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the Hon. J J Spigelman, AC, Chief Justice of NSW in 2005**

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Sesquicentenary Of The University Of Sydney Address

SESQUICENTENARY OF THE UNIVERSITY OF SYDNEY
LAW FACULTY
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SYDNEY, 5 NOVEMBER 2005

I grew up in a country in which the Prime Minister, Sir Robert Menzies, was able to travel to England for six weeks by boat with the Australian cricket team, stay for a month or so watching cricket and then return, taking another six weeks to do so. Such conduct is inconceivable today.

All aspects of life have speeded up. Where we once spoke of words per minute, we now speak of characters per second. Olympic sports like luge, cycling and canoeing are measured in milliseconds. Other sports have changed their rules or reinvented themselves to provide a "fast food" alternative, such as the introduction of tiebreakers in tennis. Sir Robert Menzies would never have approved of one-day cricket.

When the staff, students and graduates of this University Law School gathered together to celebrate the centenary of the Law School in 1990, they could never have imagined how quickly a half-century would pass. However, what we commemorate today is the resolution of the University of Sydney Senate to establish a Law Faculty. The creation of a faculty in 1855 was entirely technical, although in 1858 a barrister was appointed as the first part-time lecturer and from time to time thereafter LLBs and LLDs were awarded. It was not until 1890 that the first Professor of Law was appointed and the Law School moved into distinct premises - hence the centenary in 1990.

Nevertheless, bearing in mind the Trade Practices Act, if I were a member of this faculty I would be wary of deploying the term "sesquicentenary" in trade or commerce assuming, contrary to the contemporary fashion in higher education, that you are not already so engaged.

On the occasion equivalent to this in 1990 for celebrating the centenary, the speech was delivered by Sir Anthony Mason. He concentrated on the then recently announced decision that the Law School was, after many years of debate, finally and definitely moving to the main campus. In 2005, with the plans much further advanced than they were at that time, I feel reasonably confident in proceeding on the same assumption.

There have always been two schools of thought on this matter. I myself have always been a proponent of a site on campus. The debate about the geographic location of the University of Sydney Law School encapsulates in physical form a wider debate about the nature of legal education.

Blackstone's Commentaries were the first lectures on the common law ever delivered at Oxford, where he became the first teacher of the common law. For centuries the education of common lawyers was conducted by a medieval apprenticeship system in attorney's firms or, in the case of barristers, by the Inns of Court, then often referred to as "the Third University". Oxford and Cambridge taught only civil, canon and Roman law until Blackstone. It is not as if that was unrelated to private practice. The jurisdiction of the ecclesiastical courts was more significant and wide-ranging than common lawyers care to remember.

Over the centuries since Blackstone, there have been debates in England, the United States, Australia and other common law nations about whether a law school is a place for professional training or for learning an academic discipline. The answer, of course, is that it must be both. The balance between the two is a matter upon which reasonable minds can and do differ. There is no single correct solution.

There can be no doubt that one of the basic functions of a legal education is to teach students to learn to think like a lawyer. That is not necessarily incompatible with teaching them to think. I am afraid I am a little old fashioned about the role of education. Undergraduates come to university as minds to be formed, not as consumers with wants to be satisfied. Nor, can I accept those contemporary education philosophies that treat education as some form of therapy.

However, the basic duality of function remains. Teaching students to become fully trained members of a profession is a matter which must continue to be given primary weight. It is not, however, incompatible with that objective to seek to ensure that graduates do not emerge with a narrow concept of the role and function of the law, nor with an inward looking, inbred intellectual perspective. The profession benefits from ensuring that its members have intellectual horizons beyond the law. The physical location of the Law School raises these issues in a dramatic form. I am convinced that both functions can be properly performed from a campus location.

I emphasise the broader public interest which will be served by ensuring that legal academics and law students participate fully in the intellectual life of the University. They will, thereby, enhance the ability of the University to serve its primary mission for the advancement and dissemination of learning. There are few areas of discourse which do not benefit from a legal perspective. There are no areas of the law that should not be informed by other perspectives.

One significant recent development in this regard is the fact that a majority of law graduates do not intend to and do not in fact enter private practice. Law has increasingly become a general degree of utility in a wide range of commercial and governmental occupations. About 2,000 new lawyers are admitted to practice every year. Less than half take out practising certificates. This trend supports the decision to move the campus.

There is no doubt, however, that the degree to which this Law School has been tied to the profession has been one of its great strengths. That bond remains, in this era of competition amongst tertiary institutions, one of its competitive advantages. The move to the campus will require the Law School to make an extra effort to retain its traditional ties and to do what it can to encourage members of the profession to continue to participate in teaching. In that regard it is of great significance that the present Law School will be, as I understand the plan, in part retained for the use of postgraduate courses for the University.

An occasion such as this invites reminiscence, even nostalgia. I am one of many who recall their years at the University, including at the Law School, with great fondness. For most of my time we had the rather dubious pleasure of occupying the old University Chambers building. Large lectures were held up and down the street: in St James Hall next door and at the other end of Phillip Street in the auditorium of 2GB radio station which Barry Humphries, in one of his first triumphal visits to Sydney - as I recall he had just discovered the phallic qualities of the gladioli flower - recalled the celebrity heyday of the site, where the great Jack Davey broadcast, describing it as the "cashmere bouquet auditorium". If you don't understand that reference ask someone over 50.

Looking back now I have no doubt that my generation was privileged to pass through this Law School in one of its golden eras. The faculty had diversity and extraordinary quality. We received the benefit of it in the course structure and materials: the texts written by our lecturers, the case books they edited and the valuable notes which they prepared for each of the courses and published only for students who attended this School, as well, of course, as the lectures and tutorials themselves.

Many were prolific in their output, although some adopted the approach so well described by Justice Heydon in *Union Shipping New Zealand Limited v Morgan* (2002) 54 NSWLR 690 at 728:

"... [A]cademic legal literature is, like Anglo-Saxon literature, largely a literature of lamentation and complaint. The laments and complaints can be heard even when academic wishes are acceded to."

Notwithstanding the productivity of its staff, the Law School firmly opposed the development of any publish or perish tradition. The dean of the time, Ken Shatwell, led by example. In the early 1950s he published two excellent articles: one on consideration and one on mistake. Intellectually exhausted by this outpouring, as far as I know, he never published again.

The key to the success of this School during my era was the intellectual strength of its faculty. The two rival paradigms of legal education - professional training or academic discipline - were both represented in this Law School by lecturers of great force and talent. This gave rise, although I do not remember being conscious of it at the time, to a considerable amount of conflict within the faculty. From the perspective of the students, as best evidenced in the future career of its graduates, this conflict was in fact a creative tension. Two professors in particular represented the conflict in approaches to what a law school should be: Bill Morrison and Julius Stone. The tension between them in which others, such as Frank Hutley, frequently joined, created fraught relationships. However, the

students were the beneficiaries both of the intellectual rigour which Morrison demanded and of the intellectual breadth that Stone instilled.

For many years, perhaps until the 1960s, it was probably the case that the Victorian legal profession had the highest reputation in Australia. Since that time, it is the Sydney profession that has had that reputation. In some respects this reflects the move of the commercial and financial capital of the nation from Melbourne to Sydney, which commenced to occur in the 1960s. It does not, however, explain the intellectual strength of the profession in this city.

That strength is reflected in the universally accepted high quality of the Supreme Court and the Federal Court in this city. It is also reflected in the composition of the High Court. Since the beginning of 1989, when Justice McHugh was appointed to the High Court, the majority of its members have come from the Sydney profession. Justice McHugh, like Lord Diplock in England, is the great example in this nation of the proposition that a law school education is not essential to high attainment in the law. Nevertheless, he is very much a product of the Sydney Bar, the intellectual rigour of which has always been significantly influenced by the Law School. All the others were a product of this Law School, except for Justice Heydon who read Arts at this University and had the bad taste to study his law at Oxford. He made up for it by returning to this Law School as its dean. With Justice Crennan also a graduate of this Law School, the majority will extend beyond two decades.

The intellectual rigour of the Sydney profession is attributable in large measure, in my opinion, to its synergistic relationship with this Law School. The intellectual strength of the faculty, both full-time and part-time, instilled in future practitioners a commitment to high standards of learning and performance.

Lecturers like Bill Morrison were demanding in ways that few who passed through his hands will forget. On the other hand, insofar as the profession has escaped the perils of intellectual inbreeding, to which the law appears to be particularly subject, it is due in large measure to lecturers like Julius Stone, and the endless stream of disciples that he was able to attract here being, as he was, one of the great legal scholars of the 20th century anywhere in the common law world.

Others made similarly significant contributions. Ross Parsons established courses in corporations law and taxation law of the highest quality and forged links with the broader commercial community in this city, of which the Law School remains the beneficiary today. Pat Lane enthralled us with his encyclopaedic knowledge of constitutional law always knowing the precise page of the Commonwealth Law Reports. What would later appear to be his obsession for concentrating on the text of the Constitution - for some time a desperately unfashionable approach - may be coming back into fashion. Gordon Hawkins at the Institute of Criminology was almost as successful as Stone in maintaining contact with the best United States scholars in his criminal law field and began the tradition of counteracting the sensationalism that often attends public discussion of crime, by contributing a sensible, balanced, informed opinion to the public debate.

Throughout the period that I was at the Law School the influence of and contribution by practising members of the profession was immense. Frank Hutley, once a tutor as one of only three full-time members of faculty, continued to lecture as counsel and judge. I owe him a personal debt. Without his intellectual honesty I would probably have been denied the University Medal on the basis of not having attended enough lectures.

There were numerous practitioners who returned to contribute to the education of the generation of students to which I belong: Murray Gleeson on corporations law; Harold Glass on evidence; Gordon Samuels on pleading; Zeke Solomon on international law and, of course, Meagher and Gummow and Lehane before they became "Meagher Gummow & Lehane", and assumed the role of extirpators of heresy, knowing that fallen angels can insinuate heresy anywhere, even in the impressionable mind of a Diplock, let alone in that of the unspeakable Denning.

I know that I speak for all of those present here today that our attendance manifests the debt that we owe to this Law School. We wish the greatest of success to all those who continue to be involved in this important centre of education. I know that with the support of your Chancellor, Justice Santow, the School is dedicated to maintaining both the strength of its intellectual tradition and its ties to the practical world of the profession and the community. The move to the campus will create new challenges, particularly, for the maintenance of the close bond between the Law School and the profession. I have no doubt that those challenges can be successfully met.

Over the course of about 150 years, since the University decided to establish a law faculty, the legal

system of this State has been the product of two forces: of continuity and of change. These forces have always been with us and they will always be with us. The Law School plays a vital function with respect to both those forces. First, as custodian of some of our most important legal traditions and, secondly, as a centre for deliberation about changes that need to occur. We on the bench, and in the practising profession as a whole, depend to a significant degree on independent scholarship for many purposes, including for the development of the law and of the mechanisms for the administration of justice. We must always be conscious of our traditions, but equally conscious of why it is we do what we do.

During the Second World War, the British pressed into service for home defence whatever armaments they had available, including artillery of great vintage. Mobile units were deployed up and down the coast and trained in the traditional manner of the Royal artillery. Concern developed about the apparent lack of efficiency of the processes. The methods which the soldiers had been trained to perform in the loading, aiming and firing routines were subject to careful study. Something was extremely odd. A moment before the firing, two members of the gun crew ceased all activity, stepped back from the piece during its entire firing sequence and stood at attention. The investigator called in an old retired Colonel of artillery to ask him why all this energy and time was being wasted. The Colonel worked it out. "They are holding the horses", he said [1]. We in the law have to understand why we do traditional things, in order to ensure that we are not just holding imaginary horses.

I look forward to the continued association between the Court and the profession and this Law School in the years ahead. I know it is in good hands. Ron MacCallum as dean has made a contribution to learning in the field of industrial law that is unsurpassed. However, your contribution is much more than that. The way in which you have overcome your disability to establish yourself as a scholar of such high renown, and as an administrator of such capability, together with the extraordinarily personable style of your discourse, makes you an inspiration to us all. I, and we alumni all, wish you and your faculty well.

End Notes

[1] Elting E Morison Men, Machines and Modern Times MITQ Press Cambridge Mass. 1966 pp17-18.

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The Charles Perkins Memorial Oration 2005

**THE CHARLES PERKINS MEMORIAL ORATION 2005
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
UNIVERSITY OF SYDNEY, 27 OCTOBER 2005**

Charles Perkins and I performed our first significant act of public service, and came to public prominence, at the same time and in collaboration with each other. He as President and I as Secretary of Student Action for Aborigines and, as two of four members of the Tour Executive on the 1965 Freedom Ride. This forged a bond that endured throughout Charlie's life and which I still feel. For that reason I am grateful to the Koori Centre of the University of Sydney and, particularly, to the immediate Perkins Family – Eileen, Hetti, Rachel and Adam – for inviting me to present this Oration.

The extent of Aboriginal deprivation and the existence of systematic discrimination was not widely recognised in 1965. The primary contribution of the Freedom Ride was to make these issues front page news, day after day, in a manner that had never occurred before. The hostility, including physical violence, to which we were subjected revealed an ugly side to Australian social relationships of which many Australians were unaware or about which they had not then been concerned to inquire. The Freedom Ride changed that.

More than any other factor it is this catalytic effect which has led to the Freedom Ride being recognised, now at the safe distance of 40 years – a length of time which fills me with more bewilderment than dread – in history and social studies books used throughout Australia. The comprehensive survey by Professor Ann Curthoys in her book *Freedom Ride: A Freedom Rider Remembers* is an entirely accurate and fitting narrative of these events.

This widespread recognition gives Charlie Perkins the central, indeed critical, role: a recognition that is entirely deserved. There were numerous occasions on the Freedom Ride, when Charlie displayed the intelligence, the debating skill, the determination, the passion and the anger which would mark his life.

In Walgett, he engaged in open disputation with the leaders of the RSL Club, a club which refused to permit Aboriginal ex-servicemen – men who had fought for Australia – to become members. In Moree, Charlie led a group of Aboriginal children into the swimming pool from which, by formal resolution of the Council, they had hitherto been excluded. In Kempsey, he sought entry to the municipal swimming pool, informing the officer that he was an Aborigine, only to be told that, again by formal Council resolution, no Aborigine could be admitted to the pool.

Nothing, however, dramatised the position, to the general public, better than the bigoted violence to which we were subjected. At Walgett we had made arrangements to stay in the local church hall. At 9.30pm at night the clergyman threw us out, on the basis of the controversy we had caused in the town during the day. We were followed out of town by a convoy of cars, not knowing who the occupants were. A truck sideswiped the bus a number of times and eventually forced us off the road luckily, through the skill of the driver, without serious mishap. Our apprehension was considerable as the other cars came off the road and surrounded the bus. As it turned out, these were the local Aborigines who had come out to protect us. Similarly violent incidents occurred in Moree, when a number of us were assaulted – I myself was king hit – and all of us were subject to abuse.

These were dramatic incidents which had an immediate effect on the nature and intensity of the debate about injustices to Aborigines in this country. One of the most significant of the long term effects was, however, the emergence, for the first time in our history, of an Aborigine in a clear leadership role. There was no doubt at the time, or since, that Charlie Perkins was the leader of, and the spokesman for, the entire group of white students. In this, as in so much else, he was a pioneer for his people and a role model of considerable significance.

The contribution Charlie made at this time was to confront Australia with issues which it would have preferred to ignore. Throughout his life Charlie would continue to confront Australia in this way. He would also, through his involvement in the development of public policy and the creation of institutions,

have a major influence on the progress of his people. He was never content with the outcome. He would not be content today.

Nevertheless, there is much that has changed for the better. Not least is the contrast between the position in which Charlie found himself in 1965 as the first Aborigine graduate, or at least the first person to graduate who recognised his aboriginality, with the situation today with thousands upon thousands of Aboriginal graduates and students. On the other hand his kidney disease, of which I well remember he was already suffering as a student, and his all too short lifespan, are representative of our society's greatest failure to the Aboriginal people: the life expectancy of Aborigines is twenty years shorter than that of other Australians. This, as many of you will recall, was the central focal point of the memorable Oration in this series delivered by Noel Pearson in 2001.

There are few areas of Aboriginal policy discourse which are not fraught with controversy. Even the history of Aboriginal/white interaction is a subject where one cannot tread without trepidation. I am sure this audience appreciates that my position as Chief Justice requires me to abstain from such controversy. I intend to at least attempt to do so this evening. However, it is not always possible to predict what some people may regard to be controversial.

The involvement of Aborigines in the criminal justice system is one of the focal points of debate. That is a matter about which I can make some observations.

Fourteen years after the report of the 1991 Royal Commission into Aboriginal Deaths in Custody, which made 339 recommendations aimed at reducing the number of Aboriginal people coming into contact with the criminal justice system, the proportion of Aborigines in our prisons has increased. On recent calculations although Aborigines comprise something like two percent of the New South Wales population, they constitute almost one-fifth of adult male prisoners, approximately one-third of women prisoners and over two-fifths of juveniles in detention [1].

These incarceration statistics reflect social deprivation. It is not, however, possible to ignore, whatever the causes, that Aborigines have a higher rate of offending than the general population. On one study, Aboriginal persons are five times more likely than the New South Wales average to commit a murder, three times more likely to be an offender in a sexual assault, five times more likely to be implicated in multiple offender sexual assault, five times more likely to commit robbery, six times more likely to be involved in assault, seven times more likely to be an offender in break enter offences and eight times more likely to be an offender in an incident involving grievous bodily harm.

What requires emphasis is a fact: the other side of the coin. Who are the victims? The overwhelming majority of the victims of crimes committed by Aborigines are other Aborigines. On the same study, Aborigines are more than three times more likely than the New South Wales average to be the victim of a murder, three times more likely to be the victim of a sexual assault, three times more likely to be the victim of an assault, five times more likely to be a victim of a domestic violence related assault and also five times more likely to be a victim of an assault occasioning grievous bodily harm [2].

It is a mark of the poverty in the Aboriginal community that there is one category in which Aborigines are considerably less likely to be victims. The study to which I have referred indicates that the average member of the New South Wales community is six times more likely to be the victim of a robbery than an Aborigine.

I repeat, the overwhelming majority of victims of serious crimes committed by Aborigines are other Aborigines.

This audience is well aware of the vicious cycle of poverty and substance abuse which leads to anti-social behaviour of various kinds and which, in turn, reinforces the poverty and addiction. Nevertheless, if we wish to reduce the over-representation of Aborigines, particularly young Aboriginal men, in the prison population, the overwhelmingly most important thing that we have to do is to reduce levels of Aboriginal offending, particularly repeat offending [3].

To achieve this task the law has a significant but limited role to play. The primary means are to be found in our social, economic, health and education policies.

The New South Wales Government has adopted a ten year plan called The New South Wales Aboriginal Justice Plan which is aspirational but which identifies a range of policy changes, including

objectives for reform of the criminal justice system. The authors of the study, as indicated by the fact that the plan is a ten year plan, expect that fundamental change can only occur in the long term. Nevertheless it is a task that those of us engaged in the legal system must commit ourselves to achieving. When deciding to do so we must recognise that the principal beneficiaries of any decline in serious criminal conduct by Aboriginal offenders will be other members of the Aboriginal community.

There is, and has been for as long as anyone can remember, a debate amongst all involved in the criminal justice system about the efficacy of criminal sentences. There are many different opinions, based on a considerable body of conflicting research and experience, which question the efficacy of sentences in terms of deterrence. One thing that is clear is, whatever the rights and wrongs of that general debate, our sentencing and rehabilitation processes for Aboriginal offenders are not achieving the objective of deterrence. The re-offending rate is high. For too many young Aboriginal men, a prison term seems to have become a right of passage. New ways of doing things were clearly called for and are being adopted.

I wish to indicate my strong support for the system of circle sentencing, an idea which we picked up from the Canadians. It appears from the early results that this has been an extraordinarily successful initiative. It was tested on a trial basis in Nowra under the dedicated guidance of Magistrate Doug Dick [4]. It has now been extended to a number of other centres, with the prospect that it will become even more widely available as the great amount of preparation work required to ensure an effective system is undertaken in more and more places.

There is a good deal of evidence now that sentences which carry the support of the elders of the local Aboriginal community have a much greater impact on the individual offender than any sentence imposed by a white magistrate. The sense of shame imposed by the process itself appears to be much more effective, particularly in reducing recidivism. Furthermore, notwithstanding some scepticism at the outset in many of the communities, the victims appear to leave the process with a high level of satisfaction about both the process and the result. There does not appear to be any sense that the ultimate sentences are systematically inadequate. More significantly, the direct face to face discussions between the victim and the offender provides a kind of closure that usual court procedures do not afford.

To a very large extent the system depends on the existence of local Aboriginal leadership which is accepted by offenders. It may not be a system that can work where it is most needed, that is to say where the Aboriginal community is breaking down. On the other hand, the system itself empowers the Aboriginal leaders of the community in a way that is palpable and has a real influence on the lives of Aboriginal offenders, particularly younger offenders, as most who become involved in circle courts appear to be. The degree of acceptance is manifest in the comment of one of the elders to Magistrate Dick: "This is not white man's law anymore, it's the peoples' law" [5].

In terms of the topics on which I was asked to address you this evening – Vision, Leadership and Future –circle sentencing is both a manifestation of vision and of leadership, occurring in such a way as to reinforce the position of Aboriginal community leaders. The apparent success with respect to rates of re-offending, together with the widespread acceptance by victims of the process and its outcomes, is a very real ray of hope in an otherwise bleak landscape of criminal offending by young Aborigines.

I have been asked to make some observations about the future. In many ways, given the difficulty I have in discussing controversial subjects, speculating about the future is perhaps the easiest thing for me to do. There was a saying common in the former Soviet Union: "Predicting the future is quite straight forward, it's the past that keeps changing".

Within the limitations that my office imposes upon me, I wish to make a few observations about the future course of the reconciliation process.

Policies which have encouraged the assimilation of individual Aborigines into the white community, including particularly policies involving removal of children from their parents, have been the focus of much attention. It has long been known that many persons who are at least in part of Aboriginal origin have successfully passed as white over the course, now, of almost two centuries. Sexual contact began at the very outset of white settlement, because of the shortage of white women in the bush. It has continued in many other ways, to the extent that few families from the bush have not had such contact.

Throughout Australia there is a considerable body of anecdotal evidence about particular forebears who behaved in a manner consistent with being of Aboriginal or part Aboriginal origin. I refer to stories of grandfathers who avoided the sun as much as possible and grandmothers who caked white powder on their faces. Many family trees have points at which the origins of a particular forebear are simply left blank. These are all telltale signs of Aboriginal origin. Henry Reynolds, in his most recent book, *Nowhere People*, published this year, has come to identify, for the first time in his career as a historian of the Aboriginal people, his own Aboriginal heritage that had been suppressed by his father and grandmother. The surprise of his discovery would be replicated in tens of thousands of Australian families.

The extent to which assimilation has occurred over the course of almost two centuries, often as a result of deliberate government policy, has received prominence in the reconciliation debate. However, that attention has tended to focus, to the detriment of the reconciliation process, on matters that involved the separation of Aboriginal persons from the broader community, rather than on matters which integrate Aborigines with the broader community. Past assimilation has been treated as divisive and only divisive. It is more complicated than that.

Let me state one undeniable fact: many, probably millions of Australians have an Aboriginal ancestor. This should be recognised as an important bond. However, most do not know this fact about their family.

There was a strong sense of racism involved in the suppression in thousands upon thousands of Australian families of the Aboriginal origins of one or more of their forebears. For most of our history this has been regarded as a matter to be suppressed. It appears to me that the process of reconciliation would be advanced by a wider recognition across the broad Australian community that the number of Australians who have Aboriginal ancestors probably amounts to millions.

We have been through this process before. For most of our history respectable Australian families tried to hide their convict origins. Indeed as early as 1841 the judges of the Supreme Court declared legislation for a census which would ask persons to identify whether they were of convict origin or not to be invalid [6].

The dominant attitude in the nineteenth century to emancipated convicts and to their progeny, frequently referred to as "the shame of Botany Bay", was based in part on the idea of tainted blood being inherited. This is also the foundation of much racist thought. The sense that convict origin, however remote, was not respectable, a matter of great significance in the Victorian era, remained a factor in Australian society at least until World War II. Since then identifying one's convict origins has become a matter of some pride. I do not think it is impossible for us to hope that the same can occur with respect to the Aboriginal origins of many Australians.

Identifying Aboriginal ancestors will be a matter of great difficulty. This is not a matter on which persons kept records at the time. Most were trying to hide the fact. Nevertheless, there is an ability for persons interested in their family's tree to identify the signs of Aboriginality in many cases. To the extent that I am correct, and that millions of Australians have Aboriginal ancestors, the reconciliation process will be substantially advanced if persons of whom that is true take steps to identify those origins and take pride in finding them. The reconciliation process cannot succeed if it is based, contrary to historical fact, solely on maintaining a rigid and categorical distinction between black and white. It will succeed if a significant proportion of those Australians of whom it is true take pride in acknowledging their roots in both communities.

End Notes

[1] See *NSW Aboriginal Justice Plan: Beyond Justice 2004-2014* NSW Aboriginal Justice Advisory Council 2006, p6.

[2] See Jacqueline Fitzgerald and Don Weatherburn "Aboriginal Victimisation and Offending: The Picture from Police Records" NSW Bureau of Crime Statistics and Research, *Bureau Brief*, December 2001.

[3] See Don Weatherburn *Law and Order in Australia: Rhetoric and Reality* Federation Press, Sydney 2004 especially pp220-221.

[4] See Doug Dick "Circle Sentencing of Aboriginal Offenders: Victims Have a Say" (2004) 7 *Judicial Review* 57.

[5] Ibid p72.

[6] See J B Hirst, *Convict Society and Its Enemies* George Allan & Unwin, Sydney 1983 at p119, J M Bennett, *Sir James Dowling: Second Chief Justice of New South Wales*, Federation Press, Sydney 2001 at p121.

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Formal Opening Ceremony - Court of Criminal Appeal at Albury

FORMAL OPENING CEREMONY

Court of Criminal Appeal at Albury

Thursday 20 October 2005

I declare this ceremonial sitting of the Court open. For the first time the Court of Criminal Appeal has sat in Albury, and I invite the Mayor, Councillor Fraunfelder to address us.

Mayor Fraunfelder, Mr Arnott, Mr Lyall, Mr Gibney, thank you for your introductory remarks.

The Supreme Court's jurisdiction has been significantly affected by the increase in the District Court jurisdiction some years ago. As a direct result of that the number of filings in the Court in civil matters reduced substantially, to the extent that we could no longer justify civil circuits. The Supreme Court still comes, in its criminal jurisdiction, to this part of New South Wales and other regional parts of New South Wales but there are few areas in which the civil filings can justify anything other than occasional visits.

The Court will, of course, if necessary, send judges to sit in civil trials but the filings are not such as can justify a circuit of the character that used to occur.

It was for that reason, in large part, that the Court thought that it was in danger of losing a lot of its touch with regional New South Wales, contact that had been part of the Supreme Court for all of its 180 years in existence. This was not only in New South Wales, of course, but a century or so ago both Melbourne and Brisbane were circuit towns visited by judges of the Supreme Court of New South Wales. That changed, but in New South Wales proper it continued for many years.

The decision to sit the Court of Criminal Appeal in regional New South Wales, which has happened at least once a year over the last five years or so, was made in recognition of the disadvantages of the possible loss of contact between the Court and a significant part of the New South Wales community.

This Court is, in large measure, the final Court of Criminal Appeal. It decides some 500 cases or so a year, perhaps half a dozen cases make their way to the High Court. In the overwhelming majority of criminal cases this is the final Court of Criminal Appeal.

The significance of its jurisdiction in crime has already been mentioned by the speakers today.

The sentencing of convicted criminals is probably one of the most important tasks performed by the judiciary. It is also one of the most controversial and engages the public interest to a greater extent than virtually anything else that judges do.

To a very substantial extent public confidence in the administration of justice is determined by the way crime is tried and criminals who are convicted are sentenced. It is for that reason that it is of great significance for all sections of the New South Wales community to have as much understanding as is possible of the way the system works.

The debate, in particular about sentencing, will never be resolved. It started off in the Garden of Eden. When God called Adam to account for his transgression he did the natural thing and blamed his wife. She was much more imaginative and blamed a snake. Ever since then there has been a debate going around about what is the appropriate level of punishment. The reason why this will never rest is because sentencing involves an array of contradictory and incommensurable objectives.

It is important to deter individual criminals and others from committing crimes. It is important to ensure

that punishment is meted out in due measure. But it is also important to ensure that any prospects that a criminal may have of rehabilitation is acknowledged in the sentence imposed.

These are not matters that point in the same direction. More often than not they point in different directions. Balancing these contradictory matters is a very difficult part, and at the heart of the sentencing exercise. The requirements of justice, in the sense of just deserts, and the requirements of mercy often conflict. But we live in a society that values both justice and mercy.

As a result of this there is a wide spectrum of legitimate opinion about the appropriate level of punishment for criminal offences. It is impossible for the courts to satisfy all sections of the community with respect to a matter like sentencing, because actual public opinion varies so widely over so wide a spectrum as to what is appropriate.

In cases involving violence, particularly involving death, it is frequently observed that members of the community believe judges are too lenient. However, in other areas such as drink driving offences, which may also lead to injury and even death, frequently committed by young men, more often than not young men who have no real criminal intent, it is often said that judges are too harsh. When I say that, that is not a universal opinion, but that is the kind of opinion that is often expressed.

The permissible range of what judges can actually impose by way of sentences is much narrower than the range of public opinion. The reason for that is that judges have to ensure that there is some consistency in the imposition of sentences so that, more or less, people who commit similar offences are sentenced in a similar way.

Different judges may approach the task differently. There is a permissible range within which judges can properly sentence. It is one of the most important tasks of this Court of Criminal Appeal to ensure that there is consistency throughout the State, so that broadly similar offences are punished in broadly similar ways. Yet the permissible range of judicial opinion will remain, by reason of the need for consistency, narrower than the actual range of public opinion.

So it is an inevitable part of the sentencing process, and will always remain such, that in most situations there will be people who do not agree with the judge's decision. The fact that the judges are constrained by the law to operate in a narrower area than some people would regard as appropriate is one of the most difficult tasks of the law. It is also one of the most difficult things to explain. I hope that this kind of sitting of this Court will enhance the understanding of the general public as to the constraints, the legal constraints, under which judges operate.

There is an important task of educating the public about what judges actually do, particularly in terms of sentencing. The fact is that there are thousands of sentences imposed every year by the Courts of New South Wales. A few dozen of them may get some sort of publicity. In rural areas the reporting of criminal trials and sentences tends to be more fulsome than it can be in the city.

Nevertheless the media has an understandable focus on high profile cases and controversial cases. Necessarily, the media cannot report on everything. They fail to report in any systematic way on what judges do in the normal line of cases.

Day in day out sentencing is done dozens of times every day by judicial officers in this State. That passes without comment or controversy because the sentences are regarded generally as fair.

There is no adequate means of ensuring that the public gets such information. The media reports do tend to highlight matters of some controversy. It is an understandable way of reporting, but there has to be some sort of recognition in the public that the public, particularly on matters of criminal sentencing, is only getting part of the story.

I hope that a sitting of this character will enable the public of Albury and its broader rural region to get a better understanding of the restraints under which the judiciary operate in this criminal justice system.

I note what you said, Mr Arnott, about the Albury Courthouse being designed by Alexander Dawson. We have three points of intersection. We have been very well served in New South Wales by the

quality of our government architects over the centuries. They have made an extraordinary contribution to this State. Alexander Dawson was the government architect for only a few years. It seems he had a bit of a drinking problem and did not last the distance. He did make a contribution in three respects. First, the Albury Courthouse to which you referred. He also designed the Observatory in Sydney and I was responsible for that for many years as President of the Museum of Applied Arts and Sciences, known as the Powerhouse Museum. He also designed the original Registry building on the corner of St James Road and Elizabeth Street which the Court operates and conducts a number of activities in. One of the aspects of that building in its recent restoration was the design of the original entry room for the Registrar General, where all the filing was originally done. It is a magnificent restoration. Because of his significance we have called it the Alexander Dawson Room and that is its title in the Court complex in Sydney. So there is yet another connection between the Court and Alexander Dawson.

It is a delight to come back to this city. I first came here in 1973 as you, Mr Gibney, mentioned in a somewhat different life. I came with the then Prime Minister to sign the agreement with the Premiers of New South Wales and Victoria that led to the creation of the Albury-Wodonga Corporation which has lasted for a long time, but which, I understand, will not last for much longer.

It is a delight to be back and I thank you for your warm words of welcome to the Court on this sitting. The Court will now adjourn.

The Principle of Open Justice: A Comparative Perspective

**THE PRINCIPLE OF OPEN JUSTICE: A COMPARATIVE PERSPECTIVE
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
MEDIA LAW RESOURCE CENTRE CONFERENCE
LONDON, 20 SEPTEMBER 2005 [1]**

The principle of open justice finds its origin in the common law and as such retains its force in many common law nations including Australia. In the United States it is based on the Sixth Amendment which guarantees a criminal accused the right to a "speedy and public trial". This right bearing, as these matters tend to do in the United States, a constitutional dimension, has been extended to civil trials by application of the First Amendment.

The new found preparedness of the United States Supreme Court to draw on the jurisprudence of other nations [2] opens the opportunity to look at matters such as this from a truly comparative perspective. Over recent decades a sense of international collegiality has emerged amongst the judiciaries of nations which observe the rule of law. This is reflected in the demise of the intellectual insularity that replaced the colonial cringe or imperial omniscience of an earlier era.

In Australia we have never had any difficulty drawing on the jurisprudence of the United States Supreme Court, whose judgments are frequently referred to in many areas of the law, but particularly in our constitutional jurisprudence. I am aware of the controversy that exists within the current membership of the Supreme Court of the United States about references to foreign law. I was present at a judicial conference in Washington DC when Justice Scalia and Justice Breyer reprised their, no doubt, frequently delivered debate on this matter. Perhaps Justice Scalia's most telling point was his claim that he referred to foreign law more often than any other judge on the Supreme Court bench. It was just that the cases to which he referred did not extend beyond the last quarter of the 18th century.

In Anglo/Australian discourse the principle of open justice is most frequently expressed in the form of an aphorism attributed to Lord Chief Justice Hewart from his Lordship's judgment in *R v Sussex Justices Ex parte Macarthy*[3]:

"It is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

The aphorism is not well known in the United States, although it was referred to indirectly by Justice Frankfurter and directly by Justice Kennedy [4].

Lord Hewart's pithy aphorism about the principle of open justice encapsulated a proposition that had been long known and often expressed in different ways. Another articulation was that of Lord Atkin who once said: "Justice is not a cloistered virtue" [5]. And Lord Bowen once said: "Judges, like Caesar's wife, should be above suspicion" [6].

Lord Hewart was the Solicitor General in Lloyd George's government and, when F. E. Smith became Lord Chancellor, was promoted to Attorney General. The then British practice was that an Attorney General had a right to be appointed Lord Chief Justice of England, if the office fell vacant during his term of office. When that occurred in 1921, Lloyd George refused to dispense with Hewart's services, or at least refused to risk a by-election. He promised to appoint Hewart as soon as he could. Accordingly, a High Court Judge aged 78 was appointed in his stead. Lloyd George protected his colleague by obtaining an undated, signed letter of resignation. The very next year that new Lord Chief Justice was astonished to read of his own resignation in *The Times*. Hewart was Lord Chief Justice from 1922 to 1940.

These days Lord Hewart is probably best remembered for his publication *The New Despotism*, a series of newspaper articles published as a book in 1929. This was an attack on the rising power of the bureaucracy expressed in intemperate and politically charged language and advancing a ridiculous conspiratorial thesis. Such conduct was unprecedented by a senior English judge and has never been imitated since. However, the basic themes continue to resonate today, as Lord Bingham indicated in

his lecture entitled "The Old Despotism", whilst distancing himself from the partisan vitriol of his predecessor [7].

Must we attribute the open justice aphorism to Lord Hewart? If we do, the proposition that "justice must be seen to be done", could hardly have a less auspicious provenance. Even the *English Dictionary of National Biography*, which usually confines its entries to the bland list of facts customarily found in a *Who's Who*, could not contain itself in the case of Lord Hewart. It described him as:

"Brilliant advocate; less successful as judge through tendency to forget he was no longer an advocate". [8]

Professor R M Jackson in his book on *The Machinery of Justice in England*, referred to the system by which an Attorney General had a right of appointment as Lord Chief Justice in the following way:

"In 1922 this system landed the country with Lord Hewart as Lord Chief Justice, who proved to be a judge so biased and incompetent that he seems to have caused a reaction against it." [9]

In the seventh edition of his book published in 1977, Professor Jackson had referred to Hewart as "the worst English judge in living memory" [10]. This reference was deleted from the eighth edition of 1989. Perhaps, in the intervening decade, other contenders had emerged for the title.

Lord Devlin, however, displayed no doubt when he wrote in 1985:

"Hewart ... has been called the worst Chief Justice since Scroggs and Jeffries in the seventeenth century. I do not think that this is quite fair. When one considers the enormous improvement in judicial standards between the seventeenth and twentieth centuries, I should say that, comparatively speaking, he was the worst Chief Justice ever." [11]

Lord Hewart may very well have presided over the worst conducted defamation trial in legal history: [12].

one Hobbs suing the *Nottingham Journal*. Of the litany of misconduct found by the Court of Appeal to have been committed by Lord Hewart during the course of this trial, it is sufficient to note the following:

- Rulings were made against the Plaintiff without calling for submissions from Counsel for the Plaintiff.
- His Lordship accused the Plaintiff, in front of the jury, of fraudulently concealing documents and failed to withdraw the accusation when informed that the document had in fact been disclosed.
- He permitted two days of cross-examination on matters of bad reputation, including allegations of criminal conduct which had never been particularised.
- His Lordship received communications from the jury which were not disclosed to counsel.
- He failed to give the jury any summing up or any directions as to the limited use they could make of cross-examination of the plaintiffs.
- He failed to leave critical issues to the jury.
- When the jury indicated a tentative view in favour of the Defendant, his Lordship orchestrated an early end to the trial, before they changed their minds.
- He then refused to permit an adjournment of a second defamation trial against the same Defendant - suggesting the same jury should hear the second case immediately. He thereupon entered judgment for the Defendant in the absence of counsel for the Plaintiff.

The reputed author of the aphorism "justice must be seen to be done", never indicated to the jury that they were entitled to ignore his Lordship's numerous expressions of opinion on the facts or his adverse comments about the veracity of the Plaintiff, upon which grounds of appeal the Court of Appeal found it unnecessary to rule, being content with the observation of Lord Justice Scrutton, in accordance with the demure standards of the time, that:

"I regret that, with much better grounds available, it was thought right to insist on them." [13]

Many would wish that appellate courts were still so reticent.

Again I ask, must we continue to attribute the important aphorism about open justice to such a judge?

The last word from the *Nottingham Journal* case belongs to Lord Sankey. In his judgment, his Lordship said, with reference to the false accusation of fraudulent non disclosure of documents, that it was "unfortunate that the Lord Chief Justice did not appreciate" the correctness of certain submissions made to him. Lord Sankey concluded:

"The Bar is just as important as the Bench in the administration of justice, and misunderstandings between the Bar and the Bench are regrettable, for they prevent the attainment of that which all of us desire - namely, that justice should not only be done, but should appear to have been done." [14]

His Lordship cited no authority for this proposition. Perhaps he was indulging in a little whimsy. Alternatively, perhaps Lord Sankey, who six years earlier had merely concurred with Lord Hewart's judgment in *Rex v Sussex Justices*, was giving us a hint as to the true origins of the aphorism. For myself, I am content for the future to quote Lord Sankey.

The Scope of the Principle

The principle of open justice is one of the most pervasive axioms of the administration of common law systems. It was from such origins that it became enshrined in the United States Bill of Rights and, more recently, in international human rights instruments such as Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention for the Protection of Human Rights, as adopted and implemented by the British *Human Rights Act 1998*. In both cases the right is expressed as an entitlement to "a fair and public hearing by an independent and impartial tribunal established by law"[15].

As Jeremy Bentham, no friend of the common law, who suffered from the naïve delusion that all law could be written down with uncontestable precision in what he called a Pannomion, once encapsulated the argument for open justice:

"Publicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial." [16]

The significance of the principle of open justice is of such a high order that, even where there is no written constitution, or a written constitution does not extend to the principle, the principle should be regarded as of constitutional significance. Indeed in the fundamental House of Lords decision on the principle, *Scott v Scott* decided in 1913, Lord Shaw described the principle as "a sound and very sacred part of the constitution of the country and the administration of justice". His Lordship went on to say, when rejecting the proposition that the courts could create new categories of exclusion: "to remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand" [17].

The fundamental rule is that judicial proceedings must be conducted in an open court to which the public and the press have access. A court cannot agree to sit in camera, even if that is by the consent of the parties. The exceptions to the fundamental rule are few and are strictly defined. For over a century now it has been the law in England and in Australia that the inherent power of a court of justice to develop new circumstances in which the public may be excluded is now spent. Sitting in public is part of the essential nature of a court of law and any new exception to the principle can only be created by statute [18].

I recently had occasion to apply the principle in full force when holding that a statutory court in New South Wales with a major criminal jurisdiction had no power to make a non-publication order. The test of necessary implication had to be applied with strictness because of the principle of open justice [19]. We followed a recent Privy Council decision, on appeal from Trinidad and Tobago, that a non-publication order could not be addressed in terms to bind persons not present in court, specifically the media [20].

In 1936 the Privy Council applied the principle in an appeal from the Supreme Court of Alberta, which had set aside orders dissolving a marriage on the basis that the trial of the divorce action had not been in open court. The case had been conducted in what was described as the Judge's law library to which entry was gained through a double swing door off a public corridor. One wing of that door was always fixed, the other was usually unfastened. On the fixed wing was a brass plate with the word "Private" in black letters. It was that sign which determined the issue. The word "Private" was enough to deny the proceedings the essential qualities of a judicial trial.

The Privy Council stated with force and conviction:

"Publicity is the authentic hallmark of judicial as distinct from administrative procedure ... The court must be open to any who may present themselves for admission. The remoteness of the possibility of any public attendance must never by judicial action be reduced to the certainty that there will be none." [21]

Their Lordships felt constrained to accept the original trial judge's assertion that the somewhat unusual location of these divorce proceedings was not influenced by the status of the husband, who was then Minister for Public Works for the province of Alberta. He had instituted proceedings for divorce alleging adultery by the appellant with one Leroy Mattern. The proceedings were undefended. Subsequently, Leroy Mattern's wife divorced him and Mr McPherson, after his own apparently successful divorce proceedings, had married her. The Privy Council found itself in a dilemma. Could the secret nature of the proceedings, so inconsistent with judicial process, stand in the way of Mrs McPherson's claim to have the divorce proceedings declared void and the consequential order for restitution of what was then touchingly referred to as "conjugal rights"?

Their Lordships were not prepared, at least in the absence of Mr McPherson's second wife as a party, to actually make a declaration that the divorce was void. They found it merely voidable. However, the order absolute had become unassailable by the time the appellant's claim was made. It was for that reason only that the court refused to intervene.

The landmark United States decision is *Richmond Newspapers v Virginia* [22]. Prior to this case the Sixth Amendment, with its guarantee of a "public trial", was applied only to a criminal accused and did not give any form of positive right of access to the public and the media [23]. In *Richmond Newspapers* the First Amendment was used to fill the gaps in the Sixth Amendment. On the basis of the traditional significance of openness as a critical attribute of the Anglo American trial, the principle of open justice was constitutionalised. Chief Justice Burger's judgment contained a lengthy historical analysis of open trials, from their pre-Norman origins through to the adoption of the Constitution of the United States.

The High Court of Australia, unlike the Supreme Court of the United States, but like final courts of appeal in other common law nations, can determine what the common law requires for the whole of the nation. There is no need to constitutionalise common law doctrines. The significant difference, of course, is that once a right is found to exist in a constitution it is incapable of amendment by the legislature. That is a topic for another day.

The invocation in *Richmond Newspapers* of the First Amendment to reinforce and expand the principle of open justice, specified in the Sixth Amendment with respect only to criminal trials, has seen the principle applied in many different areas.

- Civil trials [24];
- Preliminary hearings [25];
- University disciplinary hearings [26];
- Juror selection and *voir dire* examinations [27]
- Post-trial examination of jurors for misconduct [28];
- Immigration deportation hearings [29].

Since September 11, the application of the principle to immigration deportation hearings has become controversial, leading to law journal articles with titles such as "Is *Richmond Newspapers* in Peril After 9/11?" [30].

Ten days after the attacks of 9/11, on the instructions of the then Attorney General, John Ashcroft, Chief Immigration Judge, Michael Creppy, issued what has come to be called the *Creppy Directive*

which ordered additional security measures for “special interest” deportation hearings. The features of this new system include:

- Closure to press and public, including family and friends;
- The record of proceedings remains secret from all persons except the deportee’s attorney;
- Suppression of information confirming or denying whether a special interest case was on the docket or scheduled for hearing.

The criteria for determining whether a case ought to be classified as “special interest” were broad. The restrictions apply to all cases chosen by the Attorney-General, without any need for a case-by-case analysis.

Two federal Appeals Courts have ruled on the constitutionality of the *Creppy Directive*. The Sixth Circuit found the restrictions unconstitutional [31]. The Third Circuit found them permissible [32]. The Supreme Court denied *certiorari* for an appeal from the Third Circuit decision [33]. The Government did not seek to appeal the decision of the Sixth Circuit.

In this, as in so many respects, the fundamental principles of our legal procedures have to face new challenges associated with the threat of terrorism.

Application of the Principle

The principle of open justice is one of the most pervasive axioms of the administration of justice in common law nations. It informs and energises the most fundamental aspects of our procedure and is the origin, in whole or in part, of numerous substantive rules.

For example, the requirement of due process or natural justice or procedural fairness – both the obligation to give a fair hearing and the importance of the absence of bias in a decision-maker – are in part based on the importance of appearances [34]. In Anglo/Australian law the test of reasonable apprehension of bias is an objective one. It is a question of what fair minded people, not just the parties but the public at large, might reasonably apprehend or suspect.

How significant the appearance of proper conduct of the administration of justice must be is a matter that can vary over time. It is inconceivable that today, in any common law jurisdiction, let alone in England and Wales after the passage of the *Human Rights Act*, a court of appeal would decide two cases in the same way as the English Court of Appeal did in about 1970.

In one case the Court of Appeal held that a trial did not miscarry despite the fact that during the accused’s counsel’s address to the jury the chairman of Quarter Sessions kept sighing and groaning and was heard to say “Oh God” a number of times [35].

In the other case the Court of Appeal rejected an allegation that a murder trial miscarried when the judge appeared to be asleep for 15 minutes. The Court was satisfied, by perusal of his summing-up, that he must have been awake. The mere appearance of being asleep was not enough. The Court referred to the principle that “justice must be seen to be done” as a “hallowed phrase” and dismissed the appearance of the judge as being asleep as a “facile” application of the principle [36].

One important manifestation of the principle is also the foundation of judicial accountability. I refer to the obligation to publish reasons for decision. This obligation requires publication to the public, not merely the provision of reasons to the parties [37].

Judges can no longer rely on the advice which Lord Mansfield gave to a general who, as Governor of an island in the West Indies, would also sit as a judge. Lord Mansfield said:

“Be of good cheer – take my advice, and you will be reckoned a great judge as well as a great commander-in-chief. Nothing is more easy; only hear both sides patiently – then consider what you think justice requires and decide accordingly. But never give your reasons – for your judgment will probably be right, but your reasons will certainly be wrong.” [38].

Numerous other specific rules are influenced by the principle of open justice. For example, the

prohibition of undue interference by a judge and of improper conduct by a court officer with respect to the trial[39]; the determination of the weight to be given to the public interest when ruling on a claim of privilege [40]; the proposition that a permanent stay of criminal proceedings will be extremely rare [41].

The maintenance of public confidence in the judiciary has been described by one Australian High Court Judge to be the current meaning of the traditional phrase "the majesty of the law" [42]. In this respect a critical function of open justice is to ensure that victims of crime and the community generally understand the reasons for criminal sentences [43].

The significance of this function was well expressed by Chief Justice Burger, in the landmark decision of *Richmond Newspapers v Virginia*:

"Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done - or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice", and the appearance of justice can best be provided by allowing people to observe it.

.....

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case." [44]

The Principle and the Media

The principle of open justice raises many issues about the administration of justice relevant to the media. It is appropriate to recall the observations of Justice Felix Frankfurter:

"A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other, both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press." [45]

In the landmark case of *Attorney General v Leveller Magazine*, Lord Diplock said the principle of open justice requires that the Court should do nothing to discourage fair and accurate reports of proceedings [46]. This has been described as a "strong" but not a "mechanical" rule [47]. Indeed, it is appropriate to speak of a right to publish a report of court proceedings [48].

As Lord Steyn put it:

"A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the value of the rule of law." [49]

In Anglo/Australian law the principle of open justice does not create some kind of *Freedom of Information Act* entitling the media to access to court documents, at least when those documents have

not yet been deployed in any manner in the course of litigation [50]. Except insofar as freedom of speech considerations may be involved, the principle of open justice serves purposes related to the operation of the legal system. This limits accessibility in circumstances where proceedings are only filed [51].

There is a range of legitimate judicial opinion on the application of the principle. It has always been so. It always will be so. The search for the middle ground, an instinctive judicial response to the dilemma of choice, was well described, perhaps satirised, by Lord Hoffmann. It is a noble passage worth quoting at length:

“There are in the law reports many impressive and emphatic statements about the importance of the freedom of speech and the press. But they are often followed by a paragraph which begins with the word ‘nevertheless’. The judge then goes on to explain that there are other interests which have to be balanced against press freedom. And in deciding upon the importance of press freedom in the particular case, he is likely to distinguish between what he thinks deserves publication in the public interest and things in which the public are merely interested. He may even advert to the commercial motives of the newspaper or television company compared with the damage to the public or individual interest which would be caused by publication. The motives which impel judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them. Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. And publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is not freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which ‘right-thinking people’ regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.”

This judgment was delivered before the United Kingdom adopted the European Convention on Human Rights. However, Lord Hoffmann referred to Article 10 of the Convention and noted the limited list of exceptions to its guarantee of freedom of speech. His Lordship concluded:

“It cannot be too strongly emphasised that outside the established exceptions or any new ones which Parliament may enact in accordance with its obligations under the Convention, there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.” [52]

I must point out that his Lordship’s “trump card” metaphor was not adopted by the other judges, who used the terminology of balancing without any suggestion of a tilt, let alone a predetermined priority. Further, in his Goodman Lecture of 1996, Lord Hoffmann modified his position by denying that freedom of speech always trumps other rights.

Nevertheless, (I use the word despite Lord Hoffmann’s scorn), other perspectives are available. These perspectives can lead to different weight being given to freedom of speech in a balancing process.

One retired judge of my court expressed a widely held view:

“It is the power of the media which alone remains, in the relevant sense, arbitrary. I do not use the term pejoratively or by way of criticism: I use it to describe the nature of the power. I mean two things. The media exercises power, because and to the extent that, by what it publishes, it can cause or influence public power to be exercised in a particular way. And it is, in the relevant sense, subject to no laws and accountable to no-one: it needs no authority to say what it wishes to say or to influence the exercise of public power by those who exercise it.

The media may, by the exercise of this power, influence what is done by others for a purpose which is good or bad. It may do so to achieve a public good or its private interest. It is, in this sense, the last significant area of arbitrary public power.

I do not mean by this that those who control the distribution of information are free from the ordinary laws of the land: they are not. They, like others in the community, are subject to such laws as apply to them. But what is here in question is the capacity of those who publish to influence public authorities to do what they would have them do. The law of defamation is the only - or the only substantial - legal control over what they may say in order to achieve this purpose.

Nor do I suggest that those who can publish do not act in the public interest. They can and often do. But the capacity to exercise power otherwise than for good is obvious: the existence of, inter alia, a Hearst or a Maxwell must be recognised and provided for." [53].

If I may be permitted the sin of self quotation, in a case in which a television crew trespassed on land to confront the owner with his iniquity, I said:

"The media have considerable power in contemporary society. That power is enhanced by the capacity for intrusion afforded by contemporary technology. That power can be wielded for good or ill. To establish, for the first time, a wide ranging right to enter property to pursue the truth, let alone the quite different requirements of a "good story", would be to trust those who wield power to a degree that centuries of experience with searches and seizures establishes to be unwise." [54]

And in another case I observed:

"When the media come before the Court invoking high-minded principles of freedom of speech, freedom of the press or the principle of open justice, it is always salutary to bear in mind the commercial interest the media has in maximising its access to private information about individuals." [55]

The media do not need to rely on such high minded rhetoric. Too often it sounds like self-serving cant. No Bill of Rights anywhere in the world contains a freedom to entertain. The media's position can candidly be supported on the basis of Adam Smith's invisible hand. The media can serve the public interest by pursuing its own interests.

Balancing Conflicting Rights

The interaction of the principles of open justice and freedom of speech, with other doctrines of the law is at the heart of much media law. The principle of open justice has important implications for the law of contempt, for the interpretation of legislation and for the exercise of powers by a court which impinge upon media access to proceedings in court. The principle often interacts with other rights, e.g. the right to reputation, the right to privacy and the right to a fair trial. Each of these interfaces raises a major topic. I will focus on the latter.

As the full text of the Sixth Amendment makes clear, and the express conjunction of a "fair and public hearing" in the ICCPR and the European Convention highlights, the principle of open justice is directly related to, and interacts with, the principle of a fair trial. This interaction raises difficult issues for the application of each principle with important implications for the media. The interaction requires a court to compare essentially incommensurable matters. The values served by openness cannot be measured on the same scale as the values served by a fair trial.

Many take the opposite position of those who believe freedom of speech is a trump. Trial lawyers are prone to refuse to accept any balancing which would diminish the right to a fair trial found, for example, in Article 6 of the European Convention [56]. What precisely may be required – to refer to one of the exclusions from freedom of speech in Article 10(2) of that Convention – to "maintain the authority and impartiality of the judiciary" is a matter about which reasonable minds may differ. These words have been held to encompass the requirements of a fair trial [57].

For persons who are advocates of particular interests, or hold a particular intellectual perspective, the terminology of balancing is not always acceptable. The reason is obvious. Balancing necessarily results in occasions when the particular interest or perspective takes second place to some other right or principle. One English commentator, who emphasised the right to a fair trial under Article 6 of the European Convention, dismissed the terminology of "balancing" on the basis that it leads to "sloppy reasoning" and allows the right to a fair trial to be "balanced away" [58]. The Privy Council on a Scottish appeal had to consider whether adverse pre-trial publicity meant that a fair trial under Article 6 was

impossible. The leading judgment rejected the idea that the Article 6 right must be balanced against the public's right to information. Article 6 right was described in terms of "primacy" [59]. A few months later, however, in another Article 6 case, the Privy Council, deployed the terminology of "fair balance" [60].

These issues have been much debated in the United States. There is force in the conclusion of the author of one review of the American literature who said: "We all share a common intuitive grasp of, or at least are in agreement about, what the metaphor of balancing interests entails" [61].

Perhaps a better way of approaching the issue is to discard the metaphor of balancing and to focus on the scope of the right in issue. As one author has observed:

"With complex rights ... reasons for constructing, limiting or qualifying the exercise of the relevant right may in many cases be thought of as constitutive or definitional. The weight given to competing rights or considerations simply goes to defining the proper scope and application of the right. When properly weighed, rights to reputation or public safety merely illustrate the proposition that freedom of communication is a qualified right that does not include in its scope shouting fire in crowded theatres or destroying reputations." [62]

In *Richmond Newspapers* itself Chief Justice Burger acknowledged that the openness of a trial must on occasion give way to another "overriding interest". He said:

"... Our holding here today does not mean that the First Amendment rights of the public and representatives of the press are absolute that ... [A] trial judge, in the interests of the fair administration of justice [may] impose reasonable limitations on access to a trial." [63].

First Amendment jurisprudence, however, requires an extremely strong "overriding interest" to displace the presumption of openness. For example, a statute requiring the exclusion of the press and public during the testimony of underage victims of sexual assault was found unconstitutional [64]. Similarly a decision to close a six week *voir dire* examination of jurors was overturned [65] and the test of "reasonable likelihood of substantial prejudice" was found not sufficient to warrant closure to the public [66].

United States First Amendment jurisprudence, as this audience well knows, gives free speech dominant and usually determinative effect in a broad range of circumstances in which that right comes into conflict with other rights and principles. Other common law nations also recognise the significance of freedom of speech and of freedom of the press. In comparative terms, however, the First Amendment ensures that the outcome of virtually every conflict between freedom of speech and other rights and principles is quite different in the United States than in all other common law nations [67]. In effect, the balance has been predetermined as a matter of law.

The position in Australia is exemplified by one case in which I sat, when the NSW Court of Appeal had to determine whether in the Australian law of contempt the conflict between freedom of speech and a fair trial was such that the balance had been predetermined by giving the right to a fair trial predominance [68]. The case involved a publication about a person alleged to be Australia's largest heroin distributor. At the time of publication that person had been committed for trial on charges of supplying heroin.

The Court decided by a majority in which I participated, that there was no predetermined balance and that the public interest defence law to a prosecution for contempt had been made out. My judgment proceeded by balancing the public interest in freedom of speech against the public interest in the administration of justice. I am pleased to say that I have not identified a single "nevertheless" in the judgment [69]. However, (to use a word of transition not satirised by Lord Hoffmann), in Australian practice there is a discernable tilting of the balance in favour of the right to a fair trial by means of a "thumb on the scale", rather than by a predetermined balance. It appears to me that the same mild form of tilting existed in the courts of England and Wales, at least before the *Human Rights Act* [70]. The position in England and Wales under the *Human Rights Act* appears to me to remain in doubt [71]. The position in Canada under its Charter involves an equal balance [72]. The New Zealand position continues the traditional approach, which tilts the balance in favour of a fair trial and against open

justice [73].

Pre-trial Publicity

The conflict between the principle of open justice and the principle of a fair trial is most acute in the context of jury criminal trials. In many jurisdictions, such as Australia and in England, the civil jury has all but disappeared. That is not the case in the United States. In all common law jurisdictions, however, despite the steady expansion of the significance of matters heard in the summary jurisdiction, the more important criminal trials continue to be conducted before juries. As far as I am aware, save with respect to complex corporate or fraud cases, there are no serious proposals that this situation should change.

Over many centuries the common law developed a series of elaborate procedures and rules for channelling, and in some respect restricting, the flow of information that is made available to jurors. Indeed, most of the law of evidence is concerned to exclude evidence so as to ensure a fair trial where the tribunal of fact is a jury.

It is an essential characteristic of a fair trial that the jurors decide the case upon the evidence that is allowed to be adduced in the trial and which has been tested in accordance with the common law mechanism of trial, particularly by the legal representatives of the accused. Whether this is called due process or natural justice, there is no more fundamental rule in our procedure, especially in our criminal procedure. I do not think any common lawyer would believe that a fair trial could be said to have occurred unless this rule was observed.

One of the most important manifestations of the principle of a fair trial is the withholding of evidence from the jury. Another aspect is that judges and juries should not be subject to external pressure to decide in a particular manner. How the courts should handle the actuality or prospect of publicity before or during a trial is something that arises frequently. After all the courts are one of the great forums of public theatricality. It is probably no accident that reality television only took off after the OJ Simpson trial. We were there first.

The differences between Australian and United States approaches to media publicity relating to criminal cases has been the subject of an exhaustive academic analysis [74]. In this, as in so many other relevant respects, the difference between the United States and other nations, is derived from the strength of United States First Amendment jurisprudence.

In order to ensure a fair trial courts in the United Kingdom, Canada and Australia rely upon restraint of pre-trial publicity, whether by formal orders or informal restraint by the media itself, determined in large measure by the uncertainties of the law of contempt. The First Amendment virtually rules out deterrent sanctions on the dissemination of prejudicial publicity and also the use of injunctions forbidding the publication of specific material. This leaves little room for the strategies of court closure, actual restrictions on publication or *ex post facto* prosecution.

The United States approach is to control the jury rather than the publicity. This involves a range of remedial techniques including extensive *voir dire* examinations of prospective jurors and a greater use of sequestration of juries. Other nations do not engage in anything like that kind of exhaustive investigation and questioning of potential jurors. So far as I am aware, sequestration is now quite rare outside the United States [75].

The extent to which the principle of a fair trial may conflict with the principle of open justice will be determined by a judgment as to the ability of a jury to set aside irrelevant considerations in the course of its deliberations. This is a matter on which judges will have a range of different views. I have often expressed the view that the tendency to regard jurors as exceptionally fragile and prone to prejudice is unacceptable. I based this on a considerable body of experience of trial judges to the effect that jurors approach their task in accordance with the oath they take and that they listen to the directions they are given and implement them [76]. Other Australian appellate judges take a similar approach [77]. I cannot say that all trial judges do.

I am not sufficiently familiar with other jurisdictions to give anything more than impressions. Canadian judges appear to trust juries more than they used [78]. The same appears to be the case with English judges who have frequently asserted their faith in juries [79]. However, the statutory jurisdiction to make orders under s4(2) of the *Contempt of Court Act* 1981 is still exercised robustly [80].

Judicial attitudes have been influenced by studies of jury behaviour. New Zealand and Australian

studies conclude that juries are able to ignore pre-trial publicity or, at least, jurors said so in answer to express questioning. Allowing for a natural reluctance to admit such influence, the studies concluded that the effects were in fact minimal [81]. These studies have frequently been referred to in judgments, including in England [82].

In the United States there have been numerous studies about the effect of pre-trial publicity on jurors. Indeed there have been so many that it is possible to study the studies. One such meta study considers the results of 44 other studies. It concludes that negative pre-trial publicity significantly affects jury's decisions [83].

It is important to recognise that the Australian and New Zealand studies, as their authors recognised [84], were done against a background in which law of contempt operates as a constraint on media conduct to a degree unknown in the United States. Furthermore, Australian and New Zealand courts make suppression orders on a regular basis, much too regularly media lawyers frequently suggest. The contrasting results of the Australasian studies on the one hand and the United States studies on the other, may be understood to support the proposition that unrestrained media publicity does have an effect on a fair trial.

In Australia, suppression orders are issued on occasions when they cannot be justified. In the context of a trial where the judge prohibited the publication of a conviction pending a further trial, I repeat, what I said again sinfully:

[97] The third legal error that his Honour committed is found in the passage where he said:

‘The wider publication of his guilt in relation to very similar conduct would serve no end other than to prejudice the likelihood of a fair trial.’

[98] This comment discounts the principle of open justice which is a fundamental value of our legal system. It suggests a pre-occupation with the incidents of a “fair trial” to the exclusion of other values served by the justice system and of the mechanisms for ensuring the efficacy of that system.

[99] The principle of open justice is not simply a means of attaining a fair trial. In a free society public access to the conduct of the courts and the results of deliberations in the courts is a human right, as well as a mechanism for ensuring the integrity and efficacy of the institutions of the administration of justice. The publication of findings of guilt are of value in and of themselves. It cannot be said that such publication “could serve no end other than to prejudice the likelihood of a fair trial”.

A divergence of views on matters of this character is to be expected. In Australia the tendency is to trust jurors more than was the case in the past. There is greater faith in the ability to ensure a fair trial by means of strong directions. Furthermore, in Australia we do not have constitutional or even a statutory right to a speedy trial, as in the Sixth Amendment to the United States Constitution or Article 6 of the European Convention and Article 11(b) in the Canadian Charter. That makes an adjournment of a trial a more feasible option. There is, however, no likelihood that Australia will return to the practice of sequestering juries, let alone to adopt for the first time extensive *voir dire* examinations of individual jurors.

Many of the issues that arise in other jurisdictions are resolved in Australia by express statutory provision. In the absence of constitutional entrenchment or an interpretation clause, of the kind found in s3 of the British *Human Rights Act*, such provisions, so long as they are expressed with sufficient force and clarity, resolve the issue in many cases. For example, we have a statutory prohibition of publication of matter which identifies the complainant in certain sexual offence proceedings or which permits the identification of a child who is a witness or is a victim in criminal proceedings [85]. Furthermore, our national *Family Law Act* 1975 prohibits the identification of any party to matrimonial proceedings. This effectively prevents the reporting of all such cases. These are broad spheres of conduct in which questions of the exercise of a discretion by judges do not arise. The Parliament has determined the rule in a manner adverse to the principle of open justice.

One of the focal points of concern is in the doctrine of contempt by scandalising the court. This was probably long thought to have passed into desuetude but was acknowledged to still be in existence in Australian law by the High Court about 20 years ago [86]. Some jurisdictions with a bill of rights have found that the common law offence of scandalising the court infringes the guarantee of freedom of expression, e.g. that contained in s2(b) of the Canadian *Charter of Rights and Freedoms* [87]. The

South African Constitutional Court did not extend their constitutional guarantee that far [88]. The Court expressly rejected an invitation to import United States First Amendment jurisprudence into South Africa.

The position in the United States was determined in the classic case of *Bridges v California* [89] which has frequently been cited in other judgments throughout the common law world. Harry Bridges, an Australian-born leader of the longshoremen's union on the West Coast of the United States – perhaps our most successful export until Rupert Murdoch – had been convicted of contempt of court for criticising a California judge's decision in a case involving the union. It was in this case that Justice Black adopted Oliver Wendell Holmes Jr's axiom [90] that censorship could only be justified if there was a "clear and present danger" to the administration of justice [91]. Justice Black was speaking for the majority. We now know that nine Supreme Court judges who originally heard the case had decided to uphold the contempt conviction by 6 to 3. However, before the judgment was delivered two members of the majority retired and another judge who had intended to vote to affirm the conviction, changed his mind. In the end there was a majority of 5 to 4 to overturn the conviction [92]. Anyone who suggests that the answers to questions of this character are obvious does not understand history or the judicial process.

Conclusion

The principle of open justice did not emerge in our legal history by a process of deduction from an abstract ideal. Like so many important aspects of our legal system, the principle was derived from the actual practice of dispute resolution over long periods of time. Once recognised as a principle, however, it influences further development of practice.

The word "court" in the sense of the judicial institution shares a common origin with a royal or aristocratic "court" which, by its nature in medieval and early modern England, involved a broader range of persons than the immediate disputants. Similarly, the earliest juries sat as representatives of the community, which implied public access. Such are the pragmatic origins of fundamental principle in the common law.

The process continues with new challenges continuing to emerge. Perhaps the most significant is the availability of information on the internet. Throughout the common law world jurors have access to information about accuseds and an ability to check expert evidence in a manner which, perhaps was always theoretically available, but which was clouded in practical obscurity.

Accessing the internet is a new form of jury misbehaviour which creates challenges for some of the means that have been adopted in the past to reconcile the principle of open justice and the principle of a fair trial, e.g. adjournments or change of venues. Perhaps the American practice of sequestration of jurors will be reassessed in nations where the practice is no longer common [93].

Information is now so generally accessible that it cannot be effectively controlled. For almost all purposes this is a wonderful phenomenon. It does, however, pose very real challenges for the administration of justice.

There are some who will resist the revolutionary implications of recent technological developments. The same occurred during the previous such revolution – the invention of printing. Before the upstart entrepreneur and goldsmith turned printer, Johann Guttenberg, transformed publishing, it had been conducted for millennia by scribes who, in Europe, were controlled by the church. A limited form of mass production was able to be achieved in large scriptoria contained in monasteries. Printing was a major threat to this business.

Fra Filippo di Strata, a Dominican friar from the convent of San Cipriano on Murano, an island of Venice, proclaimed in the late 15th century that the German interlopers, who were taking work from Italian scribes, were crude and untutored. He called them "ignorant oafs" who "vulgarised intellectual life". He attacked the printing process for many of the reasons that person have criticised the internet. This included a form of information overload. He complained that it was hardly possible to walk down the streets of Venice without having armfuls of books thrust at you "like cats in a bag", for two or three coppers. Printed versions of the Bible, sometimes distorting what Fra Filippo saw to be the subtlety of the Latin text, were now becoming available to individuals without the intermediation of a priest. The lascivious works of Ovid were poisoning the morals of youth.

Fra Filippo proclaimed:

"The world has got along perfectly well for 6,000 years without printing and has no need

to change now.”

He was wrong then. We are going through the same process again [94].

End Notes

[1] This address draws on an earlier address J J Spigelman “Seen to be Done: The Principle of Open Justice” (2000) 74 ALJ 290, 378. The interaction with the principle of a fair trial is considered in another address J J Spigelman “The Truth Can Cost Too Much: The Principle of a Fair Trial” (2004) 78 ALJ 29. Both addresses are accessible on the NSW Supreme Court website www.lawlink.nsw.gov.au/sc.

[2] *Laurence v Texas* 539 US 558 (2003) esp at 573 per Kennedy J.

[3] *R v Sussex Justices; Ex parte Macarthy* [1924] 1 KB 256 at 259.

[4] See *Joint Anti-Fascist Refugee Committee v Magrath, Attorney General* 341 US 172 (1950) at 171-2 with footnote reference quotation from *R v Justices of Bodmin; Ex parte McEwan* [1947] 1 KB 321 at 325. The direct quotation appears in *Liteky v United States* 510 US 540 (1994).

[5] *Ambard v Attorney General for Trinidad & Tobago* [1936] AC 322 at 335.

[6] *Leeson v General Medical Council* (1889) 59 LJ Ch NS 233 at 241.

[7] See His Lordship’s lecture “The Old Despotism” delivered in May 1999 and published in Tom Bingham *The Business of Judging: Selected Essays and Speeches* Oxford University Press, (2000) pp195-210.

[8] *The Concise Dictionary of National Biography*, Vol II, Oxford University Press (1992) p1413; see also Simpson *Biographical Dictionary of the Common Law* London, Butterworths (1984) pp237-238.

[9] *Jackson’s Machinery of Justice in England* (8th ed) Cambridge University Press, Cambridge (1989) p375.

[10] *Ibid* (7th ed, 1977) p475.

[11] Lord Devlin *Easing the Passing: the Trial of Dr John Bodkin Adams* Bodly, London (1985).

[12] *Hobbs v Tinling and Company Limited* [1929] 2 KB 1.

[13] *Hobbs v Tinling* at 33.

[14] At 48.

[15] A reference to a “competent” tribunal in the ICCPR has been omitted in the European Article. No doubt someone found it unnecessary or offensive.

[16] Bowling (ed) *Works of Jeremy Bentham* (1843) Vol 4 at 316-317.

[17] *Scott v Scott* [1913] AC 417 at 473, 477.

[18] See *Scott v Scott* supra; *Dickason v Dickason* (1913) 17 CLR 50 supra; *McPherson v McPherson* [1936] AC 177; *Russell v Russell* (1976) 134 CLR 495.

[19] See *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344 esp at [51].

[20] *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2004] 3 WLR 611.

[21] See *McPherson v McPherson* supra at 200.

[22] 448 US 444 (1980).

[23] *Gannett Co Inc v De Pasquale* 443 US 368 (1979).

[24] *Publicker Industries, Inc v Cohen* 733 F 2d 1059 (3rd Cir, 1984); *Westmoreland v Columbia Broadcast Systems, Inc* 752 F 2d 16 (2nd Cir, 1984); *Newman v Graddick* 696 F 2d 796 (11th Cir, 1983).

[25] *Press-Enterprise Co v Superior Court* 478 US 1 (1986).

[26] *United States v Miami University* 294 F 3d 797 (6th Cir, 2002).

[27] *Press-Enterprise Co v Superior Court* 464 US 501 (1984).

[28] *United States v Simone* 14 F 3d 833 (3rd Cir, 1994).

[29] *Detroit Free Press v Ashcroft* 303 F 3d 681 (6th Cir, 2002) but cf *North Jersey Media Group v Ashcroft* 308 F 3d 198 (3rd Cir, 2002) *cert denied* 123 S Ct 225 (2003).

[30] See Howard W Chu "Is Richmond Newspapers in Peril After 9/11?" 2003 64 *Ohio St. L.J.* 1655.

[31] *Detroit Free Press v Ashcroft* 303 F 3d 681 (6th Cir, 2002).

[32] *North Jersey Media Group Inc v Ashcroft* 308 F 3d 198 (3rd Cir, 2002).

[33] 123 S Ct 225 (2003).

[34] See *Webb & Hay v The Queen* (1994) 181 CLR 41 at 47 and particularly the list of cases set out in n 36; *Murray v Legal Services Commission* (1999) 46 NSWLR 224 at 242 [6]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; see Jackson op cit *Natural Justice* Ch 4; *Re Pinochet* [2000] 1 AC 119; *Pullar v United Kingdom* (1996) 22 EHRR 391 at [30].

[35] See *R v Hircock* [1970] 1 QB 67.

[36] See *R v Langham* (1972) Crim LR 459.

[37] See, e.g. *Public Service Board v Osmond* (1986) 159 CLR 656 at 666-667; *Pettit v Dunkley* (1971) 1 NSWLR 377 at 382; *Housing Commission of NSW v Tatmar Pastoral Co Limited* (1983) 3 NSWLR 378 at 385-386; *Soulezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 273, 277 and 281.

[38] Quoted in Jackson *Natural Justice* (2nd ed, 1979) p97.

[39] See, e.g. *Cleaver* (1953) 37 Cr App R 37 at 39-40; *R v Racz* [1961] NZLR 227 at 232; *Yuill v Yuill* [1945] 1 All ER 183 at 185; *R v Barney* [1989] 1 NZLR 732; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 349-350.

[40] See *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582 at 593-594; *Alister v The Queen* (1984) 154 CLR 404 at 415; *Ellis v Home Office* [1953] 2 QB 135 at 147.

[41] See *Jago v District Court (NSW)* (1989) 168 CLR 23 at 50; *Subramaniam v The Queen* (2004) 79 ALJR 116.

[42] *Mann v O'Neill* (1997) 191 CLR 204 at 245 per Gummow J.

[43] See *Jago v District Court (NSW)* supra at 49-50; *Pearce v The Queen* (1998) 194 CLR 610 at 622 [39]; *R v Jurisic* (1998) 45 NSWLR 209 at 221.

[44] *Richmond Newspapers Inc v Virginia* at 571-572,

[45] *Pennekamp v State of Florida* 328 US 331 (1946) 335.

[46] See *Attorney General v Leveller Magazine* [1979] AC 440 at 450; see also *John Fairfax & Sons v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 476-479; *Hodgson v Imperial Tobacco Limited* [1998] 1 WLR 1056 esp at 1068-1073; *Amber v Attorney General for Trinidad & Tobago* [1936] AC 322 at 345.

[47] See *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 at 603.

[48] For an Australian authority see *Esso Australian Resources Ltd v Plowman* (1995) 183 CLR 10 at 43.

[49] *Re S (A Child) (Identification: Restrictions on Publication)* supra at 607. See also *R v Legal Aid Board Ex parte Kaim Todner (A Firm)* [1999] QB 966 at 977.

[50] See, e.g. *R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289 at 305-307; *Dobson v Hastings* [1992] Ch 30 394 at 401-402; *Smith v Harris* [1996] 2 VR 335 at 347-350; *Titelius v Public Service Appeal Board* (1991) 21 WAR 201 at [74]-[88]; *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101 accessible at the NSW Supreme Court website www.lawlink.nsw.gov.au/sc and to be published in 2005: 61 *NSWLR* at [27]-[32]; Note "The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera" (1982) 16 *Georgia L Rev* 659.

[51] See my analysis in *John Fairfax Publications v Ryde Local Court* supra at [60]-[69].

[52] *R v Central Independent Television plc* [1994] Fam 192 at 202-203.

[53] *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 725.

[54] *TCN Channel Nine Pty Ltd v Anning* (2002) 45 NSWLR 333 at [61].

[55] *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101 to be published in 62 *NSWLR*.

[56] See my discussion in "The Truth Can Cost Too Much" supra n1 at 44-46.

[57] *Sunday Times v United Kingdom* (1979) EHRR 28, 274 [56]; *Attorney General v Associated Newspapers Ltd* (1994) 2 AC 238 at 243 D-E.

[58] See Andrew Ashworth "Crime Community and Creeping Consequentialism" (1996) *Crim L R* 220 at 229; Andrew Ashworth "Criminal Proceedings After the Human Rights Act: The First Year" (2001) *Crim L R* 855 at 864-867.

[59] *Montgomery and Coulter v HM Advocate* [2003] 1 AC 641 at 670.

[60] *Brown v Stott* [2003] 1 AC 681 at 704F, 712H, 720E-F.

[61] See V Luizzi "Balancing of Interests in Courts" (1980) 20 *Jury Metrics Journal* 373 at 373.

[62] G Marshall "Things we can say about Rights" (2001) *Public Law* 207 at 209.

[63] *Richmond Newspapers* supra at 581 n18.

[64] See *Globe Newspaper Co v Superior Court* 457 US 596 (1982).

[65] *Press Enterprise Co v Superior Court* 464 US 501 (1984).

[66] *Press Enterprise Co v Superior Court* 478 US 1 (1986).

[67] See J A Brandwood "You Say 'Fair Trial' and I Say 'Free Press': British and American Approaches to Protecting Defendants' Rights in High Profile Trials" (2000) 75 *NYUL* 1412; J E Nowack "Jury Trials and First Amendment Values in 'Cyber World'" (2001) 34 *U Rich L R* 1213; M Chesterman "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America" (1997) 45 *Am J Comp L* 109; N N Minow and F H Cate "Who is an Impartial Juror in an Age of Mass Media?" (1990-1991) 40 *Am U L Rev* 631; E A Minnefor "Looking for Fair Trials in the Information Age: the Need for More Stringent Gag Orders Against Trial Participants" (1995-1996) 30 *USFL Rev* 95; E Patrick "Protecting the Defendant's Right to a Fair Trial in the Information Age" (2002) 15 *Cap Def J* 71; A Riehle "Canada's 'Barbie and Ken' Murder Case: The Death Knell of Publication Bans?" (1996-1997) 7 *Ind Int'l & Comp L Rev* 193; J M Redgrave "Unplugging Jurors from the

Internet" (2001) 48-JUL *Fed Law* 19; C Walker "Fundamental Rights, Fair Trials and the New Audio Visual Sector" (1996) 59 *Mod L Rev* 517; C Walker "Cyber-contempt: Fair Trials and the Internet" (1997-98) 3 *Oxford Yearbook of Media and Entertainment Law* 3.

[68] See *Attorney General (NSW) v X* (2000) 49 NSWLR 653.

[69] The Australian public interest defence is stated in *Ex parte Bread Manufacturers Limited v Truth & Sportsman Limited* (1937) 37 SR (NSW) 242 as approved in *Hinch v Attorney General (Vic)* (1987) 164 CLR 15.

[70] See, e.g. *R v Taylor & Taylor* (1994) 98 Crim App R 361 and the discussion in D Corker & M Levi "Pre-trial Publicity and its Treatment in the English Courts" (1996) *Crim LR* 622.

[71] See J M Honess et al "Empirical and Legal Perspectives on the Impact of Pre-Trial Publicity" (2002) *Crim LR* 719; Ben Emereson and A Ashworth *Human Rights and Criminal Justice* London, Sweet & Maxwell (2001) at 16-51-14.66 (a).

[72] See *Re Dagenais and Canadian Broadcasting Corporation* (1994) 96 CCC (3d) 289.

[73] See *Solicitor General v Wellington Newspapers Limited* [1995] 1 NZLR 45 esp at 48 and 57; and on appeal *Gisborne Herald Co Limited v Solicitor General* [1995] 3 NZLR 563 at 574.

[74] See Chesterman "OJ and the Dingo" op cit.

[75] See, e.g. *Re Global Communications Limited v The Attorney General for Canada* (1984) 10 CCC (3d) 97 esp at 111-112. See generally for a comprehensive comparison of the United States and Australian approaches N Chesterman "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt with in Australia and America" (1997) 45 *Am.J.Comp.L.* 109.

[76] See, e.g. *R v Bell* (unreported, NSW Court of Criminal Appeal, 8 October 1998) 5-6; *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 at [103]-[110].

[77] See, e.g. *R v Glennon* (1992) 173 CLR 592 at 603; *Gilbert v R* (2000) 201 CLR 414 at [31]; *Murphy v The Queen* (1989) 167 CLR 94 at 99; *Hinch v Attorney General (No 2)* (1987) 164 CLR 15 at 74; *R v Yuill* (1993) 69 A Crim R 450 at 453-454.

[78] *R v Hubbert* (1979) 29 CCC (2d) 279 esp at 291 (an authority referred to with approval in the Australian case law) approved on appeal in [1977] 2 SCR 267. See also *R v Sherratt* (1991) 63 CCC (3d) 193 at 209; *R v Vermette* (1988) 41 CCC (3d) 523-530; *R v Parkes* (1993) 84 CCC (3d) 353 at 360; *R v Corbett* (1988) 41 CCC (3d) 385 at 402; Vidmar "Pre-trial Prejudice in Canada: A comparative Perspective on the Criminal Jury" (1996) 79 *Judicature* 259 esp at 252-3; Gorman "DPP v Charles Haughey: A Canadian Perspective on Stays of Proceedings and Pre-trial Publicity" (2000) 44 *Criminal Law Quarterly* 149 esp at 152-60.

[79] See, e.g. *R v West* (1996) 2 Cr App R 374 at 386.

[80] See, e.g. *Ex parte The Telegraph Group plc* [2001] 1 WLR 1983.

[81] See *Juries in Criminal Trials Pt 2: A Discussion Paper*, Law Commission Wellington NZ November (1999) Ch 9; *Juries in Criminal Trials Pt 2: Some Research Findings* Law Commission Wellington NZ November 1999 746-757; Michael Chesterman et al *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in NSW* Justice Research Centre 101-4.

[82] For example *Montgomery and Coulter v Home Associate* supra at 673; *Ex parte Telegraph Group* supra at [24].

[83] Steblay et al "The Effects of Pre-trial Publicity on Juror Verdicts: A Meta Analytical Review" (1999) 23 *Journal of Law & Human Behaviour* 219 esp at 229-230.

[84] See Chesterman et al supra at 503.

[85] See s578A of the *Crimes Act* (1900) (NSW) and s11 of the *Children (Criminal Procedure) Act* 1987

(NSW).

[86] *Gallagher v Durack* (1983) 152 CLR 238.

[87] See *R v Kopyto* (1987) 44 DLR (4th) 213 a decision of the Ontario Court of Appeal.

[88] See *S v Mamabolo* (2001) (3) SA 409.

[89] *Bridges v California* 314 US 252 (1941).

[90] From *Schenk v United States* 249 US 47 (1919) at 52.

[91] See *Bridges v California* supra at 261 and 273.

[92] See Anthony Lewis "Justice Black and the First Amendment" (1987) 37 *AJA LR* 289 at 295-296; Margaret H Marshall "Dangerous Talk, Dangerous Silence: Free Speech, Judicial Independence and the Rule of Law" (2002) 24 *Sydney L Rev* 455 at 457.

[93] I have considered a range of US, UK and Australian cases involving internet access by jurors in a speech in May 2005 "The Internet and the Right to a Fair Trial" to be published in the *Criminal Law Journal*, accessible on the Supreme Court website, supra.

[94] The description of Fra Filippo di Strata is based on Martin Lowry *The World of Aldus Manutius: Business and Scholarship in Renaissance Venice* Basil Blackwell, Oxford, 1979 at pp26-36; Vernon J Hippetts "Yesterday Once More: Sceptics, Scribes and the Demise of Law Reviews" 1996 *Akron L Rev* 267 at 268-271

Negligence: Is Recovery for Personal Injury too Generous?

NEGLIGENCE: IS RECOVERY FOR PERSONAL INJURY
TOO GENEROUS?
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
TO THE 14th COMMONWEALTH LAW CONFERENCE, LONDON
14 SEPTEMBER 2005[1]

The District Court of New South Wales is the highest volume personal injury jurisdiction in Australia. Filings for the twelve months ending 30 June each year - the financial year in Australia - was about 14,500 cases per year in the late 1990s. This increased in the year 2000/2001 to 17,500 and in 2001/2002 to over 19,000. Thereafter a precipitate decline occurred: to about 8,500 in 2002/2003; 6,500 in 2003/2004; and 5,500 in 2004/2005. Similar trends have occurred in other courts.

These figures reveal a dramatic change in the practical operation of the law of negligence in Australia over a few years. This is the result of two factors. First, there has been a substantial shift in judicial attitudes at an appellate level, led by the High Court of Australia. Secondly, fundamental changes to the law of negligence have been implemented by statute.

Legislative intervention was prompted in large measure by the escalation of insurance premiums: in 2000 premiums for public liability increased by 10% and for professional negligence by 35%; in 2001 the increases were, respectively, 18% and 31%; in 2002 they were 43% and 29%; in 2003 they were 17% and 16%. In 2004, as the changes began to have some effect, public liability and professional negligence premiums both decreased by 4%[2]. Further falls appear to be occurring this year. This experience may not be replicated in other nations. It does, however, explain why the political reaction in Australia was urgent and wide ranging.

Background

Until about the middle of the 20th century judges were regarded, so far as I am aware universally in all common law jurisdictions, as mean, conservative and too defendant-oriented. This led parliaments to extend liability: Lord Campbell's Act; the abolition of the doctrine of common employment; the abolition of the immunity of the Crown; the creation of workers' compensation and compulsory third party motor vehicle schemes; provision for apportionment in the case of contributory negligence.

In Australia, about twenty to twenty-five years ago, the process of legislative intervention changed its character. It proceeded on the basis that the judiciary had become too plaintiff-oriented. There may very well be an iron law which dooms judges to always be a decade or two behind the times. That is probably a good thing. Fluctuations in intellectual fashion and transient crises or enthusiasms make it difficult to discern a permanent change.

Throughout Australia, in different ways and at different times, new regimes were put in place from about the early 1980s, particularly for the high volume areas of litigation involving motor vehicle and industrial accidents. In Australia's second largest state of Victoria, a no fault scheme for traffic accidents was established, similar to the wide-ranging New Zealand scheme. In the largest state of New South Wales such a scheme was actively considered but not, in the event, adopted. In all states, what had come to be regarded as common law rights were significantly modified by legislative intervention. I say, "come to be regarded", because many of the causes of action were only available because of the previous century of legislative change, to which I have referred, which overrode the common law.

Professor Atiyah referred to a long-term historical trend of expanding the scope of the tort of negligence and the damages recoverable for the tort, as "stretching the law"[3]. There was, however, an equivalent, parallel trend, perhaps of even greater practical significance, of 'stretching the facts'. It may well be that these phenomena occurred to a greater degree in Australia than other common law countries. Our experience may not be relevant to others.

The undefined elements of the tort of negligence leave much open. What effects are reasonably foreseeable? What protective conduct is reasonably required? What damages are remote? What does "commonsense" suggest as the cause? When is a contribution to the creation of a risk "material"?

Should a limitation period be extended? Should the plaintiff's evidence be accepted? How should one choose between two widely divergent experts' opinions, each of which is probably at, or beyond, the boundaries of the range of legitimate opinion? Should the plaintiff be believed about what affect a hypothetical warning would have had upon him or her? There is much flexibility in the outcome of negligence litigation.

Contemporary judges generally reached intellectual maturity at the time that the welfare state was a widely accepted conventional wisdom. The "progressive" project for the law of that era was to expand the circumstances in which persons had a right to sue. We are now more conscious of limits - social, economic, ecological and those of human nature. Hobbes has triumphed over Rousseau, albeit not over Locke. For several decades now economic and social limits on the efficacy of governmental intervention have received greater recognition. The law cannot remain isolated from such trends in social philosophy.

In particular there has been a significant change in expectations within Australian society, as elsewhere, about persons accepting responsibility for their own actions. The previously dominant idea that any personal failing is not your fault, that everyone can be categorised as a victim, has receded. The task is to restore an appropriate balance between personal responsibility for one's own conduct and social expectations of proper compensation and care.

The debate in Australia, leading to recent statutory changes, focused on particular cases in which persons recovered damages, sometimes substantial damages, when there could be little doubt that they were the authors of their own misfortune. One case referred to frequently[4] involved a young man diving from a cliff ledge into a swimming pool without checking the depth of the water. I know of no English case which went this far, with the possible exception of *Dorset Yacht*[5]. The idea that the authority which owned the land should have put up a warning sign advising against diving is no longer, with the changing times, accepted to be as a reasonable basis for liability. The High Court is now reserved in two other diving cases and may well follow the House of Lords in *Tomlinson* by giving renewed emphasis to personal responsibility[6].

There seems no doubt that the past attitude of judges, when finding facts, determining liability and awarding compensation, was influenced to a substantial extent by the assumption, almost always correct, that a defendant was insured. Judges may have proven more reluctant to make findings of negligence, if they knew that the consequence was likely to be to bankrupt the defendant and deprive him or her of the family home. The result was that the broad community of relevant defendants bore the burden of damages awarded to injured plaintiffs. Some commentators came to regard such loss sharing as the prime object of tort law.

The line between the kinds of mistakes or unfortunate results that are an inevitable concomitant of day to day human interaction, including professional practice, on the one hand, and the sorts of mistakes or results which should not occur at all, on the other hand, may have been drawn in a different way on many occasions in the absence of the ubiquity of insurance. The various choices that the fungibility of the concepts associated with the tort of negligence throws up may very well have been made differently.

Over the course of a number of decades the effect of Australian judicial decision-making was, in substance, to virtually transform the tort of negligence from a duty to take reasonable care into a duty to avoid any risk by reasonably affordable means.

The Australian judiciary has now become more sensitive to the broader implications of individual decisions, including their effect on the overwhelming majority of claims that are settled out of court in the light of practitioners' understanding of the likely outcome. Evidence has accumulated about the unintended consequences of the tort system. The practice of defensive medicine is a good example. Both my brothers are doctors. Even in the late 1960s I recall the scorn that they expressed about their American colleagues who refused to stop at the scene of road accidents. Australian doctors have long since joined them. The adverse social effects of fear of litigation have become substantial. Risk averse reactions will often go too far. However, overreaction based on an exaggeration of risk is understandable and all too human.

The judiciary cannot be indifferent to the economic and social consequences of its decisions. Insurance premiums for liability policies can be regarded as, in substance, a form of taxation (sometimes compulsory but ubiquitous even when voluntary) imposed by the judiciary as an arm of the state. For many decades there was a seemingly inexorable increase in that form of taxation by judicial decision [7]. In Australia that increase has stopped as a result of a change in judicial attitudes and, subject to

the vagaries of the insurance market, appears certain to be reversed, as a result of legislative intervention throughout Australia.

Perhaps indirectly in the case of judges, and overtly in the case of the parliaments, the shift in attitude has been driven by the escalation of insurance premiums to which I have referred and by the unavailability of insurance in important areas on any reasonable terms, or at all.

Over 2002-2003 there were virtually daily reports in the Australian media about the social and economic effects of increased premiums: cancellation of charitable and social events such as dances, fetes, surfing carnivals and Christmas carols; the closure of children's playgrounds, horse riding schools, adventure tourism sites and even hospitals; the early retirement of doctors and their refusal to perform certain services, notably obstetrics; local councils were shutting swimming pools and removing lethal instruments such as seesaws and roundabouts from children's playgrounds; our Sydney tabloid proclaimed "The death of fun"; many professionals could not obtain cover for categories of risks, leading to the withdrawal of their services - for example, engineers advising on cooling tower maintenance could not get cover for legionnaires disease, building consultants could not get cover for asbestos removal, agricultural consultants could not get cover for advice on salinity; midwives were unable to get cover at any price; many professionals were reported to have disposed of assets so as to be able to operate without adequate cover or even any insurance.

The issue became highly charged politically. The talk was of "crisis". The concern of governments was motivated, in part, by the liability of government directly as a major employer, property owner and provider of services, particularly in education, health and transport. This was reinforced by the emergence, over recent years, of a role for government as a backstop for private insurers, as the reinsurer of last resort. It took many years for the government role of "lender of last resort" to take the institutional form of the contemporary central bank. We are in the early stages of institutional development of the "reinsurer of last resort" function.

In Australia we have had a range of proposals in different areas for the government to underwrite existing insurers, e.g. for the risks associated with terrorism. Of particular significance was the acceptance that it was politically impossible for the government to stand by and let a major insurer default on its obligations. A national scheme was implemented to support the major medical insurer when it appeared to be insolvent. Governments at both levels of our federal system became involved in protecting policyholders when a major general insurer, HIH Limited, went into liquidation. This is exactly what happened long ago in the case of banks.

Governments have a very real financial interest in the operations of the tort system.

Whether by way of increases in insurance premiums or by way of a call on taxpayers funds, it became widely accepted at all levels of Australian government and in the general community that the existing tort system had become economically unsustainable. The particular focus was the sudden escalation of premiums. Insurance premiums are a result of a multiplicity of factors. The suddenness and size of the increases, and the expansion of policy exclusions, reflected contemporary developments in the insurance market. However, the cost of claims sets the basic structural parameters within which other forces operate. Those costs have increased considerably over recent decades.

Responsibility

One of the clearest themes to emerge in recent Australian case law and legislation is the renewed emphasis on individuals taking responsibility for their own actions. There is a distinct retreat in Australian jurisprudence, as in a broad range of social policies, from the hitherto dominant relativism by which misconduct is to be explained and, generally excused, on the basis of difficulties experienced by a person in his or her upbringing or other social interaction. There is, in Australian law, as in other aspects of Australian policy, renewed acceptance of the possibility of failure. Many things that happen are not someone else's fault. Not everyone is a victim in a culture of complaint.

There is, of course, nothing new about blaming others for one's own failings. This reaction started in the Garden of Eden when God called Adam to account for his transgression. He, of course, blamed his wife. She - more imaginatively - blamed the snake. Nevertheless, the end result was to enforce Adam and Eve's personal responsibility. Indeed, some religious traditions suggest that their responsibility has been inherited by us all.

There are, of course, limits to the extent to which personal responsibility can operate. It is not appropriate to, in effect, restore the old rule that contributory negligence is a defence. It is necessary to ensure that personal responsibility is balanced with other social values such as compassion, the

understanding of personal failings and the social need to maintain mutual communal responsibility, particularly for the seriously injured.

The balance amongst these conflicting considerations will, necessarily, be made differently in different societies and at different times within a society. Over recent years the balance has been altered in Australia for reasons which may or may not be relevant to the other common law nations represented at this Conference.

Judicial Attitudes

It is at the boundaries of the tort, where new and different situations are under consideration, that the change in judicial attitudes has become most apparent. However, the change will also have an effect on the outcome of cases in well-established categories. The various choices available to a judge in terms of acceptance of evidence and the formulation of the relevant judgments required in a negligence case will be affected by the change of attitudes to which I refer.

There has been a steady stream of cases in the appellate courts, particularly in the High Court, in which the outcomes would have been different if the process of stretching the law and of stretching the facts had not been arrested and reversed[8].

People who trip on footpaths no longer always successfully sue local councils. The owner of a shopping mall was not responsible for criminal conduct in the mall's car park. The authors of the rules for rugby were not liable to injured players. Nor was the person who conducted an indoor cricket arena. A cinema was not liable when a client tried to sit down but the seat was, as is common, retractable. A hotelier was not liable for injuries suffered after his departure by an intoxicated patron. A club with gambling machines was not liable to refund the losses of a compulsive gambler whose cheques it had cashed. The driver of a vehicle was not liable when a child suddenly darted out into the road. A school authority was not liable for intentional criminal conduct, relevantly sexual abuse, of a teacher against a pupil. Another school authority was not liable for failing to constantly supervise children playing on a flying fox. A government department was not liable for the health consequences of a failure to regulate self-interested commercial actors whose conduct caused injury. Governmental intervention on the basis of allegations, that proved incorrect, in family relationships which caused psychiatric injury did not create liability. An employer which conducted disciplinary or dismissal actions with adverse psychiatric consequences was found not to be liable. Nor was an employer liable for psychiatric injury arising from over work. An occupier was not liable for not breaking up a fight on its premises. A home owner was not liable when intoxicated guests caused an explosion by throwing methylated spirits on a barbecue. A prison authority was not liable for psychiatric injury caused to the victim of a crime by an escapee, nor for injuries to her prematurely born son. A company which was repairing callipers for a polio sufferer, but which had not followed up the victim who had failed to provide the requisite form to secure governmental financial assistance, was not liable to their client for injuries suffered when his old callipers broke.

It is quite likely that many of these cases would have been decided differently only a few years ago. I do not wish to imply that the development has been all one way. There have been important cases in which liability has been established in circumstances where the issue was debatable. Nevertheless, the drift of judicial decision-making is plain at a senior appellate level. It is having a substantial effect on trial judge decision-making.

If one had to pick a single point of departure for the imperial march of the tort of negligence, the beginning of the process of what Atiyah calls "stretching the law", it was probably the judgment of Lord Reid for the Privy Council in *Wagon Mound (No 2)*[9]. That judgment was delivered at a time when the practice of the Board was to deliver a single inscrutable judgment. Such a judgment acquires some of the power of a legislative enactment, precisely because it is bereft of that divergence of reasoning amongst different judges in a final court of appeal that is more appropriate for the principled development of the law. Lord Reid's judgment is quite simplistic. That is sometimes the product of the compromises that are required for a joint judgment.

The case was an appeal directly from a single judge of the Supreme Court of New South Wales, Mr Justice Walsh, later to serve on the High Court. Sir Cyril Walsh, placed particular weight on his assessment that the likelihood of an oil spillage catching fire was "rare" and "very exceptional". The Privy Council rejected this as the appropriate test. It asked whether or not something was "a real risk" in the sense that it would not be brushed aside as "far fetched". The subsequent application of this test by the High Court in Australia has led to the formulation that a risk of injury is foreseeable unless it can be described as "far fetched or fanciful"[10].

Lawyers, even after *Wagon Mound (No 2)*, continued to refer to the test for identifying a duty as one of "reasonable foreseeability". I cannot see that "reasonableness" has anything to do with a test that only excludes that which is "far fetched or fanciful". The test appears to be one of "conceivable foreseeability", rather than one of "reasonable foreseeability"[11].

There has been criticism of the "farfetched or fanciful" test in recent judgments of the High Court of Australia[12]. The High Court will reconsider the issue in the near future[13].

Many of the recent cases to which I have referred have refused to extend the boundaries of the border of negligence into new areas. When deciding proceedings in which a novel issue arises the Australian common law does not adopt the three part Caparo test applied in England and Wales[14]. The contemporary Australian approach, although there are a number of different views expressed in the authorities, is to engage in a multi-factorial or salient features analysis, in which a range of different aspects of the relationship are assessed[15].

In such an analysis two matters are of particular significance. First, the control of the situation on the part of the party said to owe the duty[16]. Secondly, the vulnerability of the person to whom it is alleged the duty is owed. Vulnerability is used in the sense that it was not reasonably possible for the person to take steps to protect themselves from the identified risk. This consideration is the complement of the new emphasis on personal responsibility[17].

One factor that has proven to be important in restraining the hitherto imperial march of the tort of negligence has been the emphasis given in recent Australian decisions to the importance of coherence in the law. The tort of negligence has not been permitted to extend so as to interfere with another area of the law which has developed a distinctive approach to balancing the conflicting interests that arise in the interaction of persons in disparate spheres of discourse. Issues of coherence have been of particular significance in cases in which the exercise of a statutory power or performance of a statutory duty has arisen[18]. The imposition of a duty of care may be directly inconsistent with the statute or otherwise inappropriate by distorting the focus of the statutory decision-making process or inducing decisions to be made in what has been called a "detrimentally defensive frame of mind"[19]. Questions of coherence have also arisen in common law contexts such as the interaction between negligent words causing mental harm and actions for defamation or whether recovery can be permitted for negligent conduct causing nuisance where the law of nuisance would not permit recovery[20].

Legislative Change

In New South Wales legislative change had commenced in a number of areas prior to the events of 2002-2003. Those events led to a national response in which many of the New South Wales proposals were adopted generally. Indeed, the new legislation went even further than had been considered appropriate until that time.

In the high volume areas of motor vehicle and industrial accidents the regimes vary considerably from state to state. Changes to these regimes from about 1999 onwards made them even less generous than those adopted in 2002-2003 for other claims. I will focus on the generally applicable regime.

The Commonwealth and the States appointed an inquiry to review the law of negligence. The Panel was chaired by the Honourable David Ipp, a judge of the New South Wales Court of Appeal. By and large, the recommendations of this panel have been implemented, with some variation, in all States and Territories, with complementary national legislation. The principal thrust of the changes is the limitation of circumstances in which damages can be recovered for personal injury and the restriction of the heads and quantum of damage that can be so recovered. The changes are wide ranging and include the following:

- The not "far fetched or fanciful" test for foreseeability has been replaced by a test that a risk be "not insignificant" which, despite the double negative, is of a higher order of possibility.
- A requirement has been introduced identifying a range of factors which have to be taken into account when determining breach of duty - referred to as the "negligence calculus". These factors include probability of harm, seriousness of harm, the burden of taking precautions, the social utility of the activity and precautions that may be required by similar risks, not just the particular causal mechanism of the case before the court. This statutory requirement, which in most respects reflects the common law, may focus attention on matters which may not have been given adequate weight, particularly in lower courts.

- An express acknowledgment of the normative element in determination of issues of causation, also reflecting Australian common law, is adopted by applying a test of whether responsibility for the harm *should* be imposed on the negligent party.
- An express provision emphasising that the plaintiff always bears the onus of proving any fact relevant to the issue of causation, thereby implicitly overturning judgments which state that in the case of evidentiary gaps - often medical causation issues - proof on the issue of causation could shift from the plaintiff to the defendant.
- The introduction of a modified version of the *Bollam* test, which was not the law in Australia, in all cases of professional negligence, providing that treatment was not negligent if it occurred in accordance with an opinion widely held amongst respected practitioners, subject to the ability of the court to intervene if the opinion was "irrational". The test does not, however, apply to a duty to warn or inform.
- The enactment of a "person of normal fortitude" test for purposes of foreseeability of mental harm, which the Ipp Panel identified as representing the majority view in the most recent High Court authority on the subject, although the judges who did in fact hold that view have since accepted that the majority regarded normal fortitude as merely a relevant consideration and was not an independent test[21]. The statutory test is likely to deny liability in many situations in which the common law would have imposed it.
- In a number of states, including New South Wales, the legislature has gone beyond the Ipp recommendations by restricting recovery for pure mental harm to a person who directly witnessed another being killed or injured or put in peril or who was a close family member of the victim.
- A number of States have adopted, in different terms, a policy defence available to public authorities, requiring that the interests of individuals after materialisation of a risk have to be balanced against a wider public interest, including the taking into account of competing demands on the resources of a public authority. In New South Wales the defence is contained in a set of principles for determining whether a duty exists or breach has occurred, expressly acknowledging that performance may be limited by financial and other resources available to the authority, that the allocation of resources is not open to challenge and that the conduct of the authority is to be assessed by reference to its full range of functions. Also, in New South Wales, the legislation provides that a public authority is not liable for a failure to exercise a power to prohibit or regulate an activity, if the authority could not have been required to exercise that function in mandamus proceedings instituted by the claimant. This provision may well come to test the limits of the availability of mandamus and principles of standing.
- The liability of a volunteer and of a good samaritan is limited.
- The liability of persons who act in self-defence to criminal conduct is limited.
- Changes are made to the law about voluntary assumption of risk and contributory negligence. An intoxicated person is deemed to have contributed twenty-five percent to the injury. In New South Wales the defence of intoxication is broader.
- An injured person is deemed to have been aware of any obvious risk, about which there is no duty to warn save after express request or in the case of a professional service.
- Provision is made that an apology cannot constitute an admission. This is regarded as of particular significance in the field of medical negligence. Doctors can say sorry for a result, without fear of making an admission of liability.

There are also thresholds, caps and restrictions on recoverable damages, including:

- Establishment of an indexed maximum for the recovery of economic loss, generally three times average weekly earnings. Persons earning more than that are believed to have the ability to

take out first person loss of earnings insurance.

- Establishment of a threshold of a percentage of permanent impairment before a person may recover general damages at all, generally a sliding scale of fifteen percent up to about thirty percent, after which full recovery is permitted.
- Establishment of an indexed maximum for recovery of general damages.
- Restrictions have been imposed on the recovery of damages for provision of gratuitous services.
- The rate of interest that can be awarded on damages has been fixed and generally reduced.
- The discount rate established by the courts for the determination of the present value of future loss has been fixed and increased.
- Exemplary damages have been abolished in many jurisdictions and, to some degree, aggravated damages have also been abolished. Exemplary damages were rarely awarded and this will make little practical difference to insurance premiums. Aggravated damages represent actual loss. This change does, however, pander to the current imperative of political life in a media saturated age: to be seen to be doing something. In the heat of the debate it appeared that anything less was more. The reasons proffered for this change are singularly unconvincing.

This list indicates how wide-ranging and fundamental the alterations of the law have been. Some of the changes were contained in a list of possible amendments to the law which I compiled in an address in 2002 - not including caps and thresholds - and which became something of a template for the subsequent debate[22]. In that address I emphasised the importance of proceeding on the basis of a principled alteration, rather than an underwriter driven alteration of the law. In many respects the changes are not principled.

The Australian Experience

The differences amongst nations with respect to personal injury litigation makes it difficult to assess how relevant the experience of one nation is for others. Relevant considerations extend beyond differences in the substantive law to encompass differences in judicial attitudes which affect fact finding, and the formulation of judgments, differences in the organisational structure and culture of the legal profession, differences in social expectations, differences in the structure of the insurance industry and, particularly, the level of competitiveness amongst insurance companies and also differences in investment practices and success on the part of insurance companies.

The Australian experience in the years 2002 to 2003 occurred in a context where the business cycle in the insurance industry transformed a buyer's market into a seller's market, virtually everywhere. The causes of this included an unusual concatenation of natural disasters which drew down the capital of insurance companies, particularly that of reinsurers. The events of 11 September 2001 in New York and Washington exacerbated this process. This coincided with the end of a share market boom which further reduced capital available to insurance companies. Quite quickly, demand exceeded supply in the global reinsurance market and this was immediately reflected in premiums and in decisions as to what kinds of businesses to write and where.

This effect was aggravated in Australia by events that were entirely Australian made. For many years one of the country's biggest general insurers, as became clear in retrospect, had been aggressively underpricing in order to increase market share. The company collapsed at this time. The problem was further aggravated by the fact that the largest medical indemnity insurer in Australia, covering some 50 percent of Australian practitioners, was faced with insolvency and had to be saved by the financial support of the government.

The cumulative effect of all of these factors, some of them limited to Australia, caused the explosion in insurance premiums to which I have referred. Nevertheless, these factors operated in the context of structural elements affecting the cost of claims of general insurers which were determined by the operation of the legal system. Many of those structural elements were also peculiar to Australia.

I note that in a Government report prepared for purposes of the debate in the United Kingdom, figures are set out for OECD countries specifying "tort costs" as a percentage of the gross domestic product in

each of those countries in the year 2000. I am not sure how these figures were calculated but they show, as one would expect, that the United States of America was at the top of the list, expending 1.9 percent of its GDP on tort costs. Australia was the equal fourth highest country, expending 1.1 percent on tort costs. The United Kingdom was the second lowest on the list, expending only 0.6 percent of GDP on tort costs in that year[23]. I cannot vouch for the accuracy of these figures but the range itself indicates that these issues will vary in their significance from one jurisdiction to another.

The United Kingdom debate has focused on whether or not there has emerged in this nation a "compensation culture". The debate has been stirred by the tabloid press in a campaign which is very similar to that which we experienced in Australia. The view that personal injury claims had become grossly excessive became quite widespread. The United Kingdom Government has announced that it will introduce a new Compensation Bill to address a range of perceived difficulties. The details of the Bill are not yet available. It will, however, go some way to addressing one of the problems that arises when people believe they are at greater risk of being sued than is in fact the case. As the Better Regulation Taskforce of the United Kingdom indicated in its report on this matter, the perception itself affects behaviour in quite significant ways.

"The prospect of litigation for negligence may have positive effects in making organisations manage their risks better, but an exaggerated fear of litigation, regardless of fault can be debilitating. The fear of litigation can make organisations over cautious in their behaviour. Local communities and local authorities unnecessarily cancel events and ban activities which until recently would have been considered routine. Businesses may be in danger of becoming less innovative - and without innovation there will be no progress."

The report concluded that the "compensation culture is a myth, but the cost of this belief is very real"[24].

Risk averse behaviour is not always rational but it is very human. The British consideration of appropriate policy responses has been more deliberate than that which occurred in Australia during what was perceived to be a crisis requiring urgent attention. For that reason alone the Australian response may not be of great assistance. However, I should note that the Australian reaction was not as radical as that which has occurred in the Republic of Ireland, where all civil actions for personal injuries must now be referred for prior assessment by a Personal Injury Assessment Board. This requirement came into effect together with legislation altering almost all aspects of the procedure for pursuing compensation for personal injury[25].

There is an active debate in Australia as to whether or not the statutory changes have gone too far. Those changes occurred without a full appreciation of the extent to which judicial attitudes had already changed and were changing. A number of persons, including myself, have indicated that in various respects the statutory changes have gone too far.

This debate is to some degree fuelled by the modest reduction in premiums that has occurred to date, in contrast with the considerable increase in insurance company profits and their escalating share prices. There is now a flow of judgments interpreting the new legislation which include critical comment by judges about the anomalies and the injustices arising from the application of the statutes. Legal practitioners and their representative organisations have emphasised that many people with serious injuries are no longer able to receive any or adequate compensation. Insurance companies and their organisations have responded by highlighting the self-interest that some legal practitioners have in these observations. There is a distinct element of pots calling kettles black and vice versa in all of this.

In New South Wales a parliamentary committee is conducting an inquiry into the changes to personal injury compensation law both with respect to the general tort law reform and also the earlier changes to workers compensation and third party motor accident schemes. The changes in New South Wales went well beyond what has occurred in other States. That included significant changes that have no implication for insurance premiums paid by individual organisations or companies. The changes in New South Wales have fundamentally altered the ability of citizens to sue the government and its instrumentalities. These changes go well beyond anything that was recommended by the Ipp Report. New South Wales is virtually the only State to have gone so far in restricting the liability of government.

One of the matters that has been raised in the course of the parliamentary inquiry is the existence of significant differences amongst the different schemes. By reason of the political process in which different insurers have a seat at the table when determining what should be the government response in their particular cases, whether and to what degree an individual can recover for personal injury depends on who and where s/he is. Whether the injury occurred at work or at home? Whether it

occurred in a car or in a car park? The existence of such inconsistencies is often criticised. A remaining concern is the determination of compensation for the long term of persons who suffer catastrophic injuries[26].

The insurance industry is, of course, particularly concerned with certainty, so that it can both price its products and make appropriate provisions. Nevertheless the speed, some would say haste, with which the changes were introduced in Australia was such that there are substantial pressures emerging for some changes to be reversed.

There are straws in the wind which would indicate that some reversal of the statutory intervention is likely. One plaintiff who succeeded in recovering damages from the Council responsible for Bondi Beach after diving into a sandbank was originally portrayed in a most unflattering light in media articles that proclaimed the death of the Australian way of life. When he was ultimately successful in the High Court a few years later, his victory was treated, in the same media, as a triumph for compassion. Australian law in this regard has not yet settled.

One lesson we must all learn from history is never to underestimate the ingenuity of the legal profession when faced with such dramatic changes to its customary practices. I am reminded of the attempt by the City of New York to control its burgeoning litigation bill by adopting a law to the effect that the City could not be sued for a defect in a road or sidewalk unless it had had fifteen days' notice of the specific defect. The plaintiff lawyers, or as, they call themselves, trial lawyers of New York City, established the BAPSPC, the Big Apple Pothole and Sidewalk Protection Committee. The function of this committee was to employ persons to continually tour the streets and footpaths of New York to note each and every blemish and, forthwith, to give the City of New York precise details of each defect. Regular reports cataloguing the notices which had been given to the City were available for sale to trial lawyers[27].

At any one time the total cost of curing the defects of which the city had been given notice was several billion dollars. Last year the Mayor of New York complained that in calendar year 2002 alone, the city received 5,200 maps from BAPSPC spotters which identified some 700,000 blemishes[28]. Needless to say the city has never successfully defended a case under the fifteen days' notice law. I am confident that Australian lawyers lose little by way of invidious comparison with their American cousins on the scale of creativity.

End notes

[1] This address repeats and develops themes in two earlier published addresses: Spigelman "Negligence: The Last Outpost of the Welfare State" (2002) 76 ALJ 432; Spigelman "Negligence and Insurance Premiums: Recent Changes in Australian Law" (2003) 11 *Torts LJ* 91. Both addresses are accessible on the NSW Supreme Court website www.lawlink.nsw.gov.au/sc under speeches.

[2] Australian Competitions and Consumer Commission, *Public Liability and Professional Indemnity Insurance: Fifth Monitoring Report July 2005* ACCC, Canberra 2005 pp15, 30.

[3] Atiyah, *The Damages Lottery* (1997) Hart Publishing, Oxford, Chapters 2 and 3.

[4] *Nagle v Rottnest Island Authority* (1993) 177 CLR 423.

[5] *Home Office v Dorset Yacht Co* [1970] AC 1004.

[6] See *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 esp at [44]-[46].

[7] See *Kinzett v McCourt* (1999) 46 NSWLR 32 at [97]; cf at [116].

[8] See *Liftronic Pty Ltd v Unver* (2001) 179 ALR 321; *Derrick v Cheung* (2001) 181 ALR 301; *Agar v Hyde* (2000) 201 CLR 552; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; *Rosenberg v Percival* (2001) 205 CLR 434; *Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512; *Sullivan v Moody* (2001) 207 CLR 562; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Graham Barclay Oysters Pty Ltd v Ryan* (2003) 211 CLR 540; *New South Wales v Lepore* (2003) 212 CLR 511; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469; *Koehler v Cerebos (Aust) Ltd* [2005] 79 ALJR 845; *Commissioner of Main Roads v Jones* (2005) 79 ALJR 1104; *Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn (as St Anthony's Primary School) v Hadba* [2005] HCA 31; *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43; *Van Der Sluice v Display Craft Pty Ltd* [2002] NSWCA 204; *Richmond Valley Council v Standing* (2002)

Aust Torts Rep 81-679; *University of Wollongong v Mitchell* (2003) Aust Torts Rep 81-708; *New South Wales v Paige* (2003) Aust Torts Rep 81-676; *Newcastle City Council v Shortland Management Services* (2003) 57 NSWLR 173; *New South Wales v Godfrey & Godfrey* (2004) Aust Torts Rep 81-741; *Amaca Pty Ltd v New South Wales* [2004] NSWCA 124; *Wyong Shire Council v Vairy* [2004] NSWCA 247; *Boyded Industries Pty Ltd v Canuto* [2004] NSWCA 256; *Lake Macquarie City Council v Holt* [2004] NSWCA 136; *State of NSW v Finnan* [2004] NSWCA 314; *TAB Ltd v Atlantis* [2004] NSWCA 322; *Parissis v Bourke* [2004] NSWCA 373; *Australian Capital Territory v Kitt* [2004] NSWCA 444; *TNT Australia Pty Ltd v Willis* [2004] NSWCA 455; *Spooner-Hart Prosthetics Pty Ltd v Jones* [2005] NSWCA 2.

[9] *Overseas Tank Ship (UK) Limited v Miller Steam Ship Co Pty Ltd* [1967] 1 AC 617.

[10] *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47.

[11] I have advanced this proposition on a number of occasions, originally in my address Spigelman "Negligence: The Last Outpost of the Welfare State" supra esp at 441-442.

[12] *Swain v Waverley Municipal Council* (2005) 79 ALJR 249 at [79]-[81]; *Koehler v Cerebos* supra at [54].

[13] *Mulligan v Coffs Harbour City Council*; *Varley v Wyong Shire Council* [2004] HCA Trans 494.

[14] *Caparo Industries plc v Dickman* [1990] 2 AC 605.

[15] See *Sullivan v Moody* (2001) 207 CLR 562 at 579 [50]-[51]; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 198 [27]-[28] and 254 [204], 302 [333], 326 [406]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 597 [149], 624 [236]-[237].

[16] See e.g. *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 559 [102]; *Graham Barclay Oysters* supra at 598 [150]; *Crimmins Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 24 [43]-[46], 42 [104], 61 [166], 82 [227], 104 [304], 116 [357]; *Modbury Triangle* supra at 260 [19]-[21], 270 [42]-[43], 292 [110]-[117]; *Graham Barclay Oysters* supra at 558 [20], 579 [90]-[95].

[17] See *Perre v Apand* supra at 194 [10]-[11], 220 [104]-[105], 225 [118]-[120], 228 [125]-[126], 229 [129], 259 [216]; *Crimmins* supra esp at 26 [51], 39 [93], 40 [100]-[104], 24 [44], 25 [46], 65 [233]; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 78 ALJR 628 at 23 and 80; *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43 at 49 [29]-[43].

[18] See *Perre v Apand* supra 253 [197]; *Sullivan v Moody* supra at 576 [42], 579 [50], 580 [53]-[55]; *Tame v New South Wales* (2002) 211 CLR 317 at 335 [28], 342 [58], 361 [123], 425 [323]; *Graham Barclay Oysters* supra at 574 [78]; *New South Wales v Paige* (2003) 60 NSWLR 371 at 390 [93]-[95]; *New South Wales v Godfrey* (2003) Aust Tort Rep s81-741 at [71]-[80]; *Newcastle City Council v Shortland Management Services* supra 189 [87]-[89]; *Edwards v Attorney General (NSW)* (2004) 60 NSWLR 667 at 671 [6]-[9]; *Hunter Area Health Service v Presland* [2005] NSWCA 33 at [20]-[21].

[19] See *Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 63D; See also *Crimmins* supra at [29]; *X v Bedfordshire County Council* [1995] 2 AC 633 at 739E; *Graham Barclay Oysters* at 574 [78] and *Crimmins* supra at 77 [216], [292]. The cases summarised in *Hunter Area Health Service v Presland* supra at [20]-[21].

[20] See *Sullivan v Moody* supra at 580-581 [54]-[55]; *Tame v NSW* supra at 335 [28]; *Newcastle City Council v Shortland* supra at 189 [86]-[89].

[21] See *Commonwealth of Australia Review of the Law of Negligence: Final Report September 2002 (The Ipp Report)*, www.revofneg.treasury.gov.au at 9.13 and cf *Tame v New South Wales* (2002) 211 CLR 317 esp at [16], [61], [109], [196], [273] and [366] and *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 77 ALJR 1205 at [98] and [119].

[22] See Spigelman "Negligence: The Last Outpost of the Welfare State" supra.

[23] See Better Regulation Taskforce *Better Routes to Redress*, London, May 2004, at p15.

[24] *Ibid* esp at p3.

[25] *Personal Injuries Assessment Board Act 2003* and the *Civil Liability and Courts Act 2004*.

[26] See a recent proposal published by the NSW State Government *Lifetime Care and Support for People with a Catastrophic Injury from a Motor Vehicle Accident* Motor Accidents Authority of NSW, Sydney, 2005.

[27] The *New Yorker* April 21 and 28 2003 at p101. See also www.nystla.org.

[28] See www.nyc.gov/html/law/pressreleases/pr050602.pdf.

Judicial Review And The Integrity Branch Of Government Address

JUDICIAL REVIEW AND THE INTEGRITY BRANCH OF GOVERNMENT ADDRESS
 BY THE HONOURABLE J J SPIGELMAN AC
 CHIEF JUSTICE OF NEW SOUTH WALES
 WORLD JURIST ASSOCIATION CONGRESS
 SHANGHAI, 8 SEPTEMBER 2005

In the 1920s Sun Yat-sen proposed that the new Republic of China adopt a five yuan or branch system of government comprised of three branches from the Western governmental tradition - executive, legislative and judicial - and two from China's own Imperial tradition: an examination branch and a control or integrity branch. The Chinese Imperial Civil Service had a separate branch, the Du Cha Yuan, called, in translation, the "censorial" or "supervising" branch, which maintained surveillance over all other governmental activities and enforced proper behaviour through processes of impeachment, censure and punishment.

The 13th century Mongol Emperor, Kublai Khan, once said of his government structure:

"The Secretariat is my left hand, the Bureau of Military Affairs is my right hand, and the Censorate is the means for my keeping both hands healthy." [1]

In accordance with the sumptuary rules by which each branch of government had distinctive dress requirements, members of the Censorate wore an embroidered breast patch which displayed a legendary animal called a Xiezhi which could detect good from evil and smell an immoral character from a distance, whereupon the Xiezhi would leap upon the person and tear him or her to pieces [2].

Proposals in Western constitutional law discussion suggesting that a distinct integrity branch of government should now be recognised as a distinct fourth branch, to add to the traditional threefold division, have drawn on the Chinese tradition and the proposal of Sun Yat-sen by way of analogy [3].

The idea of an integrity branch of government identifies a universal governmental function of such significance as to be entitled to designation as a fourth branch. The concept of an integrity branch provides a broader context within which the body of law known as an administrative law may find a place.

The word "integrity" in English covers two distinct matters. First, personal integrity and, secondly institutional integrity. The two matters are interrelated. Both involve an idea of purity, of an unimpaired or uncorrupted state of affairs.

In the case of personal integrity the focus of attention is on the conduct required of occupants of public office in terms of characteristics such as honesty, absence of corruption, ethical conduct and compliance with proper practice.

In the case of institutional integrity, there are three elements. The conduct of every government agency:

- (1) must be authorised by law;
- (2) must be faithful to the public purposes for the pursuit of which a power was conferred or a duty was imposed; and
- (3) must be in accordance with the values, including procedural values, which the institution is expected to obey.

There is a range of different institutional mechanisms developed by different nations to ensure personal integrity and institutional integrity. In every nation, each of the other branches of government - legislative, executive and judicial - performs integrity functions.

For example, most legislatures operate through committees which supervise conduct of the executive arm. In the Westminster tradition, the institution of question time is of particular significance.

Numerous different agencies have been established to ensure integrity. Perhaps the oldest is the separation of an independent government auditor focusing on public expenditure. Other institutions include independent Directors of Public Prosecutions, Independent Commissions Against Corruption, Ombudsmen and statutory Integrity Commissioners, as well as ad hoc commissions of inquiry. In the Peoples Republic of China, the peoples congresses, the procurate and the judiciary at national, provincial and local levels, all perform integrity functions.

Constitutional law is a clear case of an integrity function performed by the judiciary. Judicial review of administrative action is, in my opinion, also the performance of an integrity function.

In nations which derive their traditions from the British common law a distinction is often made in this context between legality and merits. The distinction is sometimes difficult to draw but so is the difference between night and day. The existence of twilight does not invalidate the distinction between night and day [4].

Judicial review is a manifestation of the integrity branch of government and merits review is a manifestation of the executive branch.

Judicial review is the enforcement of the rule of law over the conduct of the executive. The judiciary is empowered, generally by legislation even in nations of the common law tradition, to prevent the executive arm of government from exceeding the powers given to it by law, again usually by legislation.

The starting point is the principle of legality which encompasses both substantive and procedural legality.

Every government institution requires legal authority for any action that it wishes to undertake. In contemporary circumstances such authority is usually found in legislation. However the holder of an executive position is often entitled to act by reason of his or her office and would generally be entitled to do whatever a private citizen is entitled to do. Such entitlement, however, must also be understood as authorised by law.

Action by any government agency that is not supported by legal authority is invalid. What invalidity may mean for the consequences of the invalidated conduct is a matter which each system of administrative law must address.

Judicial review has developed in all advanced legal systems beyond a narrow concept of legality. In the legal tradition with which I am most familiar, the expansion of judicial review has been one of the great projects of the law over the last half century or so. It is now clear that judicial review extends to ensuring that powers are exercised for the purpose, broadly understood, for which they were conferred and in the manner in which they were intended to be exercised.

This is quite distinct from merits review for which separate statutory provision is often made. Merits review is concerned to ensure that the correct and preferable decision is made in a particular case and that the fairness, consistency and quality of decision-making is maintained.

The practice of judicial review, whether expressly authorised by constitutions, codes or statutes or a development of judge made law, inevitably gives rise to tension between the judiciary and those whose conduct is being reviewed. It is an important objective of all mechanisms of governance that this inevitable tension should be a creative tension. How this is to be achieved depends upon the extent to which a formal separation of powers is entrenched in the constitutional arrangements of a nation.

Contemporary debates about judicial activism are only the latest in a long history of conflict over judicial review. The Chinese Imperial Censorate was itself attacked for going too far. One Imperial Grand Secretary complained about the intervention of censors and said they were like "the squawkings of birds and beasts" [5]. He has been followed by a long line of government ministers making similar comments about judges.

In the common law tradition there was an intense period of conflict between the Court of Kings Bench and the Stuart Kings over the Court's assertion of a supervisory jurisdiction.

The solution to the conflict in France, after the Revolution, was a strict separation between the

judiciary in the ordre judiciaire, which exercises the civil and criminal jurisdiction, and the ordre administratif.

Over the course of over two centuries, the administrative law developed by the Conseil d'Etat and its subordinate court structure, appears indistinguishable from the operation of judicial review in the common law tradition. Indeed, because of the absence of a detailed code, the law administered by the Conseil d'Etat developed in ways similar to the judge made law of the common law tradition.

In French law the principle of *légalité* encompasses general principles of law - *les principes généraux du droit* - which include a range of propositions [6] that are very similar to the development in the common law tradition of principles of administrative law and of principles of the law of statutory interpretation [7].

In both civil and common law traditions judicial review goes beyond issues of legality narrowly understood to encompass a duty to give a fair hearing, to act impartially, to give reasons and, often, to recognise a range of human rights. It also extends to ensuring that powers are exercised for the purpose for which they were given and in the manner in which they were intended to be exercised, either expressly or on the basis of a procedure which is in conformity with public expectations of how government actors ought behave in the particular nation.

An independent judiciary confident in its own autonomy does not need to be hesitant in asserting its right to enforce the rule of law. Nevertheless, as controversies in many nations attest, those who find their conduct constrained by judicial intervention frequently assert that the judiciary has gone too far. Sometimes these criticisms are valid. More often, however, they merely reflect the frustration of powerful people who are used to getting their own way and cannot do so because of proper legal constraints.

In many jurisdictions the grounds upon which judicial review is permitted may be expressed in such amorphous terms as to invite the judiciary to intervene too frequently. The purposes of administrative law can be stated at different general levels of generality. When stated in such terms as preventing "abuse of power" or advancing "good administration", it becomes very difficult to distinguish between review on the basis of legality and review on the basis of merits.

Such vague general standards are sometimes enshrined in a code or statute authorising judicial review. Even in nations of the common law tradition there is a noticeable tendency over recent decades to expand the scope of judicial intervention by imposing a general label such as "abuse of power" or "proportionality" or "legitimate expectations" on longstanding but more limited principles. This is not merely the traditional common law method of induction. It blurs the distinction between legality and merits.

The Australian judiciary has, generally, been more tough minded - some would say narrow minded - in holding the line, than the judiciaries of most other nations with which we compare ourselves. For example, we have refused to adopt the idea of "proportionality" which has entered English law from Europe. We have also rejected any idea of "deference" to administrative decision-makers of the kind adopted in the United States and to some degree Canada and, until recently, in the United Kingdom. Deference is only necessary if the standard to be applied is too wide.

The concept of an integrity function of government, with judicial review as part of an integrity branch of government, expresses the limits upon the permissible scope of judicial review in a manner which may be useful. If intervention by a court is understood as ensuring the institutional integrity of the decision-making process, the judiciary is more likely to act with appropriate restraint. When purporting to ensure that the executive does not exceed its lawful powers, it is of supreme importance that the judiciary must not exceed its own. The issue is judicial legitimacy.

The classic statement of the proper role of the judiciary is that of Chief Justice Marshall in *Marbury v Madison*: "It is emphatically the province and duty of the judicial department to say what the law is".

We must, however, remember the Xiezhi, the mythical animal that could smell an immoral character from a distance and thereupon tear him or her apart. Thus is the integrity function performed.

End Notes

[1] C O Hucker *The Censorial System of Ming China* Stanford Uni P, 1966, p 6. See also H B Jacobini *An Introduction to Comparative Administrative Law* Oceana, New York, 1991, Ch VII.

[2] See R Huang 1587, *A Year of No Significance: The Ming Dynasty in Decline* Yale Uni P 1981, pp53-54.

[3] See B Ackerman "The New Separation of Powers" 2000 113 *Harvard LR* 633 at 694-696; W P Alford "Book Review" 2000 113 *Harvard LR* 167 at n96; J J Spigelman "The Integrity Branch of Government" 2004 78 *ALJ* 724 at 724-725 accessible on the NSW Supreme Court website at www.lawlink.nsw.gov.au/sc under speeches.

[4] I owe this analogy to Chief Justice Gleeson. See A M Gleeson "Judicial Legitimacy" 2000 20 *Aust Bar Rev* 4 at 11.

[5] Hucker op cit p297.

[6] See N Brown & J S Bell *French Administrative Law* (5th ed) Clarendon Press Oxford 1998 pp214ff.

[7] See my discussion in an address "The Principle of Legality and the Clear Statement Principle" to be published in 2005 79 *ALJ* and accessible on the Supreme Court website above.

Address on the Retirement of the Honourable James Wood AO

**ADDRESS ON THE RETIREMENT OF
THE HONOURABLE JAMES WOOD AO
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SYDNEY , 31 AUGUST 2005**

We gather here today to mark the retirement of the Honourable James Wood AO, one of the most highly respected, and most widely respected, judges in the history of this Court. Over a period of 21 years as a judge of this Court, as a Royal Commissioner and as Chief Judge at Common Law, the contribution that your Honour has made to the administration of justice in this State represents a level of public service that few can hope to equal and none surpass.

Your contribution has not only been that of a judge, but that of a judicial leader. Your legal learning, intelligence, judgment, courage, humanity, keen sense of justice, fundamental decency and straight forward style have combined to enable you to show leadership by example, with the result that the role appears to be effortless. Your colleagues have instinctively accepted your leadership without question. There has never been an occasion since my own appointment as Chief Justice over seven years ago, when I was not able to rely completely on your Honour's advice, judgment and competence. I could not have wished for a better colleague.

There is in the law a certain snobbishness which accords higher status and significance to technical legal reasoning. Nothing could be further from the truth. The most important job done by judges is the making of findings of fact and, where a jury is the tribunal of fact, the provision of guidance to the jury. The primacy of fact finding in the course of the administration of justice is not acknowledged as widely as it ought be.

Your Honour's performance as a trial judge, or as a judge instructing a jury, was always impeccable. No doubt your Honour can remember occasions on which you have been overturned on appeal but none of your colleagues, to whom I have spoken in recent days, can do so.

Both as a trial judge, and as a judge sitting in the Court of Appeal, your Honour has made important contributions to the development of the civil law. Your work has covered the full range of diverse civil disputes that come before the Common Law Division. A number of your Honour's judgments are regarded as the leading cases on particular matters.

It is, however, in the area of criminal justice, both at trial and on appeal, that your Honour has made your most important contribution. You have done so across the full spectrum of the issues that arise in this fundamental area of the law: the elements of liability, the details of criminal procedure, the admissibility of evidence and the principles of sentencing. There is no area of the criminal law in which your Honour has not delivered judgments that, I have no doubt, will stand the test of time. Your judgments comprehensively analyse every issue that arose in each case and every one manifests a force and clarity of expression that ensures their utility for the long term.

This contribution began soon after your Honour's appointment when your Honour presided in the Ananda Marga Inquiry to determine whether the convictions in that high profile matter were safe. Your Honour's analysis has frequently been cited with approval in subsequent such inquiries. Subsequently your Honour delivered many judgments which serve as models for all those who have followed: directions with respect to relationship evidence in a sexual assault case; principles of relevance when sentencing Aboriginal offenders - principles which manifest your Honour's profound humanity; the construction and operation of the unfavourable witness provisions under the 1995 *Evidence Act*; the operation of new provisions concerning admissions under the same Act; determining that the mental health fitness provisions extend to persons who are developmentally or intellectually disabled; determining what to do in the case of jury misbehaviour, such as obtaining information about an accused over the internet or undertaking private views; guidance as to the role of drug addiction as a factor relevant to sentencing for offences such as armed robbery; determining whether a sentence of life imprisonment is appropriate after the "life means life" statutory amendments. Recently your Honour conducted the first trial of an alleged terrorist under the special

legislation adopted for the trial of such offenders. Your Honour also participated in all of the sentencing guideline judgments which the Court developed over recent years. Your contribution to the analysis contained in those judgments was fundamental, whether or not your Honour wrote a separate judgment.

No-one in this room, indeed few people in this State, is unaware of the extraordinary public service your Honour performed in conducting the Royal Commission into the NSW Police Service and the accompanying paedophile inquiry. Your Honour's intelligence, competence and courage were never on better display than during that period. At the outset your Honour had the crucial insight that you would not discover whether or not there existed systematic and entrenched corruption by reviewing files relating to past matters. You recruited police from the Australian Federal Police and from the forces of other States to conduct your own investigations. Turning one crooked policeman at an early stage enabled the covert work of the Commission to produce extraordinary results, including that celebrated and now iconic footage, recorded by a camera in the dashboard of a car, showing that person handing over a bribe to a colleague. From that moment onwards the Commission was seen to be effective and the impetus towards reform within the police force became unstoppable.

Your final report did not simply record the existence of widespread corruption, including process corruption such as verballing and the planting of evidence, but put forward a range of proposals for significant management change, including a new institutional structure to prevent, or at least minimise, the future occurrence of the conduct exposed. The parallel paedophile inquiry led to a range of recommendations, also adopted, with respect to the adequacy of the law and the conduct of court cases involving child complainants. For these reports alone, the people of NSW will stand in your debt for decades to come.

There is another contribution, perhaps not quite as public, but which is also of great significance. I refer to your Honour's role as a judicial administrator. The period of your service coincided with the transformation of the role of judges with respect to the conduct of proceedings. The judiciary now actively seeks to ensure the effective and efficient management of individual cases and of the case load of courts, a role which it did not perform at all when you became a judge over 20 years ago. Your Honour was a leader in this development.

There may have been in the past judges who acted on the principle that nothing must ever be done for the first time. That has long since ceased to be the case. It was never true of your Honour. There is no aspect of this Court's management of civil common law cases or criminal trials or criminal appeals that has not been initiated or expanded or reinforced by your own contribution and example. I can testify personally to the fact that until the day that you retired, you never lost your enthusiasm for new ideas and your preparedness to review past practice.

For all of these reasons, and others that time does not permit me to mention, it is with great regret that your colleagues gather here today to say farewell to a remarkable man.

Statutory Interpretation And Human Rights, address to the Pacific Judicial Conference Vanuatu

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**STATUTORY INTERPRETATION AND HUMAN RIGHTS
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
TO THE PACIFIC JUDICIAL CONFERENCE
VANUATU, 26 JULY 2005**

This address repeats in part and develops my speech to the New South Wales Bar Association Conference on 18 March 2005, "The Principle of Legality and the Clear Statement Principle" to be published in 79 *ALJ*, accessible at www.lawlink.nsw.gov.au/sc.

Most of the nations represented at this conference have a constitutionally entrenched Bill of Rights. They vary in scope but have considerable common content. New Zealand has a statutory Bill of Rights. New Caledonia and French Polynesia operate under the French Constitution which contains the "Declarations of the Rights of Man". As I understand the position, only Australia, except in the Australian Capital Territory, has no Bill of Rights of any character.

Infringements of human rights most often occur through the exercise of powers under statutes. Where there is no Bill of Rights or a Bill of Rights of limited scope, the protection of fundamental rights and liberties is secreted, to a substantial extent, in the law of statutory interpretation. That must also be the case in any jurisdiction where, some or all human rights are not given overriding constitutional protection of a character which may lead to the striking down or modification of a statute. It is likely to be the case, at least to some degree, in all of the jurisdictions represented at this conference that the law of statutory interpretation will have work to do in protecting human rights.

One of the ways that the multi-faceted development, generally referred to as "globalisation", has manifested itself in world legal systems is through what has been described as the "human rights revolution" of recent decades. Even in those jurisdictions that do not have a Bill of Rights, or have some form of protection of limited scope, the greater salience of human rights concerns has had an influence on the judiciary. That influence is manifest in the development of, or the more rigorous application of, long established principles of statutory interpretation in the case of statutes which impinge on human rights.

The preponderant view in Australia remains that a Bill of Rights, even of a legislative character is inappropriate because it will give the judiciary a legislative role. There remains a widespread concern that the judicialisation of politics will lead to the politicisation of the judiciary. Nevertheless, the burgeoning jurisprudence of those nations who have taken this step is having its effects, particularly on younger lawyers.

The greater salience that is being given to human rights considerations is reflected in the emergence of what has come to be called "the principle of legality". That principle identifies the higher purpose of a number of principles of the law of statutory interpretation which have, in the past, generally been referred to as canons or presumptions or maxims. The words "the principle of legality" were introduced into contemporary discourse by Lord Steyn, being a phrase he found in the 4th edition of *Halsburys Laws of England*, where it was employed as equivalent to the traditional phrase "the rule of law", albeit in a narrower sense than many uses of that concept[2]. It is, however, a concept with a longer history and was developed at some length in the early 1950s by Glanville Williams[3].

The principle of legality has been adopted as a concept by Chief Justice Gleeson of Australia[4], and by Chief Justice Elias of New Zealand[5].

Lord Steyn referred to the principle in the following way:

"Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary."[6].

That statutes are not enacted in a vacuum has long been accepted. It is an inevitable concomitant of statutory interpretation that it is necessary to invoke interpretative principles which reflect values and assumptions that are so widely held as to not require express repetition in every text. Often these principles will play the determinative role in determining the meaning of the text. The existence of such background assumptions has been identified in many different circumstances of constitutional and statutory interpretation[7].

In the case which established “the principle of legality” as a unifying principle in English law, Lord Hoffman said, in a passage subsequently quoted with approval by Gleeson CJ[8] and by Kirby J[9], and by Elias CJ and Tipping J[10], and which Lord Steyn has recently characterised as a ‘trenchant statement’[11].

“The principle of legality means that Parliament must squarely confront what it is doing and accept the political costs. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”[12].

As Lord Simon of Glaisdale once said, the canons of construction “... are ... constitutionally salutary in helping to ensure that legislators are not left in doubt as to what they are taking responsibility for”[13]. The idea is the same as that expressed by John Marshall, Chief Justice of the United States, when he said in 1820, with respect to the rule that penal laws are to be construed strictly:

“It is the legislature, not the Court, which is to define the crime and ordain its punishment.” [14].

The principle of legality is a unifying concept, which can be understood to encompass a range of more specific interpretive principles that have emerged over many centuries of common law development of the law of statutory interpretation. Amongst the rebuttable presumptions, which it may now be convenient to consider as manifestations of the principle of legality, are the presumptions that Parliament did not intend[15]; I give, hereafter, Australian examples, being those with which I am most familiar.

- To invade fundamental rights, freedoms and immunities[16].
- To restrict access to the courts[17].
- To abrogate the protection of legal professional privilege[18].
- To exclude the right to claims of self-incrimination[19].
- To permit a court to extend the scope of a penal statute[20].
- To deny procedural fairness to persons affected by the exercise of public power [21].
- To give immunities for governmental agencies a wide application[22].
- To interfere with vested property rights[23].
- To alienate property without compensation[24].
- To interfere with equality of religion[25].

These interpretive principles are of longstanding. The debate about their deployment by common law judges goes back at least as far as Blackstone and Bentham. In many ways Blackstone’s account of statutory interpretation in Book 1 of the *Commentaries* [26] is quite contemporary.

What attracted Bentham’s outrage, in this as in other aspects of the common law method, was the fluidity that is introduced by the use of interpretive principles, particularly those which emphasise the context and purpose of the statutory text and specific principles, e.g. that Parliament did not intend an absurd result. Bentham found all of this inconsistent with a rational legal order, which required express codification of everything. He made no allowance for ambiguities, gaps, generalities or the scope of language. He found the flexibility that the common law judges retained nothing short of outrageous[27].

Many years ago Rupert Cross described Bentham's approach to Blackstone as "pig headed" and referred to:

"... The naïve belief manifested throughout so much of his work that it is possible for the laws of a sophisticated society to be formulated in terms of indisputable comprehensibility." [28].

Notwithstanding the assumption in many civil law systems, that complete precision and perfect comprehensibility is possible, which appears to retain its force in France but no longer to the same degree in Germany, Bentham's obsessiveness has never been accepted in the common law world. His view that every aspect of law could be written down as a complete body of law, which he called a Pannomion, has never been achieved, even in the Continental codes.

It is, however, interesting that, over the course of the last century when Parliament has codified, modified and rewritten the common law in so many areas, the law of statutory interpretation has been changed to only a small degree in the respective Interpretation Acts or by provisions of specific scope.

Of particular significance is the fact that, the interpretative principles which are manifestations of the principle of legality have not as far as I am aware, been the subject of statutory modification, unless the introduction of requirements for a purposive interpretation can be so understood. They have not had any such effect in practice. That these principles exist is well known to every parliamentary drafter. They are well established and have been reaffirmed on numerous occasions. The courts are entitled to approach the process of statutory interpretation on the assumption that, if the principles are not to be applied, the Parliament will either say so or otherwise clearly identify the results it wishes to achieve in a way that will ensure that the law of statutory interpretation does not interfere with that occurring.

It is, however, a concomitant of the principle of legality, and a manifestation of what Chief Justice Gleeson has felicitously called judicial legitimacy [29], that the judiciary do not find ambiguity where there is none and recognise clear and unambiguous language when it is presented to them for interpretation.

The task of statutory interpretation is most frequently expressed in terms of identifying the intention of the Parliament. This terminology is not without its difficulties. Indeed, legislative intention is often characterised as a fiction.

At one level the terminology of "intention", when employed by judges, is an act of constitutional courtesy which the judiciary observes in its collective relationship with the Parliament. Courteous language is a feature of our constitutional arrangements which have, over the course of a long period, involved tensions and, sometimes, conflict between the separate institutions of our mechanisms of governance.

The task of the courts is to interpret the words used by Parliament. It is not to divine the intent of the Parliament [30].

The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say [31].

The language of intention has been criticised on a number of bases and some judges avoid its use, making their attitude clear by putting the word within scare quotes, as Felix Frankfurter and Justice Michael Kirby have done [32]. So, interestingly, has Justice Scalia [33]. Justice Kirby has described legislative intention as "a polite but unacceptable fiction" [34].

On the other hand the constitutional significance of the language of intention has been emphasised by others, including recently by Chief Justice Gleeson [35]:

"In the construction or interpretation of a statute, the object of a court is to ascertain, and give effect to, the will of Parliament. Courts commonly refer to the 'intention of the legislature'. This has been described as a very slippery phrase (*Salomon v A Salomon & Co Ltd* (1897) AC 22 at 38 per Lord Watson), but it reflects the constitutional relationship between the legislature and the judiciary. Parliament itself uses the word 'intention' in the *Interpretation Act* 1901 (Cth) as a focal point for reference in construing its enactments. Certain words and phrases are said to have a certain meaning unless a contrary intention

is manifested in a particular Act. Parliament manifests its intention by the use of language, and it is by determining the meaning of that language, in accordance with principles of construction established by the common law and statute, that courts give effect to the legislative will.”

What is involved is the search for an objective intention of Parliament, not the subjective intention of Ministers or Parliamentarians[36]. Indeed, often there is no relevant subjective intention at all. The words used may represent a compromise, without consensus, so that, in substance, the decision has been left to the courts[37]. Even more frequently, indeed almost always in cases of difficulty, the circumstances in which the statute falls to be applied were not actually contemplated by anybody. Even if they were contemplated, a statement of intention in a Ministerial Second Reading speech will not prevail over the words of the statute[38].

So long as the objective nature of the relevant intention is kept firmly in mind, there is a strong case, and not just for reasons of constitutional courtesy, to continue to use the terminology of Parliamentary intention. There is, however, truth in the observation of Oliver Wendell Holmes Jr:

“ ... Intention is a residuary clause intended to gather up whatever other aids there may be to interpretation beside the particular words and the dictionary.”[39].

There are, however, examples in legal history of the judiciary applying interpretive principles as a means of subverting legislative intent. For example, the old rule that penal statutes must be strictly construed – referred to as the rule of lenity in the United States – was developed to mitigate the harshness of the death penalty, then applicable to minor offences, and attempts by Parliament to restrict benefit of clergy[40].

The contemporary controversy about judicial activism - particularly in the context of human rights litigation, most notably in migration cases - raises parallel issues. Subject to an entrenched bill of rights, the judiciary must always remember that the interpretive principles are rebuttable.

The determination that the principle of legality and that a particular interpretive principle applies in a particular case is, regrettably, the easy part of the process. All that we have done at this stage is to identify the two elements - namely the statutory formulation and the interpretive principle – that may give rise to an incompatibility. The difficult part is determining which must prevail in the particular circumstances. It is at this point that judicial reasoning often becomes distinctly fuzzy when identifying a relevant test and, perhaps more significantly, when applying it. The relevant test is, more often than not, expressed in the conclusion rather than in the reasoning.

There are a range of verbal formulations, all basically equivalent, as to how the presumption that Parliament does not intend to interfere with rights has been expressed. I have compiled the following list from the judgments of the High Court of Australia over the years:

“Clear and unambiguous words”, “unambiguously clear”, “irresistible clearness”, “express words of plain intendment”, “clear words or necessary implication”, “unmistakable and unambiguous”, “expressly stated or necessarily to be implied”, “clearly emerges whether by express words or by necessary implication”, “with a clearness which admits of no doubt” and “something unequivocal must be found, either in the context or the circumstances, to overcome the presumption”[41].

It is often said that a statute which impinges upon the principle of legality, or any of its constituent interpretive principles, must be construed strictly. However, the concept of strict construction does not involve a simple standard. There are degrees of strictness. There is very little discussion in the literature or case law about what is meant by strict construction.

I believe we should stop using the language of “strict construction”. It suggests that courts give a restricted interpretation to the language of Parliament and do so irrespective of the intention of Parliament. That that has been the case, and not only in the distant past, is a good reason for ensuring that the terminology more accurately reflects the true judicial role. In my opinion, this approach is more appropriately called: the clear statement principle. All the formulations I have listed reflect this principle. Whenever rights, liberties and expectations are affected, if Parliament wishes to interfere with them, it must do so with clarity. The clear statement principle is one way that the law of statutory interpretation reflects and implements the principle of legality.

A core difficulty remains. Clarity, like beauty, always involves questions of degree and is affected by the eye of the beholder.

There is a tendency in some of the authorities to give a narrow application to the relevant presumption on the basis that it is first necessary to find an ambiguity in the statutory formulation before the presumption can operate. In both the House of Lords and the New Zealand Court of Appeal, such references appear in judgments which emphasise the restrictive operation of common law presumptions in comparison with statutory provisions for interpretation in the human rights acts of those nations[42]. In my opinion this reflects an unnecessarily restrictive view of the concept of ambiguity in the law of statutory interpretation. When the relevant common law presumption is understood as a specific application of the principle of legality it is not appropriate to take a narrow approach to what is meant by ambiguity.

I have on more than one occasion had reason to draw on the observations of a master of statutory interpretation, Lord Simon of Glaisdale[43] – both an officer of the Simplified Spelling Society and a scrabble tragic - including the following:

“Words and phrases of the English language have an extraordinary range of meaning. This has been a rich resource in English poetry (which makes fruitful use of the resonances, overtones and ambiguities), but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know as exactly as possible, where he stands under the law)”[44].

Perhaps not without irony, the word “ambiguity” is itself ambiguous. It is not necessarily limited to situations of lexical or verbal ambiguity and grammatical or syntactical ambiguity. The word ambiguity is often used in a more general sense of indicating any situation in which the scope and applicability of a particular statute is, for whatever reason, doubtful[45].

For my own part, save where the word falls to be construed in an Interpretation Act, I would prefer to confine the word “ambiguity” to its more usual meaning of verbal or grammatical ambiguity. The broader issue raises a problem of “inexplicitness” [46]. There are a range of circumstances in which the application of a statutory formula is doubtful: when deciding whether to read down general words; when implications are sought to be drawn from a text; when considering whether to depart from the natural and ordinary meaning of words; when deciding whether or not a statutory definition or interpretation section does not apply on the basis of an intention to the contrary; when giving qualificatory words an ambulatory operation; and, more controversially, whether words and concepts are read into a statute by filling gaps.

The problem of what I prefer to call “inexplicitness” most frequently arises when a court is asked to determine the true extent of general words adopted in legislation. When should general words used in a statute be read down so as to have a narrower meaning than that of which they are literally capable? It is actually quite rare to find an English word that cannot be applied at different levels of generality or cannot otherwise be circumscribed in its application. The former poet laureate, Ted Hughes, put it well:

“A word is its own little solar system of meaning.”

For those who find comfort in the “plain meaning” rule, it is necessary to recognise, in the words of Lord Wilberforce, that general words do not necessarily have a “plain meaning”[47].

Reading down general words, particularly by the application of presumptions attributed to the legislature, is a well established means of statutory interpretation[48].

As long ago as 1560, the Barons of the Court of the Exchequer said:

“And the Judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular where the intent was particular.”[49].

A fuller quotation from this judgment of 1560 has a decidedly contemporary ring:

“... the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they

have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.”[50].

Some authorities and texts refer to a process of “reading words into an Act”. This terminology appears to me to offend a fundamental principle of constitutional law. In my opinion, the relevant authorities are consistent with a process of interpretation by which the court interprets the words actually used by the Parliament by giving them effect *as if* they contained additional words or as if some words were deleted for a specific application. This does not, in my opinion, introduce words into the Act. It involves the interpretation of the words actually used, perhaps by means of reading down general words or by giving some words an ambulatory operation[51].

A significant development in this area is the inclusion in some human rights legislation of a requirement that courts construe *other* legislation so as to be consistent with the fundamental human rights protected in some manner by that Act[52].

This overlaps to some degree with one of the fundamental aspects of the principle of legality, i.e. the presumption that Parliament does not intend to interfere with fundamental rights and freedoms. Such a presumption is recognised in all jurisdictions and has long been accepted to be the law in Australia[53].

Chief Justice Gleeson has recently said:

“The presumption is not merely a commonsense guide to what a Parliament in a liberal democracy is likely to have intended. It is a working hypothesis, the existence of which is known both to the Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.”[54].

His Honour also said:

“What courts will look for is a clear indication that the Parliament has directed its attention to the rights and freedoms in question and has consciously decided upon abrogation or curtailment.”[55].

In the context of this interpretive principle, the level of strictness is high, i.e. a high level of clarity is required by the clear statement principle. In such a case, it will frequently be the case that the test for clarity is not merely what Parliament ‘intended’, but the more stringent test of what it has said expressly or by *necessary* intention. Indeed, Lord Steyn, no doubt fearful of glib incantation, has advanced the formulation “express words or *truly* necessary implication”[56].

It is understandable that the jurisprudence in those jurisdictions which have adopted an express statutory requirement to construe other acts to conform with a list of rights, have emphasised the significance of the new legislative mandate. Nevertheless, the common law principles of statutory interpretation remain robust and of considerable significance, particularly for those of us who have no such legislative scheme. They will also be significant for those whose legislative implementation of Bills of Rights provisions do not cover the full range of rights and liberties recognised at common law.

There are two models for a provision of this character in the legislation of New Zealand and the United Kingdom, the jurisprudence of which have developed in similar directions but have not converged. For other jurisdictions that have, or are contemplating, the adoption of such a provision, the history of their application is instructive.

Section 6 of the New Zealand *Bill of Rights Act* 1990 provides:

“6 Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other

meaning.”

Section 3 of the *Human Rights Act* 1968 (UK) provides:

“3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

British jurisprudence about s3 has revealed two quite distinct approaches to its application: called by others a cautious approach and a radical approach[57]. As Lord Nicholls of Birkenhead put it, the difficulty is the ambiguity inherent in the word “possible”[58].

Although the range of issues may not be fully resolved, the House of Lords has adopted an approach at the radical end of the spectrum. The Court has emphasised that the test of what is “possible”, found in s3, enables a court to modify the meaning of a statutory interpretation even to reach a result that is contrary to the intention of Parliament when enacting legislation subsequent to the *Human Rights Act* and which impinges upon rights protected by the European Convention[59].

In a case involving the interpretation of a ‘rape shield’ law, regulating the admissibility of sexual history evidence, the House of Lords found that it was subject to a proviso that any questioning required to ensure a fair trial was not excluded[60]. No such interpretation could have been reached by the application of common law rules, notwithstanding the strength of the principle of a fair trial at common law.

The scope of the change effected by s3(1) was affirmed late last year by the House of Lords in *Attorney Generals Reference No 4* (2002). The Court made clear that provision for a “declaration of incompatibility”, inserted by Parliament to reconcile the judicial role under the *Human Rights Act* and the British tradition of parliamentary sovereignty, is a last resort. Lord Bingham indicated[61] that:

- “The interpretive obligation under s3 is a very strong and far reaching one and may require the court to depart from the legislative intention of Parliament.”
- “A Convention compliant interpretation under s3 is a primary remedial measure and a declaration of incompatibility under s4 an exceptional course.”
- “There is a limit beyond which a convention compliant interpretation is not possible” but the basic test is the statutory form “so far as it is possible to do so.”

As can readily be seen, this suggests a significant change in the traditional relationship between Parliament and the courts. It is similar to what has occurred in Canada with an entrenched Bill of Rights. The change is justified in the United Kingdom on the basis that Parliament has specifically conferred authority on the courts to modify, by means of interpretation, the effect of legislation, even when the result is that the intention of Parliament in other legislation is not implemented. The *Human Rights Act* has been given a quasi constitutional status. This should come as no surprise.

The history of the British Constitution, which has never been a written Constitution, is that various Acts of Parliament have, in effect, been given constitutional status, primarily by means of the law of statutory interpretation. The circumstances in which an Act is passed and/or the passage of time often make it clear that it is politically impossible to repeal or amend the Act. Where such a statute affects the distribution of political power or the rights and liberties of citizens, it is appropriate that the constitutional status of the statute should be recognised. As a matter of substance, that statute is as entrenched as a constitutional provision.

Even in a nation with a written Constitution, like Australia and most nations represented at this conference, statutes can acquire quasi constitutional status when the possibility that they may be amended by Parliament is entirely theoretical[62].

The recognition that not all statutes are equal – or at least some statutes are more equal than others – is of particular significance in a nation without a written constitution, such as the United Kingdom, Israel or New Zealand. The jurisprudence of each such nation reflects a recognition of the existence of a hierarchy of statutes.

The New Zealand judiciary has in some respects adopted a robust approach with respect to the *Bill of Rights Act* 1990. In *Baigent’s* case, the Court of Appeal created a public law remedy by awarding

damages against the Crown for breach of the *Bill of Rights*[63]. In *Moonen* the Court of Appeal decided that it would, in an appropriate case, declare that a statute unjustifiably impinges on human rights even though the New Zealand Act, unlike the United Kingdom Act, makes no express provision for any such declaration of incompatibility[64]. Chief Justice Elias has indicated that this approach reflects a recognition that there is a hierarchy of statutes and manifests a process of dialogue between Parliament and the courts[65].

Notwithstanding this jurisprudence, the New Zealand courts have not adopted the radical approach of the House of Lords to the special statutory interpretation provision in the New Zealand Act[66].

An example of the difference in approach is found in cases construing statutory provisions which shift the burden of proof. Even at common law, in my opinion, the clear statement principle would apply and such a section would generally be interpreted to shift only an evidential burden, not the burden of proof [67].

The House of Lords had no difficulty in deploying s3 of the United Kingdom Act to that effect[68]. In contrast, the New Zealand Court of Appeal did not apply s6 of the New Zealand Act in that way[69]. Admittedly, this was in 1991 and the result may be different today.

There are differences in the wording of the New Zealand and United Kingdom sections, notably the express use of the word "possible" in the UK Act, with the emphatic additions "so far as" and "must be read", compared to the meek formulation "can be given". The New Zealand Act also contains in s4 an express preservation of the doctrine of implied repeal[70].

Some early New Zealand judgments suggested that s6 may not go much further than the common law of statutory interpretation[71]. The drift of authority, albeit cautious, indicates that s6 will be accepted as a new and powerful rule of statutory interpretation[72]. Different approaches are apparent in Court of Appeal judgments[73].

These differences in approach will no doubt need to be resolved by the New Zealand Supreme Court. It appears likely that, as in the United Kingdom, the express statutory provision will be found to have significantly modified the common law of statutory interpretation.

For those of us who have no such statutory modification the common law, however robust, will not lead to the same results. Nevertheless, it would be wrong to underestimate the force of the combined effect of the principle of legality and the clear statement principle.

Statutes now represent the most important area of the law. Contemporary debates about judicial activism emphasise that the judiciary must always remember the proper role of courts in a democratic polity.

Oliver Wendell Holmes Jnr summarised the law of statutory interpretation with his customary epigrammatic brevity. Speaking of a statute which he described as "a foolish law" - it happened to be the Sherman Act - he said:

" ... If my fellow citizens want to go to Hell, I will help them. It's my job."[74].

When Chief Justice Gleeson said that the quality that sustains judicial legitimacy is fidelity to the techniques of legal methodology, in part, he probably had something similar in mind[75].

End Notes

1. This address repeats in part and develops my speech to the New South Wales Bar Association Conference on 18 March 2005, "The Principle of Legality and the Clear Statement Principle" to be published in 79 *ALJ*, accessible at www.lawlink.nsw.gov.au/sc.
2. See *Halsburys Laws of England*, 4th ed, reissue vol 8(2) (1996) par [6].
3. See Glanville Williams, *Criminal Law*, 1st ed, Stevens & Sons Limited (1953) at pp434-465.
4. See Murray Gleeson AC, *The Rule of Law and the Constitution: The Boyler Lectures*, ABC Books, (2000), pp 2 and 5; *Al-Kateb v Godwin* (2004) 208 ALR 124 at [19]; *Electrolux Home Products Pty Ltd v Australian Workers Union* (2003) 209 ALR 116 at [21] and [23].

5. *R v Pora* [2001] 2 NZLR 37 at [53].
6. *R v Secretary of State to the Home Department; Ex parte Pierson* (1998) AC 539 at 587.
7. See e.g. Bell and Engle *Cross on Statutory Interpretation*, 3rd ed, Butterworths, London, (1995), pp165-166 and also Sunstein "Interpreting Statutes in the Regulatory State" (1989) 103 *Harvard LR* 405 passim.
8. *Plaintiff S157/2002 The Commonwealth* (2003) 211 CLR 476 at [30]; *Al-Kateb* supra at [19] fn 11.
9. *Daniels Corporation v ACCC* [2002] 213 CLR 543 at 582.
10. *R v Pora* (2001) 2 NZLR 37 at [53].
11. *Roberts (FC) v Parole Board* (2005) UKHL 45 at [93], and see at [30] per Lord Bingham.
12. *R v Secretary of State for Home Department; Ex parte Simms* (2002) 2 AC 115 at 131. See also *B v DPP* (2000) 2 AC 423 at 470; *Ngata Apa Ki Te Waipounama Trust v The Queen* (2000) 2 NZLR 659 at [82].
13. *Ealing London Borough Council v Race Relations Board* (1972) AC 342 at 361.
14. *United States v Wiltberger* 5 Wheat. 76 (1820) at 95.
15. See Pearce & Geddes, *Statutory Interpretation in Australia*, 5th ed, Sydney, Butterworths (2001) esp at 515-529; Burrows, *Statute Law in New Zealand* Lexis Nexis, Wellington (2003) pp219-227; I give, hereafter, Australian examples, being those with which I am most familiar. I have no doubt that similar examples can be found in all common law jurisdictions.
16. *Potter v Minahan* (1908) 7 CLR 277 at 304; *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523, 532; *Bropho v Western Australia* (1990) 171 CLR 1; *Plaintiff S157* supra at [32]; *Coco v The Queen* (1994) 179 CLR 427 at 437; *Al-Kateb* supra at [19], [150]; *Minister v Al Masri* (2003) 197 ALR 241 at [82]-[85].
17. *Magrath v Goldsborough Mort & Co Ltd* (1932) 47 CLR 121 at 134; *Plaintiff S157* supra esp at 492.
18. *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at [11]. Note also *R (Morgan Grenfell Ltd) v Special Commissioner* [2003] 1 AC 563 at 606-607 ([7]-[8]).
19. *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Rich v ASIC* (2004) 78 ALJR 1354.
20. *Ex parte Fitzgerald Re Gordon* (1945) 45 SR(NSW) 182 at 186; *Krakouer v The Queen* (1998) 194 CLR 202 at [62].
21. *Commissioner of Police v Tanos* (1958) 98 CLR 363 at 395-396.
22. *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 101 at 116; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 525 at [33]-[37], [59]-[68], [113].
23. *Clissold v Perry* (1904) 1 CLR 363 at 373; *Clunies Ross v The Commonwealth* (1984) 155 CLR 193 at 199-200.
24. *Commonwealth v Haseldell Ltd* (1918) 25 CLR 552 at 563; *Durham Holdings* (2001) 205 CLR 399 at [28]-[31].
25. *Canterbury Municipal Council v Muslim Alawy Society Ltd* (1985) 1 NSWLR 525 at 544 per McHugh JA.
26. Blackstone *Commentaries on the Laws of England*, London, 1830, Vol 1 at pp87-92.
27. See the analysis in Sunstein and Vermule "Interpretation and Institutions" (2003) 101 *Michigan L*

Rev 885 esp at 890-897.

28. Cross "Blackstone v Bentham" (1976) 92 *LQR* 516 at 521 and 520.

29. Murray Gleeson AC "Judicial Legitimacy (2000) 12 *Judicial Officers Bulletin* 41.

30. See *State v Zuma* (1995) (4) BCLR 401 at 402; [1995] (2) SA 642; *Matadeen v Pointu* [1999] 1 AC 98 at 108; *R v PLV* (2001) 51 NSWLR 736 at [82]; *La Compagnie Sucriere de Bel Ombre Ltee v Government of Mauritius* (Privy Council, 13 December 1995, unreported; *Pinder v The Queen* [2003] 1 AC 620.

31. *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-169; *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948 at 953d; [1978] 1 WLR 231 at 236G; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 at 814a, 842; [1975] AC 591 at 613G, 645C-V; *R v Young* (1999) 46 NSWLR 681 at [5]; *Dossett v TKJ Nominees Pty Ltd* (2003) 78 ALJR 161 at [10]; *Donselear v Donselear* (1982) 1 NZLR 97 at 114.

32. See Felix Frankfurter, "Some Reflections on the Readings of Statutes", (1947) 47 *Columbia L Rev* 527 at 538; *The Residential Tenancy Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 190 CLR 410-497; *Byrne v R* (1999) 199 CLR at [80]; *R v Hughes* (2000) 202 CLR 535 at [60]; *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [262]; Kirby "Interpretation and the Rule of Law" in Kelly (ed) *Essays on Legislative Drafting* Adelaide, 1988 pp88-90.

33. *Bank One Chicago N.A. v Midwest Bank Trust Co* 516 US 264 (1996) at 279.

34. *R v Hughes* (2000) 202 CLR 535 at [60].

35. See *Wilson v Anderson* (2002) 213 CLR 401 at [8]; *Singh v Commonwealth of Australia* (2004) 78 ALJR 1383 at [19]. See also Bennion *Statutory Interpretation* (4th ed) Butterworths, London, 2002, pp405-405 and *NAAV v The Minister for Immigration* (2002) 123 FCR 298 at [430] and [432].

36. See, e.g. *Eastman v The Queen* (2000) 203 CLR 1 at 146-147 per McHugh J.

37. See *Brennan v Comcare* (1994) 50 FCR 555 at 572-575; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-169.

38. *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *R v Young* 1999) 46 NSWLR 681 esp at [33]-[37].

39. Quoted by Felix Frankfurter *infra*.

40. *Pearce & Geddes* (5th ed) *supra* at [9.8]; Radzinowicz *A History of English Criminal Law*, Vol 1, Stevens & Sons, London 1948 pp83-88; Solan "Law, Language and Lenity" (1998-1999) 40 *Wm & Mary L. Rev* 59; Hall "Strict or Liberal Construction of Penal Statutes" (1935) 48 *Harvard L. Rev* 748; Jeffries "Legality, Vagueness and the Construction of Penal Statutes" (1985) 71 *Va L. Rev* 245; Newland "The Mercy of Scalia: Statutory Construction and the Rule of Lenity" (1994) 28 *Harv. C.R. - C.L. L. Rev* 19; Klooper "The Status of Strict Construction in Canadian Criminal Law" (1983) 15 *Ottawa L. Rev* 553.

41. See *Durham Holdings Pty Ltd v NSW* (1999) 47 NSWLR 340 at [44]-[45].

42. See *R v Secretary of State to the Home Department: Ex parte Pierson* (1998) AC 539 at 587; *Quilter v Attorney General* (1998) 1 NZLR 523, 526, 541-542, 581.

43. The titles of two earlier addresses were drawn from Lord Simon's judgments; Spigelman, "Statutory Interpretation: Identifying the Linguistic Register" (1999) *Newcastle L Rev* 1; "The Poet's Rich Resource: Issues in Statutory Interpretation" (2001) 21 *Aust Bar Rev* 224; See also his Lordship's series of articles on "English Idioms from the Law" (1967) 76 *LQR* 283 and 429, (1962) 78 *LQR* 245 and (1965) 81 *LQR* 52.

44. *Stock v Frank Jones (Tipton) Limited* (1978) 1 WLR 231 at 236.

45. See the references set out in my earlier addresses in the *Newcastle Law Review* supra n41 at p2; *Australian Bar Review* supra at 231-232; *Repatriation Commissioner v Vietnam Veterans Association of NSW Branch* (2000) 24 NSWLR 548 at 116.

46. See *Repatriation Commission v Vietnam Veterans' Association* (2000) 48 NSWLR 548 at [116].

47. *Maunsell v Olins* (1975) AC 373 at 385-386.

48. I have collected the relevant Australian authorities in *R v Young* (1999) 46 NSWLR 681 at [25]-[31]; Spigelman "Statutory Interpretation" supra at 528; "The Poet's Rich Resource" supra at 227-230, 232-233.

49. *Stradling v Morgan* (1560) 75 ER 305 at 312.

50. Ibid at 315. See also *Bowtell v Goldsbrough Mort* supra at 457-458 *Ex parte Walsh*; *In re Yates* (1925) 37 CLR 36 at 91-93; *Ex parte Kisch* supra at 244; *Commercial Union Insurance Co Limited v Colonial Carrying Co of New Zealand Limited* [1937] NZLR 1041 at 1047-1049; *Church of the Holy Trinity v United States* 143 US 457 (1892) at 459; *Tokyo Mart Pty Limited v Campbell* (1988) 15 NSWLR 275 at 203; *Smith v East Elloe Rural District Council* [1956] AC 736 at 764-765; *Bropho v Western Australia* supra at 17-18.

51. See *R v Young* supra at [5]-[12]; Spigelman "The Poet's Rich Resource" supra at 233-2234.

52. See, e.g. s3 of the *Human Rights Act* 1998 (UK); s6 of the *Bill of Rights Act* 1990 (NZ); s13 of the *Human Rights Act* 2004 (ACT).

53. See above n15.

54. *Electrolux* supra at [21].

55. *Plaintiff S157* supra at [30].

56. *B v DPP* supra at 470.

57. The divergence is reflected in the contrast between Lord Steyn and Lord Hope who, respectively, adopted the radical and cautious approaches in *R v A (No 2)* (2002) 1 AC 45 at [108] and [44]; See also Greenberg (ed) *Craies on Legislation* 8th ed London Sweet & Maxwell 2004 Chapt 25; Francesa Klug "United Kingdom Experience" in Christine Debono and Tanya Colwell, (eds) *Comparative Perspectives on Human Rights* (2004) at 5; David Bonner et al "Judicial Approaches to the Human Rights Act" (2003) 52 *Int & Comp LQ* 549 at 555-557.

58. *Ghaidan v Goden-Mendoza* ibid at [27]-[28].

59. See *Ghaidan v Goden-Mendoza* (2004) 2 AC 557 esp at [49] and Appendix at 578-582.

60. *R v A (No 2)* supra.

61. Ibid at [28].

62. See *Egan v Chadwick* (1999) 46 NSWLR 563 at [7]; Spigelman, "Seen to be Done: The Principle of Open Justice" (2000) 74 *ALJ* 290 at 293; Spigelman, "The Truth Can Cost Too Much: The Principle of a Fair Trial" (2004) 78 *ALJ* 29 AT 32-33.

63. *Simpson v Attorney General (Baigent's Case)* [1994] 3 NZLR 520.

64. *Moonen v Flim and Literature Board of Review* (2000) 2 NZLR 9.

65. See Elias, "Sovereignty in the 21st Century: Another Spin on the merry go round" (2003) 14 *PLR* 148 at 157-162.

66. See Burrows (2003) supra esp at 242-252; Spigelman "Blackstone, Burke, Bentham and the

Human Rights Act 2004" (2005) 26 *Aust Bar Rev* at 8-10.

67. *Ibid* at 8.

68. *R v Lambert* (2002) 2 AC 545 at 563, 574-575, 590, 610.

69. *R v Phillips* (1991) 3 NZLR 175 at 176-177.

70. When the *Human Rights Bill* was debated in the House of Lords, Lord Simon of Glaisdale suggested an amendment to refer to the doctrine of implied repeal. This was done to ensure that *prior* inconsistent legislation would in fact be taken as overruled without the need for a declaration of incompatibility. That the *Human Rights Act* itself should be insulated from subsequent implied repeal was not the focus of attention. See Great Britain, Parliamentary Debates (Hansard), House of Lords, 18 November 1997 at 509–510, 518–529; 19 January 1998 at 1289–1295.

71. See, e.g. *Simpson v Attorney General* (1994) 3 NZLR 667 at 217.

72. See the template set out in *Moonen v Film and Literature Board of Review* *supra* at [16]-[20], noting the additional observations in *Moonen v Film and Literature Board of Review* (2002) 2 NZLR 754 at [14]-[15].

73. See, e.g. *R v Poumako* (2002) 2 NZLR 695 cf [37] per Gault J and [79]-[84] per Thomas J and *R v Pora* *supra* at [110] per Gault Keith and McGrath JJ, [32]-[35] per Elias CJ and Tipping J and [119]-[128] per Thomas J. Note also the observations of Burrows *supra* at 243-352.

74. Howe (ed), *Holmes-Laski Letters: The Correspondence of Mr Justice Holmes and Harold J Laski 1916-1935*, Harvard Uni P Cambridge, Massachusetts 1953 p249.

75. Murray Gleeson AC, *The Boyer Lectures*, *supra*, pp136-137 and cf 130.

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The internet and the right to a fair trial

25

**THE INTERNET AND THE RIGHT TO A FAIR TRIAL
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
TO THE 6TH WORLD WIDE COMMON LAW JUDICIARY CONFERENCE
WASHINGTON DC, 1 JUNE 2005**

Improved accessibility of legal information on line is the most dramatic technical improvement in my legal lifetime. It has transformed the scope and efficiency of legal research for all of us toilers in the vineyard. It has rendered achievable one of the fundamental requirements of the rule of law: that all citizens should be able to ascertain what the law requires of them, albeit in many contexts with the assistance of a lawyer.

Perhaps there are still some who resist the revolutionary implications of ready accessibility to information. It was always thus. There were those who resisted the previous such revolution, the invention of printing. Before the upstart entrepreneur and goldsmith turned printer, Johan Guttenberg, transformed publishing, it had been conducted for millennia by scribes who, in Europe, were controlled by the Church. A limited form of mass production was able to be achieved in large scriptoria contained in monasteries. Printing was a major threat to this business.

Filippo di Strata, a Dominican friar from the convent of San Cipriano on Murano, an island of Venice, proclaimed in the late 15th century:

“The world has got along perfectly well for 6,000 years without printing and has no need to change now.”[1]

Fra Filippo regarded persons involved in printing as crude and untutored. Indeed, they were frequently German interlopers taking work from Italian scribes. Fra Filippo called them “ignorant oafs”. Printing, he said, allowed “uneducated fools to give themselves the airs of learned doctors”. They “vulgarised intellectual life”. He said that printers, unlike scribes, did not really understand what they were doing and made numerous spelling mistakes and typographical errors. He was concerned that the editorial expertise and writing skills of the scribes would be lost, as would be the great educational value of having to write things out in longhand, at a pace which enabled a monk to absorb and contemplate the text: “As he is copying the approved text, he is gradually initiated into the divine mysteries and miraculously enlightened”.

There was also a serious threat of intellectual freedom, I emphasise *of*, not *to*, intellectual freedom. Lascivious Roman love poetry, such as the works of Ovid, were widely circulated for the titillation of the young and impressionable. This and other such publications constituted a threat to the authority of religion. Cheap printed versions of the Bible, sometimes distorting what Fra Filippo saw to be the subtlety of the Latin text, were now becoming available to individuals without the intermediation of a priest. The same process is underway today. There is a recent study of the hundreds of crypto-Catholic websites devoted to the Virgin Mary, which operate without any supervision by the Church and consist of a range of cults proclaiming miracles and wonders. They overlap imperceptibly into New Age sites [2].

For Fra Filippo, another problem was that printers produced enormous quantities of books that anyone could get. He complained that it was hardly possible to walk down the streets of Venice without having armfuls of books thrust at you, “like cats in a bag” for two or three coppers. This was an early form of information overload. We now are of course overwhelmed by information affluence. Indeed, if you search the words “information overload” on Google, as I did recently, you get the self-satirical answer of 869,000 hits, in 0.23 of a second. This problem has been called “data asphyxiation”.

Information is now so generally accessible that it cannot be effectively controlled. For almost all purposes this is a wonderful phenomenon. There is one area of particular difficulty for those of us who come from a common law legal tradition. We have developed over many centuries a series of elaborate procedures and rules for channelling, and in some respects restricting, the flow of information that is made available to jurors.

In many jurisdictions, such as Australia and in England, the civil jury has all but disappeared. That is not the case in the United States. In all common law jurisdictions, however, despite the steady expansion of the significance of matters heard in the summary jurisdiction, the more important criminal trials continue to be conducted before juries and, as far as I am aware, save perhaps with respect to complex corporate or fraud cases, there are no serious proposals that this situation should change.

It is an essential characteristic of a fair trial that the jurors decide the case upon the evidence that is allowed to be adduced in the trial and which has been tested in accordance with the common law mechanism of trial, particularly by the legal representatives of the accused. Whether it is called due process or the principle of natural justice, there is no more fundamental rule in our procedure, especially our criminal procedure. I do not think any common lawyer would believe that a fair trial could be said to have occurred unless this rule was observed.

It is not possible to list exhaustively the attributes of a fair trial. Issues have arisen in a seemingly infinite variety of actual situations in the course of determining whether something that was done or said, either before or at the trial, deprived a trial of the quality of fairness to a degree where a miscarriage of justice had occurred[3].

“Nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused.”[4]

Over the course of centuries certain identifiable issues have arisen on many occasions and led to similar judgments being made with respect to the effect of events on the fairness of the proceedings. Many of our rules of procedure and of evidence have been developed on the basis that trial by jury is the norm. Although they may be of attenuated significance where a judge is the tribunal of fact, they are still applicable where a jury is involved. One of the most important manifestations of the principle of a fair trial is the withholding of evidence from the jury.

An issue that frequently arises is what is to be done if a juror either has or acquires information about the judge, a party or a witness in the case, or about the events in issue. This can arise by reason of a prior relationship or by reason of access to information before or during the trial. What the internet does is completely transform the possibilities of the latter [5].

The internet poses a challenge to the ability to ensure that a fair trial has occurred and renders less efficacious some of the mechanisms hitherto adopted to insulate the tribunal of fact from available information about the accused and witnesses or about the events. The internet opens up the prospects of new forms of misbehaviour by jurors during the course of the trial, by directly accessing the internet to acquire information about the events, about an accused or a witness, or for the purpose of checking expert evidence.

There is a distinct category of matters which impinge upon a fair trial which it is appropriate to consider under the general heading of jury misconduct [6]. Identification of misbehaviour is not an easy matter, by reason of the exclusionary rule that courts will refuse to receive evidence about deliberations in the jury room. This rule is based upon important considerations of public policy: the need to promote full and frank disclosure amongst jurors, to ensure the finality of the verdict, to protect jurors from harassment, pressure, censure and reprisal, and to maintain public confidence in juries[7].

Many cases of alleged juror misconduct have involved consideration by jurors of material not admitted into evidence, particularly media reports about parties or witnesses. The internet has transformed the ability to do this.

A good example of this challenge occurred recently in New South Wales in a case in which a person had been convicted of murder, but the Court of Criminal Appeal had ordered a new trial. In this case the man was on trial for the murder of his first wife. He had also been tried but acquitted of the murder of his second wife. A relevant fact was that both wives were from the Philippines and there was prejudicial material on a website maintained by a group called *The Solidarity Philippines Australia Network*. An appeal from the conviction in the second trial was allowed because of internet searches by the jury. The searches revealed that, not only had the person been previously tried and convicted of the charge of the murder of his first wife at his first trial, but that he had been charged and acquitted of the murder of his second wife[8].

The decision to set aside the verdict in the second trial for murder of his first wife and order a third trial for that offence was not based on the knowledge of the retrial. That fact was known to the jury, albeit

not in terms that there had been a conviction. It was the natural inference, that that had occurred and the trial judge had directed the jury in strong terms to ignore the circumstances of the prior trial. On appeal that direction was held to be sufficient. What was found to be a miscarriage of justice was the revelation of the charge of murder of the second wife. (I interpolate that third trial proceeded by judge alone, as can be done by consent in New South Wales. He was convicted again.)

The categories of jury misconduct by accessing information are multifarious. In a case earlier this year in England, a rape conviction was overturned after a juror had downloaded documents including *The Feminist Position on Rape* and *Rape and the Criminal Justice System*. The documents had been found in the jury room with handwritten notes on them. It was not known if the documents had been discussed, but the Court held the conviction was unsafe because members of the jury may have been influenced by them.

The Court of Appeal said:

“Just as a juror should not speak about a case to anyone other than another juror and for precisely the same reason of principle, he or she should not conduct private research for information which may have a bearing on the trial. The internet has many benefits, and we do not mean to diminish its value. Of course, not every site is always right. Some sites seek to persuade. The contents of some are inconsistent with the assertions made in another. The internet cannot discuss the case. It can however provide material which may influence a juror’s views. If used for research purposes during the trial it can just as easily influence the jurors mind as a discussion with a friend or neighbour. And the verdict is no more a true verdict according to the evidence than a verdict in which one or more members of the jury have taken account of something said to them out of court.”

The Court went on to consider the content of directions that may be given in this respect to jurors. Most common law systems now have standard form directions about inquiries by jurors. They are gradually being amended to include express reference to the internet.

The problem of jurors conducting their own research is not new, nor limited to internet searches. In New South Wales recently, in a highly charged gang rape trial, two jurors conducted their own view, for the purpose, it appears, of assessing the victim’s identification evidence. Such examples have occurred in many other jurisdictions[9].

Similarly, independent investigations, tests and even experiments are featured in many of the cases on jury misconduct[10]. Issues have arisen, for example, about whether the use of law books and dictionaries caused prejudice of the requisite degree. In some cases the answer was yes and in other cases no.

The internet opens up a new range of opportunities for jurors to conduct their own legal research, rather than accepting instructions on law from the trial judge as assisted by counsel. Similarly, and quite likely to be of growing significance, is the ability to investigate technical matters for the purpose of better understanding expert evidence given at the trial. This is a phenomenon likely to be of significance for judge alone trials as well.

In a Colorado criminal prosecution for child abuse resulting in death, the prosecution had presented testimony to the effect that the defendant was taking daily medication for stress and depression. An issue arose as to how significant the underlying condition was and whether the particular medication was only prescribed for persons with severe mental ailments. A juror downloaded information about the drug which purported to outline the seriousness of the conditions for which the drug was prescribed. A new trial was ordered[11].

In other United States cases jurors have checked medical terms used in medical evidence[12], looked up information on the telemarketing industry in the context of criminal charges of fraud in relation to the operations of a telemarketing company[13], investigated the financial position of the defendant company in a breach of contract case, being information that may have been relevant to the determination of punitive damages by the jury[14], checked the chemical composition of cocaine in a trafficking prosecution[15] and researched medical issues arising in a criminal trial[16].

All of this conduct, of course, occurred despite instructions to the jury to make their decision only on the evidence adduced in the trial and, usually, despite instructions not to conduct their own investigations,

including references to the internet.

Model instructions for the jury have long contained references to the jury not to conduct their own research. Many of them now contain express references to searching the internet as well as refraining from using other reference material such as dictionaries[17]. In two Australian States a juror who makes inquiries, including on the internet, commits an offence[18].

These issues first arose in Australia in the context of a website called CrimeNet which promoted itself as a source about criminal conduct by individuals and a place to discover the criminal background, if any, of particular individuals. Questions were raised as to whether or not jurors had had access to entries with respect to a particular accused on this site[19]. Today this particular site requires a person to open an account and provide credit card details. The subscriber must agree not to search for details whilst serving as a juror in a trial "in a jurisdiction that prohibits such information". Similar websites exist elsewhere including one American site which describes itself as "Google on steroids"[20].

These issues first appear to have arisen in the United Kingdom in an unsuccessful proceeding for contempt of court on the basis of publication on a website of information about an accused in a criminal trial. The judge ruled that there was no basis for believing that the jury would not obey his direction to have regard only to the evidence. His Lordship's ruling in 2001, that as the material was in an archive rather than in a current publication, access was less likely, already appears archaic post Google [21].

The right to a fair trial is protected by numerous specific practices and rules that have developed over the course of centuries of practical experience involving adaptation to changing circumstances in accordance with the classic common law process. The internet is only the most recent technological challenge requiring a new course of pragmatic adaptation of our procedures.

This issue arises with particular acuteness in the context of a case which has received a considerable amount of pre-trial publicity. This is a matter on which different jurisdictions have quite distinct approaches. It requires the balancing of the principle of open justice, on the one hand and the principle of a fair trial on the other hand. United States practice, as I understand it, is heavily influenced by First Amendment jurisprudence in favour of the former, perhaps more than other common law jurisdictions. Proceedings for contempt by publication, although perhaps less aggressively pursued than in the past, remains a real option in most of the common law world[22].

One of the particular challenges the internet poses for us in terms of pre-trial publicity is that the old mechanisms for diminishing the risk to a fair trial, where there has been considerable pre-trial publicity, may no longer work. I am thinking particularly of the practice of ordering a change of venue away from a locality in which persons are likely to remember the publicity and the common practice of delaying a criminal trial until the effect of publicity has worn off[23].

One of the few positive aspects of media exuberance is that it is transitory. The collective memory of the journalistic profession has a short attention span, often no longer than that of a gnat. It was, of course, always possible for someone to go to a public library and look up a newspaper index. It did not happen. Now such research can be done with a few clicks of a mouse and all is revealed. The former practical obscurity has disappeared[24].

I have made the suggestion, in the Australian debate, that a prosecutor, prior to a trial, should conduct an internet search and then approach websites with a view to the removal, on a temporary basis, of prejudicial material[25]. Needless to say the media did not embrace this proposal with enthusiasm. However, in one case prejudicial material was removed from a website pending a high profile trial, at the request of the Court's Information Officer[26].

One area within the control of the Court is its own website. These contain a considerable body of readily accessible information about particular offenders. Recidivism is as prevalent amongst the Australian criminal classes as it appears to be everywhere else. We have to adapt our practices to the loss of practical obscurity. We should develop means to control the intrusions of what one author has called "electronic peeping toms"[27]. Accessibility of court information, including judgments, raises important privacy concerns which are beyond the scope of this paper[28]. The privacy considerations raise issues of public policy well beyond those which are appropriate to be decided by judges.

I have, however, suggested[29] that the kind of detailed personal information about parties and witnesses which judges have become used to including in reasons for judgment are not all necessary to fully explicate the reasons for a decision. Identification of persons by name, in a way which permits the compilation of information about those individuals, is not always necessary. Perhaps we should

make greater use of abbreviations and pseudonyms.

One Australian judge has proposed the following guidelines:

“When editing sentencing remarks that are intended for electronic publication:

- (a) Consider whether a victim’s name or any witness’ name needs to be disclosed in full or at all.
- (b) Avoid identifying the residential address of any person involved in the sentencing.
- (c) Avoid disclosing family relationships when that information is unnecessary for the sentence.

In preparing reasons for judgment, the following list may be of assistance:

- (a) Consider whether it is necessary to disclose a person’s complete date of birth. Is the month and year of birth sufficient or is the year of birth sufficient for the purposes of the judgment?
- (b) Consider the extent to which the personal information about a witness or party is essential to support the decision.” [30]

Care may need to be taken when deciding to place judgments on a court website. Interlocutory judgments before a criminal trial can prejudice a jury[31]. The New South Wales Supreme Court no longer publishes such judgments before the trial and often delays posting a criminal appeal court judgment on our website, pending a new trial. Where it is posted, the trial judge in a retrial will sometimes request its removal.

We have also adopted a mechanism, which is perhaps excessively protective, but it has been implemented since we first created our website. This is the use of the Robots Exclusion Protocol. Robots, which are sometimes called wanders, crawlers, or spiders, are programs that search the World Wide Web. Guidelines have been developed for Robot authors and it appears that they have been widely adopted. The guidelines include standards for Robot exclusion when material is regarded as sensitive. Search engines look in the root domain of websites for a specially formatted file which tells the Robot which files it may not download. This is a voluntary code with no official status and there is no guarantee that current and future Robots will use it. However, the majority of Robot authors at this stage do use it giving information providers protection against unwanted access.

Only two Australian States, and our national site AUSTLII, adopt the Exclusion Protocol. It is not foolproof, as sometimes court judgments are passed on to the other sites which do not adopt the protocol.

The Robot Exclusion Protocol does suggest that there may be a possibility of developing technical fixes which at least have some potential to partially ameliorate the adverse effects of accessibility of information upon the fairness of a trial. It highlights, however, the tension between freedom of information and the principle of a fair trial.

A traditional technique for controlling misbehaviour by juries is sequestration. As I understand the position, that is still widely practised in criminal trials in the United States. Our own practice with respect to locking up juries has changed over the last decade or two. It used to be common, particularly after the jury retired to consider its verdict. It now hardly ever happens. It may very well be that accessibility of information on the internet will lead to the return of this practice, although it has not happened yet.

Sequestration orders may not be entirely effective because of the ability to access the internet by satellite with small devices, even if attempts are made to ensure that they do not enter the jury room. In *State of Nevada v Tabish* the court had to determine whether to discharge a juror who had used a Palm Pilot. It decided that, although the internet could have been accessed, only the calculator and calendar functions had actually been used and discharge was not warranted[32].

There are a number of areas of current regulation which may need to be reviewed in the light of the accessibility of information. The reluctance of rape victims to come forward, by reason of the publicity that attends rape trials, particularly when complainants were named, led to legislative restriction in some jurisdictions on the ability to identify victims. These restrictions may become less effective. Similarly, the particular need for the rehabilitation of young criminal offenders has led to legislation in many jurisdictions prohibiting the naming of juveniles who are accused of criminal offences. These

policies may need reinforcement.

The objects of the criminal justice system are also affected by the retention of information in an accessible form for long periods of time. The need for rehabilitation has led to the creation in some jurisdictions of a regime for spent convictions. In Australia it generally takes the form of removing, after ten years, the ability to identify a person who was sentenced to a short period of imprisonment. Accordingly, prior criminal convictions are no longer able to be taken into account in the wide range of matters that involve issues of character, such as job applications or credit assessments. It would be desirable, if possible, to develop some kind of electronic equivalent for a spent convictions regime. This depends on where the convictions are recorded. The kinds of cases that are covered by this regime are not usually the cases that attract media attention. Nevertheless, there is an electronic record in various forms in government departments. Such records are increasingly accessible and need to be regulated if a spent conviction statute is to have its desired effect.

A particular concern is the ability to discover information about the character of an accused, particularly about prior criminal conduct, whether alleged or proven. I am aware that different jurisdictions take different attitudes to the admissibility of prior convictions and that, accordingly, the significance of ready accessibility to such records will vary.

In Australia the law with respect to similar fact evidence, or as we call it now tendency or propensity evidence, remains reasonably strict. Recent developments in the United Kingdom manifest a different approach. The *Criminal Justice Act 2003* abolishes the common law rules governing the admissibility of evidence of bad character and establish a new statutory regime clearly designed to make such evidence more generally available^[33]. Nevertheless, the Court retains a discretion to exclude such evidence on fairness grounds. Accessibility issues will still arise.

The right to a fair trial is protected by many different techniques:

- Determining whether a trial should proceed at that time or geographical location or before a particular judge or, in an extreme case, at all.
- The multiplicity of requirements of a fair hearing including notice, disclosure, cross-examination, legal representation, etc.
- The exclusionary rules of evidence.
- Warnings and direction to a jury.

The internet heightens the significance of the last technique. The importance of strong directions is highlighted in the most recent House of Lords judgment^[34]

Even a few years ago judges were apprehensive about giving jurors a direction not to look up the internet, because they were fearful that the very direction may serve as a suggestion to engage in conduct which really cannot be checked. As the use of the internet has exploded, however, this inhibition has disappeared.

As I have said the standard form direction, generally given to all jurors requiring them not to make any inquiries, now often specifically refers to searches on the internet. Furthermore, in two Australian States the Jury Acts have been amended so that a juror who engages in such conduct now commits an offence.

The issues that are raised by the accessibility of information on the internet highlight the conflict between two important principles: the principle of open justice and the principle of a fair trial. This is a conflict that arises in many different ways in many different contexts. When issues arise in the courts about jury access to extraneous information it is necessary to balance the conflicting public interests involved in these two principles against each other. Different jurisdictions have different tests about the weight to be given to the principle of a fair trial.

The cases that have arisen over the years, when juries had access to some information of a character that was not formally adduced in evidence, have never been decided one way. Some test of the significance of the impact of the information upon the deliberations of the jury has always been applied, albeit expressed in different ways, in different jurisdictions and over time.

The degree of emphasis, indeed the absoluteness as an overriding value, of the right of a fair trial will clearly differ from one judicial mind to another. The assessment of how significant access to information has been, or could have been, requires the balancing of conflicting interests that are, in their essential nature, incommensurable. As Justice Scalia once put it, this is like asking "whether a

particular line is longer than a particular rock is heavy"[35]. Nevertheless, it is the kind of judgment that judges have long been called upon to make.

Some have criticised the appropriateness of any kind of balancing process between the quest for truth and the right to a fair trial[36]. However, such balancing has often been done. Nevertheless, it has long been the case that the absoluteness of the quest for truth, as an overriding value, has been modified by other values, particularly the right to a fair trial.

In 1846, in a judgment which Lord Chancellor Selborne would later describe as "one of the ablest judgments of one of the ablest judges who ever sat in this court"[37], Vice-Chancellor Knight Bruce said:

"The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical efficacy of torture is not, I suppose, the most weighty objection to that mode of examination ... Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much."[38].

So it is with access to information on the internet by jurors with respect to the trial. Save particularly with respect of the vast array of dubious websites relevant to expert evidence, there is no doubt that the internet can reveal "the truth". Nevertheless, such access to the truth may cost too much in terms of infringement of the right to a fair trial.

Internet Address - Annexure 1

NORTH AMERICAN MODEL DIRECTIONS

Most US model or pattern jury instructions do not yet directly caution jurors not to use the Internet. This is especially true of civil jury instructions. Some criminal pattern jury instructions have been modified to include a reference to the Internet but not all. (Redgrave, *Unplugging Jurors From the Internet*, 48 *JUL Fed. Law.* 19, at 19 and 20).

The 9th Circuit Model Jury Instructions for criminal trials and civil trials both specifically refer to internet research:

"1.9 Conduct of the Jury

I will now say a few words about your conduct as jurors.

First, you are not to discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else, nor are you allowed to permit others to discuss the case with you. If anyone approaches you and tries to talk to you about the case, please let me know about it immediately;

Second, do not read any news stories or articles or listen to any radio or television reports about the case or about anyone who has anything to do with it;

Third, do not do any research, such as conducting dictionaries, searching the Internet or using other reference materials, and do not make any investigation about the case on your own;

Fourth, if you need to communicate with me simply give a signed not to the [bailiff] [clerk] [law clerk] [matron] to give to me; and

Fifth, do not make up your mind about what the verdict should be until after you have discussed the evidence. Keep an open mind until then."

So do the General Instructions for Federal Criminal Cases, Federal Jury Practice and Instructions (West Publishing Co, 2004):

Section 10.01, Opening Instructions

"...do not do any research or make any investigation on your own about any matter involved in this case. By way of examples, that means you must not read from a dictionary or a text book or an encyclopaedia or talk with a person you consider knowledgeable or go to the Internet for information about some issue in this case. In fairness, learn about this case from the evidence you receive here at the trial and apply it to the law as I give it to you."

See also Section 11.01, Admonitions At Court Recesses:

"...do not read about the case in the newspapers or on the Internet or listen to radio or watch television broadcasts about the trial. If a newspaper headline or news broadcast about the case catches your eye or ear, do not examine the article or watch or listen to the broadcast any further. The person who wrote or is reporting the story may not have listened to all of the testimony, may be getting information from people who you will not see here in court under oath and subject to cross-examination, may emphasize an unimportant point, or may simply be wrong. You must base your verdict solely and exclusively on the evidence received in court during the trial."

The New York Criminal Jury Instructions, similarly state:

Jury Admonitions in Preliminary Instructions:

*"...
6. Do not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or on the internet, or by any other means or source."*

Some model instructions include a specific reference to the Internet but only require jurors to avoid articles found on the Internet and do not specifically admonish jurors not to conduct research on the internet.

For example, Watt's Model Jury Instructions, written by the Ontario Criminal Lawyers' Association, provide:

Preliminary instructions 16.7 "Radio, television, newspaper and Internet reports or anything that you may have heard from anyone else about this case, or the persons or places involved in it, are not evidence. You should ignore them completely. You should avoid all media and other coverage of this case and not discuss this with anyone else."

Final instructions 3.1 "You must disregard completely any radio, television, newspaper accounts or Internet information you have heard, seen or read about this case, or about any of the person or places involved or mention in it. Those report, and any other information about the case from outside the court room, are not evidence."

Washington Civil Pattern Jury Instructions (but strangely not their criminal pattern jury instructions, which do not mention the internet at all) provide:

"Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, the Internet, or radio or television broadcasts which may discuss this case or issues involved in this trial. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case".

By contrast, model jury instructions from the 11th circuit and 7th circuit make no reference to the internet at all.

It is always within the trial judge's discretion to tailor pattern jury instructions so as to warn specifically

against internet use. For example, in *Apostolou v The American Tobacco Company et al.*, No. 34734/00 (Kings County Sup. Ct, Jan. 2000), which was a civil lawsuit in New York state court, the trial judge gave the following instruction:

“Now, there’s another thing you can’t do. You can’t do any private investigation. Now, that means you can’t get on the Internet and see what the Internet is saying about anything touching this case. You can’t talk to somebody who you may consider authoritative on an issue that you are going to hear about. You cannot do any of that.”

4 Internet Address - Annexure 2

EXTRACT FROM NEW SOUTH WALES MODEL DIRECTIONS

[*In a case where there has been prior media publicity in relation to the accused*]

It is of fundamental importance that you put any such publicity right out of your minds. You must, to be true to your oath or affirmation, decide this case solely by reference to the evidence presented in open court and, of course, the directions of law which I shall give you at the conclusion of the evidence. If you were to do otherwise you would not be true to the oath you took or the affirmation which you made.

You must also put out of your mind completely any reference you may have heard or read in any context whatsoever in relation to the accused. So it is not only publicity concerning this trial that you must put out of your mind.]

Importantly, you must not, during the course of the trial, use any material or research tool, such as the Internet, or otherwise, to access legal databases, earlier decisions of this or other courts, and/or any other material of any kind relating to any matter arising in the trial.

It is my duty to draw your attention to the following provisions in the *Jury Act 1977* (NSW) which creates a number of offences which are relevant to the conduct of all criminal trials.

Soliciting information from or harassing jurors or former jurors

A person must not solicit information from, or harass, a juror or former juror for the purposes of obtaining information about:

- (a) the deliberations of a jury; or
- (b) how a juror, or the jury, formed any opinion or conclusion in relation to an issue in a trial ([s 68A\(1\)](#)).

There is however no prohibition against a juror soliciting information from another member of the jury during a trial ([s 68A\(4A\)](#)).

Disclosure of information by jurors etc

A juror must not, except with the consent of or at the request of the judge, wilfully disclose to any person during the trial information about:

- (a) deliberations of the jury; or
- (b) how a juror, or the jury, formed any opinion or conclusion in relation to an issue arising in the trial ([s 68B\(1\)](#)).

There is however no prohibition against a juror disclosing information to another member of the jury during a trial ([s 68B\(4\)](#)).

A person (including a juror or former juror) must not, for a fee, gain or reward, disclose or offer to disclose to any person information about:

- (a) the deliberations of a jury; or

(b) how a juror, or a jury, formed any opinion or conclusion in relation to an issue arising in a trial ([s 68B\(2\)](#)).

Inquiries by juror about trial matters prohibited

A juror for the trial of any criminal proceedings must not make an inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as a juror ([s 68C\(1\)](#)).

This prohibition applies in respect of a juror from the time the juror is sworn in as a juror until the juror, or the jury in which the juror is a member, is discharged by the judge ([s 68C\(2\)](#)).

However, the above provision does not prohibit a juror:

- (a) from making an inquiry of the court, or of another member of the jury, in the proper exercise of his or her functions as a juror; or
- (b) from making an inquiry authorised by the court ([s 68C\(3\)](#)).

That phrase **making an inquiry** includes the following:

- (a) asking a question of any person;
- (b) conducting any research, for example, by searching an electronic database for information (such as by using the Internet);
- (c) viewing or inspecting any place or object;
- (d) conducting an experiment;
- (e) causing someone else to make an inquiry ([s 68C\(5\)](#)).

The reason you must not undertake any such inquiries is that you must be true to your oath or affirmation. To be true to your oath or affirmation you must decide this case solely by reference to the evidence presented in open court and, of course, the directions of law which I shall give you at the conclusion of the evidence. [See [R v K \(2003\) 59 NSWLR 431 at \[89\]–\[90\]](#)].

The reason that you are not permitted to make such inquiries is that to do so would change your role from that of impartial jurors to investigators, and lead you to take into account material that was not properly placed before you as evidence, of which those representing the Crown and the accused would be unaware and unable to test. Such material might require expertise in order to ensure that the inspection or experiment was properly conducted.

The only circumstances in which views or experiments are permitted, and are available by way of evidence, are those which occur in the presence of all jurors, the legal representatives of the parties, and myself. Those circumstances involve safeguards being taken to replicate the conditions, which were in existence at the time of the relevant events, and if there are any relevant differences in the alleged crime scene or in the circumstances of the experiment, they can be pointed out to you in the course of the evidence.

The restriction concerning jurors making their own inquiries about any aspect of the case, inspecting the site, or carrying out experiments, extends not only to individual jurors but also requires that none of you causes or requests anyone else to do any of those things.

The law provides that anything done by a juror in contravention of a direction given to the jury by the judge in the criminal proceedings is not a proper exercise by the juror of his or her functions as a juror ([s 68C\(4\)](#)).

You are not permitted to have computers with you in the jury room, and you are requested not to take mobile phones into the jury room. If you have brought a mobile phone with you, you are requested to leave it with the Sheriff's officer. If it is necessary, as a matter of urgency, for any of you to have access to your phone during the course of the trial, then arrangements can be made with the Sheriff's officer.

You should, even at the expense of appearing to be rude, avoid speaking to any person in the precincts of the court. This is because you may inadvertently speak to a person waiting to give evidence in the trial, a legal representative of one of the parties, or some person otherwise associated

with the conduct of the trial. If this were to occur, it may mean that you would not be able to continue as a juror in this trial. It could even mean that it would be necessary for me to discharge the whole jury. This would, of course, be a most undesirable outcome.

Further, if anyone attempts to speak to you about the case, at any stage of the trial, it is your duty to report that fact to me as soon as possible, and refrain from mentioning the fact to any other member of the jury panel.

In the event of it becoming apparent to any of you, in the course of the trial, that another of your number has made any independent enquiry in relation to any aspect of the case, then it should be brought immediately to my attention. This includes making an enquiry about the accused or the background of the offence; making a private inspection or conducting a private experiment; causing anyone else to do any of those things; or discussing the case with anyone other than the remaining members of the jury.

In the event of it becoming apparent to any of you in the course of the trial, that any matter which is not in evidence has found its way into the jury room, then that should similarly be brought to my attention.

The reason it is necessary for any such matter to be brought to my immediate attention, is that, unless it is known before the end of the trial, it may not be possible to put matters right. In this case an injustice may possibly have occurred, requiring me to discharge the jury and direct a retrial.

If you have any query about the evidence or the procedure during the trial, you should direct such a query to me, and to me alone. The Sheriff's officers, who will attend to your general needs, are not there to answer questions about the trial itself. Should you have any questions about the evidence or the procedure, please make a note and give it to the Sheriff's officer. The note will be forwarded to me and, after I have discussed the matter with counsel, I shall deal with the matter.

End Notes

[1]. This and the following quotations are from Martin Lowry *The World of Aldus Manutius: Business and Scholarship in Renaissance Venice* Basil Blackwell, Oxford, 1979 at pp26-35 and generally repeated in Vernon J Hippenst "Yesterday Once More: Sceptics, Scribes and the Demise of Law Reviews", 1996, *Akron L Rev* 267 at 268-271.

[2]. See Paolo Apolito "The Internet and the Madonna" University of Chicago Press, Chicago, 2005.

[3]. I have discussed the range of issues that arise in Spigelman "The Truth Can Cost Too Much: The Principle of a Fair Trial" (2004) 78 *ALJ* 29.

[4]. *Connelly v DPP* (1964) AC 1254 at 1347.

[5]. See also J J Spigelman "Open Justice and the Internet" (2004) *Judicial Officers Bulletin* 1; Justice Virginia Bell "How to Preserve the Integrity of Jury Trials in a Mass Media Age". Paper to the Supreme and Federal Court Judges Conference, January 2005. These two speeches are accessible at www.lawlink.nsw.gov.au/sc.

[6]. See Jimmie E Tinsley "Jury Misconduct Warranting New Trial" 24 *American Jurisprudence Proof of Facts* 2d 633. For the most recent treatment of this matter in the House of Lords see *R v Smith* (2005) 1 WLR 704.

[7]. This is the way the relevant authorities were recently summarised in *R v Skaf* (2004) NSWCCA 37; 60 NSWLR 86 at [211] based on a long line of the authority from *Vaise v Delaval* (1785) 1 Term Rep 11; 99 ER 944 to *R v Mirza* (2004) 2 WLR 201 and *R v Pan* (2001) 2 SCR 344. (New South Wales cases are accessible at www.lawlink.nsw.gov.au/sc.)

[8]. See *R v K* (2003) NSWCCA 406; 59 NSWLR 431.

[9]. See the cases referred by Tinsley supra at fn 31-45.

[10]. See Tinsley supra at fn 46-55.

[11]. *People v Wadle* 77 P. 3d 764 (2003).

[12]. *Buford v Group Health Co-Operative v Pujet Sound* (2000) WL 44123 (Wah.App.Div.).

[13]. *United States v Showa* 133 F. 3d 930 (1997).

[14]. *CGB Occupational Therapy Inc v RAH Health Services*, United States Court of Appeal for the Third Circuit No 02-4372, January 28 2004.

[15]. *Commonwealth v McCaster* 46 Mass.App.Ct. 752, 710 N.E. 2d 605 (1999).

[16]. *State v McKnight* 352 S.C. 635, 576 Se.e. 2d 168 (2003).

[17]. See generally Redgrave "Unplugging Jurors from the Internet" 48 JUL *Fed Law* 19; I annex extracts from the direction used in New South Wales. For the full context see the Judicial Commission of New South Wales *Criminal Trial Bench Book* available at www.judcom.nsw.gov.au. I also annex some United States model directions.

[18]. The *Jury Act* 1977 (NSW) now provides in s68C:

"68C(1) A juror for the trial of any criminal proceedings must not make an inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as a juror.

Maximum penalty: 50 penalty units or imprisonment for 2 years, or both.

(2) This section applies in respect of a juror from the time the juror is sworn in as a juror and until the juror, or the jury of which the juror is a member, is discharged by the court having conduct of the proceedings.

(3) This section does not prohibit a juror:

(a) from making an inquiry of the court, or of another member of the jury, in the proper exercise of his or her functions as a juror, or

(b) from making an inquiry authorised by the court.

(4) Anything done by a juror in contravention of a direction given to the jury by the judge in the criminal proceedings is not a proper exercise by the juror of his or her functions as a juror.

(5) For the purpose of this section, **making an inquiry** includes the following:

(a) asking a question of any person,

(b) conducting any research, for example, by searching an electronic database for information (such as by using the Internet),

(c) viewing or inspecting any place or object,

(d) conducting an experiment,

(e) causing someone else to make an inquiry."

[19]. See *R v McLachlan* (2000) VSC 215; *R v Cogley* (2000) VSCA 231. See also *R v Long* (2003) QCA 77, 138 A Crim R 103.

[20]. The website is www.crimenet.com.au. A similar site in the United States is www.webdetective.com. Furthermore there is www.zabasearch.com which describes itself as "Google on steroids", but criminal record checks require a fee.

[21]. See *H.M. Advocate v Beggs (No 2)* (2002) SLT 139 at 140.

[22]. See J A Brandwood "You Say 'Fair Trial' and I Say 'Free Press': British and American Approaches to Protecting Defendants' Rights in High Profile Trials" (2000) 75 *NYUL* 1412; J E Nowack "Jury Trials and First Amendment Values in 'Cyber World'" (2001) 34 *U Rich L R* 1213; M Chesterman "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America" (1997) 45 *Am J Comp L* 109; N N Minow and F H Cate "Who is an Impartial Juror in an Age of Mass Media?" (1990–1991) 40 *Am U L Rev* 631; E A Minnefor "Looking for Fair Trials in the Information Age: the Need for More Stringent Gag Orders Against Trial Participants" (1995–1996) 30 *USF L Rev* 95; E Patrick "Protecting the Defendant's Right to a Fair Trial in the Information Age" (2002) 15 *Cap Def J* 71; A Riehle "Canada's 'Barbie and Ken' Murder Case: The Death Knell of Publication Bans?" (1996–1997) 7 *Ind Int'l & Comp L Rev* 193; J M Redgrave "Unplugging Jurors from the Internet" (2001) 48-JUL *Fed Law* 19; C Walker "Fundamental Rights, Fair Trials and the New Audio Visual Sector" (1996) 59 *Mod L Rev* 517; C Walker "Cyber-contempt: Fair Trials and the Internet" (1997–98) 3 *Oxford Yearbook of Media and Entertainment Law* 3.

[23]. See my observations in *John Fairfax v District Court of New South Wales* [2004] NSWCCA 324 at [6] to be published in 61 *NSWLR*.

[24]. On practical obscurity see *United States Department of Justice v Reporters Committee for Freedom of the Press* 489 US 749 (1989) esp at 762-764.

[25]. See *R v Burrell* [2004] NSWCCA 185 at [39]. See also *Bell* supra esp at p10.

[26]. *John Fairfax v District Court of NSW* supra at [11].

[27]. Winn P.A. "Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information" (2004) 79 *Wash L Rev* 307 at 318.

[28]. See on the Australian debate, Puplick "Justice: Now Open to Whom?" (2002) 6 *The Judicial Review* 95.

[29]. See fn 5 above.

[30]. Justice Debra Mullins "Judicial Writing in an Electronic Age", 21 December 2004 (Unpublished paper, Supreme Court of Queensland).

[31]. See, e.g. *R v Weiss* [2002] VSC 153.

[32]. See www.courtvtv.com/trials/binion/documents/newtrial_decision.

[33]. See Professor J R Spencer QC "Part 11 Chapter 1 of the *Criminal Justice Act* 2003: Evidence of Bad Character". http://www.jsboard.co.uk/downloads/text_of_instruction_manual_revised1april05.doc

[34]. See *R v Smith* supra at fn 6.

[35]. *Bendix Autolite Corp v Midwesco Enterprises Inc* 486 US 888 (1988).

[36]. See, for example, the discussion in my paper "The Truth Can Cost Too Much" supra at pp44-46.

[37]. *Minet v Morgan* (1873) 8 LR Ch App 361 at 368.

[38]. *Pearse v Pearse* (1846) 1 De C & Sm 12 at 28-29; 65 ER 950 at 957.

Address on the retirement of the Honourable Justice Sheller

ADDRESS ON THE RETIREMENT OF THE HONOURABLE JUSTICE SHELLER BANCO COURT, SUPREME COURT OF NEW SOUTH WALES SYDNEY, 29 APRIL 2005

In the 180 year history of this Court there have been numerous judges who have displayed many of the judicial virtues: learning, wisdom, compassion, eloquence, robust independence, impartiality, attentiveness, diligence, common sense, clarity of thought and of expression, administrative skills and strength of character. Few have had all of these qualities and to the high level, that has been manifest by the Honourable Justice Simon Sheller for the entire period of over thirteen years that you have served as a Judge and Judge of Appeal of this Court.

Regrettably the time has come to pass on the responsibilities of office to others. In the words of Lucretius - *et quasi cursores vitae lampada tradunt*: "like runners they pass on the torch of life". This State is losing a great judge. It is fitting that so many of us have gathered here today to mark your retirement.

From your Honour's first day in this Court to your last day, not one of the many hundreds of litigants, whose affairs it fell to you to determine, had any doubt that they were treated with the utmost courtesy; that the assessment of the case for and against their interests was conducted with care and rigour; by a person of great dignity who also had an enormous store of legal knowledge and a compassionate understanding of their difficulties and wishes. No one left your Honour's Court, whether during the course of a hearing or after judgment was delivered, with any doubt that they had received substantial justice according to law.

Your Honour's contribution was not limited to sitting as a judge. It extended to the detailed administration of the Court and more broadly to the service of the Australian judiciary. Your Honour made a contribution that is unlikely to be surpassed and which has justifiably been recognised at the highest levels by the award of an Order of Australia.

Between 2000 and 2004 your Honour served as the president of the Judicial Conference of Australia where you represented the whole of the Australia judiciary at a time of considerable challenge, particularly in the context of the imposition of a taxation surcharge on judicial pension entitlements.

In this Court your Honour served as the chairman of the Building Committee from its establishment in 1993 ensuring that the practical accommodation needs of the Court were met and, perhaps most notably, supervising the transformation of the original Francis Greenway designed Supreme Court building in an award winning heritage project which, unusually for a heritage building, recycled an old building for its original use, whilst providing contemporary accommodation standards.

Your Honour also chaired the Alternative Dispute Resolutions Committee of the Court since 1997. Your enthusiasm for mediation has led directly to changes in the Court's Rules and in its practice with respect to mediation, which changes have considerably enhanced the dispute resolution process in this State.

Your Honour has served on the Law Court's Library Management Committee since 1995 and as chair from 2002 to 2004, maintaining the high level of quality of the service provided by the library, which is much appreciated by all judges. This service has been considerably enhanced by the resolution under your guidelines of longstanding budgetary difficulties with those who fund the courts and the reconstruction of the library itself.

Your Honour also chaired the 175th Anniversary committee in 1999, organising a series of events including a ceremonial sitting, lectures, an exhibition and a dinner, by which the legal profession and, to some degree, the broader community came to better recognise the contribution that is made to this nation by the longevity of our institutions of the rule of law.

In all of these respects your Honour's past activities will continue to have effect to the great advantage of the administration of justice for many years to come.

Like any judge, your major contribution is the judgments you have delivered. Over 200 are published in the New South Wales Law Reports which, of course, represent only a fraction of your Honour's entire throughput in what was once called, when there was such a thing, unreported judgments.

I have, over recent years, on these occasions of the retirement of a Judge of Appeal noted a number of that judge's judgments which will clearly stand the test of time. On this occasion I stand defeated. There are simply too many. It would be invidious to select some rather than others. There is no area of this Court's jurisdiction that your Honour did not touch. There is no area that you touched that you do not adorn.

You have delivered leading judgments on the duties of company directors, on the law of options, on takeovers and winding ups, on the lifting of the corporate veil, on equitable setoffs and constructive trusts, on fatal accident claims, on the duty of care of local authorities and hospitals, on the effect of fraudulent conduct on insurance policies, on the requirements of procedural fairness in various statutory bodies, on the duties of executors, on the disbarment of legal practitioners, on the law of declarations, on the standing to obtain injunctions, on the rights of beneficiaries to have access to trust documents, on sentencing for sexual offences, on identification evidence based on photographs, on the withdrawal of a guilty plea, on the 'perils of the sea' exception to carriers liability and on the valuation of a dredge. There is no point in singling out any one of these judgments, nor in extending the list further.

Each of these judgments manifest your Honour's judicial style of comprehensive attention to all of the relevant facts, to the issues arising in the proceedings and to the arguments submitted by the parties. Notwithstanding the complexity or the size of the task, every one of your Honour's judgments deals with each of the requirements of the case at hand in a manner that is uncluttered by anecdote, literary reference or any other form of self indulgence, to which so many of us, including myself, sometimes succumb. Your command of the language allows all of this to be expressed with force and clarity and in a tone of high sobriety.

However, there is a side of you that is not manifest in your judgments and which is only available to those with the privilege of direct personal contact. Your Honour is a man of great wit, frequently of a kind that borders on the impish. Interacting with you, as your fellow judges have had the privilege to do on a regular basis, has always been a delight. That delight has been considerably enhanced by the contribution that your wife, Jan, to whom you are devoted, has made to the collegial life of the Court. I wish to acknowledge that contribution here this morning. I know how much you value her support. We are particularly grateful that she permitted you to stay until you were required to retire by statute.

Your Honour leaves us with many memories and with many contributions and insights, on which we will draw for some considerable time. There is one, however, that will abide for all of my time as a judge and I am sure, in this respect, I speak for all of those who have been your colleagues. Thank you for many things, but thank you most of all for providing all of us a role model as to how a judge should behave.

Occasional Address Faculty of Law Graduation Ceremony

**BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SYDNEY, 15 APRIL 2005**

For those of us who make a living from words today is a quite momentous anniversary. It was on this day precisely 250 years ago, 15 April 1755, that there was published in London the first edition of Samuel Johnson's Dictionary. Perhaps only after the King James Bible and the works of Shakespeare, Samuel Johnson's contribution, most significantly in his Dictionary, has had the most profound influence on the vitality of this extraordinary language of which we are the lucky inheritors.

Johnson compiled his Dictionary - with its 42,773 entries and 114,000 quotations - in eight years and virtually single-handedly, in contrast the Dictionaire of the Académie Française was compiled by 40 scholars over 55 years.

We remain to this day the beneficiaries of Johnson's extraordinary capacity for an apt turn of phrase: patriotism is the last refuge of the scoundrel; second marriages represent the triumph of hope over experience; imminent hanging concentrates the mind wonderfully; no man but a blockhead ever wrote except for money; and "I am willing to love all mankind except an American"; identifying with bias but precision the contemporary American cant in his rhetorical question: "How is it that we hear the loudest yelps for liberty among the drivers of negroes?"

As a recent observer commented on the Dictionary:

"Nothing remotely comparable had been done before, and it made his dictionary into a superior prototype of the internet – a bulging lucky dip of wisdom, anecdote, humour, legend and fact. Nobody but Johnson could have done it, because nobody had read so much." Sunday Times, 27 March 2005, review of Henry Hutchings, "Dr Johnson's Dictionary: the Extraordinary Story of the Book that Defined the World", Murray, 2005.

The collected works of Johnson, in particular The Dictionary, would have formed one of the world's greatest web logs. There are a number of websites which, in substance, now give us a Johnson web log, albeit without the cut and thrust of contemporary updating See The Johnson Society of London website: www.nbbl.demon.co.uk and the list of links on its home page, in particular the Samuel Johnson Sound Bite Page at: www.samueljohnson.com.

It is the personal touch, from the wonderfully opinionated mind of a person with an unerring instinct for cant, that makes Johnson's writings and conversation, as faithfully recorded by Boswell, so attractive. His personal prejudices are plain for all to see.

In his Dictionary he defines oats as "a grain, which in England is generally given to horses, but in Scotland appears to support the people". A quotation which could be displayed to advantage in many health food stores. His political prejudices become clear when he defines Tory as "one who adheres to the ancient constitution of the state" and defines their political opponents, the Whigs, as "the name of a faction".

Nevertheless, his learning and scholarship were profound. The Dictionary entry for the verb "take" identifies 133 meanings and has 363 illustrative quotations. Of course, as a pioneer, he is entitled to a measure of self-indulgence, of which he passed up few opportunities: as when he defined lexicographer - "a writer of dictionaries; a harmless drudge that busies himself in tracing the original, and detailing the signification of words" or in his definition of dull - "not delightful; as, to make dictionaries is dull work".

Since Johnson's time dictionaries have become more anodyne and more impersonal. The most comprehensive continue Johnson's innovation of providing examples from the actual use of words in printed form. However, most are now simply compilations of meaning, bereft of idiosyncrasy and personal prejudice. In short, they have become tools of trade rather than works of literature.

There is a hierarchy that information scientists deploy: data at the bottom, then information, then knowledge and at the top is wisdom. It was a hierarchy first identified by T S Eliot when he said:

“Where is the wisdom we have lost in knowledge?
Where is the knowledge we have lost in information?” From “The Rock”.

Johnson's feat, 250 years ago, in transforming an enormous body of information into knowledge was awe inspiring at the time. That a single individual could read, let alone distil and comprehend, so much was nothing short of extraordinary. It cannot be replicated today by any individual, particularly because of the exponential explosion of the base of data and then of information on which knowledge must draw.

Every discipline and profession has been transformed over recent decades by information and communication technology. The practice of law is in large measure an information retrieval business and the new technology has revolutionary implications for it. Electronic communications and the accessibility of legal information online is the most dramatic technical change in my legal lifetime. Yours is the first generation of lawyers to have been brought up with computers and mobile phones and to regard the internet as a fact of life, rather than as a miracle. The transformation has really only just begun.

For those of you who have discovered the Questia site you will understand the extraordinary utility of having a public library on your desk. That facility will be transformed when Google finishes its project to digitise the out-of-copyright materials held by the libraries of Oxford, Harvard, Michigan and Stanford Universities and the New York Public Library.

There are some who doubt, even those who fear, the implications of the internet, particularly insofar as it may threaten traditional mechanisms of publication in print form. There is nothing new in this. The previous great revolution in communication, the invention of printing, was greeted with the same doubts and fears.

Before the upstart entrepreneur and goldsmith turned printer, Johann Gutenberg, transformed publishing, it had been conducted for millennia by scribes who, in Europe, were controlled by the church. A limited form of mass production was able to be achieved in large scriptoria contained in monasteries. Printing was clearly a threat to this business.

As Filippo di Strata, a Dominican friar from the convent of San Cipriano in Murano, an island of Venice, proclaimed in the late 15th century:

“The world has got along perfectly well for 6,000 years without printing and has no need to change now.” This and the following quotations are from Martin Lowry, *The World of Aldus Manutius: Business and Scholarship In Renaissance Venice*, Basil Blackwell, Oxford, 1979 at pp26-35; and Vernon J Hibbetts “Yesterday Once More: Sceptics, Scribes and the Demise of Law Reviews”, 1996, 30 Akron L. Rev 267 at 268-271.

Unlike scribes, persons who were involved in printing were crude and untutored – frequently German interlopers taking work from Italian scribes. Fra Filippo thought that they vulgarised intellectual life, did not really understand what they were doing, made spelling mistakes and typographical errors. The great educational value of having to write things out in long hand, at a pace which enabled a monk to absorb and contemplate the text, was being lost in the speed of the printing process.

What was worse, printers produced enormous quantities of books. Fra Filippo complained that it was hardly possible to walk down the streets of Venice without having armfuls of books thrust at you “like cats in a bag” for two or three coppers. An early form of information overload.

There was also a serious threat of intellectual freedom. Lascivious Roman love poetry, such as the works of Ovid, were titillating the young and impressionable. Most significant, however, was the threat to the authority of religion. Cheap printed versions of the Bible, distorting what Fra Filippo saw to be the subtlety of the Latin text, were now becoming available to individuals without the intermediation of a priest.

This same process is underway today. A good example is the recent study of the hundreds of Catholic websites devoted to the Virgin Mary, which operate without any supervision by the Church and consist of a range of cults proclaiming miracles and wonders. They overlap imperceptibly into New Age sites

See Paolo Apolito *The Internet and the Madonna* University of Chicago Press, 2005..

We must all now face the problem of information affluence. How can each of us make our way through this extraordinary profusion of available information, so that each of us can make the most effective use of our talent and our time. Each of us must develop our own self-consciously determined process of selection, otherwise mere chance will determine what we learn and what we do. No doubt there are some who put their faith in chance, as many have put their faith in supernatural phenomenon over the millennia. However, I speak as one who wishes to remain in control of my own intellectual development.

The scale of the problem can be represented by one figure. If you search the words "information overload" on Google, as I did yesterday, you get 829,000 hits. That has a certain self-satirical quality. It does, however, reflect the broader problem, which has been called "data asphyxiation".

On this occasion, I thought I might tell you how I have come to deal with the burden of information overload. It is not a coping mechanism that will suit everyone, but some of you may find it useful. A maxim I have found compelling is: Live as if you will die tomorrow, but read as if you will live forever. An insight that I have found useful in my own journey is that if you try to learn too much, you may end up learning nothing.

I decided long ago that if I kept reading as widely as I had been, and in an unsystematic fashion, I would acquire a lot of information in the short-term, but the depth of my understanding of anything would not improve. For those of you who will become barristers, you will learn that it is essential to the craft that you cram your mind with an enormous amount of information about the subject matter of the proceedings and instantly download the whole of that database as soon as you come out of court. Unfortunately, this process becomes so ingrained, that you find that you dispose of a lot of things you would have preferred to retain.

My technique for adapting to the pressures of information overload was to choose one area of intellectual inquiry about which I could read in-depth, preferably an area not directly connected to my daily activities.

I first chose the history of western Shanghai. This was the early eighties when China was still a totalitarian State and the possibility of the extraordinary change in the People's Republic, and the re-emergence of Shanghai as a major international city, was not within the realms of contemplation. After several years that project ceased, when I realised that I really couldn't do it properly unless I taught myself how to read Chinese. That, at the time, seemed a daunting project albeit, in retrospect, I wish I had had the courage to proceed.

The substitute was far removed in time and place. I read in depth into medieval history, concentrating on the life of Thomas Becket. This was a subject on which I was tolerably confident that there were no new documents to be discovered. My schoolboy Latin was probably enough. Becket had attracted a large, but finite and apparently manageable, body of historical writing.

This became my intellectual hobby. It was a disciplined way of organising my ignorance. It had a purpose and a finite end. Instead of acquiring a glib understanding on a wide variety of subjects, I could come to understand a particular subject in-depth and eventually, perhaps, write about it. My overseas travel acquired a purpose. There were places to be visited, such as Canterbury itself. In those pre-Amazon days, books had to be discovered, often by chance, in second hand bookshops. I recall well the thrill of finding a definitive biography in a Paris bookshop of the contemporary french king, Louis VII. I did not experience anything like the same sensation when, in order to check whether this was still the definitive biography in french, I conducted a thirty second check on Amazon France, to find that it was. Most enjoyable was the time I spent in libraries throughout the world, particularly in London, Sydney and Washington.

Eventually I was able to organise this research in the form of a draft during a sabbatical I gave myself from the Sydney bar in 1992. Nothing more was done until 1999, when I was asked to address the St Thomas More Society.

Over the course of five years, this little obsession transformed itself into a series of lectures to the Society on the life and death of Thomas Becket and his relationship with Henry II. It has been a wonderful journey but, in late 2003, I finally killed Becket. The lectures were published last year by the Society as a book and this journey is over.

I am now actively looking for another hobby.

You will now be alumni, at a time when Universities including Law Faculties, are seeking to create a stronger relationship with their graduates than in the past. As is well known, the American universities have long since established such relationships, to their inestimable advantage, particularly financial, but not only such. It is no accident that the overwhelming proportion of the greatest universities in the world are now American. It is a reflection of the wealth of that nation. It is also a reflection of the way they organise their universities and their finances. The relationship with alumni plays a critical role.

We Australians will have to move in the same direction. The time when government finances were regarded as some kind of magic pudding – in which you could cut off a slice and it would just grow back – has long since gone.

All of you in the future will be called upon to support the Law Faculty through an alumni link. This has sometimes been portrayed as some kind of invitation to charity or at most an expression of gratitude. It should not be regarded as only such. This is a matter of enlightened self-interest.

American law alumni form a distinct network. There is a bond between people who have shared the experience of attending the same institution, often being taught by the same people. From the point of view of new graduates, this network can be of assistance in their development in the profession. Even after you are well established in the profession, the stimulation of interaction with younger people, who have graduated more recently, has considerable advantages.

The degree you receive today has a reputation. That reputation is determined by the quality of the students, staff and course content of this Faculty over decades past. The recognition that your degree will receive in the future, will be adversely affected if the quality of the degree is not sustained. It is in your own long-term interests to do what you can to ensure that this Law Faculty continues to have the highest reputation.

I realise that many of you will not in fact practice law. Nevertheless, the significance of your legal training will manifest itself in numerous ways in your future careers.

I congratulate each of you on your graduation and wish you well in your journey.

The Principle of Legality and the Clear Statement Principle

**THE PRINCIPLE OF LEGALITY AND THE CLEAR STATEMENT PRINCIPLE
OPENING ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
TO THE NEW SOUTH WALES BAR ASSOCIATION CONFERENCE
WORKING WITH STATUTES
SYDNEY, 18 MARCH 2005**

When dealing with the interpretation of words, a judge in an adversary system sometimes experiences the frustration that Eliza Doolittle expressed in the musical *My Fair Lady*:

“Words! words! words! I’m so sick of words. I get words all day through: first from him, now from you! Is that all you blighters can do?”

Nevertheless, I congratulate the NSW Bar Association on organising this Conference. The law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of the law are determined entirely by statute. No area of the law has escaped statutory modification.

Statutory interpretation is not merely a collection of maxims. It is a distinct body of law. Its significance is emphasised by the fact that the protection which the common law affords to the preservation of fundamental rights and liberties is, to a substantial extent, secreted within the law of statutory interpretation[1].

Oliver Wendell Holmes Jnr summarised the law of statutory interpretation with his customary epigrammatic brevity. Speaking of a statute which he described as “a foolish law” - it happened to be the Sherman Act – he said:

“ ... If my fellow citizens want to go to Hell, I will help them. It’s my job.”[2]

When Chief Justice Gleeson said that the quality that sustains judicial legitimacy is fidelity to the techniques of legal methodology, in part he probably had something similar in mind[3].

Intention

The task of statutory interpretation is most frequently expressed in terms of identifying the intention of the Parliament. This terminology is not without its difficulties. Indeed, legislative intention is often characterised as a fiction.

At one level the terminology of “intention”, when employed by judges, is an act of constitutional courtesy which the judiciary observes in its collective relationship with the Parliament. Courteous language is a feature of our constitutional arrangements which have, over the course of a long period, involved tensions and, sometimes, conflict between the separate institutions of our mechanisms of governance.

A good example of constitutional courtesy is the statement that a monarch or, in our system, a governor or governor-general, acts on the “advice” of his or her ministers. What we in fact mean by this terminology is that the Head of State will do as he or she is told. The word “advice” softens the brutal reality of the situation.

Indeed, the word minister itself, referring to the executive head of a particular department of state, has another meaning of rendering aid or service to another person. In our constitutional history, Ministers serve the monarch in this way. Both senses of the word derive from the same Latin origin, with its distinct connotation of subordination.

The language of intention has been criticised on a number of bases and some avoid its use, making their attitude clear by putting the word within scare quotes, as Felix Frankfurter and Justice Michael Kirby have done[4]. So, interestingly, has Justice Scalia[5]. Justice Kirby has described legislative

intention as “a polite but unacceptable fiction”[6].

On the other hand, the constitutional significance of the language of intention has been emphasised by Chief Justice Gleeson who said:

“In the construction or interpretation of a statute, the object of a court is to ascertain, and give effect to, the will of Parliament. Courts commonly refer to the ‘intention of the legislature’. This has been described as a very slippery phrase (*Salomon v A Salomon & Co Ltd* (1897) AC 22 at 38 per Lord Watson), but it reflects the constitutional relationship between the legislature and the judiciary. Parliament itself uses the word ‘intention’ in the *Interpretation Act* 1901 (Cth) as a focal point for reference in construing its enactments. Certain words and phrases are said to have a certain meaning unless a contrary intention is manifested in a particular Act. Parliament manifests its intention by the use of language, and it is by determining the meaning of that language, in accordance with principles of construction established by the common law and statute, that courts give effect to the legislative will.”[7].

Bennion’s *Statutory Interpretation* contains a spirited and detailed defence of legislative intention as the paramount criterion and a rebuttal of the proposition that it is a fiction[8].

What is involved is the search for an objective intention of Parliament, not the subjective intention of Ministers or Parliamentarians[9]. Indeed, often there is no relevant subjective intention at all. The words used may represent a compromise, without consensus, so that, in substance, the decision has been left to the courts[10]. Even more frequently, indeed almost always in cases of difficulty, the circumstances in which the statute falls to be applied were not actually contemplated by anybody. Even if they were contemplated, a statement of intention in a Ministerial Second Reading speech will not prevail over the words of the statute[11].

The task of the court is to interpret the words used by Parliament. It is not to divine the intent of the Parliament[12]. The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say [13].

This issue has long been settled in the cognate law of the construction of contracts in which the relevant question is always: What is the meaning of the words used?, not: What was the intention of the parties?[14]. As Isaacs J put it, “few principles are more firmly entrenched in the law” [15].

So long as the objective nature of the intention is kept firmly in mind, there is a strong case, and not just for reasons of constitutional courtesy, to continue to use the terminology of Parliamentary intention. There is, however, truth in the observation of Oliver Wendell Holmes Jr:

“... Intention is a residuary clause intended to gather up whatever other aids there may be to interpretation beside the particular words and the dictionary.”[16]

Determining the objective intention of the legislature is a process that sometimes requires care. As Chief Justice Griffith once pointed out:

“... As to the argument from the assumed intention of the legislature, there is nothing more dangerous and fallacious in interpreting a statute than first of all to assume that the legislature had a particular intention, and then, having made up one’s mind what that intention was, to conclude that that intention must necessarily be expressed in a statute, and then proceed to find it.”[17].

It is all too easy to dress up a conclusion reached on other grounds in the language of intention. There are important limits to the role of the judiciary in a democratic polity.

Ambiguity

As is well known, the most well established circumstance calling for a process of interpretation is where the legislative will is not apparent and there is ambiguity. In part that is a function of our extraordinary language.

I have on more than one occasion had reason to draw on the observations of a master of statutory interpretation, Lord Simon of Glaisdale[18] – both an officer of the Simplified Spelling Society and a scrabble tragic - including the following:

“Words and phrases of the English language have an extraordinary range of meaning. This has been a rich resource in English poetry (which makes fruitful use of the resonances, overtones and ambiguities), but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know as exactly as possible, where he stands under the law).” [19].

Perhaps not without irony, the word “ambiguity” has more than one meaning. It is not necessarily limited to situations in which a word has more than one meaning by reason of lexical or verbal ambiguity and grammatical or syntactical ambiguity. The word ambiguity is often used in a more general sense of indicating any situation in which the scope and applicability of a particular statute is, for whatever reason, doubtful[20].

For my own part, save where the word falls to be construed in Interpretation Acts, I would prefer to confine the word “ambiguity” to its more usual meaning of verbal or grammatical ambiguity. The broader issue raises a problem of “inexplicitness”[21]. There are a range of circumstances in which the application of a statutory formula is doubtful: when deciding whether to read down general words; when implications are sought to be drawn from a text; when considering whether to depart from the natural and ordinary meaning of words; when deciding whether or not a statutory definition or interpretation section does not apply on the basis of an intention to the contrary; when giving qualificatory words an ambulatory operation; and, more controversially, whether words and concepts are read into a statute by filling gaps. Each of these interpretive techniques arises frequently. I will only be able to refer to some of them in the course of this lecture.

Context

Whilst all statutory interpretation is text based, it has long been accepted that the words of the text must be understood in their context. The words do not exist in limbo[22]. We do not, as Justice Learned Hand once famously said: “Make a fortress out of the dictionary” [23].

As Professor Sunstein has put it:

“Legal words are never susceptible to interpretation standing by themselves, and in any case they never stand by themselves.”[24].

Context is always important. Take the example of the statement: “The chicken is ready to eat”. This can either refer to a cooked chicken or a hungry chicken. The context alone will determine the meaning.

Similarly, in an adaptation of an example originally propounded by Ludwig Wittgenstein[25], parents leave their young children in the care of a babysitter with an instruction to teach them a game of cards. The babysitter would not be acting in accordance with these instructions if he or she taught the children to play strip poker[26].

Furthermore, when a nanny is instructed to “drop everything and come running” she would know that it is not intended to apply literally to the circumstance in which she was holding a baby over a tub full of water. As Professor Lon L Fuller said of this example:

“Surely we have a right to expect the same modicum of intelligence from the judiciary.”[27].

I give one final example of the significance of context. It does make a difference to understand that you are involved in a discourse about the judicial power in Chapter 3 of the *Constitution of the Commonwealth*, when you are asked to answer the question: “What’s the matter?”. Your answer might be quite different in another context.

A similar dilemma is identified in *Hamlet* in the passage when Polonius asked the prince, who was in one of his unco-operative moods: “What do you read my Lord?”. To this Hamlet replied: “Words, words, words”, a line which the more astute of you will have immediately observed was shamelessly plagiarised by Eliza Doolittle. Polonius then asked: “What is the matter my Lord?”, to which Hamlet replied: “Between who?”, so that Polonius had to say: “I mean the matter that you read my Lord.”. This, as you will have noted, was not a Chapter 3 context.

The broader concept of ambiguity performs the same role as performed by a broad idea of the context

in which words have to be construed. As the High Court has authoritatively stated:

“The modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which ... one may discern the statute was intended to remedy. Instances of general words of a statute being so constrained by their context are numerous. ... Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.”[28].

The context in which language is used encompasses the background against which the text has been brought into existence and reflects assumptions as to the manner in which, and the circumstances in which, the statute will operate. As McHugh J once put it:

“The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the texts took for granted or understood without conscious advertence by reason of their common language or culture.”[29].

It is an inevitable concomitant of statutory interpretation that it is necessary to invoke interpretive principles which reflect values and assumptions that are so widely held as to not require express repetition in every text. Often these principles will play the determinative role in finding the intended meaning of the text. The existence of such background assumptions has been identified in many different circumstances of constitutional and statutory interpretation[30].

As the authors of the 3rd edition of *Cross on Statutory Interpretation* indicate:

“Statutes ... are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules ... Longstanding principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament. ... One function of the word ‘presumption’ in the context of statutory interpretation is to state the result of this legislative reliance (real or assumed) on firmly established legal principles ... These presumptions apply although there is no question of linguistic ambiguity in the statutory wording under construction and they may be described as ‘presumption of general application’. At the level of interpretation, their function is the promotion of brevity on the part of the drafter. Statutes make dreary enough reading as it is and it would be ridiculous to insist in each instance upon an enumeration of the general principles taken for granted.

These presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles which are not easily displaced by a statutory text.”[31].

The focus of this address is on one of the most fundamental of these background assumptions, which has conveniently been called, in comparatively recent times, “the principle of legality”.

The Principle of Legality

In Australia the first use of this terminology of which I am aware was by Chief Justice Gleeson in his Boyer Lectures[32]. His Honour subsequently referred to the ‘principle of legality’ in a number of landmark cases including *Al-Kateb* and *Electrolux*[33].

The principle of legality was adopted in the United Kingdom and appears likely to be accepted here. It should be regarded, in my opinion, as a unifying concept identifying the higher purpose of a number of interpretive principles which have in the past been called canons or presumptions or maxims. The words “the principle of legality” were introduced into contemporary discourse by Lord Steyn, being a phrase he found in the 4th Edition of *Halsburys Laws of England*, where it was employed as equivalent to the traditional phrase “the rule of law” in a narrower sense than many who used that concept have adopted[34].

Lord Steyn referred to the principle in the following way:

“Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.”[35].

In the case which established “the principle of legality” as a unifying principle in English law, Lord Hoffman said, in a passage subsequently quoted with approval by Gleeson CJ[36] and by Kirby J[37].

“The principle of legality means that Parliament must squarely confront what it is doing and accept the political costs. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”[38].

As Lord Simon of Glaisdale once said, the canons of construction “... are ... constitutionally salutary in helping to ensure that legislators are not left in doubt as to what they are taking responsibility for”[39]. The idea is the same as that expressed by John Marshall, Chief Justice of the United States, when he said in 1820, with respect to the rule that penal laws are to be construed strictly:

“It is the legislature, not the Court, which is to define the crime and ordain its punishment.”[40]

In the same context, Isaacs J said, to similar effect:

“ ... a court should be specially careful, in the view of the consequences to both sides, to ascertain and enforce the actual commands of the legislature.”[41]

The principle of legality is a unifying concept, which should be used to encompass a range of more specific interpretive principles that have been developed over many centuries of common law development of the law of statutory interpretation. Amongst the rebuttable presumptions which it may now be convenient to consider under the rubric of the principle of legality are the presumptions that Parliament did not intend[42].

- To invade fundamental rights, freedoms and immunities[43].
- To restrict access to the courts[44].
- To abrogate the protection of legal professional privilege[45].
- To exclude the rights to claims of self-incrimination[46].
- To permit a court to extend the scope of a penal statute[47].
- To deny procedural fairness to persons affected by the exercise of public power [48].

- To give immunities for governmental bodies a wide application[49].
- To interfere with vested property rights[50].
- To alienate property without compensation[51].
- To interfere with equality of religion[52].

These interpretive principles are of longstanding. The debate about their deployment by common law judges goes back at least as far as Blackstone and Bentham. In many ways Blackstone’s account of statutory interpretation in Book 1 of the *Commentaries*[53] is quite contemporary.

What attracted Bentham's outrage, in this as in other aspects of the common law method, was the fluidity that is introduced by the use of interpretive principles, particularly those which emphasise the context and purpose of the statutory text and specific principles, e.g. that Parliament did not intend an absurd result. Bentham found all of this inconsistent with a rational legal order, which required express codification of everything. He made no allowance for ambiguities, gaps, generalities or the scope of language. He found the flexibility that the common law judges retained nothing short of outrageous[54].

Notwithstanding the assumption in some continental legal systems that complete precision and comprehensiveness is possible, Bentham's obsessiveness has never been accepted in the common law world. His view that every aspect of law could be written down as a complete body of law, which he called a Pannomion, has never been achieved, even in the Continental codes.

Many years ago Rupert Cross described Bentham's approach to Blackstone as "pig headed" and referred to:

"... The naïve belief manifested throughout so much of his work that it is possible for the laws of a sophisticated society to be formulated in terms of indisputable comprehensibility."[55].

Notwithstanding this longstanding controversy, over the course of the last century when Parliament has codified, modified and rewritten the common law in so many areas, the law of statutory interpretation has been modified to only a small degree in the respective Interpretation Acts or by provisions of specific scope. Indeed the most dramatic alteration to the law of statutory interpretation is a relatively recent development where a provision is inserted into human rights legislation requiring courts to construe *other* legislation so as to be consistent with the fundamental human rights protected in some manner by that Act[56]. The case law on such provisions has led to the result that the inconsistent provision will be read down in a manner contrary to the intention of Parliament when enacting the later statute, by reason of the authority of Parliament given by the human rights act[57]. We are a long way from taking that step here.

Except in the ACT, which has enacted such a provision in its Human Rights Act, the interpretive principles which are manifestations of the principle of legality have not been the subject of statutory extension. Nor have they been modified. That they exist is well known to every parliamentary drafter. They are well established and have been reaffirmed on numerous occasions. The courts are entitled to approach the process of statutory interpretation on the assumption that, if the principles are not to be applied, the Parliament will say so, or otherwise express its intention so as to identify the results it wishes to achieve in a way that will ensure that the law of statutory interpretation does not interfere with that occurring.

However, it is a concomitant of this principle, and a manifestation of what Chief Justice Gleeson has felicitously called judicial legitimacy, that the judiciary do not find ambiguity where there is none and recognise clear and unambiguous language when it is presented to them for interpretation.

The common law rule that statutes have to be interpreted so as to achieve the purpose of the legislature is now enacted in statutory form in all Australian jurisdictions. The application of the various presumptions that are manifestations of the principle of legality is not directly affected by this, or by any other statutory modification. The application of a purposive approach may, however, have consequences which recognise that the presumptions contained within that unifying principle are rebuttable and, accordingly, constitute an application of the common law of statutory interpretation rather than a qualification of it.

There are examples in legal history of the judiciary applying interpretive principles as a means of subverting legislative intent. The old rule that penal statutes have to be strictly construed – referred to as the rule of lenity in the United States – was developed to mitigate the harshness of the death penalty then applicable to minor offences and concomitant attempts by Parliament to restrict benefit of clergy[58].

The contemporary controversy about judicial activism – particularly in the context of human rights litigation, notably in migration cases, raises parallel issues. Subject to an entrenched bill of rights, the judiciary must always remember that the interpretive principles are rebuttable.

Changing the Common Law

The protection of fundamental rights, freedoms and immunities recognised by the common law has often been expressed in a shorthand way as the protection of common law rights. That terminology can be misleading if it is used in such a way as to equate the position of fundamental rights, freedoms and immunities with the old presumption that Parliament did not intend to change the common law.

One matter under consideration in this Conference arises from the significant changes to the common law made by the *Civil Liability Act 2002* (NSW), and similar legislation in other States. This requires consideration of the contemporary strength, indeed existence, of the presumption that Parliament did not intend it to affect common law rights, if understood as extending to common law doctrines. That is a presumption that first emerged in a period when the body of statute law was small and statutory intervention was generally narrowly directed to quite specific rules and practices. Prior to the emergence of widespread government regulation, particularly after the Great Depression and the Second World War, judges often approached legislation as a foreign intrusion. As Benjamin Cardozo once put it:

“The truth is that many of us, bred in common law traditions, view statutes with a distrust which we may deplore, but not deny.”[59].

It has now long been the case that statutory intervention is not only wide-ranging, but often fundamental.

The High Court judgment in *Bropho* emphasised that the strength of the presumptions reflected in the law of statutory interpretation may vary over time. The Court said:

“If such an assumption be shown to be or to have become ill founded, the foundation upon which the particular presumption rests will necessarily be weakened or removed. Thus, if what was previously accepted as a fundamental principle or fundamental right ceases to be so regarded, the presumption that the legislature would not have intended to depart from that principle or to abolish or modify that right will necessarily be undermined and may well disappear.”

The Court went on to hold that the presumption that legislation did not intend to bind the Crown had been so modified.

The same process has occurred with respect to the rule that penal statutes have to be strictly construed. Penal provisions are now only be read down in the case of ambiguity[60].

The same development has occurred in the United States. As one author has concluded:

“Rather than facilitating judicial nullification of the legislative will, the rule evolved into a principle of judicial restraint, mandating that the legislature define crime.”[61].

There is a real issue as to what aspects of tort litigation would ever have invoked the principle that legislation is to be interpreted on the assumption that it does not invade common law rights. Many aspects of negligence law are based on statutory modification of the common law: e.g. *Lord Campbell's Act* permitted the recovery of damages for the death of another person, the abolition of the doctrine of common employment, the abolition of Crown immunity, the creation of an apportionment regime in the case of contributory negligence. Many of the matters that are often called common law rights are, in fact, statutory rights, although some allowance must be made for the fact that the common law would have developed in a similar direction[62].

There is now a clear distinction between legislation which invades fundamental rights and legislation which alters common law doctrines[63].

As Lord Simon of Glaisdale put it in 1975:

“It is true that there have been pronouncements favouring a presumption in statutory construction against a change in the common law ... Indeed, the concept has sometimes been put (possibly without advertence) in the form that there is a presumption against change in the law pre-existing the statute which falls for construction. So widely and crudely stated, it is difficult to discern any reason for such a rule – whether constitutional,

juridical or pragmatic. We are inclined to think that it may have evolved through a distillation of forensic experience of the way Parliament proceeded at a time when conservatism alternated with a radicalism which had a strong ideological attachment to the common law. However valid this particular aspect of the forensic experience may have been in the past, its force may be questioned in these days of statutory activism ... Whatever subsisting scope any canon of construction may have, whereby there is a presumption against change of the common law, it is clearly a secondary canon ... - of assistance to resolve any doubt which remains after the application of 'the first and most element rule of construction', that statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances. Moreover, even at the stage when it may be invoked to resolve a doubt, any canon of a construction against invasion of the common law may have to compete with other secondary canons. English law has not yet fixed any hierarchy amongst the secondary canons: indeed, which is to have paramountcy in any particular case is likely to depend on all the circumstances of the particular case." [64].

Kirby J has emphasised the duty to obey legislative texts and the impermissibility of adhering to pre-existing common law doctrine in the face of a statute [65].

McHugh J has on a number of occasions in recent years emphasised that the presumption that a statute is not intended to alter or abolish common law rights must now be regarded as weak [66]. His Honour did not expressly distinguish in this respect between the presumption against altering common law doctrines and the presumption against invading common law rights. His Honour did, however, identify circumstances in which the presumption would operate more strongly, identifying that category as "fundamental legal principles" [67] or as "a fundamental right of our legal system" [68]. He distinguished "fundamental rights" which are "corollaries of fundamental principles" from "infringements of rights and departures from the general system of law" [69] and "a fundamental right" from a right "to take or not to take a particular course of action" [70].

With respect to common law doctrines, his Honour emphasised the weakness of the presumption. He said:

"Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that the legislature did not intend to interfere with them. Given the frequency with which legislatures now abolish or amend 'ordinary' common law rights, the 'presumption' of non-interference with those rights is inconsistent with modern experience and borders on fiction. If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced." [71].

This analysis would appear to apply to the *Civil Liability Act*.

The Clear Statement Principle

The determination that the principle of legality and a particular interpretive principle applies in a particular case is, regrettably, the easy part of the process. All that we have done at this stage is to identify the two elements - namely the statutory formulation and the interpretive principle - that may give rise to an incompatibility. The difficult part is determining which must prevail in the particular circumstances. It is at this point that judicial reasoning becomes distinctly fuzzy when identifying a relevant test and, perhaps more significantly, when applying it. The relevant test is, more often than not, expressed in the conclusion rather than in the reasoning.

It is often said that a statute which impinges upon the principle of legality, or any of its constituent interpretive principles, must be construed strictly. However, the concept of strict construction does not involve a single standard. There are degrees of strictness. There is very little discussion in the literature or case law about what is meant by strict construction. Such discussion as there is tends to arise in the context of a particular interpretive principle without cross-reference to the use of similar terminology in cases involving other interpretive principles [72]. It may be that a careful reading of the authorities will identify patterns and themes which repeat themselves in particular contexts, so that it may prove possible to identify circumstances in which the level of strictness varies and to determine why. I have not undertaken such a task.

It is, of course, necessary to commence with the words of the statute to be interpreted and to recognise that the primary rule of interpretation is to give those words their natural and ordinary meaning. However, as I sought to indicate at the outset, words always have a context and the principle of legality

should be regarded as part of that context. In my opinion, the principle is always engaged in the task of interpretation and it is not necessary to first determine that there is an ambiguity in the text.

There are a variety of formulations about how a Parliamentary intention needs to be expressed to ensure that the principle of legality, or the relevant constituent principle, if applicable in the circumstances, has been subordinated. They include “clear and unambiguous words”[73] or “irresistible clearness”[74] or “clearly emerges whether by express words or by necessary implication”[75] or “with a clearness which admits of no doubt”[76]. These various formulations are equivalent[77].

I do not believe we should continue to use the language of “strict construction”. It breaches the constitutional courtesies to which I have earlier referred. It suggests that courts give a restricted interpretation to the language of Parliament, and do so irrespective of the intention of Parliament. That that has been the case, and not only in the distant past, is a good reason for ensuring that the terminology more accurately reflects the true scope of the judicial role. In my opinion, this approach should now be called: the clear statement principle.

The core difficulty remains. Clarity, like beauty, always involves questions of degree and is affected by the eye of the beholder.

The circumstance in which the application of the clear statement principle most often leads to a diversity of result is when an issue arises as to whether or not general words used in a statute should be read down so as to have a narrower meaning than that of which they are literally capable, with the result that the particular conduct under consideration falls outside the terminology of the statute. It is actually quite rare to find an English word that cannot be applied at different levels of generality or otherwise circumscribed in its application. The former poet laureate, Ted Hughes, put it well:

“A word is its own little solar system of meaning.”

The classification of words as general and, therefore, as capable of being read down, is so frequently available a technique that it can be invoked in circumstances where it would be quite inappropriate.

Nevertheless, as Isaacs J put it:

“ ... The full literal intention will not ordinarily be ascribed to general words where that would conflict with recognised principles that Parliament would be prima facie expected to respect. Something unequivocal must be found, either in the context or the circumstances, to overcome the presumption.”[78].

This is a well-established and longstanding technique of statutory interpretation for which there are numerous authorities, including many in which the principle of legality has arisen[79].

As long ago as 1560, the Barons of the Court of the Exchequer said:

“And the Judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular where the intent was particular.” [80].

A fuller quotation from this judgment of 1560 has a decidedly contemporary ring:

“ ... the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.”[81].

The “foreign circumstances” referred to would extend to the circumstances which give rise to the principle of legality.

In my concluding remarks I will focus on the presumption that Parliament does not intend to interfere with fundamental rights and freedoms. This interpretive principle has a long history in Australian jurisprudence dating back to the judgment in *Potter v Minahan* in 1908[82]. It has been expressed on numerous occasions including, forcefully, in the joint judgment of the Court in *Coco v The Queen*[83].

“The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with a question because, in a context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.”[84].

It is the formulation in *Coco* of a “fundamental right, freedom or immunity” that should be accepted as an authoritative statement of the scope of the interpretive principle, in preference to “common law rights”. The word “fundamental” has work to do.

The presumption has been described by Chief Justice Gleeson in the following terms:

“The presumption is not merely a commonsense guide to what a Parliament in a liberal democracy is likely to have intended. It is a working hypothesis, the existence of which is known both to the Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.”[85]

His Honour also said:

“What courts will look for is a clear indication that the Parliament has directed its attention to the rights and freedoms in question and has consciously decided upon abrogation or curtailment.”[86].

And in another case, his Honour said:

“Courts do not impute to the legislature an intention to abrogate certain human rights and freedoms (of which personal liberty is the most basic) unless such intention is clearly manifested in unambiguous language, which indicates that the legislature has directed its attention to the rights and freedoms in question and has consciously decided upon abrogation or curtailment.”[87].

In the context of this interpretive principle, the level of strictness is high, i.e. a high level of clarity is required for the clear statement principle. In such a case, it will frequently be the case that the test for clarity is not merely what Parliament ‘intended’, but the more stringent test of what it has said expressly or by *necessary* intention. Indeed, Lord Steyn, no doubt fearful of glib repetition, has advanced the formulation “express words or *truly* necessary implication”[88].

Nevertheless, a diversity of approach will still occur. This is manifest in the judgments of the High Court in *Al-Kateb*. The relevant statutory provisions were in mandatory language:

- An officer “must detain” an unlawful non-citizen.
- An unlawful non-citizen “must be kept in immigration detention until he or she is ... removed from Australia”.

- “An officer must remove, as soon as reasonably practical, an unlawful non-citizen” after a request for removal.

On the facts of the case there was no prospect of Australia receiving international co-operation for the removal of the applicant. By a majority of four to three the High Court held that the terminology was clear, unambiguous and intractable[89]. The majority held that there was no room in this context for the application of a “purposive limitation” or of the presumption that Parliament does not intend to interfere with individual rights and freedoms. Detention must continue until deportation, however unlikely that may be.

The minority of Gleeson CJ, Gummow and Kirby JJ, a singular and perhaps unique concatenation of dissentients, read down the words “must be kept in immigration detention”.

Gleeson CJ applied the principle that “unambiguous language” in a statute interfering with human rights or freedoms must indicate “that the legislature has directed its attention to the rights or freedoms in question and has consciously decided upon abrogation or curtailment” [90].

- The majority made no reference to this particularly strict requirement, contained in the joint judgment of the Court in *Coco*[91].
- The majority reasoning proceeded on the basis that the mandatory requirement – ‘must keep in detention’ – satisfied any such test.

Gummow J construed the provisions as having the purpose of removal and, accordingly, that the power could be read down once that purpose was no longer pertinent[92].

Kirby J agreed with Gummow J, but also invoked a presumption of the common law “in favour of liberty and against indefinite detention”[93].

Similar divergences can be expected in the future.

Although the identification of which rights and freedoms are recognised as fundamental by the common law is to a certain extent uncontroversial, the boundaries cannot be regarded as settled.

On one occasion, McHugh J identified some fundamental legal principles which were entitled to a strong presumption including:

“ ... A civil or criminal trial is to be a fair trial, a criminal charge is to be proved beyond reasonable doubt, people are not to be arrested or searched arbitrarily, laws, especially criminal laws, do not operate retrospectively, superior courts have jurisdiction to prevent unauthorised assumptions of jurisdiction by inferior courts and tribunals ...”

His Honour emphasised that these matters were examples[94].

The right to personal liberty is plainly fundamental in the requisite sense[95]. A range of other rights are also jealously, but perhaps not so stringently, protected.

What is required to overcome the interpretive principle is not only affected by the nature of the right, freedom or immunity. It is also affected by the extent of the intrusion. As the Full Federal Court said in *Al Masri*, with respect to this principle:

“In considering the application of the principle of construction it is appropriate to take into account not only the fundamental nature of the right that may be abrogated or curtailed, but also the extent to which, depending upon the construction adopted, that may occur. Although all interferences with personal liberty are serious in the eyes of the common law, it may be said that the more serious the interference with liberty, the clearer the expression of intention to bring about that interference must be. Where the right in issue is the fundamental right of personal liberty, it is appropriate to consider the nature and duration of the interference.”

There is considerable scope for diversity of opinion in this regard also.

To a considerable degree, Australian lawyers have been insulated from what has been called the global human rights revolution. Nevertheless, although we have no bill of rights, save in the ACT, rights discourse has re-emerged. As anti-terrorist legislation and restrictive migration legislation continues to be enacted, in a form which impinges on fundamental rights, freedoms and immunities, it is likely that the clear statement principle will be frequently invoked in the years ahead.

End Notes

1. This address involves a repetition and development of ideas put forward in earlier addresses: "Statutory Interpretation: Identifying the Linguistic Register (1999) 4 *Newcastle L Rev* 1; "The Poet's Rich Resource: Issues in Statutory Interpretation" (2001) 21 *Aust Bar Rev* 324; "Blackstone, Burke, Bentham and the Human Rights Act (2004)" (2005) 26 *Aust Bar Rev* 1.
2. Howe (ed), *Holmes-Laski Letters: The Correspondence of Mr Justice Holmes and Harold J Laski 1916-1935*, Harvard Uni P Cambridge, Massachusetts 1953 p249.
3. Murray Gleeson AC, *The Rule of Law and the Constitution: The Boyer Lectures*, 2000, ABC Books, pp136-137 and cf 130.
4. See Felix Frankfurter "Some Reflections on the Reading of Statutes" (1947) 47 *Columbia L Rev* 527 at 538; *The Residential Tenancy Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 190 CLR 410-497; *Byrne v R* (1999) 199 CLR at [80]; *R v Hughes* (2000) 202 CLR 535 at [60]; *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [262]; Kirby "Interpretation and the Rule of Law" in Kelly *Essays on Legislative Drafting* Adelaide, 1988 pp88-90.
5. *Bank One Chicago N.A. v Midwest Bank Trust Co* 516 US 264 (1996) at 279.
6. *R v Hughes* (2000) 202 CLR 535 at [60].
7. *Wilson v Anderson* (2002) 213 CLR 401 at [8]. His Honour expanded on these observations in *Singh v Commonwealth of Australia* (2004) 78 ALJR 1383 at [19].
8. Bennion *Statutory Interpretation* (4th ed) Butterworths, London, 2002, pp405-409; see also *NAAV v The Minister for Immigration* (2002) 123 FCR 298 at [430], [432].
9. See, e.g. *Eastman v The Queen* (2000) 203 CLR 1 at 146-147 per McHugh J.
10. See *Brennan v Comcare* (1994) 50 FCR 555 at 572-575; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-169.
11. *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *R v Young* 1999) 46 NSWLR 681 esp at [33]-[37].
12. See *State v Zuma* (1995) (4) BCLR 401 at 402; [1995] (2) SA 642; *Matadeen v Pointu* [1999] 1 AC 98 at 108; *R v PLV* (2001) 51 NSWLR 736 at [82]; *La Compagnie Sucriere de Bel Ombre Ltee v Government of Mauritius* (Privy Council, 13 December 1995, unreported; *Pinder v The Queen* [2003] 1 AC 620.
13. *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-169; *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948 at 953d; [1978] 1 WLR 231 at 236G; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AC* [1975] 1 All ER 810 at 814a, 842; [1975] AC 591 at 613G, 645C-V; *R v Young* (1999) 46 NSWLR 681 at [5]; *Dossett v TKJ Nominees Pty Ltd* (2003) 78 ALJR 161 at [10]; *Donselear v Donselear* (1982) 1 NZLR 97 at 114.
14. See *Monypenny* (1986) 11 ER 671 at 684; *Smith v Lucas* (1881) 18 Ch Div 531 at 542; *Rickman v Carstairs* (1833) 110 ER 931; *Deacon Life & Fire v Gibb* (1962) 15 ER 630; *Drughan v Moore* (1924) AC 53 at 57.
15. *Life Insurance Co of Australia v Phillips* (1925) 36 CLR 60 at 76.
16. Quoted by Felix Frankfurter, "Some Reflections on the Readings of Statutes", supra at 221.
17. *Richardson v Austin* (1911) 12 CLR 463 at 470.
18. The titles of the first two earlier addresses set out in fn 1 above were drawn from Lord Simon's judgments. See also his Lordship's series of articles on "English Idioms from the Law" (1967) 76 *LQR* 283 and 429, (1962) 78 *LQR* 245 and (1965) 81 *LQR* 52.
19. *Stock v Frank Jones (Tipton) Limited* (1978) 1 WLR 231 at 236.
20. See the references set out in my earlier addresses in the *Newcastle Law Review* supra at p2; *Australian Bar Review* supra at 231-232; *Repatriation Commissioner v Vietnam Veterans Association of NSW Branch* (2000) 24 NSWLR 548 at 116.
21. See *Repatriation Commission v Vietnam Veterans' Association* supra at [116].
22. See, e.g. *Morris v Beardmore* (1981) AC 446 at 459 per Lord Edmond-Davies.
23. *Cabell v Markham* (1945) 148 F 2d 737 at 739.
24. Sunstein, "Principles, Not Fictions" (1990) 57 *U.Chi. L Rev* 1247 at 1247.
25. See Ludwig Wittgenstein *Philosophical Investigations*, Basil Blackwell, Oxford, 1958, footnote to [68]-[69] at p33e.

26. This adaptation of the Wittgenstein example is found in Zander *The Lawmaking Process*, London, Wiedenfeld & Nicholson (1980) at 57.
27. Lon L Fuller "The Case of the Speluncean Explorers" (1949) 62 *Harvard L Rev* 616 at 625-626.
28. See *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408; see also *K & S Lakes City Freighters Pty Ltd v Gordon & Gotch Limited* (1985) 157 CLR 309 at 515; *R v Wilson*; *Ex parte Kisch* (1934) 52 CLR 234 at 244; *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297 at 304 and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].
29. *Theophanous v Herald and Weekly Times Limited* (1994) 182 CLR 104 at 196.
30. For example the well-known reference to the background of the rule of law referred to in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J; and the assumption of responsible government, referred to in a range of authorities summarised in *Egan v Chadwick* (1999) 46 NSWLR 563 at [16]-[25]. This is also the general theme of Sunstein "Interpreting Statutes in the Regulatory State" (1989) 103 *Harvard Law Rev* 405.
31. Bell & Engle, *Cross on Statutory Interpretation*, 3rd ed, Butterworths, London (1995) pp165-166.
32. Gleeson, *The Rule of Law* supra at 2 and 5.
33. See *Al-Kateb v Godwin* (2004) 208 ALR 124 at [19]; *Electrolux Home Products Pty Ltd v Australian Workers Union* (2003) 209 ALR 116 at [21] and [23].
34. See *Halsburys Laws of England*, 4th ed, reissue vol 8(2) (1996) par [6].
35. *R v Secretary of State to the Home Department; Ex parte Pierson* (1998) AC 539 at 587. I should note that his Lordship believed that the presumption that Parliament did not intend to invade common law rights was not applicable because the statute under consideration contained no ambiguity. This takes an unnecessarily restrictive view of the concept of ambiguity. In my opinion that common law presumption should be regarded as a specific application of the principle of legality, although it is now necessary to distinguish between fundamental rights, traditions and immunities, recognised by the common law, and other common law doctrines, which may also be loosely described as common law rights.
36. *Plaintiff S157/2002 The Commonwealth* (2003) 211 CLR 476 at [30]; *Al-Kateb* supra at [19] fn 11.
37. *Daniels Corporation v ACCC [2002] 213 CLR 543 at 582.*
38. *R v Secretary of State for Home Department; Ex parte Simms* (2002) 2 AC 115 at 131. See also *B v DPP* (2000) 2 AC 423 at 470; *Ngata Apa Ki Te Waipounama Trust v The Queen* (2000) 2 NZLR 659 at [82].
39. *Ealing London Borough Council v Race Relations Board* (1972) AC 342 at 361.
40. *United States v Wiltberger* 5 Wheat. 76 (1820) at 95.
41. *Scott v Cawsey* (1907) 5 CLR 132 at 155.
42. See Pearce & Geddes, *Statutory Interpretation in Australia*, 5th ed, Sydney, Butterworths (2001) esp at 515-529.
43. *Potter v Minahan* (1908) 7 CLR 277 at 304; *Bropho v Western Australia* (1990) 170 CLR 1 at 179 CLR 427 at 437; *Plaintiff S157* supra at [32]; *Coco v The Queen* (1994) *Al-Kateb* supra at [19], [150]; *Minister v Al Masri* (2003) 197 ALR 241 at [82]-[85].
44. *Magrath v Goldsborough Mort & Co Ltd* (1932) 47 CLR 121 at 134; *Plaintiff S157* supra esp at 492.
45. *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at [11]. Note also *R (Morgan Grenfell Ltd) v Special Commissioner* [2003] 1 AC 563 at 606-607 ([7]-[8]).
46. *Pyneboard Pty Ltd v Trade Practices Commission* (1983); *Rich v ASIC*.
47. *Ex parte Fitzgerald Re Gordon* (1945) 45 SR(NSW) 182 at 186; *Krakouer v The Queen* (1998) 194 CLR 202 at [62].
48. *Commissioner of Police v Tanos* (1958) 98 CLR 363 at 395-396.
49. *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 101 at 116; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 525 at [33]-[37], [59]-[68], [113].
50. *Clissold v Perry* (1904) 1 CLR 363 at 373; *Clunies Ross v The Commonwealth* (1984) 155 CLR 193 at 199-200.
51. *Commonwealth v Haseldell Ltd* (1918) 25 CLR 552 at 563; *Durham Holdings* (2001) 205 CLR 399 at [28]-[31].
52. *Canterbury Municipal Council v Muslim Alawy Society Ltd* (1985) 1 NSWLR 525 at 544 per McHugh JA.
53. Blackstone *Commentaries on the Laws of England*, London, 1830, Vol 1 at pp87-92.
54. See the analysis in Sunstein and Vermule "Interpretation and Institutions" (2003) 101 *Michigan L Rev* 885 esp at 890-897.
55. "Blackstone v Bentham" (1976) 92 LQR 516 at 521 and 520.
56. See, e.g. s3 of the *Human Rights Act* 1998 (UK); s6 of the *Bill of Rights Act* 1990 (NZ); s13 of the *Human Rights Act* 2004 (ACT).
57. *Ghaidan v Godin Mendoza* (2004) 3 WLR 113; *Sheldrake v DPP; Attorney General's Reference (No 4 of 2002)* (2004) 3 WLR 976; Spigelman, "Blackstone, Bentham and the Human Rights Act" supra fn 1 at 5, 8-10.
58. *Pearce & Geddes* (5th ed) supra at [9.8]; Radzinowicz *A History of English Criminal Law*, Vol 1, Stevens & Sons, London 1948 pp83-88; Solan "Law, Language and Lenity" (1998-1999) 40 *Wm &*

Mary L. Rev 59; Hall "Strict or Liberal Construction of Penal Statutes" (1935) 48 *Harvard L. Rev* 748; Jeffries "Legality, Vagueness and the Construction of Penal Statutes" (1985) 71 *Va L. Rev* 245; Newland "The Mercy of Scalia: Statutory Construction and the Rule of Lenity" (1994) 28 *Harv. C.R. – C.L. L. Rev* 19; Klooper "The Status of Strict Construction in Canadian Criminal Law" (1983) 15 *Ottawa L. Rev* 553.

59. Quoted in Sunstein "Interpreting Statutes and the Regulatory State" supra at p408 fn 2.

60. See, e.g. in relation to penal provisions *Beckwith v The Queen* (1976) 135 CLR 569 at 576; *Denning No 456 Pty Ltd v Brisbane Unit Development Co Pty Ltd* (1983) 155 CLR 129 at 145; *Waugh v Kipping* (1986) 160 CLR 157 at 164.

61. Newlands supra at 200.

62. See Spigelman, "Negligence: The Last Outpost of the Welfare State" (2002) 76 *ALJ* 432 at 437-438.

63. Pearce & Geddes, *Statutory Interpretation in Australia* supra at 5.21.

64. *Maunsel v Olins* (1975) AC 373 at 394-395.

65. See, e.g. *Regie Nationale Renault v Zhang* (2002) 210 CLR 481 at [143]-[147].

66. See *Malika Holdings* supra at [28]-[30]; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36].

67. *Malika Holdings* supra at [28].

68. *Gifford* supra at [36].

69. *Malika Holdings* supra at [28].

70. *Gifford* supra at [36].

71. See *Gifford* supra at [36]. See also the approving reference by Gleeson CJ in *Electrolux* supra at [19]. See also *Malika Holdings* supra at [29]-[30].

72. See, e.g. Mullins, "Coming to Terms with Strict and Liberal Construction" 64 *Albany L Rev* esp at 12-13; Jeffries, "Legality, Vagueness and the Construction of Penal Statutes" (1985) 71 *Va L. Rev.* 189, esp at 219.

73. *Bropho* supra at [17].

74. *Potter v Minahan* supra at 304.

75. See *Pyneboard* supra at 341; *Public Service Association (SA) v Federated Clerks Union* (1991) 173 CLR 132 at 160.

76. *McGrath v Goldsborough Mort & Co Ltd* supra at 128.

77. I collected them in *Durham Holdings v NSW* (1999) 47 NSWLR 340 at [44].

78. *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93.

79. See my discussion of reading down general words in: "The Poet's Rich Resource" supra fn 1 at 227-230, 232-233 and in *R v Young* (1999) 46 NSWLR 681 at [22]-[32].

80. *Stradling v Morgan* (1560) 75 ER 305 at 312.

81. *Ibid*, at 315. See also *Bowtell v Goldsborough Mort* at 457-8; *Ex parte Walsh; in re Yates* supra at 91-3; *Ex part Kisch* at 244; *Commercial Union Insurance Co Ltd v Colonial Carrying Co of New Zealand Ltd* [1937] NZLR 1041 at 1047-9; *Church of the Holy Trinity v United States* 143 US 457 (1892) at 459; *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275 at 203; *Smith v East Elloe Rural District Council* [1956] AC 736 at 764-5; *Bropho* supra at 17-18.

82. *Potter v Minahan* supra at 304 per O'Connor J.

83. *Coco* supra at 437.

84. See also *Bropho v Western Australia* supra at 17-18.

85. *Electrolux* supra at [21].

86. *Plaintiff S157* supra at [30].

87. *Al-Kateb* supra at [19].

88. *B v DPP* supra at 470.

89. *Al-Kateb* supra at [33] per McHugh J; at [241] per Hayne J (with whom Hayden J agreed); and at [298] per Callinan J.

90. *Ibid* at [19].

91. See *Coco* supra at [437].

92. *Ibid* at [117] and [122].

93. *Ibid* at [15].

94. *Malika Holdings v Stretton* (2001) 204 CLR 290 at [28].

95. *Al Masri* supra at [86]-[91].

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Opening of Law Term Dinner 2005

**OPENING OF LAW TERM DINNER, 2005
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
FOR THE ANNUAL OPENING OF LAW TERM DINNER
OF THE LAW SOCIETY OF NEW SOUTH WALES
SYDNEY 31 JANUARY 2005
A NEW WAY TO SENTENCE FOR SERIOUS CRIME**

The Analects of Confucius record the Master saying that there were three matters that are essential for government: weapons, food and the trust of the people[1]. Of the three, he said, trust was the most important. The significance of public confidence in the administration of justice is a manifestation of this fundamental proposition.

Over recent years there have been frequent expressions of concern about what many detect to be a decline in the level of public trust with governmental institutions. The importance of the maintenance of trust has been emphasised in the course of this debate[2].

The level of trust in our society is a form of social capital which, as has increasingly come to be recognised, is as important as physical capital for the effective and efficient operation of our economy and society. Social capital includes the institutions which are the fundamental bases for all forms of social interaction. It extends to the values and rules for social conduct, including the acceptance of civic duties and responsibilities[3]. Social capital, like other forms of capital, is subject to a process of depreciation and requires continuing investment to replenish the capital base. The administration of justice does not differ from other spheres of public conduct in this respect.

Many aspects of the operation of our system including the appointment, training and conduct of judges and the participation of legal practitioners, as members of a profession not merely as persons conducting a business, all contain elements of investment replenishing the social capital deeply imbedded in our legal system. Participation by members of the public in the administration of justice, as parties or as witnesses, constitutes, although their perspectives may be partial, a mechanism for ensuring that trust in the administration of justice remains at a high level.

There is, however, a specific institution which, in my opinion, is of fundamental importance in maintaining public confidence. I refer to the jury system. The direct involvement as decision-makers of members of the public, in their capacity as such, does more to ensure the maintenance of a high level of trust and confidence in the administration of justice than, perhaps, any other single factor.

Decision-making by jurors is not, of course, the cheapest form of dispute resolution. Nor, however, is democracy the cheapest form of government. The pressure on public expenditure over recent decades is one of the reasons why the use of juries has progressively retreated and, in this State, has almost disappeared in civil matters. There is, however, no real doubt that the jury will be retained as the critical decision making body which imposes the stigma of guilt of a serious crime, leading to the penal consequences of such guilt, on any citizen.

It is sometimes suggested that judges do not trust juries. Nothing could be further from the truth. I do not know a trial judge who does not have the highest degree of respect for the deliberations of the jury. Although there are occasions when doubts have been expressed about the results of jury deliberations, the overwhelming majority of comments that I have heard from judges over the years is praise for the diligence, efficiency and accuracy of jury deliberations.

The role of jurors as representatives of the community is a well understood and longstanding tradition. A jury does not represent the community in the sense of constituting, in some way, a microcosm of the community. That would be impossible. It represents the community by reason of the random process of its selection.

We have become accustomed over recent centuries to representatives being chosen by election.

However, selection by lot is, notwithstanding what appears to be an element of chance, a fundamentally rational process with a long and honourable tradition. In ancient Greece legislators were selected by lot, albeit from a narrow base. Similarly, in Renaissance Venice and Florence selection by lot was used, sometimes through a sequence of steps, to choose executive decision-makers.

Such a selection process has two distinct advantages. First, it operates on the principle that all the persons eligible to be selected are fundamentally equal and that, in the relevant circumstances, it is invidious to say that one person is more qualified than another. Secondly, particularly in the complicated Venetian series of steps, selection by lot prevents corruption of the system, whether directly through bribery or indirectly by the relevant decision maker feeling obliged to tailor his or her decisions to the wishes and interests of those who are responsible for the selection.

From time to time there are calls for more widespread use of selection by lot[4]. The jury is continually referred to as one of the great continuing examples of the rationality of selection by lot. The jury is a profoundly democratic and egalitarian institution. That element lies at the heart of the acceptance by the community of the outcome of our criminal processes.

All of us understand the extent to which chance determines our fate, perhaps victims of crime and criminals more than most. The greater the extent to which one person or group may be seen to determine the outcome by deciding who makes the decision, the greater the prospect that a sense of unfairness can arise. All of us seem prepared to put up with the outcome of chance in circumstances where a process of deliberate selection could be regarded as unfair, whether justifiably or not. Those who have their expectations disappointed by reason of a random decision-making process, it appears, accept the outcome to a degree that rational argument could not convince them to accept.

The magic of the jury is reflected in the choice of number. Traditionally, as is still the case in criminal juries, that number is twelve[5]. So important is the number twelve that, like 20 with the word "score", it is one of the few numbers that has its own second name, i.e. a dozen.

For the superstitious minds of the population during the era that the number twelve was fixed upon as the size of the jury, that number had special connotations: in the Old Testament there were twelve patriarchs and twelve minor prophets; Israel was divided into twelve tribes; in the New Testament there were twelve apostles who would sit on twelve thrones to judge in the afterlife; the calendar was divided into twelve months, even though the solar year is closer to 13 lunar cycles; the day was divided into two twelve hour periods; there were twelve pence in a shilling; dozens were frequently referred to and twelve twelves made a gross.

A group of twelve is large enough to represent a diversity of views but not so large as to be impractical. The surrounding odd numbers, both eleven and thirteen, acquired supernatural or superstitious connotations. There is no mathematical reason for the triumph of the decimal system. That, no doubt, arose from the number of fingers on two hands.

Over recent years, I have been increasingly concerned that public confidence in the administration of justice and public respect for the judiciary is diminished by reason of ignorance about what judges actually do, particularly, in terms of criminal sentences that are imposed. Sentencing engages the interest, and sometimes the passion, of the public at large more than anything else judges do. The public attitude to the way that judges impose sentences determines, to a substantial extent, the state of public confidence in the administration of justice.

Plainly there are occasions when a particular sentence attracts criticism and that criticism is reasonable based. What concerns me is that such cases appear to be widely regarded as typical, when they are not.

There is a considerable body of research that indicates that, with respect to crime, there is a significant disparity between what actually happens and what the majority of the public believes happens. Furthermore, research in many nations, including Australia, has shown that when the full facts of particular cases are explained the public tends support the sentences actually imposed by judicial officers. Research with juries, who are the members of the public that have particular knowledge of the circumstances of an offence, support judicial sentences. Such research indicates that about the same proportion thinks the sentence was too severe as the proportion which thinks the sentence was too lenient[6]. It would be a useful antidote to some of the publicity that attends sentencing decisions for research of this character to be replicated in this State.

Obviously sentencing is a task on which a spectrum of opinion is permissible and, indeed, to be expected. It must be recognised that the range of permissible judicial discretion is narrower than the range of actual public opinion. For that reason, the outcome a judicial sentencing task will, necessarily, not be acceptable to some segment of public opinion. Two factors do not receive the recognition they deserve. First, judges operate within legal constraints that do not permit decisions at either extremity of public opinion. Secondly, in terms of publication in the mass media, the public receives only part of the story.

Judges must obey the law and there are legal constraints on sentencing outcomes. A judge cannot impose a sentence on the basis of retribution alone. By law a judge must take into account the circumstances of the offender, as well as of the offence. Issues of rehabilitation, for example must be considered by law. Retribution is not the only factor required to be considered.

The media has an understandable focus on high profile cases and controversy. What judges do on a day-to-day basis in the normal line of cases simply is not news, nor is it ever likely to be. I do not suggest that such reporting is wrong. A mass media outlet must appeal to a broad public. There remains a task for all of us who are engaged in the administration of justice to attempt to educate the public about the actual levels of sentences imposed.

The effect of selective media reporting is not only a matter affecting public confidence in the administration of justice, important as that is. It actually impedes the administration of justice. A key objective of criminal sentencing is, of course, deterrence. For deterrence to work potential offenders must have an understanding of the likely consequences of criminal conduct. If, as I believe is the case, media reporting gives excessive emphasis to light sentences and gives the impression that such sentencing is typical, when it is not, then deterrence will not work. Let me put it in headline form: Media Bias Causes Crime Wave. There is, however, as much point in complaining about selective media reporting as there is in complaining about the weather.

The maintenance of public confidence in the judiciary requires the administration of justice to appeal directly to the public. The best way of doing so is through the jury system. I wish to put forward an idea in which jurors can come to play a role in the sentencing process, with a view to enhancing public confidence in it.

What I have in mind is the development of a system in which judges consult with juries about sentencing. There was a tradition in the United States that many states had juries which actually imposed sentences. Now, only half a dozen states continue that tradition, although there have been recent calls for its return^[7]. I am not suggesting anything of that character here. The scope of relevant considerations is such that sentencing requires the synthesis of a range of incommensurable factors. This cannot be done by a group, without an undesirable process of compromise. Ultimately, an experienced criminal judge must decide, often quite instinctively, where the balance should lie.

What I am proposing is an in camera consultation process, protected by secrecy provisions, by which the trial judge discusses relevant issues with the jury after evidence and submissions on sentence and prior to determining sentence.

I do not put forward this proposal as a means of increasing the level of sentences. Generally, I do not believe that it will have that effect. Nevertheless, such a basic change in procedure can have unexpected effects. The available research concludes, as I have said, that jurors generally accept the appropriateness of sentences imposed in those cases on which they sat. I have come to the view, that a process of consultation can improve both the jury decision-making process and the judicial sentencing process, as well as enhancing public confidence in the administration of criminal justice. Jurors are interested in what happens. Indeed many turn up for the sentencing.

I have not myself been a criminal trial judge. However, those with whom I have spoken all emphasise the considerable difficulty and loneliness involved in the sentencing exercise. Consultation with judicial colleagues is possible, but many of the matters that arise for determination in the sentencing process are such that, in my opinion, judges would welcome assistance from a spectrum of opinion reflecting a diversity of experience.

The range of conflicting elements that must be taken into account in the sentencing exercise involve the full range of human relationships and human conflicts. For example, judgments must be made about the prospects of re-offending, the chances of rehabilitation, the actual gravity of conduct

involved, e.g. in cases of euthanasia. In these and other such respects I believe the sentencing process could be improved by a judge being able to draw on a broader range of experience.

Furthermore, there are occasions when the judge has to make assumptions about the jury's reasoning process. For example in a manslaughter case it is necessary for the judge to make a finding beyond a reasonable doubt as to the basis on which a conviction of manslaughter rather than murder was entered. Was it based on the defence of provocation or on the basis of an unlawful and dangerous act or was there some element of mental impairment? If the last, then the sentencing task must proceed on the basis that death was not intentional. Whilst it is true that the jury does not have to be unanimous as to the basis on which a charge of murder is reduced to manslaughter, it will assist the sentencing exercise for the judge to understand why the verdict was as it was.

As we have seen from recent experience in this State, the jury decision-making process can go wrong [8]. It is quite likely that, if there has been some fundamental defect, the trial judge will discover it during the course of consulting with the jury about sentence. I do not think that that is a bad thing. The process could lead to a report for the purposes of the Court of Criminal Appeal. Such a report could also include information about the significance, or lack of significance, of any error on the jury's decision-making process. This could assist an appeal court to refuse an appeal on the basis of some technical breach, by the application of the proviso.

There are difficult issues which arise whenever a system is established which may intrude into the secrecy of the jury deliberation process. The present secrecy rule protects the jury and remains fundamental to our system. Sometimes, however, the rule is subject to criticism on the basis that it may conceal miscarriages of justice. This has frequently led to difficult decisions in the courts[9]. Senior judges have suggested that the immunity from scrutiny of the jury will in the long run effect public confidence in the jury system[10]. The legislative scheme for the implementation of my proposal, if it were to be adopted, would have to carefully regulate the conflicting principles involved. These are matters that require careful investigation in order to ensure that the appropriate balance is maintained.

I put forward this proposal tentatively. It requires detailed working out, perhaps by means of a reference to the Law Reform Commission. It is not possible to predict all the ramifications of such a significant change. Legislation should authorise the adoption of the system at first on a trial basis. This is what occurred a few years ago with a system of Sentence Indication Hearings, which looked good on paper but which was eventually abandoned.

I should note that the proposal has resource implications. It will not work without additional resources. It will require the recall of such proportion of the jury as is able to return to hear the evidence on sentencing. One of the factors which delays the outcome of criminal trials in this State is the fact that the Probation and Parole Service requires a period of six weeks after verdict before it can provide the information about the offender that is required for the sentencing task. Further delays arise because of availability of counsel. It is undesirable for a jury to wait for a long period before being recalled for a process of consultation about sentencing. Additional resources are required to ensure that such a process can be carried into effect in a timely manner.

I am conscious of the fact that the overwhelming majority of sentences imposed in this State do not involve juries. Not only are many criminal offences dealt with in the Local Court, but a substantial majority of sentences in the District Court occur after guilty pleas. It is not appropriate or desirable to create some kind of artificial jury composed of persons who have not had to decide the critical question of guilt. A jury that has had to turn its collective mind to the determination of guilt has had to focus in a direct, and not merely advisory way, on elements critical to the sentencing task. This focus cannot be artificially created.

I put forward this proposal in a tentative manner realising that there are many details that require to be worked out and also with the diffidence appropriate for a novel proposal. Nevertheless, I am of the view, after a limited process of consultation with others more experienced in the criminal jurisdiction than myself, many of whom have real reservations about its implications, that this idea offers real prospects of improving the quality of sentence decision-making in this State and enhancing public confidence in the administration of criminal justice. As far as I am aware, no such system exists anywhere else. It is, in my opinion, worth a trial.

1. See The Analects of Confucius translation by Simon Leys, W W Norton & Co, New York, 1997, par

12.7.

2. See for example Frances Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity*, Free Press, 1995; Onora O'Niell, *The Question of Trust*, The BBC Reith Lectures, Cambridge University Press, 2002; Kieron O'Hara, *Trust: From Socrates to Spin*, Icon Books, London, 2004.

3. See for example *Social Capital: Reviewing the Concept and its Policy Implications*, Productivity Commission, Canberra, 2003

4. See for example Bernard Manin, *The Principles of Representative Government*, Cambridge University Press, 1997 esp ch 1; Allan Ryan, *Do We Really Want Equality?* *New Statesman*, 25 September 2000; Neil Duxbury, *Random Justice: on Lotteries and Legal Decision Making*, Oxford Clarendon Press, 1999; Bruce Chapman, *Chance Reason and the Rule of Law*, 2000 50 *University of Toronto LJ* 259; Wayne Hall, *Euro Scepticism: Greek and British*, *Quadrant*, May 1999 pp40-41.

5. See Charles Rembar, *The Law of the Land: The Evolution of Our Legal System*, Touchdown, New York, 1980, pp 158-163

6. See the references collected in J J Spigelman, *Sentencing Guideline Judgments* (1999) 73 *ALJ* 876 at footnotes 23-28

7. See Adriaan Lanni, *Jury Sentencing in Non Capital Cases: An Idea Whose Time Has Come (Again)?* (1990) 108 *Yale LJ* 1775; Morris B Hoffman, *The Case for Jury Sentencing*, (2002-2003) 52 *Duke LJ* 951; Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, (2003) 89 *Va L Rev* 311.

8. See generally Virginia Bell, *How to Preserve the Integrity of Jury Trials in a Mass Media Age*, unpublished paper at the Supreme and Federal Courts Judges' Conference January 2005, available on the Supreme Court website, www.lawlink.nsw.gov.au/sc.

9. See eg *R v Minarowska* (1995) 83 *A Crim R* 78; *R v Mirza* [2004] UKHL2; [2004] 2 *WLR* 201.

10. See *Mirza*, supra, at [22] per Lord Steyne dissenting.

T D Castle and B Kercher (eds), *Dowling's Select Cases, 1828 to 1844*, Sydney,
The Francis Forbes Society for Australian Legal History, 2005

FOREWORD

BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

From the time he disembarked in Sydney Harbour to an eleven gun salute on a hot February Sydney day, fully robed and wigged which he remained for the whole day, James Dowling dedicated himself to the task of his office. He did so even though that first day's experience disappointed him and he expressed regret for his decision to accept his appointment. This was an era in which the obligations of a profession or of a craft carried within themselves a set of ethical principles of honesty and fidelity to duty, without reference to incentives or rewards which have come to be emphasised in recent times. Dowling's qualms and regrets never affected the performance of his duty.

Perhaps nothing indicates Sir James Dowling's dedication more than the hours he spent compiling the *Select Cases* which are at last published after so long a delay. The reasons for the delay and the background to the project are outlined in the Introduction and require no repetition.

As joint editor of this publication, Professor Bruce Kercher continues the substantial contribution he has already made to Australian legal history, not least by the publication of the earliest decisions of the Court on the Macquarie University website, a publication which has been appropriately described as the Kircher Reports. He has been joined on this occasion by Tim Castle, who as an active barrister has somehow found the time to undertake this task.

Making original source material of this character available is essential if others are to be able to investigate the origins of Australian society. Many of the strengths and weakness our nation has displayed over the course of its existence are manifest in these cases.

As a successor in office to Sir James Dowling, the *Select Cases* reinforce for me the significance of the longevity of our legal system, a longevity matched by very few nations. The cases reported here apply legal principles and manifest a style of reasoning of which we are the direct inheritors today. Many of the principles have not changed at all. Many of the cases would be decided in exactly the same way. The cases manifest, however, one abiding theme: the omnipresence of continuity and change. Within the stream of applied precedent one can detect adaptation to the particular circumstances of the society in which the common law had been received. It is this the unique combination of rigidity and flexibility which has allowed the common law to endure. Publications such as this help all of us understand why.

I commend the editors for their diligence and welcome this addition to the legal history of Australia.

JJ Spigelman
Chief Justice of NSW

***New South Wales Civil Practice and Procedure, Thomson
Lawbook Co, 2005***

FOREWORD

BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

The passing into law of the Civil Procedure Act 2005 (“the CPA”) and the Uniform Civil Procedure Rules 2005 (“the UCPR”) means that, for the first time, the general run of civil proceedings in the Supreme, District and Local Courts (and also the Dust Diseases Tribunal) will be governed by one set of Rules. The CPA gathers together in one place procedural provisions previously found (often in overlapping form) in the Supreme Court Act, the District Court Act and the Local Courts (Civil Claims) Act and a miscellany of other Acts, going back as far as the Judgment Creditors Remedies Act 1901.

The Act and Rules were developed by a working party chaired by Mr Justice Hamilton of the Supreme Court. The other members of the working party were Judge Garling of the District Court, Magistrate Cloran of the Local Courts, Michael McHugh, Greg George and Hamish Stitt (the Bar Association’s representatives), Peter Johnstone, a senior partner of Blake Dawson Waldron (the Law Society’s representative) and Tim McGrath, Jenny Atkinson, Stephen Olischlager, Steve Jupp, Peter Ryan, Peter Shiels and Pam Wilde, of the Attorney General’s Department.

The new legislation will mean that practitioners and the public will need to refer to only one set of legislation to deal with litigation in any of the courts I have mentioned. Importantly, they will have to keep and use only one set of forms in litigation, in either paper or electronic form. The number of forms has been reduced from about 200 in the Supreme Court alone to about 60 altogether. This may seem a pedestrian or mechanical matter, but will be of real moment in simplifying the conduct of litigation. It will also facilitate the use by practitioners and the courts of new technologies, such as electronic lodgment of documents and electronic case management.

The drafting philosophy has been to simplify provisions of the Act and Rules where possible, but without radical changes in substance or form. The Rules follow the same general order as existing rules, to keep them logical and familiar to court users. However, some rules that deal with similar subject matters have been grouped together.

Phrases with a settled meaning have been carried over into the Act and Rules. There have been substantial changes in drafting style since the existing Rules were promulgated. But the changes in style have been implemented in a manner designed to carry over, so far as possible,

established authority on the interpretation of procedural provisions and thus minimise litigation about the meaning of a section or rule. The Second Reading Speech emphasised that stylistic changes should not be taken to change meaning, unless a change of meaning was clearly intended

Whilst most provisions will apply generally in the Supreme, District and Local Courts and Dust Diseases Tribunal, some provisions will have a limited application. It was important to retain simplified procedures in Local Courts, particularly in the Small Claims Division. The provisions themselves clearly indicate these limited applications.

The Act and Rules reduce the number of ways in which proceedings or interlocutory steps in proceedings are commenced.

All proceedings (including appeals to single Judges or Magistrates) will be commenced either by statement of claim or summons. This is based on the present regime in the Supreme Court, which has operated successfully over 30 years.

All interlocutory processes will commence by notice of motion, rather than by the range of processes that are currently used. Thus, even an application to issue a writ of execution will now require a notice of motion. This is to facilitate the operation of computer systems. Motions which may be dealt with out of court must state that they are to be dealt with in the absence of the public. They include common form probate applications, adoption applications, applications for enforcement, time to pay applications and urgent stay applications.

A key feature of the new Act and Rules is found in the provisions relating to case management. These provisions recognise the importance of case management as a tool for increasing the efficiency of the court system and for reducing the cost of litigation. As it has grown, the case management system has wrought a revolution in the conduct of civil litigation. The case management provisions in this legislation, Act and Rules, seek to strike a balance between protecting the interests of justice in the individual case and protecting the interests of justice for other litigants and promoting the efficiency of the courts.

A set of guiding principles for case management is now embodied in the Act rather than residing in rules. Section 56 substantially reproduces SCR Part 1 r 3 and sets out the overriding purpose of the Act and Rules. The following sections deal with the objects of case management; the requirement of the courts to follow the dictates of justice; and the courts' duties to eliminate delay and to ensure that the costs of proceedings are proportionate to the degree of complexity and importance of the subject matter. The dictates of justice remain paramount, but are specified as not limited to justice only between the parties to the litigation.

The elevation of these provisions from the status of Rules to the status of statutory requirements overcomes any possible lack of rule making power in the inferior courts. As a further step in the change of culture, it also marks

the importance now to be attached in the courts to principles of case management.

This service will provide an annotated copy of the Act and Rules. Importantly, it provides a comparison of the existing and the Uniform Rules to highlight changes in procedure. This will be invaluable as legal practitioners and the public settle in to the new regime.

J J Spigelman AC

Chief Justice