

THE PARLIAMENT OF NEW SOUTH WALES

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INAUGURAL NEVILLE WRAN LECTURE

**NEVILLE WRAN – A LAWYER POLITICIAN – REFLECTIONS ON
LAW REFORM AND THE HIGH COURT OF AUSTRALIA**

The Hon Justice Michael Kirby AC CMG*

NEVILLE WRAN'S LIFE & TIMES

PARALLEL LIVES

This is the inaugural lecture to honour Neville Wran, one of the most successful Australian politicians and lawyers of my lifetime. Over the years I have honoured parliamentarians on all sides of politics. In Melbourne, I gave the Alfred Deakin Lecture, established by those associated with the Liberal Party of Australia. In this Parliament I gave the Earle Page Lecture established to celebrate the life of a leader of the Australian Country Party. Now, the Neville Wran Lecture established by the Australian Labor Party. Yet unlike the British, from whom we otherwise derived so many conventions of political and civic life, Australians tend to observe a highly partisan view of their politicians,

* Justice of the High Court of Australia. Personal views and opinions. The writer acknowledges the assistance of his associate, Leonie Young, in respect of some of the biographical materials.

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even after they have left politics. This is an infantile disorder. We need to grow out of it and acknowledge warmly those who have contributed to our public life.

In some respects, my life has run on a parallel course with Neville Wran's. We were both children of families, intelligent but not well off. We both grew up in the western suburbs of Sydney. We both attended selective public schools. We enjoyed the extra-curricula activities of university life. We somehow survived impeniosity as articled clerks. We did similar work – especially before industrial tribunals – at the Bar.

Neville Wran was a happy gladiator. But he then left the Bar and became one of the longest-serving Premiers of New South Wales. I went off to the judiciary, from service in which I am shortly to re-emerge. It was Neville Wran who introduced me to Lionel Murphy, his friend and professional colleague. It was Lionel Murphy who appointed me, at age 35, as the inaugural chairman of the Australian Law Reform Commission. But for that chance, in 1975 (the year before Neville Wran became Premier of New South Wales) I would probably not have gone on to serve in the Federal Court of Australia, the New South Wales Court of Appeal or the High Court of Australia. I shared with Neville Wran the motto: "*Carpe Diem!*". He seized his day in politics and made a difference. My differences have been smaller and mostly in the judiciary. But I have set something of an endurance record. So our lives share these things in common.

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My first encounter with Neville Wran happened in a curious way. At Sydney University in 1962 and 1963 I had been elected president of the Students' Representative Council. Things were more conservative in those days than they were to become for a time after 1968. Still, there were causes to be fought for. I spoke out on issues that were dear to us students. The provision of scholarships for Aboriginal students. Opposition to moves to reduce the participation of overseas students that had then lately expanded under the Colombo Plan. The pursuit of our own modest "freedom rides" to country districts - in which Charles Perkins, Jim Spigelman, I and others took part. Equal rights for women in Australian society which Peter Wilenski so strongly advocated. And later, during the Vietnam War, protests against the war and claims for conscientious objection.

My student activities during the 1960s, attracted the attention, and calumny, of the usual suspects in the media at that time. The leader of the pack was Eric Baume. Originally from New Zealand, he was an early exponent of the demonisation of enemies so as to "wedge" issues and to create of anxiety in society. Endlessly, he attacked me on his radio programme. Every time he did, my popularity amongst the university student body soared.

Baume's confrontations eventually attracted the attention of Neville Wran, by this time an up and coming Sydney barrister. He invited me to his chambers in Phillip Street and asked me about my plans. This was typical of him. He was not self-centred or narrowly

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focussed, as many lawyers are. He was interested in the views I was expressing and my career. Over the years, because those views grew out of deep values that rested on foundations similar to his own, we shared many (although not all) ideas in common.

So I am here tonight as a friend and a long-time colleague in the law, to launch this lecture series. I do so in the Parliament which he bestrode like a Colossus. If Australia became, during the period of his government, more civilised, accepting of difference and cosmopolitan, this was an outstanding contribution by Neville Wran to civic life in the State and everywhere in our country. After the law reforms introduced into this Parliament by the Wran government, many features of Australian society changed, in my view for the better.

In a series such as this, it is the obligation of the inaugural lecturer to recount something of the life and times of the person who is celebrated. For me, this is no burden because I observed, often from afar, many of the milestones in Neville Wran's life. It is proper that we should remember them. Hearing the events of his life, we should reflect again on the fact that this Parliament House in Sydney represents one of the longest-serving continuous homes of representative democracy in the world. It may sometimes be difficult for us to think of ourselves as a mature democracy. The activities that happen here have occasionally seemed immature. But it is out of our democracy that Neville Wran rose to prominence, served his fellow citizens for a time and then chose the moment of his departure to pursue other interests.

We the citizens who benefited from the contributions to public life of a fine lawyer who could have graced any Bench or made much more money at the Bar, do well to honour Neville Wran's public service. To understand that service, we need to be reminded of where it all began. That is where his values were formed.

EARLY LIFE

Neville Kenneth Wran was born in Sydney on 11 October, 1926. As a boy, he was raised in the suburb of Balmain.¹ At the time, Balmain, was typical of the working-class – a far cry from the fashionable, inner-city living it offers today.²

The young Neville commenced his education at Nicholson Street Public School. He then won a place at Fort Street Boys' High School, the oldest public school in Australia. It was the school of famous lawyers such as Edmund Barton, Bert and Clive Evatt, Garfield Barwick, Alan Taylor John Kerr, Bob Ellicott, Trevor Morling and many others.

In the aftermath of the Great Depression, the children of the Balmain working class often saw greater value in working for a living

¹ M Steketee & M Cockburn, *Wran: An Unauthorised Biography*, Allen & Unwin, Sydney, 1986 at 17 (hereafter Steketee & Cockburn)

² *ibid.*

rather than furthering their education. This was before the Chifley/Menzies Commonwealth scholarships changed educational opportunities. Despite the prevailing attitudes, Neville Wran's family, specifically his brother and two sisters, encouraged him and supported him financially to continue his studies at university.³ He attended Sydney University and gained a Bachelor of Laws degree with Honours in 1948. At that time, more perhaps than today, such a degree was a "passport for a secure future and a stepping stone to politics".⁴ In 1951 Neville Wran was admitted as a solicitor. He would eventually be called to the Bar in 1957. Recognition of his legal skills would follow with his appointment as Queen's Counsel in 1968.⁵

Earlier, at school, the young Neville Wran had displayed great talents as an actor. Treading the boards was something Fort Street taught its precocious young talent to pursue. I did it myself. The law affords many a repressed actor an opportunity to live out their true calling but with a steadier income and an ever-changing script. Neville Wran was no exception. Law and politics became for him the "substitutes for a preferred career as an actor".⁶ At university, he

³ B Dale, "The Path to Power" in T Bramston (ed) *The Wran Era*, Federation Press, Sydney, 2006 at 10 (hereafter Dale). Neville Wran was a member of the Liberal Club whilst at University.

⁴ Steketee & Cockburn at 35.

⁵ Dale at 10-11.

⁶ Dale at 12.

performed in plays and indulged his love for the stage. Despite his gifts for acting, Neville Wran eventually embraced law wholeheartedly. It was, for him, “a more stable, prestigious and lucrative profession than acting” could ever be.⁷

He proved a hard-working and diligent student. Reportedly, he was often found hunched over his books in the Law School library.⁸ He was described by one of his fellow students as “a square, conventional student”,⁹ but also “by far the best looking in our group, by far the best dressed and, in worldly terms, I always thought, by far the most ambitious”.¹⁰ Nothing wrong with ambition when properly deployed. It becomes the propulsion for getting things done. By 1951 the young and handsome Neville Wran stood on the brink of a legal career full of promise.

IN THE LAW

His first experience of life in the law was as an articled clerk to James N. Creer the Elder, senior partner of the legal firm Abbott, Tout, Creer and Wilkinson. Mr Creer embodied the characteristics of that firm

⁷ Steketee & Cockburn at 25.

⁸ Steketee & Cockburn at 26.

⁹ Ibid.

¹⁰ Steketee & Cockburn at 25.

at the time: conservative and somewhat stuffy. Neville Wran found himself involved in tasks that required none of his talent at all, ranging from delivering messages to filing court documents. For these efforts, he was rewarded with a salary of £1 per week.¹¹ Years later, not knowing of Neville Wran's fate, I applied for articles of clerkship to James N. Creer the Younger. Perhaps fortunately, I was rejected. Bereft of our joint or several talents, the firm, one of the oldest in the State, was dissolved a few years back. What a difference we might have made to its fortunes.

When Abbott left the firm to start his own, Neville Wran followed him. However, one sunny afternoon, he reportedly took a lunch break and lay down on the grass in the Royal Botanic Gardens. Lulled by the warm sunshine, he fell asleep. He was rudely awoken by a rather irate Abbott, who dismissed him on the spot.¹² I sometimes wondered if this peremptory and unjust treatment played a part in pointing Neville Wran's interests in the direction of industrial relations law.

Despite this rocky start, Neville Wran's brother-in-law introduced him to Harold Bartier, a partner at the legal firm Bartier, Perry and Purcell. That firm did not share the same level of prestige as Abbott, Tout, Creer and Wilkinson, but it was well-reputed nonetheless and, more to the point, it survives to this day. Neville Wran mostly worked

¹¹ Steketee & Cockburn at 36-37.

¹² Steketee & Cockburn at 37.

under Basil Purcell, a senior partner. Purcell's influence over the young lawyer was significant. He set high standards and expected them to be met at all times. He expected his employees to dress professionally, advising him to buy a hat and to invest in a tailor-made suit. Neville Wran worked with the firm for four years, first as a clerk and then, after his admission in 1951, as a solicitor.¹³ Other notable lawyers who worked at Bartier Perry included the Hon Roger Gyles, former judge of the Federal Court of Australia, and my brother, Justice David Kirby of the Supreme Court of New South Wales.

As he approached his 10-year anniversary with Bartier Perry, Neville Wran's friend from university days, Lionel Murphy, along with Ray Gietzelt (then, and for a long time, General Secretary of the Miscellaneous Workers' Union) set out to persuade Neville Wran to make the move to the Bar.¹⁴ Their powers of persuasion proved successful and the move was accomplished.

As for many of his contemporaries, the early days at the Bar were difficult for Neville Wran. At first, he worked in the rabbit warrens that were the barristers' chambers of those days in Phillip Street, on either side of Martin Place.¹⁵ He then moved to the new chambers that had just

¹³ Steketee & Cockburn at 37-38.

¹⁴ Steketee & Cockburn at 40.

¹⁵ Ibid.

been built by a co-operative of barristers led by Garfield Barwick – Wentworth Chambers. As fate would have it, he obtained chambers on the fourth floor of Wentworth, which is where I first met him. These chambers would soon boast the core of barristers with skills in the intricacies and dramatics of industrial law: Lionel Murphy QC, Jack Sweeney QC and Bill Fisher QC.¹⁶

Neville Wran quickly came to be considered as one of the leading counsel in the fields of industrial and common law.¹⁷ His colleagues and mentors at the time included not only Jack Sweeney QC and Lionel Murphy QC, but also Jim McLelland, by then a highly successful Sydney solicitor. Neville Wran increasingly concentrated on industrial law, developing the talents in forensics and communication that would serve him well during his later political career.¹⁸ In jury trials, his abilities were first class.¹⁹ Terry Sheahan, later a Wran Cabinet colleague and now a Judge of the New South Wales Land and Environment Court, describes his experience of Neville Wran’s legal expertise:

“As a 19-year-old law student, I was becoming very active in the party at branch level, and was lucky enough to gain

¹⁶ *ibid.*

¹⁷ Dale at 10.

¹⁸ Dale at 10.

¹⁹ G Freudenberg, “The Voice of Sydney” in T Bramston (ed) *The Wran Era*, Federation Press, Sydney, 2006 at 102 (hereafter Freudenberg).

articles of clerkship with a firm very involved in work for the trade union movement. In that work I met many luminaries of the law, but one who made a unique impression was Neville Kenneth Wran, QC”²⁰

As a barrister Neville Wran worked extremely hard. To my own knowledge he sometimes started work at 4am, occasionally 5am and never later than 6am. I went to the Bar in 1967. I was often Neville Wran’s junior during the 1960s. As I have said of those mornings before the sun rose:

“My first task was to make him a very strong cup of tea and then outline the issues as I saw them. He was a remorselessly diligent barrister. He would always sacrifice elegance in presentation to attention to detail. How many times I sat beside him as he would carefully go through his notes taken during argument to make sure each and every point that was made was put to the court.”²¹

Because at that time I did not really know much about his political life and activities I must confess that I thought he was a certainty for appointment as a judge. Later, he would say that he would only consider a judicial appointment if he had “a terminal illness”.²² He knew that he was destined to walk along a different path.

LIFE IN POLITICS

²⁰ T Sheahan, “Reflections of a Minister” in T Bramston (ed) *The Wran Era*, Federation Press, Sydney, 2006 at 228 (hereafter Sheahan).

²¹ Steketee & Cockburn at 46-47.

²² Dale at 10-11.

In 1972, two years after being elected a member of the New South Wales Legislative Council, Neville Wran began to see his future in politics rather than the legal profession.²³ His stamina was amazing. He seemed to exist on a daily quota of two or three hours' sleep. After a late sitting of the Legislative Council, he was still there at 4am or 6am the next morning, ready for our case. Sharp. Dedicated. Focussed. Mastering the detail. Determined to win. Loved by his clients. It was an amazing experience for a young lawyer like me to have. He taught me a lesson that, in my opinion, provides a chief reason for his great success in public life. The devil is always in the detail. If you master the detail you cannot be snared by witnesses, outgunned by opponents or defeated by your own slips and mistakes. Despite his ultimate preference for Parliament House over the courts, there is no doubt that Neville Wran's skill, developed throughout those long years at the Bar, contributed significantly to his political success. In his biographical note, Brian Dale observes:

“For Wran, with his legal background and court experience, along with logic, delivery and intelligence, the Legislative Council gave him freedoms far beyond the courts.”²⁴

²³ Dale at 10-11.

²⁴ Dale at 12.

From his very first appearance as a Member of the Council, the oldest legislative chamber in Australia, Neville Wran's advocacy skills served him well. He later moved to the Legislative Assembly. Dale again:

"When the parliament resumed for the new session in 1974, Wran, a new MLA, was given none of the courtesies of a new member. His maiden speech was delivered as an urgency motion and spirited debate, peppered by constant interjections, ensued. But Wran gave as good as he got – he had not been a leading QC for nothing".²⁵

Neville Wran's ascent to leadership of the Australian Labor Party in this Parliament, his transfer to the Legislative Assembly and his victory in the 1976 general election were considerable political accomplishments. Especially so because his electoral success followed the dismissal and defeat of the Whitlam Government only six months earlier. Neville Wran would go on to be one of New South Wales' longest serving Premiers, serving a then record term of 10 years.

During his 13 years as the Labor Leader, Neville Wran led his party to victory in four State elections. He was instrumental in producing the two "Wranslides" in 1978 and 1981, with a fourth win (and reduced but comfortable majority) in 1984. In 22 by-elections, Neville Wran held the leadership that saw the government gain two seats from the Liberal

²⁵ Dale at 15.

Party whilst never losing a Labor-held seat.²⁶ It was a record that both sides of politics in New South Wales study closely, never so much as at present.

The Wran government pioneered a large number of important law reforms, urged on by a Premier who was always detail-focussed. These addressed the enhancement of human rights and protection of democratic freedoms – sentiments which were often popular during the late 1970s and early 1980s.²⁷

Some of the significant reforms that were enacted by this Parliament during the time that Neville Wran was Premier included:

Criminal Law: The reform of crimes associated with the poor, offences such as busking and begging were abolished; reform of the *Jury Act* was undertaken; proper treatment of victims of crime was introduced; and, at long last, following reforms introduced by Don Dunstan in South Australia and John Gorton in the Australian Capital Territory, homosexual acts were decriminalised.²⁸ This last change was an important liberator for

²⁶ A Green, “The ‘Wranslides’ and Electoral Politics” in T Bramston (ed) *The Wran Era*, Federation Press, Sydney, 2006 at 31.

²⁷ Freudenberg at 106.

²⁸ F Walker, “Social Policy and the Reform Agenda” in T Bramston (ed) *The Wran Era*, Federation Press, Sydney, 2006 at 174-175.

many, including me. I pay tribute to Neville Wran and to John Dowd for getting this reform accomplished despite fierce opposition from the usual sources.

Anti-Discrimination: The *Anti-Discrimination Act 1977* (NSW) was enacted to render discriminatory acts unlawful and to provide for greater equal opportunity in New South Wales; the Anti-Discrimination Board was established; along with the introduction of equal employment opportunity policies and practices in the public sector.²⁹

Aboriginal affairs: A multi-party select committee of the Legislative Assembly on Aborigines was established to conduct a comprehensive inquiry into the conditions faced by Aborigines in New South Wales. The resulting report is regarded as one of the most comprehensive ever seen in an Australian Parliament. It was also one of those steps that helped change the *Zeitgeist* of this country. It prepared the way for the *Mabo* decision of the High Court in 1992.³⁰ It identified the dispossession of the Aboriginal people since the late 18th century. It resulted in the enactment of the *Aboriginal Land Rights Act 1983* (NSW), bringing with it the

²⁹ G Moore, "Social Policy" in T Bramston (ed) *The Wran Era*, Federation Press, Sydney, 2006 at 161.

³⁰ P O'Shane, "An Aboriginal Perspective" in T Bramston (ed) *The Wran Era*, Federation Press, Sydney, 2006 at 194 (hereafter O'Shane)

long-awaited recognition of such rights³¹. That Act afforded very important rights to claim land and other property rights that would contribute to improving the economic status of the States' Aboriginals. The large ambit of the resulting legislation and its beneficial and protective purpose for indigenous peoples were emphasised only last month in a unanimous decisions on the High Court in *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council*.³²

Rights of women: The New South Wales Women's Advisory Council to the Premier (WAC) was established, among other initiatives, to tackle issues relevant to women including rape, prostitution law reform and legislation to protect women from domestic violence.³³ Many of its proposals were enacted into law.

There were many other more important reforms including in the field of administrative law and environmental protection.

³¹ O'Shane at 95. For the majority of Aboriginal people, the Act is the lasting legacy of the Wran government.

³² [2008] HCA 48.

³³ C Niland, "Women's Policy" in T Bramston (ed) *The Wran Era*, Federation Press, Sydney, 2006 at 187.

FINDING A VOICE

At the height of his political powers, Neville Wran was described as “the voice of Sydney”. The gravelly voice he later developed was attributed to throat surgery that he underwent in June 1980. Gravelly his voice might have been; but it lost nothing of its eloquence in espousing the causes that Neville Wran believed in. He was never a stand-still politician. For him, politics was social reform in action, not mere occupancy of the Treasury benches for the sake of power and glory.

It may be difficult for some young people today to remember what a straight-laced place Sydney, New South Wales and the nation were, before Neville Wran was Premier of New South Wales. Many immediately noticeable changes came about. Cafes and restaurants diversified. They spilt out onto the street. Nude beaches sprang up. The censors and the prissy moralists were put in their place. The environment became more interesting. All this was not, of course, done by Neville Wran alone. For example, the succeeding Coalition Premier Nick Greiner was also a civilised man of similar social inclinations. But Neville Wran’s influence was determinative on these things during the Labor government. Such governments are sometimes socially very conservative. Under Neville Wran there was no real chance that that would be the ultimate approach of the government he led.

Neville Wran’s closest friend, from their early days at the Sydney Law School, was Lionel Murphy. By the 1960s, he was a Senator and

well-respected Queen's Counsel. He would be appointed to the High Court in February 1975.³⁴ Stetkete and Cockburn, in their "unauthorised" and sometimes polemical biography of Neville Wran, describe the friendship:

"To people looking from the outside, Wran and Murphy seemed to be quite different figures: Wran, fluent, with a gift of expression, quick-witted, handsome and good company; Murphy, a much less outwardly attractive figure, with a slow ... manner of speech. Whereas Wran's mind was attuned to solving problems using rigorous logic and analysis, Murphy was of more philosophical bent, an innovator, widely read and excited by ideas. Whatever the outside appearance, there was nothing boring about Murphy to those who knew him and appreciated his intelligence. He had great personal charm and, like Wran, a streak of the larrikin in him."³⁵

It was clear to all who know them both that their friendship was a strong one. However, that friendship was to bring some dark times to Neville Wran's life. In April 1983, the ABC published allegations against the Premier. An inquiry led by the State Chief Justice, Sir Laurence Street was established to investigate the allegations. Properly, Neville Wran stepped aside whilst the investigation was conducted.³⁶ It was during this time that he gave a memorable speech which demonstrated his ability to communicate in vivid word pictures that could reach out to ordinary Australians:

³⁴ Freudenberg at p 102.

³⁵ Stetkete & Cockburn at 39.

³⁶ Sheahan at 234.

“Balmain boys don’t cry. We’re too vulgar, too common for that. But if you prick us with a pin, we still bleed like anyone else. I can assure you, delegates, that the stress, anguish and indignity of the last few weeks have been an extraordinary and unique experience for me.”³⁷

In the result the inquiry found that the facts of the accusations against Neville Wran were as he stated them to be. There was no impropriety on his part. He was exonerated.³⁸ However, as Neville Wran was himself to say: “[t]he mud will stick”.³⁹ From my own experience I can confirm that this is how things happen in Australia. Falsehoods take on a life of their own. One never completely gets away from them. Whereas once they would have been lost in cobwebbed files now the internet ensures that they will live forever.

DEPARTURE FROM PUBLIC LIFE

Not long after the Street Commission report was delivered, another saga of the so-called “The Age Tapes” began to unfold. *The Age* newspaper in Melbourne published details of alleged telephone conversations illegally obtained.⁴⁰ The reports occasioned an

³⁷ Freudenberg at 104.

³⁸ D Shanahan, “An Assessment from the Outside” in T Bramston (ed) *The Wran Era*, Federation Press, Sydney, 2006 at 242 (hereafter Shanahan).

³⁹ Freudenberg at 104.

⁴⁰ D Shanahan at 242.

investigation into the conduct of Justice Lionel Murphy.⁴¹ Many saw Justice Murphy as the main target of a campaign, but some also considered that Neville Wran was another target.⁴² Criminal charges were eventually brought against Lionel Murphy. He was acquitted at his second trial. But in the midst of these events Neville Wran was found guilty of contempt of court for responding to a journalist's question with words of support for his friend Lionel Murphy.⁴³ It was a very hard time.

No-one who viewed those events, whether close up or less close, will forget the toll that they took, especially on Lionel Murphy. A vigorous, generous-spirited, forward-thinking humanitarian began to waste away as the cancer that sprang up during his ordeal reduced him ultimately to a shadow. The toll that this catastrophe took on Neville Wran can only be imagined. In the end it led to his resignation from Parliament and his return to civilian life.

At Lionel Murphy's memorial service in October 1986, Neville Wran delivered a heartfelt eulogy for his friend. It was just three months after his resignation from Parliament:

⁴¹ N Minchin, "Digging in the Dirt: Investigative Journalism in Australia from the 1950s to 2000" – accessible via <http://www.abc.net.au/4corners/4c40/essays/minchin.htm>.

⁴² Sheahan at 232.

⁴³ Ibid.

"I refer to his [Lionel Murphy's] infinite capacity for friendship. He really did believe in helping lame dogs over the stile ... He refused to retreat into some ivory tower of judicial isolation ... There used to be a good Australian word for the value of openness and equality in our society. I am proud I can still use that word for Lionel Murphy. He was my mate.⁴⁴"

The inquiries and the "Age Tapes" and their aftermath led Neville Wran to question an ongoing involvement in politics and indeed public life. In an interview with Bruce Stannard of *The Bulletin* on 14 January 1986, shortly before his resignation, he said:

"The parliament itself is a bear pit. There are no rules. New South Wales politics is a blood sport in which people are torn down.⁴⁵"

Despite strong appeals urging him to reconsider his resignation, on 7 June 1986, Wran gave a press conference.⁴⁶ He told the media:

"I didn't set out to achieve much, actually. My principal objective was to keep beating the Liberals, and I've had amazing success at doing that. That's been my main triumph".

As had been his style as an advocate in the court-room, Neville Wran described his political philosophy as "beat your opponents".⁴⁷ Yet,

⁴⁴ Freudenberg at 105-106.

⁴⁵ Freudenberg at 106.

⁴⁶ Shanahan at 245.

although the gladiator in him compelled him to take one last swipe at his parliamentary opponents (and to savour his repeated political successes) it was clear that the way politics was being played ultimately convinced Neville Wran that there were other things in life for him to do.

No one should take his self-assessment at face value. The record of legislative achievement and the changes to the culture of a stitched-up city and State of the 1950s and 60s remain a very important legacy from Neville Wran's period of change in State politics.

Many who watched Neville Wran's enormous gifts at work regretted that he never became a member of the Federal Parliament. Not a few believe he should have been Prime Minister.⁴⁸ It was the sudden ascendancy of Bob Hawke in and before March 1983 that helped withhold of that glittering prize. Yet he left politics when he chose. He did so whilst he was still ahead, young enough to start a new life and fit enough to enjoy a fuller existence than was possible either in the "bear pit" of Parliament or in the still, cloistered chambers of the judiciary or the Bar.

In Olympic diving, dancing the tango, performing a strip tease and political life, timing is everything. It involves knowing when to be there,

⁴⁷ T Bramston, "The Wran Leadership Model" in T Bramston (ed) *The Wran Era*, Federation Press, Sydney, 2006 at 46.

⁴⁸ Sheahan at 234.

close to the empty chair once the music stops. Also knowing when to leave, whilst the pantomime is still filling the stalls. Neville Wran knew both of these secrets. It is right that we are now big enough to acknowledge this and his multiple achievements. Yet it has taken more than 20 years for us to do so.

REFLECTIONS ON LAW REFORM AND THE HIGH COURT

REFLECTIONS OF LAW REFORM

It would not be sufficient in this lecture simply to celebrate the life and achievements of Neville Wran, even in an inaugural lecture. I will therefore take advantage of this occasion to offer a few reflections on law reform and the judiciary in the High Court, where I have spent my own professional years. As I approach my judicial *quietus*, the mind naturally turns to ways in which things could have been done more effectively. Looking back, what would I have done if I enjoyed a second chance, with hindsight wisdom, to tackle the challenges of law reform and of the judiciary?

So far as law reform is concerned, Lionel Murphy appointed me in 1975 to be the inaugural chair of the Australian Law Reform Commission. I served in that role until 1984. That decade was highly influential for my professional career, as it subsequently unfolded. It changed me from a fairly typical product of the common law tradition – pragmatic and impatient with too much doctrine – into a lawyer

concerned with the entire mosaic of law. In the Law Reform Commission, conceptual thinking, which was always Lionel Murphy's great strength as a lawyer, became second nature to me.

I came to appreciate the particular contributions that academic scholars, empirical researchers and public opinion could play in the design of the law. I threw off the formalism in which I had been trained at law school. I questioned the outcomes of legal cases. I became impatient with purely *ad hoc* solutions to legal problems. All of this was, I believe, a good preparation for service in the New South Wales Court of Appeal to which I was appointed by the Wran Government in 1984 and in the High Court of Australia which followed from 1996.

My decade in the Australian Law Reform Commission witnessed the institutional success of that body. I am proud of the ongoing achievements of the Commission, under successive Commissioners and Presidents. I believe that Lionel Murphy, who devised the legislation establishing the Commission,⁴⁹ would be glad with the Commission's high reputation and its record for impartial and expert advice to succeeding federal and state governments. Since 1975 there has not

⁴⁹ *Law Reform Commission Act 1973 (Cth)*. See now *Australian Law Reform Commission (Repeal, Transitional and Miscellaneous) Act 1996 (Cth)*.

been a serious proposal that the Commission, like its Canadian counterpart, should be abolished⁵⁰.

Successive governments and Ministers in Australia have found the Commission a very useful source of independent advice, founded on widespread expert and community consultation. The Commission has enjoyed a high level of implementation of its reform proposals, approximating about half of them in toto. By the world's standards, this is an excellent achievement. Particularly so given the often controversial subjects that have been assigned to the Commission for its report.

Nonetheless, there are a number of institutional weaknesses in the model of law reform bodies created along the lines adopted in England under the leadership of Lord (Leslie) Scarman⁵¹. In fact, the basic institutional flaw was noted in the first *Annual Report* of the Australian Law Reform Commission for 1975⁵².

⁵⁰ The Canadian Law Reform Commission was abolished by the repeal of its statute in 1992. After its revival, its successor was effectively abolished by the termination of its funds.

⁵¹ MD Kirby, "Are We There Yet?" in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005), 434. See also MD Kirby, "Law Reform, Human Rights and Modern Governments: Australia's Debt to Lord Scarman" (2006) 60 *Australian Law Journal* 299-309ff.

⁵² Australian Law Reform Commission, *Annual Report* (ALRC 3), 1975, 20-24 [44]-[50].

How does one convert excellent reports on law reform into legislative or administrative action where that is proposed? At least, how does one ensure that recommendations given consideration in the practical world of political controversy, electoral distractions, parliamentary divisions, party conflicts and competing community priorities?

In that period of Australia's history when Neville Wran performed so successfully, an important change came over the way Australians were governed. Neville Wran was by no means the sole cause of the change although he rode the wave with great success. The change involved the increasing concentration of decision-making power in the parliamentary leader of the governing party; a comparative decline of effective parliamentary and even party influence; the concomitant growth in the power of the executive government as against all other players – the Crown, the courts and Parliament itself; the growth in the influence of the media and other lobby groups; and the rise and rise in the focus on personality politics, making the effective leadership of political government crucially important.

If a political leader were actually interested in law reform (as Neville Wran was) much could be achieved. But if the leader was not a lawyer or, even if he was, was not especially interested in the subject, legal reforms were much harder to accomplish. Law reform reports would lie unread and unimplemented. This is not just a local Australian

concern. It is an institutional concern that faces law reform bodies everywhere.

In an address paying tribute to Leslie Scarman's creation of the template of the Law Commission of England and Wales, I remarked⁵³:

"As we enter the 21st century, the very notion of the 'sovereignty' of Parliament has become a somewhat inapposite description. Certainly this is so in a country like Australia that divides the sovereignty of the people among a number of institutions, federal and State, that make the written laws. In Britain, talk of the sovereignty of Parliament is quite popular. However, there is a marked disparity between the *theory* of representative and responsible government and the *reality* of authorising everything that follows in the elected government's lawmaking. Sir Anthony Mason recently concluded that the notion that Parliament is responsive to the will of the people, except in the most remote, indirect and contingent way, must now be regarded as 'quaint or romantic'. The need is for a modern form of democratic government that will prove workable over time⁵⁴".

Acknowledging the logjams that can sometimes impede the processing of law reform reports and recommendations – simply because of the inability to secure the attention of Ministers, and especially of the head of government – consideration has been given in recent years in England to the adoption of a parliamentary procedure to

⁵³ MD Kirby (2006) 80 *Australian Law Journal* 299 at 313 (citations omitted).

⁵⁴ The reference to Chief Justice Mason is to AF Mason, "Democracy and the Law: The State of the Australian Political System" (November 2005), *Law Society Journal* (NSW), 68 at 69.

ensure that, at least some law reform recommendations pass into law with a high degree of regularity – even semi-automatically, in the manner of subordinate legislation.

Of course, any such procedure would not be suitable, or acceptable, for highly controversial or politically-charged reform proposals. Yet, somehow, the lawmaking process needs to reform itself. It needs to find a median path so as to isolate the reform proposals that are suitable for bipartisan non-controversial treatment as a technical change in the law (to be accepted unless there is an objection), distinguishing such proposals from those that necessitate a full parliamentary debate and political consideration.

Often in the courts we notice seemingly uncontroversial, black-letter, even boring subjects of law reform that have been recommended in reform reports that have simply not been interesting enough to capture the decision-makers' time, parliamentary attention and implementation. A recent example was a reform to the *Bankruptcy Act* 1966 (Cth), s 82, recommended in 1988 by the Australian Law Reform Commission report *General Insolvency Inquiry*⁵⁵. Hardly riveting stuff. The proposal, of a highly technical kind (which had already been implemented for corporate insolvency) has for some mysterious reason

⁵⁵ Australian Law Reform Commission, *General Insolvency Inquiry* (Vol 1) (ALRC 45, 1988), 16.

never been accepted in the context of general insolvency. No satisfactory explanation has been given as to why this has been so.

The default in implementation was drawn to the attention of Federal Parliament by the High Court in *Coventry v Charter Pacific Corp Ltd*⁵⁶. Seemingly, the subject is just not sexy enough to secure legislative attention. It is hard to believe that party branches have risen in fervent opposition to the law reform report. But in an overburdened parliamentary agenda, vote-winning is the name of the game. Changes to bankruptcy law are unlikely to contribute many votes in marginal seats.

Securing the institutional attention of Parliament to law reform proposals is still an important challenge in our system of government. Neville Wran in Government helped to address this problem by showing a lawyer's interest in such matters and by having a strong personal commitment to law reform. This was because of his own particular professional background as a barrister, civil libertarian and a lawyer in politics. But no Premier since his day has been a lawyer. Indeed, the number of experienced lawyers now elected to our parliaments, federal and State, seems overall to have declined. Of course, there are notable exceptions. But the willingness of experienced senior lawyers to offer

⁵⁶ (2005) 227 CLR 234 at 275-276 [140]-[141].

themselves for service in Parliament as Neville Wran did seems generally to have declined.

Other institutional concerns that need to be addressed include attracting lawyers of the top rank to serve, particularly as full-time Commissioners of the permanent law reform bodies, federal and State. In England, this problem has recently been addressed in a typically British way. A convention has been accepted that senior practitioners who are willing to serve full-time in a law reform body, and thereby to demonstrate their sense of public service, are virtually guaranteed a judicial appointment after three or four years' service. Not only will they be better judges for their service in law reform. This has proved a way, at once, to enhance the intellectual quality of the law reform body and of the bench. Conventions like this take a long time to emerge, especially in Australia. Only within the past few months, the British government has apparently accepted a new convention that the Chairman of the English Law Commission will automatically be appointed to the English Court of Appeal. It is in the community's interests, as well as that of the long-term orderly development of the law, to attract the best people to institutional law reform.

The defects in the institutional parliamentary procedures which I have mentioned are a further reason for the need to consider an Australian a Charter of Rights, such as has been enacted in the

Australian Capital Territory and in Victoria⁵⁷. Such a measure has been opposed by some politicians on both sides of Australian politics on the footing that it would replace parliamentary lawmaking with rule by judges. However, if Parliament neglects the nooks and crannies of the law, it will sometimes be useful (at least in fundamental matters of human rights) for the judges to have a role to stimulate the parliamentary process. This is all that the current Charter proposal does.

The opposition to a Charter by parliamentarians is misconceived and generally based on a failure to consider the actual design of the Charter proposal and the way in which it has been operating for a decade in the United Kingdom⁵⁸. In my opinion, supporters of parliamentary democracy should approve of such measures, given that, under them, Parliament has the last say. It is no coincidence that one of the first and major modern proponents of such a reform in the United Kingdom was the founder of modern law reform, Leslie Scarman himself⁵⁹.

⁵⁷ *Human Rights Act 2000 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic).*

⁵⁸ Since the passage of the *Human Rights Act 1998 (UK)*.

⁵⁹ L Scarman, *English Law: The New Dimension* (Hamlyn Lectures, 26th Series, London, 1984), 16.

REFORM & THE HIGH COURT

Reforming the High Court of Australia is as difficult as reforming the parliamentary institutions of our country. Indeed, possibly more so because of the principle of the separation of powers and the constitutional role which the High Court plays in the nation's governance⁶⁰.

Some reforms would have to come from within the High Court itself. Some might even require amendment of the Constitution, a notoriously difficult task to accomplish in Australia. Nevertheless, in a democratic society, no institution is beyond the contemplation of reform, the High Court included. The following is a list of initiatives that might, in my view, be considered in order to improve the operations of the High Court of Australia, as viewed today:

- First, within the Court, there needs to be an improved and mutually respected assignment of work duties amongst the Justices. There is such an assignment system in the New South Wales Court of Appeal where the President (at one time myself) distributed the sitting list which was accepted by all of the Judges of Appeal. That list indicated the allocation of the writing of the opinions for the Court. When a judge writes for the Court, the

⁶⁰ Australian Constitution, s 70. The provision for appointments and removals appears in s 72.

style of writing is somewhat different, more muted, than when the judge writes only of personal opinions. This methodology led to mutuality and a respect among the judges of the Court of Appeal for one other. In the High Court, there is no equivalent arrangement. Even suggested assignments by the Chief Justice have not always been respected. As a consequence, there is a big difference between the ethos of the High Court and of the intermediate court in which I served. In my view, it is a difference that does not operate to the benefit of the highest court of the nation;

- Secondly, if moves are made to change the appointment procedures for the High Court, some could be quite easily be taken. For example, there could be no objection to suitable practitioners and judges signifying their willingness to be considered for appointment to any bench. This is now commonly done in the State and Federal courts below the High Court. For my own part, I would oppose any move to assign a final or semi-final appointment veto to retired judges or lawyers, however distinguished. It is part of the genius of our Constitution that a democratic element is introduced into judicial appointments, especially at the level of the High Court, by the fact that the appointments are made by elected politicians. Assigning the appointment process to so-called "experts", to retired or serving judges and to other lawyers, would not, in my view, be a desirable development. Obviously the highest courts make decisions that

are affected by values and judicial philosophy. In my opinion, well-informed elected politicians are much more likely to make wise decisions on the appointment of judges than a cohort of lawyers. Constitutional adjudication, in particular, is not a value-free zone or a purely technical skill. There is no reason to believe that lawyers with special skills in insolvency or trusts law have the necessary or essential skills for adjudicating the great constitutional conflicts in our nation. Politicians know this. Some lawyers never learn its truth.

- Thirdly, one change that certainly needs to be made by appointing governments is a wider spread of appointments throughout the Commonwealth. In Canada, a constitutional requirement obliges the appointment of at least three of the nine Justices of the Supreme Court from the Province of Quebec. This has led to a convention of appointments across that continental country. In Australia, there has never been an appointment to the High Court from South Australia or Tasmania. Nor from the Northern Territory of Australia. Each of those jurisdictions has produced very fine judges and lawyers of the greatest distinction. Leaving aside judges who are still serving, I think, for example, of Chief Justice John Bray, Justice Howard Zelling, Chief Justice Len King and Justice Andrew Wells or Justice Roma Mitchell in South Australia. Of Justice Inglis Clark, Justice Neasey and Justice Underwood in Tasmania. And of His Honour Tom Pauling QC, now the Administrator of the Northern Territory, who was one of

the finest advocates I have ever seen before the High Court. These and other lawyers from those jurisdictions would have graced the High Court bench. There is a need for more geographical diversity in appointments and an appreciation that the High Court is the final supreme court of the entire Australian nation;

- Fourthly, closed-circuit television should be extended to a dedicated channel beamed to the public, such as the one that now brings the Supreme Court of Canada's proceedings to the public of that country. There is no serious risk that this facility would diminish the respect for the High Court of Australia which is, after all, one of the branches of government of the Commonwealth. Is there any reason to believe that there would be misbehaviour on the part of courts or judges? Not really. In any case, the public has a right to see the High Court in action. For those who cannot come to Canberra, an edited dedicated television channel would be appropriate and well overdue;

- Fifthly, media reportage of High Court decisions is truly abysmal in Australia. Unless there is something bizarre, entertaining, humorous or allegedly shocking in the decision of the Court, it is normally not reported. The High Court of Australia, like much else now, travels on the infotainment highway. The issues in the High Court that tend to get reported are personality issues that have little to do with the long-term significance of the decisions for the

law and society made by the judges. Media reportage in the United Kingdom and the United States, and even Canada, is much more effective, detailed and accurate. In this respect there is a need to lift the media game in Australia. If this would mean the engagement of a highly skilled court communicator for television and radio, this is something that the High Court should explore. After all, most people today get their news and information about law and society in electronic form. Relying solely on the printed word is not sufficient, given the failings and comparative lack of interest of the general Australian publishing media. The cases in the High Court are important and most are quite interesting. They concern values upon which there can sometimes be acute differences. It is important that such questions should be properly reported and placed before the citizenry for their knowledge, judgment and, if so decided, legislative correction;

- Sixthly, whilst it is valuable to work towards joint opinions in the High Court, and initiatives in recent times have promoted that end, it is also important to have concurrent and dissenting opinions. This is the way by which the law develops and changes over time. Demands of some sections of the legal profession for total concurrence and Court opinions are understandable. But it is also necessary for the Court's reasons to reflect the diversity of opinions in the Court and not to suppress or sink these in an ill-considered quest for unanimity at any price. The plain fact is that,

since the introduction of universal special leave for appeals to the High Court, no case arrives there for decision that is not already recognised as reasonably arguable both ways and hence one that could be decided in either party's interests. Disagreement should therefore cause no surprise. It is inherent in a legal tradition that cherishes judicial integrity and transparency of decision-making;

- Seventhly, the fall-off in the grant of special leave to appeal to the High Court in recent years is potentially significant. The number of appeals being heard in the High Court, as in other final courts, has fallen in recent years⁶¹. In the United States of America, where the number of appeals heard is roughly the same as in Australia, the aggregate has fallen by about half since the days of the Warren Court in the 1970s. Perhaps if the Justices accepted more appeals, there would be a greater effort towards sharing of opinions where that was justified, than tends to happen in the present Court;

- Eighthly, the Court should welcome interveners to its proceedings. These are interveners who, whilst not actual parties to the case, offer to give assistance to the Court on the issues before it. In

⁶¹ The numbers of dispositions by the Full Court of the High Court of Australia (other than special leave applications) exceeded 100 in the reporting year 05/06. However, in the years 01/02, 04/05, 06/07 and 07/08 there were fewer than 80 and in two of those years they were barely more than 60. See *Annual Reports* of the High Court of Australia.

recent years, the law on the reception of *amicus curiae* briefs in the High Court has changed somewhat. To some extent there is a greater willingness now to receive such submissions, at least in writing. So much has been noted in the authorities⁶². The Court should be open to the receipt of information on the record concerning decisions of other final courts throughout the world that have dealt with common problems. It should receive information on international law which is increasingly affecting the state of Australian law⁶³. This is not always permitted⁶⁴. As Australians, we need to look outwards. The growing impact of international law upon our law is one of the most important developments that has occurred in the law of Australia in my professional lifetime;

- Ninthly, one constitutional change that I would favour would be to limit the length of service of Justices. The Constitutional Court of South Africa and the Constitutional Court of Germany as well as many other regional courts and tribunals offer their judges non-

⁶² See eg *Attorney-General (Cth) v Alinta Ltd* (2008) 82 ALJR 382 at 390-391 [28]-[33] of my own reasons, 396-397 [63]-[68] per Hayne J, 405 [104] per Heydon J; 242 ALR 1 at 9, 10; [2008] HCA 2.

⁶³ See eg MD Kirby, "Transnational Judicial Dialogue, Internationalisation Law and Australian Judges" (2008) 9 *Melbourne Journal of International Law* 171.

⁶⁴ *Wurridjal & Ors v The Commonwealth* [2008] HCA Trans 348 at 10, 95 (French CJ, Gummow, Hayne, Heydon and Kiefel JJ; Kirby and Crennan JJ dissenting).

renewable terms of years. In Australia, once appointed, a judge of the High Court serves until resignation, death or retirement at the constitutional age of 70. Some commentators have urged the repeal of the constitutional amendment that requires Justices to retire at 70. I disagree. Ensuring change and turnover, fresh ideas and a reflection of the values of different generations, is a vital aspect of a dynamic and open-minded final national court. In my view, a term of no more than 10 years would be appropriate. However, this would require a constitutional amendment and I recognise the difficulty of procuring this. Justices of the High Court should not linger on beyond their “used by” date. The experience of most of those who have served on the Court is that, after about 10 years, the same types of problems re-present themselves in new guises. Nothing is stable and certain in the law. Challenges are constantly being made to old doctrines as their instability is demonstrated by new applications. This is what the philosopher Heraclites taught in Ancient Greece. It remains true in Australia today. It suggests the need for a thoroughly healthy phenomenon of constant renewal. Change tends to produce anxiety and resentment in at least some old people. Which is why it is a good idea to provide for their compulsory departure. Without a little encouragement, some might never conclude that they should move on. Reversing the constitutional amendment that requires all High Court judges to retire at age 70 would be quite the wrong way to go. In my experience most of the voices critical of the 1976 amendment for compulsory retirement

in the High Court have tended to be judges. It is an inescapable fact of nature that older people are sometimes disconnected from the values and aspirations of younger generations. I am, of course, an exception. Neville Wran is also probably an exception. But there are not many of us. So there must be rules. And in the judiciary the rules should provide for regular and seemly exits; and

- Tenthly, Australian judges generally, but the Justices of the High Court in particular, should be encouraged, every year, to take part in international meetings with judges of other courts and to form associations with such judges. They share with them unique responsibilities. Judges, like other professionals, can learn from counterparts in other countries. They can obtain insights into comparative constitutionalism, comparative law more generally and the perspectives of the likely developments of the Australian legal system as it inter-relates with international and domestic law.⁶⁵ This encouragement should be underwritten by appropriate travel to conference venues, even occasionally in pleasant surroundings, however much this may upset some mean-spirited and petty-minded scribblers of the Australian media. An investment in the broadening of the mind of Australian judges and other lawyers is purchased cheaply by a few tickets to such encounters. For 10 years I have participated in the annual Yale

⁶⁵ MD Kirby (2008) 9 *Melbourne Journal of International Law* 171 at 182.

Constitutionalism Seminar with judges of final courts of the United States, Canada, Europe, Japan, India and elsewhere. It is amazing to learn how many problems we all share in common. There is no need for Australian judges to reinvent the wheel. Attendance at such meetings pays an efficiency dividend. Our laws are different. But in a global world, the issues arising in the judiciary are astonishingly similar.

Self-evidently, it would be desirable that the High Court building should be opened to the public on weekends and on public holidays. This facility was terminated during the last Government, following a cut in funding for the Court. With the opening of the new National Portrait Gallery building adjacent to the High Court in December 2008, the number of schoolchildren and other tourists visiting this part of the constitutional triangle in Canberra is likely to increase. It is highly desirable that the Court, like all central governmental institutions, should be available to visitors throughout the year for it is their Court. It should not be locked up at the time when people come to the neighbouring institutions. The High Court should have its own visitors' shop selling items on the history and activities of the Court at reasonable cost to the public. The Court should be an interesting place to visit, on and between hearing days, especially for the young. We should be encouraging more visitors and, by the internet, enhancing the position that the Court holds in the constitutional triangle in Canberra.

If I had my way, there would also be an occasional appointment of academic scholars to the High Court, or at least of practising lawyers who have taught and written about the theory and doctrines of the law. This is the approach now taken in the composition of the highest courts in England, Canada, New Zealand and South Africa. Scholarly training commonly makes a lawyer question the received “wisdom” of the past. That inheritance sometimes requires a thorough overhaul. If re-expression and re-conceptualisation of basic principles of law are not performed by the final court, everyone down the line gets the message. Old rules are mechanically applied despite the existence of new and changed circumstances. Innovation, which is the genius of the common law's judicial tradition, is under-valued. The law is fossilised. The complacent win the day. All this is realised in other final courts. The Australian High Court should not be left behind.

Because of the former tyranny of distance, Australians generally have sometimes been resistant to new ideas from overseas. In the past, the only comparative law Australian lawyers tended to tolerate was that derived from England. It is time we grew up. And Lionel Murphy was one of the first to see and say this.

Given a second opportunity, there are many things that I would fix up and do better than has proved possible. But second chances do not present themselves, except in the fantasy of cyberspace and in virtual lives. It is probably just as well.

A CITIZEN'S THANKS

Neville Wran's political leadership in New South Wales was progressive, reformist, civilised and memorable. We have done well to celebrate his years in politics and to do so in this Parliamentary building. Australians are not very good at thanking their elected officials for the many nights of danger and days of tedium; the hours of stress, the late afternoons of indifference and the high noon hours of venom and deliberate unpleasantness.

This occasion is therefore one when we can thank a political leader who made a difference to the society he helped to govern. If we think about it, all of us will have things to be grateful for. In my case, most especially, it was the long-delayed, but final, removal of the affront to my human dignity in the repeal of the anti-homosexual criminal laws. But it also includes the moves for greater transparency in government, equality for minorities and a better and more tolerant environment. For these and other improvements in our society, to Neville Wran (and to those who worked with him in this place and beyond) as citizens, we say a genuine thanks. And we offer an apology that the appreciation has taken so long in coming. Better late than never.

THE PARLIAMENT OF NEW SOUTH WALES

THURSDAY, 13 NOVEMBER 2008

INAUGURAL NEVILLE WRAN LECTURE

**NEVILLE WRAN – A LAWYER POLITICIAN - REFLECTIONS ON
LAW REFORM AND THE HIGH COURT OF AUSTRALIA**

The Hon Justice Michael Kirby AC CMG