surrounding the centenary of the Court, the Justices have supported the recording of an electronic archive of current and surviving Justices. Unfortunately, this archive was not sufficiently advanced to secure interviews with Barwick, Gibbs and Wilson. This is a facet of the Court's history that has been neglected. But for the future, this will be corrected.

When I arrived, Chief Justice Brennan presided in the Court. As a presiding judge, he was generally non-interventionist and invariably polite. Having myself presided in the New South Wales Court of Appeal for more than a decade, it took a time for me to become used to a more relaxed in-court style of work. Chief Justice Gleeson's presiding style is similar to that of his predecessor. In so far as the High Court of Australia is a "hot court", the heat mostly came from three sources: McHugh J, Hayne J and myself. Now it is bi-polar. Courtroom intervention is a function of personality. Perhaps it reflects a view of the utility of

¹² M D Kirby, "Recollections of Sir Harry Gibbs", *Quadrant*, September 2005, Vol XLIX, No 9, 54.

interchange with counsel. Chief Justice Dixon regarded such dialogue as an interruption to his own invaluable cogitations¹³.

Justice Stephen Breyer of the Supreme Court of the United States was at one stage Chief Judge of a United States Circuit Court. He once told me that, on his appointment as an Associate Justice of the Supreme Court, moving from the central seat to the side, he felt that he had lost part of his judicial personality. I understood precisely what he was saying.

The other Justices to retire in the last decade were Dawson J, Toohey J, Gaudron J and soon McHugh J. For the first time since its foundation, the High Court had no knights amongst its members: that form of civil honour having disappeared in the 1980s on the suggestion of the Queen. It is probable that I will be the last High Court Justice to be a member of an Imperial order of chivalry (CMG). All of the present Justices have been appointed Companions of the Order of Australia (AC), now Australia's highest civil honour.

The departure of Gaudron J meant that, once again, the High Court of Australia was composed entirely of men. The presence of Gaudron J saved the Court from excessive tendencies to blokeyness

¹³ A F Mason, "The High Court of Australia: A Personal Impression of Its First 100 Years" (2003) 27 *Melbourne University Law Review* 864 at 873; J D Heydon, "Outstanding Australian Judges" (2005) 7 *The Judicial Review* 255 at 256.

and clubiness. In significant respects, a woman's experience of society, in the law and in the legal profession, is different from that of a man. Moreover, as McHugh J pointed out several times in 2005, if intellectual and professional merit is truly the criterion for appointment, there were "at least ten women judges serving in the Supreme Courts of the States and the Federal Court who would make first-class High Court Justices"¹⁴. Their presence on the Court could be a corrective. Those who have witnessed discrimination may sometimes be more inclined to perceive legal injustice. This point helps to explain a number of cases in which Gaudron J and I dissented together¹⁵.

In addition to the changes in the composition of the Court, many of its staff and the associates have changed during the decade. The long-serving High Court librarian (Ms Jacqui Elliott) retired and was replaced in 2005 by Ms Petal Kinder. The High Court library in Canberra is, according to McHugh J, probably the finest in the southern hemisphere¹⁶. It is managed by a Committee which McHugh J chaired and on which I serve.

¹⁴ M H McHugh, "Working as a High Court Justice", unpublished paper for the Newcastle Law Society, Newcastle, 13 August 2005, 18.

¹⁵ eg *U v U* (2002) 211 CLR 238; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S 134/202* (2002) 211 CLR 441; *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

¹⁶ McHugh, above n 14, 10.

The Justices' associates are usually top law graduates. Appointment practices vary. In some chambers, recommendations from the Justices' old law schools seem to predominate. I remain the only Justice who advertises in the law schools, wishing (as I do) to signal that the position must be won strictly on equal opportunity principles. It is probably for this reason that my staff tends to be chosen from a greater variety of law schools. Recent appointees attended the Australian National University, Adelaide, Murdoch and Wollongong Universities and the University of Tasmania, as well as the usual suspects in the law schools in Sydney and Melbourne. Unlike in the United States, my associates do not draft my reasons, although occasionally, where they may be critical of my opinion, I encourage them to suggest some revisions. Sometimes (rarely) their draft causes me to change my mind and the residue of their draft finds its way, after many edits, into the *Commonwealth Law Reports*.

Throughout most of my service in the Court of Appeal and in the High Court, my personal assistant has been Janet Saleh. She was there when McHugh J was appointed to the High Court from that Court in 1989. She remembers the brave face I put on that event at the time. Now I see McHugh J depart into retirement. The end of my own service can be no more than three and a half years away.

The work: There have been changes in the work of the High Court in the past decade. When the decade opened, there were a number of important native title cases in succession to the path-

changing decision during the Mason Court in *Mabo v Queensland [No 2]*¹⁷. In my first year, I participated in the *Wik* case¹⁸, in which my opinion in favour of the Aboriginal appellants was to prove decisive for the outcome. In consequence, the Justices in the majority, and the Court in general, were subjected to unrelenting attacks by politicians and others. This represented some evidence of a decline of civic understandings between the branches of Government in the Australian Commonwealth¹⁹. Having got a taste of blood, the attacks in 1996-7 were to be followed up by a personal attack on me in the Senate (later withdrawn). This was a sorry episode in the relationship between the Parliament and the Court²⁰.

One outcome of the *Wik* decision was a commitment by a leading politician in the Government (Mr Tim Fischer) that "capital C Conservative[s]"²¹ would be appointed to replace retiring Justices.

¹⁷ (1992) 175 CLR 1.

¹⁸ *Wik Peoples v Queensland* (1996) 187 CLR 1; *North Galanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595.

¹⁹ M D Kirby, "Attacks on Judges - A Universal Phenomenon" (1998) 72 ALJ 599. See also R B Ginsburg, "Judicial Independence" (1998) 72 ALJ 611.

²⁰ E Campbell and M Groves, "Attacks on Judges Under Parliamentary Privilege: A Sorry Australian Episode" [2002] *Public Law* 625.

²¹ In N Savva, "Fischer seeks a more conservative court", *The Age*, Melbourne, 5 March, 1997, 1, 2. See also M D Kirby, *Judicial Activism - Authority, Principle and Policy in the Judicial Method* (2004) (Hamlyn Lectures, 2004), 52.

Inevitably, every Justice appointed since that time has been measured against this criterion. There can be no doubt that the philosophical balance of the High Court has shifted significantly since my appointment was announced at the end of 1995. Almost certainly, those who have supported the shift would not wish to deny it²².

There have been a few important native title cases in the past decade²³. However, that work seems now to have fallen away, at least so far as the High Court is concerned. In part, this may be because of amendments to the *Native Title Act* 1993 (Cth) effected in 1997. In part, it may be because the basic principles post *Mabo* have been settled and indigenous communities now prefer to negotiate settlements rather than to litigate. In part, it may be because of a diminished belief in good outcomes in the courts²⁴.

The most distinctive phenomenon of the work of the High Court over the past decade has been the growth in immigration cases.

²² cf Statement of Gibbs CJ (1986) 160 CLR v at vii.

²³ *Fejo v Northern Territory* (1998) 195 CLR 96; *Yanner v Eaton* (1999) 201 CLR 351; *The Commonwealth v Yarmirr* (2001) 208 CLR 1; *Western Australia v Ward* (2003) 213 CLR 1; *Risk v Northern Territory* (2002) 210 CLR 392; *Wilson v Anderson* (2003) 213 CLR 401; *Yorta Yorta* (2003) 214 CLR 422.

²⁴ H Wootten, "Conflicting Imperatives: Pursuing Truth in the Courts" in I McCalman and A McGrath (eds) *Proof and Truth - The Humanist as Expert* (2003), 15.

Typically, these have involved questions of nationality²⁵, refugee status and procedures²⁶ and the limits upon the detention of illegal immigrants²⁷. In part, the flood of cases in the High Court has arisen because of inflexibilities in the *Migration Act* 1958 (Cth), as amended and the inerasable powers of the High Court under s 75 of the Constitution. A huge number of cases began to arrive in the Court. Eventually, it has proved necessary to alter the Court's dispositive procedures to cope with such numbers²⁸. In some of the cases, the High Court has accepted controversial claims to refugee status²⁹; but not always³⁰.

²⁵ eg *Ex parte Taylor; Re Patterson* (2001) 207 CLR 391; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28; *Singh v Minister for Immigration and Multicultural Affairs* (2004) 78 ALJR 1383; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 79 ALJR 1309.

²⁶ eg *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

²⁷ *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 78 ALJR 1056; *Al-Kateb v Godwin* (2004) 78 ALJR 1099; *Ruhani v Director of Police [No 2]* [2005] HCA 43.

²⁸ Ben Wickham, Feature Article in Australian National University, Centre for International and Public Law *Newsletter*, 1/205 (July 2005) 4-5.

²⁹ eg *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 (abused female family member); *Applicant S 395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 (homosexual refugees).

³⁰ eg *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (Iranian apostate).

In the closing days of the Mason-Brennan era, in *Kable v Director of Public Prosecutions (NSW)*³¹, the High Court delivered an important decision upholding the essential independence of the State and Territory judiciaries as part of the integrated Judicature provided in the Constitution upon which federal jurisdiction might be conferred or in which it arises. This principle has not flowered in the new era, despite several attempts to invoke it³². For my own part, I suspect that had cases such as *Baker*³³, *Fardon*³⁴ and *Colonel Aird*³⁵ been argued before the Mason Court, the outcomes would have been different.

It cannot be doubted (and I suspect that those involved would affirm) that the inclination towards legal innovation, and particularly in matters concerned with basic human rights, has diminished in the High Court over the past decade. It is at least doubtful that the innovative cases on native title³⁶, constitutional free speech³⁷ and effective rights to

³¹ (1997) 189 CLR 51.

³² eg *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181; *Baker v The Queen* (2004) 78 ALJR 1483; *Fardon v Attorney-General (Q)* (2004) 78 ALJR 1519.

³³ (2004) 78 ALJR 1483.

³⁴ (2004) 78 ALJR 1519.

³⁵ (2004) 78 ALJR 1451.

³⁶ *Mabo [No 2]* (1992) 175 CLR 1.

³⁷ eg *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

legal representation in serious criminal trials³⁸ would have been decided in the same way had they first presented today. This is not unusual in courts of the common law. Such courts have intervals of innovation. Those intervals are commonly followed by periods of consolidation and quietude. Rarely, does the law wholly retreat to its former self.

This is not to say that innovation is missing. Tidying up particular corners of legal doctrine continues to happen³⁹. The High Court has generally endorsed and reinforced the purposive approach to statutory interpretation⁴⁰, first embraced in the Mason era⁴¹. This is now the standard approach of the Court⁴². Purposive interpretation is often allied with an insistence that the starting point for the resolution of legal problems, where a parliament has spoken, is the statute and not judicial statements of the law⁴³. Occasionally, the embrace of purposive interpretation appears less than wholehearted⁴⁴.

³⁸ *Dietrich v The Queen* (1992) 177 CLR 292.

³⁹ See eg *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

⁴⁰ See eg *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423-424 per McHugh J (diss).

⁴¹ *Bropho v Western Australia* (1990) 171 CLR 1 at 20.

⁴² eg *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *GIO Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Ltd* (1998) 191 CLR 85 at 112-113; cf M D Kirby, "Towards a Grand Theory of Interpretation" (2003) 24 *Statute Law Review* 95 at 99.

⁴³ eg *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72 at 88 [46]; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 545 [63]; *Allan v TransUrban CityLink Ltd* (2001) 208 CLR 107 at 184-185 [54]; *The*

The High Court has been sensitive during the past decade (some commentators have suggested too sensitive) to the rights and privileges of members of the judiciary⁴⁵ and of the practising legal profession⁴⁶. On the other hand, the last decade has not always been a good time for plaintiffs in the High Court of Australia. Professor Harold Luntz has pointed to a discernible shift in decisions in favour of defendants and their insurers⁴⁷.

The imperium of the law of negligence has been wound back. Over my protests, words of my own in *Romeo v Conservation Commission (NT)*⁴⁸ have returned to haunt me. They have sometimes led to bringing up issues of contributory negligence into considerations relevant to the identification of issues of duty and breach⁴⁹. Sir Owen

Commonwealth v Yarmirr (2001) 208 CLR 1 at 111 [249]; *Conway v The Queen* (2002) 209 CLR 203 at 227 [65].

⁴⁴ *Kelly v The Queen* (2004) 218 CLR 216 at 251 [98], 262 [136]; *Palgo Holdings Pty Ltd v Gowans* (2005) 79 ALJR 1121 at 1129 [35].

⁴⁵ *Austin v The Commonwealth* (2003) 215 CLR 185; *Fingleton v The Queen* (2005) 79 ALJR 1250.

⁴⁶ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755.

⁴⁷ H Luntz, "Torts Turnaround Downunder" (2001) *Oxford University Commonwealth Law Journal* 95; H Luntz, "A Personal Journey Through the Law of Torts" (2005) 27 *Sydney Law Review* 393 at 411-415.

⁴⁸ (1998) 192 CLR 431 at 478 [123].

⁴⁹ M Lunney, "Personal Responsibility and the 'New' *Volenti*" (2005) 13 *Tort Law Review* 76 at 90-91.

Dixon once said that he would go to his grave with s 92 of the Constitution written on his heart. I suspect that, in my case, the inscription will be nothing so grand - simply a few misapplied words on the law of negligence.

Criminal law and cases on sentencing now play a greater part in the work of the High Court than they did in the past⁵⁰. In part, this is an outcome of the Court's decision in *Dietrich v The Queen*⁵¹, reversing *Mclnnes v The Queen*⁵². This has led to better representation at the trials of accused persons facing significant criminal charges. An extension of *Dietrich* to appellate courts and the protection of the rights of prisoners who are not represented on appeal⁵³ remains an issue for the future.

It cannot now be said that grants of special leave in criminal and sentencing cases are exceptional or rare in the High Court. A good part of any special leave list in the High Court today involves an array of questions concerned with criminal law and practice. Perhaps in this respect, the High Court has come to recognise, as the general

⁵⁰ M D Kirby, "Why the High Court has become more involved in Criminal Appeals" (2002) 23 *Australian Bar Review* 4; cf M D Kirby, "The Mysterious Word 'Sentences' in s 73 of the Constitution" (2002) 76 ALJ 97.

⁵¹ (1992) 177 CLR 292.

⁵² (1979) 143 CLR 575.

⁵³ *Muir v The Queen* (2004) 78 ALJR 780.

community long has, the centrality and importance of these topics for a civilised society. Perhaps it reflects no more than the interests and experience of the currently serving Justices of the High Court. Many cases have been heard in the past decade that lay down important principles for the law of sentencing⁵⁴, a subject once thought to be generally beneath the dignity of the High Court.

One issue that has been clarified relates to the power and duty of appellate courts to review the facts decided at trials. Some of the old rigidities and *formulae* in this area of the law in civil appeals have been cleared away, in deference to the statutory functions and powers of intermediate courts⁵⁵. This is a development, and a re-expression, of legal doctrine that is more protective against miscarriages of justice at trial arising from significant errors of fact-finding. It helps to correct mechanistic approaches to the advantages of trial judges deriving from conclusions based on the appearance of witnesses. Such considerations dominated earlier thinking⁵⁶. The governing rule is now more nuanced and subtle. Its foundation lies in the texts of the enabling

⁵⁴ eg *Lowndes v The Queen* (1998) 195 CLR 665; *Postiglione v The Queen* (1997) 189 CLR 295; *R H McL v The Queen* (2000) 203 CLR 452; *Ryan v The Queen* (2000) 206 CLR 267; *McGarry v The Queen* (2001) 207 CLR 121.

⁵⁵ *Fox v Percy* (2003) 214 CLR 118. See also *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306.

⁵⁶ See eg *Jones v Hyde* (1989) 63 ALJR 349; *Abalos v Australian Postal Commission* (1990) 191 CLR 167.

statutes of the intermediate appellate courts of Australia. The movement also has implications for criminal appeals.

The litigants: A noticeable phenomenon of the past decade has been an increase in the number of self-represented litigants. In part, this is the product of the increase in applications in immigration and refugee matters. Of the special leave applications filed for the year ended 30 June 2005, 457 (representing 64% of all civil applications for special leave) related to such cases. Of these, 405 (or 88%) involved self-represented litigants. These proportions compare with 19% of such applications at the time of my arrival in the Court in 1996⁵⁷. No other final national court of appeal has such a large component of unrepresented litigants at the gateway. Most such courts have procedures requiring applications to be made, in the first instance, on the papers, so as to provide a filter for the necessary business of the court.

An outcome of this rapid escalation in the numbers of such proceedings was a change to the High Court Rules. New High Court Rules, taking effect from January 2005, permit the High Court to deal with many applications for special leave to appeal without conducting an oral hearing⁵⁸. This is a new development. The result has been the

⁵⁷ McHugh, above, n 14, 6.

⁵⁸ High Court Rules, (2004), Rule 41.11.

division of the Justices into Panels of two, for the purpose of examining such applications on the papers. Two Justices constitute the Full Court. Initially, Justice Gummow and I constituted one such Panel. We were required regularly to examine applications assigned to us by the Chief Justice, following discussion by him with the High Court Registry. The papers are carefully examined. If the application is dismissed short reasons are given. Such reasons are read, and the orders pronounced, in open court. Commonly, migration applications are dismissed because the applicant cannot identify any error of law or of jurisdiction sufficient to engage the attention of the Court. Of course, if a party is not legally represented, the inability to express such errors is unsurprising given the opacity of the expression "jurisdictional error"⁵⁹: I have sometimes confessed to being uncertain about its meaning myself.

The new procedure imposes on the Justices a duty to examine the papers in such cases most carefully. When, as sometimes occurs, a point is noticed (either in the written arguments or in the reasons of the courts and tribunal below), the application is transferred to be heard orally in an ordinary special leave hearing list. In such cases, recommendations are sometimes made for the High Court Registry to endeavour to secure *pro bono* legal assistance for the applicant if he or she is not legally represented. Fortunately, there are members of the

⁵⁹ *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S 20/2002* (2003) 77 ALJR 1165 at 1185 [122].

Australian legal profession who are willing to afford assistance of this kind.

The increased burden of dealing with special leave applications under the new Rules is obvious. There are many more files to be read; discussions must be had; short reasons must be prepared; hearings have to be completed; points need to be vigilantly watched for. A good illustration of issues noticed for the first time in the preparation by the Justices for special leave hearings was the judicial immunity point that finally proved determinative in the appeal in *Fingleton v The Queen*⁶⁰. That defence had been overlooked in the trial and intermediate appeal of Ms Fingleton, the former Chief Magistrate of Queensland. The result was that she was convicted, resigned her office and served a prison sentence for a conviction that was quashed in the High Court for a "crime" from which she always enjoyed statutory legal immunity because she had acted in a protected administrative capacity.

Each of the Justices takes special leave obligations seriously, knowing as they do that their decision represents the end of the line of legal reconsideration. The High Court (over my dissent), in the past decade, has not changed its stand on the strict approach it had earlier adopted to the character of an "appeal" under the Constitution⁶¹. It

⁶⁰ (2005) 79 ALJR 1250.

⁶¹ *Eastman v The Queen* (2000) 203 CLR 1 affirming *Mickelberg v The Queen* (1989) 167 CLR 259.

remains a 'strict' appeal and no matter how compelling, fresh or new evidence is never received. However, the Court has insisted that, whilst proceedings are alive in the Judicature, serious errors of law may be raised, even though not pressed below⁶². Despite the differing experience, philosophies and values of the Justices leading to differences in the disposition of substantive applications and appeals, there is rarely a disagreement amongst us in the disposal of special leave applications. The criteria are well known and cases for leave generally stand out. Nevertheless, where disagreement exists on that question it is publicly recorded and, sometimes, substantive reasons are given to explain the difference⁶³.

Whereas ten years ago special leave hearings consumed, on average, one hearing day a fortnight, now they involve, on average, one hearing day each week, with two panels each of three Justices sitting. Nothing else would have cleared the backlog of applications within a tolerable time. Gleeson CJ has been careful to monitor delays and to bring them to the notice of the regular monthly meetings of the Justices. It is the injustice to promising and urgent applications, which enjoy real prospects of success, that has necessitated a modification to the oral

⁶² *Gipp v The Queen* (1998) 194 CLR 106; *Crompton v The Queen* (2000) 206 CLR 161; cf *Truong v The Queen* (2004) 78 ALJR 473; *Fingleton* (2005) 79 ALJR 1250 at 1280 [141].

⁶³ eg *South-West Forest Defence Foundation Inc v Executive Director, Dept of Conservation and Land Management (WA)* (1998) 72 ALJR 837; *Muir v The Queen* (2004) 78 ALJR 780.

tradition of special leave hearings. That tradition had merits, recognised by all members of the Court. It means that each litigant gets a day in court, however brief, when the decision-maker is obliged to listen to and consider the issues. The consequence of the new system is that the residual cases, now heard in a typical special leave list, are commonly more difficult, involving serious points that have to be judged. This adds to the burden of work, as do the number of cases seeking special leave, including on the papers. It may not be wholly coincidental that in the past decade two Justices have undergone open heart surgery and I am one of them. Life as a judge in contemporary Australia involves stress and unremitting work pressure⁶⁴.

A feature of the past ten years has been the steady (still not large) increase in the number of non-governmental parties seeking to intervene in the High Court. Soon after my arrival in the court, a rather negative decision on rights of intervention was delivered by the majority, from which I distanced myself⁶⁵. More recently, intervention, at least on the papers, and sometimes with short oral argument, has been permitted. Recognition of the important role of the High Court in declaring and clarifying basic legal principles, as well as in deciding the case between the parties, warrants reconsideration of the past law and practice on

⁶⁴ cf M D Kirby, "Judicial Stress - An Update" (1997) 71 ALJ 774.

⁶⁵ *Levy v Victoria* (1997) 189 CLR 579 at 650-652; cf at 600-605; cf *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 134-137 [102]-[109].

intervention and *amici curiae*. In my view, we should bring our practice more into line with that of final courts in the United States, Canada and other countries.

Perhaps a sign of changing attitudes in this respect is the tribute paid by Gummow J in *APLA v Legal Services Commission*⁶⁶ to the assistance given by counsel for a number of legal centres (Mr J Basten QC) which, although ultimately unavailing, intervened usefully in those proceedings in support of the applicant⁶⁷. Of course, attitudes to such assistance tend to vary in accordance with the judge's perception that policy choices exist, the inclination of individual judges to identify and acknowledge such issues in judicial reasons and their allegiance to notions of transparency in deciding them.

The parade of leading barristers before the High Court over the past decade has changed as senior counsel are appointed to the judiciary or otherwise move on. Dr Gavan Griffith QC, Solicitor-General for the Commonwealth when I arrived, has been replaced by Mr D M J Bennett QC. Outstanding performers regularly appear before us. The court affords a Justice a unique appreciation of the talents of the separate Bars of the nation. I have noticed that not every advocate who is greatly talented in securing special leave has an equal talent in

⁶⁶ *APLA Limited v Legal Services Commissioner* [2005] HCA 44.

⁶⁷ *Ibid* at [127].

arguing appeals. At the Bar, as in life, there are sprinters and marathon runners, although a few are champions in both talents. The number of women advocates to address the Full Court from the central podium in Canberra remains dismally stable, if it has not actually fallen since 1996. This is so, although, as Gaudron J frequently said, gifts of communication and skills of appellate argument do not reside in a gene found on the Y chromosome. The culture of the legal profession (and perhaps other factors) still appear to be comparatively unfavourable to senior women advocates in Australia, including in the High Court⁶⁸.

Joint reasons: The legal profession, in Australia and elsewhere, thirsts for joint reasons. Obviously, the Justices of the High Court are conscious of the desirability of concurrence. Apart from anything else, if one can agree in the reasons of others, doing so shares the workload and diminishes the pressure of judicial duties. Yet whilst joint reasons are desirable, no judge of integrity will join in the reasons and orders of colleagues if he or she disagrees with the outcome reached or has serious difficulties in the mode of reasoning which cannot be accommodated by changes made by others.

The tradition of the High Court of Australia, like that of English and most other Commonwealth courts, has been for multiple opinions in which each judge expresses his or her unique conclusions and reasons.

⁶⁸ M D Kirby, "Women in the Law - What Next?" (2002) 16 *Australian Feminist Law Journal* 148.

In the High Court of Australia, this is particularly so in constitutional cases. There, special principles apply concerning the controlling force of *stare decisis* and the duty that each Justice of the Court has to the constitutional document from which the judge's commission on the Court comes⁶⁹. Normally, there is relatively little disagreement in formulating the short reasons for disposing of special leave applications. Pressures of time, circumstance and necessity encourage a high level of concurrence in that activity. But what, if anything, can and should be done to increase the number of joint reasons more generally, against the background of our traditions?

When Gleeson CJ arrived in the High Court in 1998, he came (as McHugh J and I, and later Heydon J, did) from the New South Wales Court of Appeal with its strong tradition of sharing writing obligations. In that Court, it is the function of the President each month to assign, in advance, to the Judges of Appeal, duties of preparing, or giving orally, the first reasons. This technique helps to reduce the repetitious restatement of facts, legislation and issues. It also encourages concurrence where that is possible.

⁶⁹ *Eastman v The Queen* (2000) 203 CLR 1 at 78-79 [237]-[239] and *Brownlee v The Queen* (2001) 207 CLR 278 at 313 [104]. See also *Australian Agricultural Co v Federated Engine-Drivers & Firemen's Association* (1913) 17 CLR 261 at 278-279 per Isaacs J, *Victoria v The Commonwealth* (1971) 122 CLR 353 at 378 per Barwick CJ; *Buck v Bavone* (1976) 135 CLR 110 at 137 per Murphy J.

In the Court of Appeal, there were regular meetings of the judges. Most of these features of judicial practice were introduced into the High Court by Gleeson CJ, with the agreement of the Justices. Now, after virtually every case, there is a conference in the chambers of the presiding Justice to discuss the issues and tentative impressions. Differences are identified. Agreements of reasoning are reinforced. One judge may be invited to write the first draft of reasons.

The differences from the New South Wales practice include that there is no settled assignment, in advance, of this duty. Nor is there an equal sharing of responsibilities that was a feature of the system in the New South Wales Court of Appeal. Assignments in the High Court are much more chancy, despite the fact that books on the Supreme Court of the United States show how ardently the Justices hoped, or even lobbied, for the privilege of writing for the Court in particular cases. The equity of the Court of Appeal provision for the sharing amongst all judges of big and small cases, important and routine, interesting and boring and specialist and generalist cases is missing in present arrangements in the High Court. This, I think, adds to the tendency of the Justices to write separately.

In addition to the post-hearing conferences, monthly meetings have now been instituted in the High Court to review the hearings completed during the immediately preceding sitting. These conferences have also enhanced the number of joint reasons. They allow those writing the first draft to take into account diverse opinions as may be

expressed. There are limits to the extent to which this can happen. Judges of a minimalist writing inclination may tend to focus exclusively on a relevant *text*. Judges of a disposition to recognise and identify policy choices may tend to solve legal problems by reference to *context*. This sometimes makes the marriage of individual reasoning difficult, or impossible, to secure.

My own adherence to contextualism, both in solving ordinary legal problems⁷⁰ and those arising under the Constitution⁷¹, affects the way I reason, and hence the way I write my conclusions. In a court of our tradition, comprised of robust individuals, even allowing for substantial give and take, Court opinions remain elusive. I should say that, where there is a possibility of joining in the reasons of others, my experience is that colleagues will normally accommodate (within reason) suggested amendments both of content and style. Sometimes, as in the New South Wales Court of Appeal, it is necessary, to invoke a phrase that Priestley JA used, to "grey the text", so as to disguise the author and to reduce the strong colours of individual expression.

In the High Court, Callinan J has a settled approach to the presentation of his reasons. Knowing, as he does, that outcomes often spring from the facts, he tends to state the evidence in more detail than

⁷⁰ See eg *Palgo Holdings* (2005) 79 ALJR 1121 at 1129 [37].

⁷¹ See eg *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1132 [174].

others and also to set out more of the legislation. My own reasons, over the past decade, have increasingly embraced headings and subheadings, with the object of facilitating communication⁷². In his reasons, Heydon J follows a similar style and presentation as, sometimes, did McHugh J. Improving the layout of reasons is an important challenge for judicial writers.

Given the high level of concurrence of philosophy and values amongst most of the present Justices of the High Court, a higher number of joint reasons amongst them might be expected. Yet the federal character of the Court, and the fact that the Justices normally work between sittings in their respective home cities represent practical factors that tend to reduce the number of joint opinions. Nevertheless, progress has been made. For those who dislike multiple opinions, it is necessary to appreciate the burden that the writing of judicial reasons imposes. Concurrence cannot be forced. Where there is dissent, under our system, it must be explained. And it is often out of dissent and diverse reasoning that progress is made in the law.

Dissent: The level of dissent in reasons in the High Court of Australia has increased in the last decade. The proportion of my own

⁷² M Groves and R Smyth, "A Century of Judgment Style: Changing Patterns in Judgment Writing on the High Court of Australia" (2004) 32 *Federal Law Review* 256; see C Moisisdis, "Dispelling Misconceptions About Appellate Judgments" (2004) 78 *Law Institute Journal* (Vic), 70.

dissents has increased significantly. The number is highest in constitutional cases⁷³. Depending on the cases classed as constitutional, the proportion in 2004 was 52.64% or 10 cases out of 19⁷⁴. Taking all cases in 2004, I dissented in 38% of the dispositions of all proceedings⁷⁵. The closest in dissent rates, both in constitutional cases and generally, is Callinan J with 22.45% of all decisions being in dissent. Although we sit together amicably in the Court, we represent polar legal philosophies and values. This is often reflected in our reasons.

Of course, the level of dissent depends upon whom one is dissenting from. Looking back, had I served in the Mason Court, I doubt that I would have dissented very often from the then majority of the High Court. There the dissenters would have been some of my current colleagues who enjoy high participation rates in the present majorities. To check whether I was simply "taking delight in being contrary"⁷⁶, I

⁷³ A Lynch and G Williams, "The High Court on Constitutional Law: The 2004 Statistics", (2005) 28 *University of New South Wales Law Journal* 14 at 22; cf (2004) 27 UNSWLJ 85.

⁷⁴ Gleeson CJ was 21.06% (4 cases); McHugh J 16.67% (3); Gummow J 10.53% (2); Hayne J was 0; Callinan J 22.22% (4 cases of 18) and Heydon J was 15.79% (3).

⁷⁵ Gleeson CJ was 8% (4 of 50); McHugh J was 13.73% (7); Gummow J was 3.92% (2); Hayne J was 2.17% (1); Callinan J was 22.45% (11) and Heydon J was 8.16% (4).

⁷⁶ A Lynch, "Taking Delight in Being Contrary - Worries About Being A Loner or Simply Indifferent: How Judges Really Feel about Dissent" (2004) 32 *Federal Law Review* 311. This is a review of C R Sunstein, *Why Societies Need Dissent* (2003).

checked my levels of dissent as President of the New South Wales Court of Appeal. I found that, in the last year I served in that office (1995) there were 234 cases in which I gave substantive reasons. In 198 of these (84.6%) I was in the majority. In a very high proportion of such decisions, I gave the opinion of the entire Court or secured the concurrence of one other judge, without additional comment. Thus, in the Court of Appeal, I had a level of dissent roughly equivalent to that of McHugh J in all cases in the High Court in 2004 (13.73%).

The merits of individual dissents, and their impact (if any) on future legal developments, remain for others to judge and for the future to decide. In his early days, the late Chief Justice of the United States (Rehnquist CJ) was known as the "Lone Ranger" because he was so often the sole dissenter in that Court⁷⁷. He did not much change his values or approach to law. But during his service of thirty-three years, the Supreme Court's composition altered to include more judges with an approach to legal controversies similar to his own. This is what can be achieved in a system with life tenure if the judge enjoys good health, determination and the replenishment of new colleagues.

The amendment to the Australian Constitution requiring Justices of the High Court to retire at the age of 70 promotes inter-generational

⁷⁷ Charles Lane, *Washington Post* 4 September 2005, A1, "Chief Justice William H Rehnquist Dies".

change⁷⁸. However, it diminishes the chances that a dissident will live, like Rehnquist CJ, to see his or her opinions vindicated. Whether this happens or not in some cases, or many, is not ultimately of concern to me. What is of concern is that I should state honestly, and as clearly as I can, my own conclusions and, where relevant, identify the reasons that lead me to a view different from the majority of the Court, either in outcome or reasoning.

Especially in constitutional cases (but elsewhere as well) this course of conduct allows practising lawyers, students and citizens to make their own judgments. Where my dissent seems convincing, in a matter susceptible to statutory reform, it has sometimes led to change⁷⁹. Writing dissents can be burdensome. I seek to make the reading less arduous for readers by deleting from my reasons any unnecessary repetition of statements of the evidence, legislation or other materials adequately covered in the reasons of colleagues. I have little time for this form of repetition. Certainly, it is a continuing practice that the High Court should tackle. Sometimes such repetition arises from the hope or expectation of the writer that a proffered draft will become the opinion of the Court which should therefore be full and self-contained. Where this aspiration is dashed, pride of authorship should give way to the blue

⁷⁸ Constitution, s 72.

⁷⁹ Such as the *Pawnbrokers and Second-hand Dealers (Amendment) Act 2005* (NSW) enacted immediately following *Palgo Holdings* (2005) 79 ALJR 1121 to reverse the effect of that decision: noted (2005) 17 *Judicial Officers Bulletin* (NSW), 52.

pencil. Yet, from a practitioner's point of view, a dissent can occasionally encourage insights into the role that policy choices make in appellate decision-making, to the complexity of many legal and factual problems and to the honesty of our judicial system and the commitment of its members to transparency in reasoning.

Venue: From the earliest days of the High Court of Australia, it sat on circuit in State capitals and it still does. Initially, most of the Justices resided, during the circuit, in the principal gentlemen's club in the city of the circuit. Temporary chambers were found for them in the State Supreme Court building - ousting the Supreme Court judges for a time in order to make way for the annual High Court caravan.

At the time of my appointment to the High Court in 1996 this tradition continued, although Gaudron J vetoed clubs which allowed no women members. But gradually, the use of Supreme Court buildings declined as new federal court facilities became available in Australia's State capitals.

The last mainland Supreme Court which had to displace its judges annually, for a week in August, was the Supreme Court of South Australia. In August 2005, the High Court conducted its last sitting in the Banco Court in the State court building in Adelaide. A ceremony was held to mark the occasion. In future, in Adelaide, as already in Melbourne, Brisbane, Perth and Canberra, a federal facility dedicated to the High Court will be used. In Sydney, the Court sits in the joint

Federal-State Law Courts Building. Only in Hobart, on the occasions when there is sufficient business to warrant a sitting, does the High Court still occupy chambers and use a courtroom in the State court building.

This change of venue is partly symbolic. It reflects the growth of federal courts and jurisdiction in Australia and the existence now of a significant number of federal judges. The self-image of the High Court as a court of appeal for the State supreme courts stamped on the Federal Supreme Court in Australia⁸⁰ an attitude to itself as a legal and judicial body, that greatly affected its approach to its work, including its constitutional work. It will be important for the High Court to continue social, intellectual and educational links with the State judiciary. A retreat of the Court into an isolationist attitude within federal buildings, would be undesirable.

Communication: Although the High Court of Australia is one of the three pillars of federal government in the Commonwealth, attention to (and knowledge of) its work in the community remains very low. This is so despite the great interest and importance of many of its cases, and not only constitutional cases.

⁸⁰ Constitution, s 71.

Capturing the attention of the Australian media seems to depend on the case having some party political angle or some feature that makes it ripe for entertainment or public outrage. These are elements of the modern communications system. They exist in the context of decisions of the High Court⁸¹, including in my time⁸², that have expressed constitutional protections for free speech as necessary for the representative democracy created by the Constitution.

During the High Court's centenary celebrations in 2003, commemorative events and a national seminar, attracted significant attention to the Court and its work⁸³. However, for the most part, coverage is abysmal, unpredictable and unanalysed. Unlike the United States and the United Kingdom, the Australian media have relatively few legal correspondents. They are precious as hen's teeth.

In an attempt to correct this situation, the High Court has, in the past decade, implemented a programme of outreach. The reasons of the Court are posted on the internet, available to all within minutes of

⁸¹ eg *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106; *Theophanous* (1994) 182 CLR 104.

⁸² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Roberts v Bass* (2002) 205 CLR 1; *Coleman v Power* (2004) 78 ALJR 1166.

⁸³ M D Kirby, "A Blaze in the Sky - The Centenary Conference of the High Court of Australia" (2004) 6, *University of Notre Dame Uni Law Review* 1.

delivery. Media neutral presentation of reasons has been introduced⁸⁴. A public information officer (Ms Fiona Hamilton) has been appointed. Her duties include the distribution of media summaries of cases. These have led to some enhancement of reportage, and of accuracy of reports, especially in the print media. Securing informed analysis in the electronic media remains a great challenge. Although I would have no objection to the introduction of a dedicated television channel to cover High Court argument (as in the Canadian Supreme Court), most of the present Justices are not favourable to this or to real time internet coverage. The printed transcripts are posted shortly after each day's hearing. However, for most citizens, the proceedings and outcomes in the Court remain a complete mystery.

There are some who are untroubled by this feature of Australian governance. They point to the ways of the past which were even more closed and unapproachable than the present. On the other hand, concerted campaigns in the media against the judiciary in general, and High Court Justices in particular, threaten to undermine the community confidence upon which the Judicature necessarily relies. Improving outreach still further is therefore, in my view, deserving of high priority.

Parliamentary standing orders exist to protect serving judges from attacks in the legislature, except where they are associated with motions

⁸⁴ Beginning with *The Queen v Swaffield* [1998] HCA 1; (1998) 192 CLR 159.

for their removal on constitutional grounds⁸⁵. In recent years, these standing orders, and the constitutional conventions they reflect, have not always been observed. Consistent with convention and their duties, it is not always easy for judges to defend themselves from such attacks.

The holders of the office of Federal Attorney-General over the past decade have rejected the longstanding convention that judges will routinely be defended from attacks by the chief law officer. That tradition, so far as it concerns the High Court of Australia, seems now to have been abandoned. Once the Attorney-General renounces an independent role to defend the courts and the judges, that Minister's special status for the provision of *fiats* and the grant of standing before the courts necessarily comes under close scrutiny⁸⁶. If the Attorney-General is no more than another politician, it is impossible to look to him or her to uphold justice, including against fellow politicians or other hostile sources. This development in Australia's legal culture has been noted in the High Court decisions in recent years⁸⁷.

⁸⁵ Constitution, s 72(ii). On parliamentary conventions see T Erskine-May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (10th ed, 1893), Bk I, 263, Ch IX.

⁸⁶ *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 402 [51], 422-423 [109]-112], 451 [210].

⁸⁷ See eg *Victoria v The Commonwealth and Hayden (Australian Assistance Plan Case)* (1975) 134 CLR 338 at 383, per Gibbs J. His Honour said that it would be "visionary" to rely on such a source to defend the rule of law. A similar change appears to have occurred in the United Kingdom in the Office of the Lord Chancellor: D Woodhouse, "Judges and the Lord Chancellor: Independence and Accountability" (2005) 16 *Public Law Review*

As Latham CJ once explained to Mussolini, the High Court has no battalions to defend itself or to enforce its orders. It must rely for funding on appropriations proposed by the Executive Government and made by the Parliament. Our institutions therefore depend on a knowledge and appreciation of their history and observance of the derived basic rules involving mutually respectful relationships in the service of the people⁸⁸.

Benefits of office: The salaries, allowances and benefits of the Justices of the High Court have increased during my service on the Court. The judges are well provided with chambers in Canberra and in their home States, each with a personal assistant and two research associates, with travelling allowances and an allowance for accommodation in Canberra, postal, telephone, transport and other benefits. The present salary of the Chief Justice of the High Court is \$382,110 together with an allowance of \$25,000 for Canberra accommodation. The salary of the Justices is \$346,760, together with the Canberra allowance⁸⁹.

227 at 233. This is addressed in the *Constitutional Reform Act 2005* (UK), s 17(2).

⁸⁸ *Re Reid & Anor; Ex parte Bienstein* (2001) 182 ALR 473 at 478-9 [23]-[27].

⁸⁹ *Australia, Remuneration Tribunal, Determination 2005/11 Judicial and Related Officers*.

New taxation arrangements introduced in 1997, have affected for future appointees to the High Court, the benefits of pensions payable under the *Judges' Pensions Act* 1968 (Cth). This change was described in *Austin's Case*⁹⁰. In deference to the constitutional prohibition on diminishing remuneration of federal judges during continuance in office⁹¹, no change was made to the non-contributory pensions of the Justices already appointed. Although, within the public sector, the salary and allowances of the Justices are very high (and enjoy a relativity to those of judges and members of other courts and tribunals throughout the land) they are not high by comparison to the salaries paid to leading members of the practising legal profession from whom the Justices are typically drawn. The rewards of office, which include the variety and interest of the work, its manifest importance for the nation and the honour of service on the final court, more than compensate for lowered financial rewards. The Justices are scarcely reduced to poverty.

International law: One of the greatest intellectual challenges before the High Court of Australia (and other final courts) over the past decade has been presented by the need to accommodate the Court's

⁹⁰ (2003) 215 CLR 185 at 234 [72] referring to the *Superannuation Legislation Amendment (Superannuation Contributions Tax) Act* 1997 (Cth), Schedule 5, Item 21.

⁹¹ Constitution, s 72(ii).

legal doctrine to a world in which international law (including the international law of human rights) is of growing importance⁹².

For years, I have expressed the view that international law, especially that relating to human rights, may assist, as a contextual element, in the interpretation of the Constitution, the construction of ambiguous legislation and the filling of gaps in the common law. I have done this since my time of service on the New South Wales Court of Appeal⁹³. In the High Court, virtually from the start, I have referred to the utility of such sources in the interpretation of the Constitution⁹⁴.

Although parallel debates are taking place in other final courts, sometimes with an express clash of values as between their several members for the most part, these views have not been taken up by other Justices of the High Court⁹⁵. Occasionally, a particular aspect of the

⁹² eg H H Koh, "International Law as Part of our Law" (2004) 98 *American Journal of International Law* 43 at 47; M D Kirby, "International Law - The Impact on National Constitutions" (7th Annual Grotius Lecture) (2005) 21 *Am U Int'l Rev* (forthcoming).

⁹³ See eg *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414; *Young v Registrar, Court of Appeal (NSW) [No 3]* (1993) 32 NSWLR 262.

⁹⁴ *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-658; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-419; *AMS v AIF* (1999) 199 CLR 160 at 180; cf *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 602 [172]ff, esp 607 [186]; *Re Minister for Immigration; Ex parte Ame* (2005) 78 ALJR 1309 at 1334-1335 [121]-[129].

⁹⁵ See eg *Atkins v Virginia* 536 US 306 at 316 n 21 (2003); *Lawrence v Texas* 539 US 558 at 576-577 (2003); *Grutter v Bollinger* 539 US 306 at 344 (2003); *Roper v Simmons* 543 US (2005); 125 S Ct 1183 at 1200, 1216, 1226 (2005).

reasoning that I have favoured has resulted in a comment from one of my colleagues⁹⁶. Yet mostly, there was silence.

This silence was broken in *Al-Kateb v Godwin*⁹⁷. There, McHugh J expressed the opinion that my approach represented doctrinal heresy⁹⁸:

"The claim that the Constitution should be read consistently with the rules of international law has been decisively rejected by members of this Court on several occasions. As a matter of constitutional doctrine, it must be regarded as heretical".

Naturally, I engaged with this viewpoint and expressed the contrary opinion, calling upon recent discussion of the same issue in the Supreme Court of the United States⁹⁹:

"... [O]pinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail. They will be seen in the future much as the reasoning of Taney CJ in *Dred Scott v Sandford*¹⁰⁰, Black J in *Korematsu [v United States]*¹⁰¹ and

⁹⁶ *Coleman v Power* (2004) 78 ALJR 1188 at 1171 [17]; cf at 1209 [240].

⁹⁷ (2004) 78 ALJR 1099. See also *Western Australia v Ward* (2004) 213 CLR 1 at 389 per Callinan J.

⁹⁸ (2004) 78 ALJR 1099 at 1112 [63].

⁹⁹ (2004) 78 ALJR 1099 at 1135 [90].

¹⁰⁰ 60 US 393 (1856).

¹⁰¹ 323 US 214 (1944).

Starke J in *Ex parte Walsh*¹⁰² are now viewed: with a mixture of curiosity and embarrassment ... The fact is that it is often helpful for national judges to check their own constitutional thinking against principles expressing the rules of a 'wider civilisation'¹⁰³.

The interchange between McHugh J and myself may, or may not, be followed up immediately. However, it is now in the law reports. It will influence future generations. The universality of this debate, in the courts of many countries, is a sign that Australian law will not be cut off from it.

I am confident that our accommodation between municipal and international law that I favour, and predict, will come to pass. I accept that it may require subtle adjustments of legal and constitutional doctrine¹⁰⁴. But it would be a misfortune if Australia were immured from such a profoundly influential source of legal ideas and analysis. Techniques of judicial reasoning are available. International law is now part of the context of the world in which Australian law operates. Its rules are not binding, as such, unless incorporated in domestic law by a lawmaker with the necessary powers¹⁰⁵. Nevertheless, international law

¹⁰² [1942] ALR 359 at 360 cited by McHugh J in *Al-Kateb* at [59].

¹⁰³ *Lawrence v Texas* 539 US 558 at 576-577 (2003).

¹⁰⁴ D Hovell and G Williams, "A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa" (2005) 29 *Melbourne University Law Review* 95; H Charlesworth, "the High Court on Constitutional Law: The 2004 Term" (2005) 28 *University of New South Wales Law Journal* 1 a 10.

¹⁰⁵ *Minister for Immigration v B* (2004) 78 ALJR 737 at 769 [176]-[177].

will increasingly influence contemporary lawyers and future generations. Perhaps this is why students and scholars in law schools in Australia tend to perceive its merits more clearly than many barristers and judges presently do.

Personal matters: There is one further change, since my appointment in 1996, that I have left to last. When I gave my farewell speech as President of the New South Wales Court of Appeal, in February 1996, I made no specific acknowledgment of Johan van Vloten, then my partner for nearly 27 years. He had to make do with a reference to "family and loved ones"¹⁰⁶. I used the same words when I was welcomed to the High Court¹⁰⁷, although on that occasion I made reference to the need to recognise that the "good old days" in the law had not always been so good for various groups in Australia, including homosexuals.

My partner and I had never denied our relationship. However, a point was reached when it became appropriate to be more explicit in the acknowledgment of someone who had contributed so much to my life¹⁰⁸. The past attitudes of the law towards sexual minorities was an affront to

¹⁰⁶ (1990) 70 ALJ 71 at 273.

¹⁰⁷ (1996) 70 ALJ 276.

¹⁰⁸ M D Kirby, "Seven Ages of A Lawyer" (2000) 26 *Monash University Law Review* 1 at 11-12.

fundamental human rights¹⁰⁹. The law throughout Australia has now deleted the criminal offences that oppressed and stigmatised homosexual and bisexual men. Yet attitudes will only change when human sexual diversity is acknowledged and accepted.

My partner comes to all High Court functions. He attends luncheons with the Queen, dinners with the Governor-General and the Prime Minister, functions at State Government Houses, as well as Court formal and social activities. People are getting used to it. Although I am a constitutional office-holder, he is not protected under federal law as a spouse or *de facto* spouse of a Justice would be¹¹⁰. His open participation in my public life is proper and rational. Hiding the truth because some people do not wish to face it is over. Most people hope for such an intelligent and enduring relationship in life. But as judges and barristers know from life and work, better than most, finding it is elusive. When it occurs, it is invaluable. Law is important. Life and love are even more so. For the stressful, pressured work of a professional lawyer, a loving and supportive home life is specially precious.

¹⁰⁹ *Toonen v Australia* (1994) 1 *Int Human Rights Reports* 97 (No 3); cf *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Norris v Ireland* (1998) 13 EHRR 186 and *Modinos v Cyprus* (1993) 16 EHRR 485.

¹¹⁰ The reference is to the *Judges' Pensions Act* 1968 (Cth), ss 4AC, 7, 8.

A FORTUNATE SERVICE

Much has changed in a decade. The High Court of Australia remains an institution of integrity, learning and unwavering professionalism. The forces of continuity are great. That is how it should be in a final and constitutional court. But, as I have shown, there are also forces for change. Most change is for the better. In any case, change is part of the orderly renewal of our institutions and society.

To serve as a Justice of the High Court of Australia is a privilege. As I walk to work in Canberra, along the lake, viewing successively the changing leaves of autumn and the blossoms of spring, I reflect on the good fortune that I share with my colleagues. We differ from time to time. Yet we agree most of the time. We are all experienced judges. Even when we disagree strongly, we share a civil relationship, which is an improvement on the experience of some of our predecessors¹¹¹. We express our opinions so that our fellow citizens, lawyers, scholars and others may enter into our minds and judge for themselves the accuracy and persuasiveness of our reasoning. Fortunate is the land that can boast of such a court in its constitutional arrangements. Fortunate are those few, including at the Bar, who are chosen to serve in it.

¹¹¹ C Lloyd, "Not with Peace but With a Sword - The High Court Under J G Latham" (1987) 11 *Adelaide Law Review* 175.

The challenges of the future are likely to be different from, and in some ways more difficult than, the challenges of the past. They will include complex bioethical questions¹¹²; the growing impact of international law, including the law on human rights; re-charting the law of obligations; defining the conditions of long term or indefinite official detention; examining vigilantly enhancements of official powers; addressing departures from due process and civil liberties; and limiting erosion of the essential checks and balances provided by the Constitution¹¹³.

With each passing decade, the Court must earn anew its high by the wisdom of its decisions; the quality of its reasons; the foresight of its conclusions; and the contribution that the Court makes to the good governance of the Commonwealth.

¹¹² *Cattanach v Melchior* (2003) 215 CLR 1; 199 ALR 131; *Harriton v Stephens* [2005] HCA (decision reserved).

¹¹³ Cf *Combet v Commonwealth* [2005] HCA 61.

AUSTRALIAN BAR REVIEW

TEN YEARS IN THE HIGH COURT - CONTINUITY & CHANGE

The Hon Justice Michael Kirby AC CMG