scarcely open to legislative variation. There is much to be said for simply repealing section 23 altogether, and leaving it to the judicial branch to work out its own solution. If, in a particular case, all attempts at resolution were to fail and the Court were to remain evenly divided, then, in effect, no decision could be given and, of necessity, the relevant application or appeal must fail. The **criticism** that this situation would attract is likely to ensure that its occurrence would be rare.

Michael Coper

Tipstaves. The term 'tipstaff' was defined in 1899 in Arthur English's *A Dictionary of Words and Phrases used in Ancient and Modern Law* as an 'officer attendant on judges of the King's Courts to arrest those committed. He carries a staff tipped with silver. An officer of a court who preserves order, attends juries and jurors, serves processes, &c'. The more recent *Butterworths Australian Legal Dictionary* defines tipstaff as a 'member of the personal staff of the judge with the function of assisting the judge and retrieving legal materials required by the judge'.

Griffith, **Barton**, and **O'Connor** each had tipstaves. However, in 1905, **Symon**, then **Attorney-General**, decided to abolish the tipstaves' positions because the Justices refused to allow their tipstaves to carry out the duties of **Court Crier**. He proposed that instead of three tipstaves there would be an officer designated 'High Court Usher', who would perform the duties of Court Crier and Court Attendant, and keep order in court. Fortunately for the Justices and their tipstaves, **Isaacs**, who replaced Symon as Attorney-General, did not consider that the interests of the community would be served by the abolition of tipstaves (see **Strike of 1905**).

The designation of tipstaff was used for some years, until it was changed to 'Justice's Assistant', apparently for public service administrative purposes. In 1945, there was ongoing debate between the Attorney-General's Department and the Justices as to whether Justices' Assistants should in future be selected from within the public service and be under the *Public Service Act*, or continue to be personal appointments of the Justices. **Starke** urged **Latham** to retain the right of the Justices to appoint persons of their choice from outside the public service. At the same time, he suggested that the nomenclature of 'Justices' Assistants' be changed back to the 'old legal term tipstaff'. This had taken place by 1950.

Tipstaves were recruited on the recommendation of other judicial acquaintances or friends of the Justices. Usually, they came from a background in the armed services or the police force. They were exclusively male until 1976, when **Murphy** appointed the first female tipstaff. Tipstaves were appointed at the pleasure of the Justice. When a Justice retired or died in office, the tipstaff offered his or her services to the new Justice, which was usually accepted.

The duties of the personal staff of the Justices varied between the **chambers**. Traditionally, the tipstaff would attend to the personal needs of the Justice. This involved providing refreshments for the Justice and guests, running errands, and assisting the Justice to robe. The tipstaff was also responsible for ensuring that all relevant authorities listed for **citation** by **counsel** were in court for hearings. When counsel referred to the cited case, the tipstaff would hand the report to the Justice, open at the relevant page. On **circuit**, the tipstaff had the responsibility of transporting perhaps five or six suitcases containing the Justice's personal luggage and judicial robes, and the **appeal books** for the cases to be heard. As Justices invariably worked on judgments while they were on circuit, any material that a Justice was using in the preparation of judgments was also packed in a suitcase.

Gaudron on her **appointment** chose to have two legally qualified **associates** to share the duties with the Justice's personal assistant, instead of the traditional chambers of associate, personal assistant, and tipstaff. This practice has been adopted by all Justices except **Gummow**, who retained Russell Slatter, a tipstaff with over 20 years service, and previously with **Mason**.

Rebecca Craske
Frank Jones

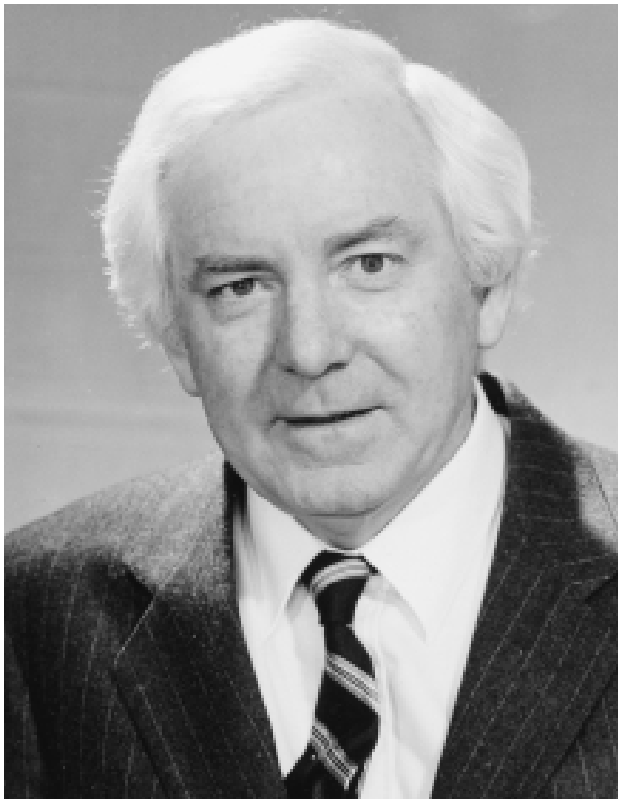
Toohey, John Leslie (*b* 4 March 1930; Justice 1987–98), was a Justice greatly concerned to develop the law to reflect justice and morality within the boundaries of the **rule of law**. He was born in countryside WA to publicans Albert and Sylvia Toohey. He grew up in the country (Meekatharra, Kojonup, and Lake Grace) and was the eldest child in his family, with two younger sisters and one younger brother.

Toohey undertook his secondary schooling at a Catholic college, St Louis (now John XXIII) College, and his tertiary education at the University of WA. He excelled in law and graduated in 1950 (later completing his BA in 1956) with first-class honours, winning the FE Parsons Prize (for the most outstanding graduate) and the HCF Keall Prize (for the best fourth-year student). Toohey undertook articles of clerkship with David Walsh and then with John Lavan. Following a short period at Lavan & Walsh, at only 24 he founded Ilbery & Toohey with John Ilbery.

Toohey rapidly established his pre-eminence in the Perth legal profession, particularly in **taxation** and **land law**. His first appearance in the High Court, as leading **counsel** in *Commissioner of Taxation v Finn* (1961), came at the age of only 31. In 1967, at the age of 38, he joined the WA Independent Bar and was appointed a QC the following year. Appointments as President of the Bar Association of WA and President of the Law Society of WA followed very shortly thereafter.

By 1973, Toohey was established as one of the leading QCs at the WA Bar, appearing often in the High Court in areas including **criminal law**, **contract law**, and **restitution**. His interest and strength in **property** law saw him keen to pass on that knowledge and he taught Real Property at the University of WA while practising. He was also the obvious choice to argue one of the best known WA property law cases before the High Court, *Adamson v Hayes* (1973), involving the vexed section 34 of the *Property Law Act* 1969 (WA).

His compassion and strong sense of civic duty saw him, in 1974, leave Perth and his lucrative work as a senior silk to establish the inaugural Aboriginal Legal Office in Port Hedland. His interests in Aboriginal law and society were powerfully forged from this time onwards. His work often involved representing Aboriginal plaintiffs and defendants (including his appearance as senior counsel for **Aboriginal peoples** at a Royal Commission inquiring into relations between Aboriginal people and police), so that when on 7 April 1977 Toohey was appointed the first Aboriginal Land Commissioner for



John Toohey, Justice 1987–98

the Northern Territory (concurrently with an appointment as a judge of the **Federal Court** and of the Supreme Court of the Northern Territory), he brought with him an acute understanding of Aboriginal issues.

During his term as Aboriginal Land Commissioner (1977–82), Toohey heard 15 claims under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) extending over country north to the Finnis River, east to the Gulf of Carpentaria and south to Uluru. At the time, these claims were controversial; the legislation governing land hearings and **native title** claims in the Northern Territory was unique. As Commissioner, Toohey had wide statutory powers and appeals from his decisions went straight to the **Full Court** of the High Court. A number of such appeals were made during Toohey's time as Commissioner, and in the *Commonwealth Law Reports* these cases bear his name (*R v Toohey; Ex parte A-G (NT)* (1980); the ***Northern Land Council Case*** (1981); *R v Toohey; Ex parte Meneling Station* (1982); *R v Toohey; Ex parte Stanton* (1982)). Only one of these decisions was reversed. Even then, in the High Court, **Wilson** said there was 'good ground for saying that the Commissioner faithfully applied the relevant law so far as it has been expressed previously in Australia'.

As Aboriginal Land Commissioner, Toohey was widely respected. Ian Barker QC described one occasion in the harsh Northern Territory heat with Toohey 'leading us like Moses who led the 12 tribes of Israel through the wilderness with a cheerful fortitude which did not ever leave him'. At the conclusion of his term as Aboriginal Land Commissioner, Ross Howie, a barrister who often appeared for Aboriginal claimants, wrote of Toohey's 'sensitivity to historical injustice', his 'genuine interest', and 'great patience'. He wrote that 'it was hard not to be impressed by the Judge's negotiating cheerfully with an old man to share the trunk of the only tree as a back rest'.

On 6 February 1987, Toohey was sworn in as a Justice of the High Court. At the same ceremony, **Mason** was sworn in as **Chief Justice** and **Gaudron** as another **puisne Justice**. His **appointment** followed those of **Deane** and **Brennan**, both of whom had sat regularly with him on the Federal Court, particularly after Toohey finished as Aboriginal Land Commissioner in 1982. Toohey's appointment was not unexpected. There had been much speculation in the **media** that he would be appointed, and when it happened it was widely applauded. One consequence was that he had to resign from his position as a member of the Constitutional Commission, which had only recently begun its work.

On the High Court, Toohey's judgments on the **common law** reflected a judicial philosophy of common law development consonant with notions of justice and morality. He was a member of the majority in ***Dietrich v The Queen*** (1992), concerning the common law right to a fair trial; *Cheatle v The Queen* (1993), affirming jury unanimity as an essential element in the constitutional guarantee of **jury trial** in Commonwealth cases; and *R v Swaffield* (1998), reviewing the exclusion of **evidence** for 'unfairness', particularly in relation to an accused person's right to silence. He dissented in *Carter v Managing Partner Northmore Hale Davy & Leake* (1995), where he and Gaudron would have held that the right of accused persons to documents that might fairly exculpate them prevails over legal professional privilege.

However, Toohey was always aware of the constraints of **precedent** and the rule of law. In *Newcrest Mining v Commonwealth* (1997), Gaudron, **Gummow**, and **Kirby** would have been prepared to overrule *Teori Tau v Commonwealth* (1969), which had held that section 51(xxxi) of the Constitution (requiring 'just terms' for a governmental **acquisition of property**) did not apply in the **territories**. Toohey agreed with their reasoning but declined to **overrule** the decision, recognising that it would be 'a serious step to overrule a [High Court] decision which has stood for nearly 30 years and which reflects an approach which may have been relied on in earlier years'. Yet he pointed out also that the primary holding in *Newcrest* (that a Northern Territory acquisition was also a Commonwealth acquisition, to which the requirement of 'just terms' did apply) made it unlikely that *Teori Tau* would ever again have any practical impact.

The pinnacle of Toohey's work on the High Court came with his judgments in ***Mabo*** (1992) and ***Wik*** (1996). They afforded an opportunity to develop the common law in an area never before directly considered by the High Court. They concerned legal issues of property and issues of fundamental importance to indigenous people. Toohey brought to these judgments not only a wealth of knowledge of property law but also a lifetime of experience and understanding of Aboriginal people. His judgments are powerful and compelling. In concluding in *Mabo* that the traditional native title of indigenous people, and in particular the Meriam people, was recognised by the common law of this country, Toohey was joined by five other members of the Court in the most momentous decision of the High Court during his

time. In some respects, still not fully resolved, his judgment (supported by Deane and Gaudron) went further than that of Brennan (supported by Mason and **McHugh**; see **Fiduciary obligations**). In ***Kruger v Commonwealth*** (1997), he agreed with Gaudron that the history of the 'stolen generations' of Aboriginal children might in substance raise issues of an **implied constitutional right** to freedom of **movement** and association, and of the **express constitutional right** to freedom of religion; and he added a reference to the possible relevance of the implied guarantee of **equality** that he and Deane had adumbrated in ***Leeth v Commonwealth*** (1992). But unlike Gaudron, who felt able by invoking the freedoms of movement and association to hold invalid the relevant provisions of the Aboriginals Ordinance 1918 (NT), he did not feel able to make a conclusive finding of invalidity on the basis of the limited materials before the High Court.

The decisions in *Mabo* and *Wik*, together with his judgments in constitutional decisions recognising 'implied rights' (or, more properly, 'freedoms') in the Constitution (see, for example, ***Free Speech Cases*** (1992); *Cunliffe v Commonwealth* (1994); *McGinty v WA* (1996)) led to **criticism** of Toohey from sections of the media for judicial '**activism**'. In particular, in *McGinty*, he and Gaudron held that, although the conception of **democracy** implied in the electoral provisions of the Constitution could have no impact on electoral distributions for purposes of state elections, a similar conception implied in the state *Constitution Act* 1889 had evolved, by 1987, to a point where continued inequalities in electoral districts could no longer be valid. In *Leeth*, his **joint judgment** with Deane had propounded a far-reaching view of 'equality' that proved particularly controversial; and at a conference in Darwin on 4–6 October 1992, within days of the handing down of judgments in the *Free Speech Cases*, he had argued (in a speech later published in 1993) that a court 'established as guardian of a written constitution within the context of a liberal-democratic society' might need to act more vigorously 'to protect core liberal-democratic values' and the rule of law, in an age when 'parliaments are increasingly seen to be the de facto agents or facilitators of executive power, rather than bulwarks against it'. Moreover, he had linked this possibility expressly with 'a revival of **natural law** jurisprudence—that for law to be law it must conform with fundamental principles of justice'.

Shortly before his **retirement**, Toohey was asked what his reaction was to the media references to him as an 'activist'. Toohey replied 'almost none'. He stated that judges must 'create law', and that this is done every time a judge changes or develops the law (see **Law-making role**); but that 'references to activism use the word "change" … as a pejorative term'. Toohey argued that a decision *not* to change or *not* to develop the law is just as 'activist' as a decision to change the law and can have consequences just as dramatic.

In retrospect, it is this very 'activism' that is Toohey's legacy to the law. If Toohey had to be described in a single word, the most fitting would be 'compassionate'. If it were necessary to point to one area of his work in which he had the most impact during his career as a lawyer, Commissioner, and Justice, it would be the legacy his compassion created for Aboriginal people.

James Edelman
Natalie Gray

Further Reading

James Edelman and Natalie Gray, 'A Short Biography of John Leslie Toohey AC: Justice of the High Court of Australia 1987–1998' (1998) 8 *JJA* 109

Ross Howie, 'Mr Justice Toohey Ends Term as Aboriginal Land Commissioner' (1982) 4 *ALB* 14

John Toohey, 'A Government of Laws and Not of Men?' (1993) 4 *PLR* 158

John Toohey, '"Without Fear or Favour, Affection or Ill Will": The Role of Courts in the Community' (1999) 28 *UWAL Rev* 1

Tort law. Australia enjoys the benefit of having a single **common law**, not separate common laws in each of its states (*Lange v ABC* (1997)). Much of the credit for this is due to the High Court, which has since the abolition of appeals to the **Privy Council** acted as the ultimate court of appeal for the whole country. It entertains many appeals in private law matters. Among these, cases on the law of torts have been prominent. The very first case to appear in the *Commonwealth Law Reports*, ***Hannah v Dalgarno*** (1903), though on a jurisdictional issue, arose out of an ordinary negligence claim against the Commonwealth.

When the **House of Lords** decided ***Donoghue v Stevenson*** (1932), the High Court did not immediately embrace the case with any enthusiasm (*Australian Knitting Mills v Grant* (1933)). Only **Evatt** dissented. But on further appeal, the Privy Council in 1935 recognised that the House of Lords had treated 'negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialized breach of duty'. Since then, as with common law courts everywhere, negligence cases have predominated in appeals to the High Court.

In an address to the National Press Club in 1976, **Barwick** complained that the monetary threshold (then $3000) allowing appeals as of right from state courts to the High Court under section 35 of the ***Judiciary Act*** 1903 (Cth) had become too low and that the Court should not have to deal with the many personal injury appeals with which it was faced (see also *Leotta v Public Transport Commission of NSW* (1976)). The Judiciary Act was then amended not only to increase the threshold to $20 000 but also to require special **leave** from the Court in the case of appeals relating only to the quantum of **damages** in respect of death or personal injury. This immediately reduced the number of appeals in this area. Subsequently, appeals as of right from state courts were abolished altogether, and the special leave procedure was extended to all such appeals by section 3 of the *Judiciary Amendment Act (No 2)* 1984 (Cth). Similar provisions were made applicable to appeals from federal courts. Notwithstanding these changes, the High Court has continued to find issues of sufficient importance or principle, or sufficient disagreement among the different state courts, to warrant special leave to appeal in many tort cases each year.

One aspect of Barwick's antipathy to having the Court's time wasted by appeals on negligence and damages was the Justices' attitude during that time to findings of negligence (or of no negligence) by trial judges. In this context, Barwick and several of the members of his Court were advocates of judicial restraint—appellate courts should not reverse trial decisions if the findings were reasonably open to the trial