

AUSTRALIAN JOURNAL OF FAMILY LAW
FAMILY LAW: THE CONTRIBUTION OF ALASTAIR NICHOLSON*
The Hon Justice Michael Kirby AC CMG**

SERVANT OF THE COMMONWEALTH

I never think of Alastair Nicholson specifically as an expert in family law, although that he surely is. His training at the Bar, his first judicial appointment to the Supreme Court of Victoria and his concurrent commission in the Federal Court of Australia indicate that he is a fine lawyer of general training and experience. He needed every element of that training and experience in the sixteen years he served as the second Chief Justice of the Family Court of Australia. His retirement from judicial office on 2 July 2004 is a watershed in the life of the Family Court, of family law, indeed of federal law in Australia.

* Some parts of this essay are derived from a valedictory address delivered by the writer at the Law School, the University of Melbourne, 15 April 2004 under the title: "Chief Justice Nicholson, Australian Family Law and International Human Rights". That essay will be published in (2004) 5 *Melbourne Journal of International Law* (forthcoming). A more detailed examination appears there of the decisions of Nicholson CJ involving the use of international law.

** Justice of the High Court of Australia.

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At a ceremonial sitting in Melbourne on 2 April 2004 his service to the law and the people of Australia was honoured by judges, members of the legal profession, politicians and other citizens. It is too early to assess the full impact of his judicial work. My purpose is to identify some of the features of his career, some aspects of his personality and service and a few elements of his jurisprudence of particular interest and novelty.

Alastair Nicholson was born in August 1938. He was raised on his parents' coffee plantation in the then Australian Territory of Papua New Guinea. At the time, the territory was emerging from the perils of war. He attended Scotch College in Melbourne as a boarder. He took his degree in law at Melbourne University. In 1961 he was admitted to legal practice. He joined the Victorian Bar in 1963. In 1979 he was appointed Queen's Counsel. Between 1982 and 1988 he served as a judge of the Supreme Court of Victoria. Then, in 1988, he succeeded Elizabeth Evatt at the second Chief Justice of the Family Court of Australia.

In the Family Court, Nicholson CJ presided over countless trials and appeals, dealing with every aspect of family law. He chaired countless committees and meetings of the court. He attended many legal conferences in Australia and overseas. He earned recognition amongst his peers for his tremendous energy and unbounded intellectual curiosity. In 1993 he was elected President of the Australian Association of Family Lawyers and

Conciliators. In 1997 he was elected President of the Association of Family and Conciliation Courts.

From the start, in the Family Court, Nicholson CJ had to face daunting challenges. Morale was low, partly because of unprecedented attacks on judges of the new court and on their families. The court's workload grew but its budget did not keep pace. The challenge of introducing new technology was one which Nicholson CJ embraced with gusto. The introduction of child support legislation, and the reference to the Commonwealth by the States of powers in relation to ex-nuptial children, reflected significant social changes. Drug dependence, serial relationships, sexual abuse of children and strident lobby groups made the post of Chief Justice of the Family Court of Australia a particularly taxing one¹. To keep on top of these institutional challenges, whilst absorbing significant changes in the governing legislation² and in the legal doctrine propounded by the courts, would have tamed the energies of a lesser person. But Nicholson CJ had long demonstrated a toughness and sense of public duty that was to strengthen his resolve and see him through. He had a prolonged connection with the Australian Defence Force rising to Judge

¹ Interview with Chief Justice Alastair Nicholson in Family Court of Australia, *Courtside*, 26 March 2004 at 2-3.

² Most especially after amendments to the *Family Law Act* 1975 (Cth) introduced by the *Family Law Reform Act* 1995 (Cth).

Advocate General between 1987 and 1992. He was fortunate to be supported in his public journey by his wife Lauris, his children, family and friends. He has been an outstanding servant of the Australian Commonwealth.

Through his strong foundation in family life, his devoted service in the defence reserve, his duty in the courts and his uncompromising defence of judicial independence, Alastair Nicholson has revealed strong elements of conservative values in his makeup. He has been a defender of truly fundamental things.

From an early age, Alastair Nicholson has known that to endure, great institutions must be defended but also must change and adapt. From the start, his court (because of the nature of its duties) was a target for criticism and calumny, most of it undeserved. In accordance with ordinary conventions, he could have ignored the attacks and the personal affronts. Yet doing that was alien to his upbringing and character. He wanted to engage with critics and supporters and with the Australian community. He led from the front, for that was his nature. This made him controversial in some circles. He was more candid and forthright than most judges. This brought him into difficulties with successive governments, ministers, some legal personalities, media pundits and civic groups.

The tributes to Alastair Nicholson by judicial colleagues and officers of the Family Court, judges overseas and legal personalities are balanced by the comments of critics (usually anonymous) who condemn his endeavour to communicate with citizens beyond the legal cloister; who picture him as a relic of an earlier time of idealism over law and its role in society; or who describe him as a bigot who was "snowed by feminists" and mortally wounded by the fierce controversies that whirled around him³. There can be no gainsaying that he performed his duties as Chief Justice in a novel and highly personal manner. Only time will reveal a rounded assessment. However, none who have read his judicial opinions and his other contributions can doubt his intellectual capacity, energy, and curiosity about the human condition and its manifold elements.

In an important decision of the High Court of Australia, delivered just weeks before the retirement of Nicholson CJ, the Full Court of Family Court was reversed in a way that would certainly have been disappointing to him⁴. The case concerned the jurisdiction of the Family Court to make provision for the welfare of children of a marriage who were detained in detention centres

³ M Simmons, "Court in the Balance as an Era Ends", *The Age*, 27 March 2004 at 3.

⁴ *Minister for Immigration, Multicultural and Indigenous Affairs v B* [2004] HCA 20.

under the *Migration Act* 1958 (Cth). By any account, the case is legally important as well as significant for the children involved and for the entire Australian community.

The reasons of the High Court in the case appear in the published decision. This is not an occasion to add to those reasons. But it would be to misread the decision, and what it stands for, to assume that it reversed, in point of general principle, a feature of the jurisprudence of Nicholson CJ that was most notable during his judicial service. I refer to his interest in, commitment to and utilisation of international law in his judicial opinions. Future writers on the contributions of Nicholson CJ, in and out of court, will focus on this special contribution of his intellectual leadership in the Australian judiciary. It travelled far beyond his own court. Indeed, it is significant for developments at the interface between international and municipal law that are going on in all parts of the world.

CONVERGENCE WITH INTERNATIONAL LAW

Surprisingly, some of the most significant recent developments in the judicial utilisation of international law - particularly the international law of human rights - have occurred in the Supreme Court of the United States of America. I say that this is surprising because the United States, and its highest court, often

appear to outsiders to be somewhat isolationist in intellectual posture.

At least in the Commonwealth of Nations, we have long been accustomed to a robust use of comparative law. In Australia, from the earliest days, judges have looked beyond our shores to many lands, for guidance in the principles of the common law and the rules that should govern the interpretation of statutes and of the Constitution itself. Yet it is the changes in the United States that have been specially interesting.

In 2002, in *Atkins v Virginia*⁵, and in 2003 in *Lawrence v Texas*⁶, the "first *indicia* of change" in the approach of the United States Court were acknowledged by Justice O'Connor⁷. In *Atkins*, Justice Stevens (with whom Justices O'Connor, Kennedy, Souter, Ginsberg and Breyer joined) invoked the established international consensus against the imposition of capital punishment upon mentally handicapped persons to inform the "evolving standards of decency" that demanded that such a sentence be set aside on

⁵ 536 US 304 (2002).

⁶ 539 US 558 (2003); 122 S. Ct. 2242 (2003).

⁷ Justice Sandra Day O'Connor, Speech given to *Southern Center for International Studies* (Atlanta, Georgia, October 28, 2003) (http://www.southerncenter.org/OConnor_transcript.pdf) at 2.

constitutional grounds⁸. The reference to international law appeared in a footnote to Justice Stevens' reasons.

Still more dramatic was the decision in *Lawrence*. There, Justice Kennedy (with whom Justices Stevens, Souter, Ginsburg and Breyer joined) cited in the text of his opinion a series of decisions of the European Court of Human Rights, and of the law as expounded in several foreign nations. He did so to support the proposition that a Texan law criminalising private adult homosexual conduct was invalid by the standards of the United States Constitution⁹. The reference to international and regional human rights law was described by Justice Kennedy, writing for the Court, as constituting a statement of "values" that were "share[d] with a wider civilisation"¹⁰.

As often happens in these things, developments of a like kind in Australia occurred contemporaneously. The encouragement to judges to look beyond the traditional sources of Australian law to international law (especially as declaring universal principles of human rights) came in the landmark judgment in *Mabo v Queensland [No 2]*¹¹. There, Justice Brennan declared that it was

⁸ 536 U.S. 304 per Stevens J., at 329 (in footnote 21) (2003).

⁹ 536 U.S. 304 per Stevens J., at 329 (in footnote 21) (2003).

¹⁰ 122 S. Ct. 2242 (2003) at 12, 16.

¹¹ (1992) 175 CLR 1 at 42.

inevitable, following Australia's ratification of the *International Covenant on Civil and Political Rights* (ICCPR), and specifically of the First Optional Protocol to that Covenant, that the powerful force of human rights law, thus endorsed, would bring its influence to bear on judicial exposition of Australian law.

One Australian judge who quickly noted and utilised the decision in *Mabo* and the approach adopted by Brennan J was Nicholson CJ in the Family Court of Australia. One can see an early illustration of his approach in *Murray v Director, Family Services ACT*¹². In a joint opinion with Fogarty J, Nicholson CJ recognised that international law, unless incorporated, was not as such part of Australian domestic law. But this did not prevent the use of international law (1) to help resolve ambiguities in the interpretation of domestic primary or subordinate legislation¹³; (2) to fill gaps in such legislation¹⁴; and (3) to elucidate and develop the common law¹⁵.

In the Family Court there followed many cases, some of them followed by an appeal to the High Court, in which international law

¹² (1993) FLC ¶92-416.

¹³ *Murray* (1993) FLC ¶92-416 at 80,255.

¹⁴ (1993) FLC ¶92-416 at 80,257.

¹⁵ (1993) FLC ¶92-416 at 80,257.

was invoked by Nicholson CJ in the interpretation of applicable Australian law and in its development. A well known instance was *B and B: Family Law Reform Act 1995*¹⁶. In that case, the Full Court was concerned with s 43(c) of the *Family Law Act*. That paragraph of the Act required that, in the exercise of the Family Court's discretion, regard was to be had to "the need to protect the rights of children and to promote their welfare". The paragraph had been in the Act since its first passage in 1975. On that basis, the federal Attorney-General submitted that it should not be interpreted by reference to the *United Nations Convention on the Rights of the Child* (UNCROC). This was because that statement of international law was not in existence at the time of the legislative adoption of s 43(c).

However, Nicholson CJ, Fogarty and Lindenmayer JJ offered five reasons for rejecting this submission. First, although UNCROC had not been adopted at the time of the passage of the *Family Law Act*, the concept of the rights of children was well established by that time, having been recognised in 1959 in the *Declaration on the Rights of the Child*, which preceded UNCROC, and to which Australia had acceded¹⁷. Secondly, the rights of children were not to be regarded as static. The paragraph of the Act was to be

¹⁶ (1997) FLC ¶92-755.

¹⁷ (1997) FLC ¶92-755 at 84,226-84,227.

interpreted as understood from time to time¹⁸. Thirdly, UNCROC was to be accorded particular attention because it was one instrument of the international law of human rights that had secured virtually universal acceptance of all nation states in the international community. It was therefore important that domestic law, so far as possible, should accord with it. Fourthly, the Declaration was scheduled to the *Human Rights and Equal Opportunity Act* 1986 (Cth)¹⁹. It therefore enjoyed "special significance" in Australian municipal law as a treaty nominated by the Federal Parliament in this way²⁰. Fifthly, it was apparent that other provisions, later introduced into the *Family Law Act*, were enacted in reliance upon UNCROC. The reasoning of the Full Court in this manner reflects the way in which the House of Lords was later to reason over the interpretation of English legislation so that it would be in harmony with later adopted principles of universal human rights²¹.

There were many other decisions of the Full Court of the Family Court where Nicholson CJ, in company with his colleagues

¹⁸ (1997) FLC ¶92-755 at 84,227.

¹⁹ UNCROC is Schedule 3 to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).

²⁰ (1997) FLC ¶92-755 at 84,228.

²¹ *Fitzpatrick v Stirling Housing Association Ltd* [2001] 1 AC 27. See A Lester and D Pannick, *Human Rights Law and Practice* (2nd ed, 2004), 423 [4.14.19].

drew upon international law in resolving the case in hand. In some, the High Court on appeal adopted a different view²². In others, the High Court confirmed the Full Court's approach or declined special leave to appeal²³.

THE VESTING OF INTERNATIONAL JURISDICTION

It is the misfortune of prophets that they are often insufficiently recognised in their own country in their own time. Especially is this so in Australia where strong pressures towards conformity are never far from the surface. Often, new ideas, and those who purvey them, are the subject of political, professional and personal suspicion and calumny. Nicholson CJ, in his time, received more than his fair share of this.

Doubtless he made some mistakes, as all of us do. Certainly, he performed his judicial duties in a new and different way. He laid emphasis upon direct communication with the general public. He was fiercely defensive of the independence of the judiciary. He did

²² *DP v Commonwealth Central Authority* (2001) 206 CLR 401.

²³ *DJS v LJT B95/2001* (19 March 2002); *DJS v LJT B95/2001* (19 March 2002) (Kirby and Hayne JJ) (<http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/hca/transcripts/2001/B95/1.html?query=djs+v+ljt>).

not accept political attacks on that independence. Under successive governments, he always gave as much as he received.

Different writers would emphasise different aspects of Nicholson CJ's contributions to the Commonwealth to note, and praise, on his retirement. His engagement with the media. His attention to the better administration of his large, national court. His loyal support of the judges of the Family Court as they performed their difficult, stressful work under great pressure. His acceptance of large burdens in participation in judicial tasks at home and abroad. His engagement with the practising profession from which he had come. His outreach to global organisations concerned about the universal issues of family law and the law concerning children. His determination to fulfil a full working load as a sitting judge: not for him management by remote control. All of these are honourable and worthy contributions. They deserve praise. But they are not unique or special.

What was special was Nicholson CJ's recognition that the age we live in is one that demands an interaction of international and local law. In a sense, the discipline of family law, as one involving universal issues, and often applying international principles, made his insight easier to come by. Yet many lawyers, of a more traditional disposition, would never have received the insight. Many still have not.

In federal Australia judges and lawyers have become accustomed to the capacity, under our Constitution, to vest federal jurisdiction in State courts. Now we are seeing, in a sense, the vesting in national courts of international jurisdiction²⁴. This is an insight that Nicholson CJ had early in his service as Chief Justice. He gave it effect in many of his judicial decisions. In the early days of new doctrine, the fact that some of his opinions were reversed by the High Court is less significant than the fact that he had the insight and courage to pursue a new and challenging legal idea.

The legal mind is all too often resistant to such insights. It was a blessing of the Commonwealth that Alastair Nicholson's mind was ever open. As a human being, a lawyer, a judge, a chief justice and an officer of the Commonwealth, Alastair Nicholson served the Australian people with admirable fidelity.

²⁴ cf P Spiro, "Treaties, International Law, and Constitutional Rights" (2003) 55 *Stanford Law Review* 1999 at 2022 (footnote omitted); I Brownlie, *Principles of Public International Law* (5th ed, Clarendon, 1998), 584 at 708. See also G V La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 *Canadian Year Book* 89 at 100; *The Queen v Finta* [1994] 1 SCR 701 at 774 per La Forest J; cf G Van Ert, *Using International Law in Canadian Courts* (Kluwer, 2002), 46.

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