Justice Kirby's NT farewell address

Your honour, the Administrator, my judicial colleagues, ladies and gentlemen of the law, my much esteemed colleague Ian Barker, Mrs Barker, ladies and gentlemen.

It's very good for Johan and me to back here in Darwin. Let's start in the way that New Zealanders do, by truly remembering the original people of our country, by thinking of their place in our land and of the special role that we lawyers play in respecting them, their traditions and ensuring that they have a true place in the heart of the law and in the protection of the law in Australia. The New Zealanders do that, not in a formal peremptory way, but in a heartfelt way, and we in Australia are learning to do the same.

I am a very old timer, as has been suggested. I have been around a very long period of time, and, in fact, I was looking at the Francis piece in the new Northern Territory Law Reports to see who the judges were at various stages in my career.

I was actually sworn in in December 1974 as Deputy President of the Arbitration Commission (CAC), and Tom Hughes who spoke on that occasion as President of the Bar of NSW, is going to be there at my farewell in the number one court in Canberra on 2 February, and he is going to speak at my exit. The Judges of the High Court of that time were Chief Justice Barwick, Sir Edmund McTiernan, Sir Harry Gibbs, Sir Ninian Stephen, Sir Anthony Mason, Sir Kenneth Jacobs and Justice Lionel Murphy. They were the Justices of the High Court, and the Justices of the Supreme Court of the Northern Territory were that one little judge William Forster and Jim Muirhead, a very fine man whom I got to know at that time because he was the

Duncan McConnel, Peter Barr QC, Justice Michael Kirby

chair of the Australian Institute of Criminology and Dick Ward, Justice Dunfrey, Justice Joske and Justice Smithers. A marvellous Judge, Justice Smithers, he taught me what to do if people came into court in the Arbitration Commission with banners and signs, and said "don't worry too much about contempt just tell them to ditch their signs because you can't see them, keep their signs make sure you can see them read them and then say 'very well, I've read them not put them down' It always works, it always works".

Justice Woodward, Justice Bob Frankie, Justice Jack Sweeney (a really clever industrial law judge) and Justice St John; they were the judges, the resident and non-resident judges of the Supreme Court in 1984, when I was appointed a full time appellant judge in the Court of Appeal in NSW, Chief Justice Forster becomes the first Knight in the Territory; a very fine Judge. A number of rules, I hate the word the product of Chief Justice Forster's wisdom, passion of understanding, of realities. Justice Murihead, Justice Toohey (who I later sat with in the High Court), Justice Gallop , Justice Nader , Sir William Kearney, Justice Kevin O'Leary (past President of the Law Council of Australia) are all really fine Judges of the Territory.

In '96 when I went to the High Court, Justice Brian Franke was the Chief Justice, Justice Kearney, Justice Angel (who does me the honour of being here tonight as Acting Chief Justice), Justice Mildren, Justice Sally Thomas, non-resident at the time, Justice Gallop, and Justice Priestley with whom I sat in the Court of Appeal in NSW. Justice Priestley, a very fine judge of quality. So they were the judges who came with me on this journey, and what began on that Friday in December 1974 is soon to come to a close in Canberra. And, I have to say to you, it's all a little bit surreal if you have been living a life with a very high degree of order, and very high degree of precision and discipline, and somehow, it is suddenly going to stop. Then it then does make you concentrate on the important things in life what you have achieved, and what you failed in, and I have had a lot time in recent weeks to think about that, and I am

going to say something about that on this occasion. Now, the reason you all come in large numbers, is you are hoping to hear some inside information of the High Court of Australia and all sorts of indelicacies and improprieties are going to be revealed; the inner tricks of the trade. We cannot go against tradition though, we can only give little bits and you will have to read between the lines, that is the tradition of the law.

I was looking at a very interesting article that I wrote (the last 34 years, I have been writing law review articles). I was reading this excellent article, simply a law review on what it is really like to be a Justice of the High Court of Australia, and in that, was a recording of a conversation I had with law students in Sydney at Sydney Law School. The conversation was one year after I'd been sworn into the High Court, and I'd tried to explain what my daily life was like so that they would have an idea of what goes on inside the building in Canberra, and elsewhere. And I read it again, in preparation for these remarks, and really, nothing much has changed. Nothing much does change in the growing institutions of the law. However, looking through, some little things have changed so I'll just remind those of you that have not been prudent enough to read that essay, what it says about an insider's view of the High Court. The first point was I remember the morning that I was asked where you will be at 6 o'clock tonight. Well I was in the Court of Appeal in Sydney and I knew that at 6 o'clock that night, I would be chairing a consumers committee of the Court of Appeal. I received a phone call from the Department of the Prime Minister's cabinet asking where I would be, I said "well as you know I am a very, very attentive person, very concerned about consumers of the Court of Appeal". We don't want to know about that, they said, we just want to know where you will be. I said, I will be in the Judge's conference room at 6 o'clock with this committee. So about 5 past 6 that night, my associate came to the door (knock knock knock knock knock). It is very unusual for an associate to interrupt a meeting in the Judge's conference room, but anyway he was admitted. A little postage sticker came along the successive people, as it was being handed down to me my brother Donald, who is a solicitor partner in a Sydney firm who was sitting opposite me, saw the postage sticker come towards me and he said, "I saw the blood drain from your face as it came closer" and it was then handed to me. Ring Mr Lavarch. My Associate, that is an honours graduate from University of Melbourne, didn't realise that the Attorney-General of course was Mr Lavarch and I was being told to ring him, which I did. I had the honour to reply to accept the appointment, and I had the honour to accept the appointment, and I will do my best. Soon after that, my partner Johan drove us down to Canberra and we got to the High Court. I really didn't know exactly how you got in there because it had already gone up since my time at the Bar, and the Queen had opened it in 1980. I had been appointed in precisely 1974, but we got there and I couldn't get the door open into my room, and I certainly couldn't open the door onto the balcony. Every Justice has a balcony. Mine was facing Parliament House, and I have, what I think, the nicest room - with the pillars, the old parliament house, the new parliament house and a vision of the whole of Canberra before me; a wonderful room. And I saw on the desk a dictaphone and some tapes, so I reached for one of the tapes, put on the machine and listened to the tape. I could recognize the voice, but I didn't quite know who it was, and so I listened and listened and I then realized it this was the dictation of the judgement in a case called Amos and Alcoa. A case about the law of having the right to sue in court and I then logged that out, and I realized this was the case, the voice of the long dead Sir Keith Aitken dictating his reasons in Amos and Alcoa. This brought home to me a very broad lesson and I explicitly said that I thought in 1997, that all of us who served in the judicial office, indeed all of us who serve in the law, all of us who are human, are just temporary. We are moving in and out of our responsibilities, we will not be there for long we have an opportunity, an obligation, to make the best out of life and do the best we can, and that was my opportunity then, and will be the opportunity of my successor, and now my successor is about to move into my room, Justice Virginia Bell. So Justice Aitkin, he occupied the room when the building was opened, he was succeeded by Justice Deane, and it was Justice Deane's appointment as Governor General that made the vacancy that lead to my appointment to the High Court, and I've often felt, as I have sat in that room, surrounded by books that have been marked by Justice Deane and had his stamp in it. I felt if I can use this expression, I felt the vibes, the vibes of Justice Deane because of all the judges of the High Court, I had reasons. You know how you read other people's expressed things. Some things are quite different from the way you would approach a problem, or the way you would express a problem, even if you come to the same conclusion, but Justice Deane's reasoning always seems to me, I feel very comfortable, my brain somehow connects with that and he was in that room for very long time. I do not want to continue reading the decisions of the High Court of the Australia. Well, I'm telling you, I'm going to continue reading the decisions of the High Court of Australia and I will be looking very closely at what

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happens after 2 February 2009.

One of the questions that really arises is: is this funny way that we choose to appoint Judges really a very successful way? By and large we have to concede it does select pretty impressive judges on a whole, I mean the system does, like the jury, if you invented that system, probably wouldn't invent it, but on the whole it works. One of the things I think I worry about is the idea that judges should be appointed by so called judicial commission. Now that sounds alright, but one of the problems would be is that it would tend to mean that Judges would be appointing Judges. I don't really favour that, I really do think the eventual democracy that we have and the fact that elected people choose the Judges is combined with the principle of the Judges themselves that at least they have never had anything to do with a political system is a way of infusing the courts with the changes of philosophy of values that come over time from the democratic time of democratic electoral process.

I had a bit of an experience recently with an alternative system which is the South African system, whereby a selection committee, a panel, chooses Judges and then the executive government can select from the Judges who are put up those who will be appointed. I applied at a very late stage in my life, namely last year, to be considered for appointment to a new United Nations Appeals Tribunal and so I put my hat in the ring and I was told I was wanted for a job interview in Geneva. Eventually I went to The Hague, and was interviewed by this panel, chaired by Justice Kate O'Regan of the Constitutional Court of South Africa. I was told I would have to do my first job test in 40 years and I thought this would be an aptitude test which I will do very well in because I'm very aptitudable! But instead it was a test of a problem with the statute of the United Nations of the rules of the tribunal and I had to solve the problem and write the opinion of the tribunal in two hours. All these learned judges from all over the world who were selected, were all traipsed into this little room and they said "Your timing begins now," and it was like going back to school. I'm doing the leaving certificate again and I was required to do my test.

Anyway, I did alright in the test, afterwards the Judge from Sri Lanka who was one of the Judges said, "We were all pretty impressed by the eloquence of your opinion," and then one of them said, "And it's wet!" But we all only had two hours and I got it all done. Anyway, I am on the shortlist, but now that the South African system prevails it will go to the general assembly who will elect the judges. We won't know this for several months, and what happens is in the lap of the gods, or the next best thing, and that would be United Nations General Assembly.

So that is something new and different, but don't ever turn over the appointment of judges solely to judges or members of the legal profession. It's very important that Judges who speak for justice, for whole of the community, should have the confidence of the whole of the community…When I got there I found that I worked on Level nine in the building, I had two staff, my PA was in Sydney, the facilities are marvellous. The library is the best and the biggest law library in southern hemisphere, there's a wonderful researcher who works in the library, helps you with research for speeches and so, all in all, you couldn't wish for a better working environment. The work methods of the High Court indicate that talk of the percent rates can sometimes be misleading, because there is a very big component of the work which is getting through the special leave applications. Some of them heard orally, some of them now, at least in part, heard by on the papers. You don't get an oral hearing if you don't get through that step and upon those two steps, there is virtually no disagreement. Occasionally there is, but virtually none. You have to take that into account in judging the level of disagreement within the court. Once a case is chosen because it's a case about which reasonable people can have different points of view and often, it's a case on which a judge with an intermediate court has dissented and so should be a matter of surprise that there is disagreements within the High Court on such decisions; such decisions that tend to be at the cutting edge of the law. There is discussion in the High Court before we go to court, and Chief Justice French has introduced additional discussion which takes place on the Monday of the sitting of the court in Canberra. So this further previous discussion, there is always discussion after the hearing which Chief Justice Gleeson introduced, and that is something we always did in the court of appeal in NSW.

One thing that is different in the court appeal, in my experience, and in the High Court is this, in the court appeal, as president it was my job to assign every month for the sitting of the month ahead, the judge who would have the primary responsibility for writing the first draft in the case or for giving an extent decision, because the court of appeal had to get through its work of about 35% of the cases dealt with extant. And it was meant to the president, I always tried to make sure everybody had a fair go; the boring cases, the

interesting cases, the big cases, the small cases, the equity cases and common law cases. You don't give all the equity cases to those equity people; you give them occasionally to the common law people to make sure someone is looking on from the outside the prism of ideas. And that was the system in the court of appeal. I think it is the system in most intermediate courts in Australia. It is accepted by everyone in order to get though the work because the work in the intermediate courts is really hard.

My last year in the Court of Appeal of NSW, I signed 389 opinions, whereas in the High Court you do about 60, so it's really hard stuff, and you really have to keep your ego under control to make sure that you're getting through the work. In the High Court, that doesn't exist, and I think that's a weakness in the High Court system. There needs to be a system of assignment, and fair assignment between the justices in order to insure that they all take an equal part in writing for the court. And I think that if that were done, it would be an improvement in the system of the court.

The staff that you have, well I was the only one, still the only one to have advertised. I advertised because when I came through the leading certificate of NSW, maximum pass first in the state of history and all this, I couldn't get articles, I went to Fort Street which is a very good school. Five other justices and I went to Fort Street and couldn't get articles. The old law worked, worked for those who were gentlemen, the old law network. So I always advertised and I got student applicants from all over the country, and I always appointed one male and one female and I always tried all things being equal to choose from outside the sandstones. They get pretty well looked after by the others, and so in the last few years my associates have been from the University of Western Sydney, UTS, Murdoch and so on. Getting people from all over the place, I think, that has been a good thing for all, and a good thing certainly for me. The staff that work on the judges in the court of appeal, churning through these cases. We didn't have time to check every little detail fact in the High Court, they have two staff members who go though every case, they check the facts against the transcripts, against the bills, they make sure we don't make slips, mistakes and that is a marvellous thing. But it's just impossible in other courts, just not feasible with the number of cases. Most of the judges have the rooms facing the airport and that is where they look longing. Looking at a place in which they would like to be - if conceivably possible - in my case I was looking out, I was looking at the old and the new buildings, and I would walk along the lake, and it's a really, you got me out here, any of you walking to work. And it's a wonderful experience; you think, you exercise, it's what human beings are supposed to do, but that is now behind me. I'm up building the stakes and I was the only one I'm afraid, who was trying raise that the High Court should come here, as was said.

Your cases are interesting, your cases are odd, very interesting from this Territory, and of course you have, you have had real brilliances. General, who will in a wylie way way, would be standing there, staring up at you and watching you as every moment you walk along the beach, making sure that they are having the vibes too. And I think that it would be a good fit, if the High Court of Australia came here. If there was enough business, it should be the same as it is in Hobart. If there's business, enough business, say one or two cases, they should come up here maybe linked to the Perth Court. We had to cancel the Perth Court this year because there was no business and if there is business in Darwin and no business in Perth, the answer is clear.

In my life, I once made a trip to Broome and Antoine Bloom and the magistrate there, wonderful magistrate, imaginative, inventive, and he had all the magistrates of that part of Western Australia, everyone was there, has pride of place in my chambers of Canberra. They are really the people on the cutting edge of law and on the delivery of justice in our country, and I honour the people who work in Darwin, in Broome, in Alice Springs, in the far reaches of this continent; bringing the law and justice to people in all parts of the country.

Now that is what I did, that is as much as you're going to get from me unless we have some questions about inside this view of democracy.

I want to put before you now what I think is as dispassionate a view as I can have of things, where I have had a measure of success and things as Justice of the High Court where I have not had good success, and I leave it you to think of what rate you will give me as a Justice of the High Court. Now you are the judges of the Judge of the High Court. Now let me say 10 items where, I think, I have had some success.

Number one. For all my life, all my life of the past 13 years in the High Court, I have been an independent judge, in an independent court, which has been independent and, according to its view of the case in partial determining, in the case we are here in this courtroom, we are here in a courtroom of independent judges. Take it from me, from my work in the International Commissions of Arbitration, my work in the world, this is not normal. This is exceptional, this is precious, and it is something we must always

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cherish. If we are lawyers, we must be proud to be a part of it. And so, I think, I have played a part. I have never ever had a minister telephone me to tell me how to decide a case, never had somebody at a club (I am not a member of any club, by the way), digging me in the ribs, I haven't had any politicians, any trade unionists, occasionally Mr Murdoch says something in the newspaper, I read that, and I ignored it, that that is a wonderful aspect of being a judge in Australia, and a solicitor, so that's the first thing.

Secondly, I have been polite to the parties. I have been polite to the lawyers, I have been polite to self represented litigants. Self-represented litigants are what really test us, everyone can be polite to Mr Barker because if you're not polite to Mr Barker, then you pay a huge price. Similarly to the Administrator when he was at the bar table, but to be polite to self-represented litigants is when we are tested, and it's hard. And, it's when we were doing special needs, when having hundreds of people who were claiming special needs refugee cases, trying to explain to them that they had to show jurisdictional error. Jurisdictional error now, because I hold judge, I understand and of course it always is then we are tested most. The court order of NSW had been a slaughter house before I arrived and all that I hope changed forever. You don't get the best out of lawyers if you're rude to them; their blood pressure rises. You've got to always remember (and being a solicitor and barrister teaches you), behind the representative is someone who is very nervous this day, and who is depending on you to make a good and fair and a lawful decision.

Number three. I think, I thought, to reject the idea of the Intermediate Appellant Courts. At the time I was appointed in NSW, the court of appeal was the only permanent Intermediate Appellant Court, and since then there is one in Queensland, Victoria, in Western Australia and in the ACT. There is an Appellant Court in this Territory and an Intermediate Court and Family Court, and I think that is a better and more efficient way of dealing with appeals. Justice Priestly served in this Territory, and in fact, Chief Justice French has suggested, I think this is a very good idea, that there should be a full office of commissions so the judges of different parts of Australia can serve for a time in the appellant system. It does mean you don't get any hint, suggestion, or possibility that the appellant judge is going light on a colleague because that judge made their decision and an appeal from them in a few weeks time. And I think it's a better system, but the price of that system, is that the High Court has to respect the intermediate appellant courts. It is not correct to say that the High Court is the only place that can re express and develop the common laws or the statue laws of Australia. Because it just doesn't get enough cases and doesn't do it, won't have time to do it. Therefore it's important that the High Court should recognize the Intermediate Appellant Courts have a role in developing and re-expressing the law and not to criticise them when they do so because that is part of the genius of the common law system.

Number four. I believe that I have contributed to the institutional law reform. I can remember those days when I was first appointed to the CAC; how there was real animosity towards institutional law reform, there was real objection. Chief Justice Young, otherwise a great judge, said that the trouble with the law reformers is that they got a professional investment, it being in favour of reform. But now we can always receive law reform reports, they are usually very useful and well researched material. We use them at work to prep the judges. Many of the Judges at the High Court, Chief Justice French, Justice Heydon, Justice Penfold, have been traditionalists of the CAC. Justice Penfold was also involved with the CAC. So I think it is now not an issue, using the reform, seeing the role of law reform in our system of law is something that is accepted.

Number five. I have always been, partly because of my work in law reform, close to the academic community. The academics are very clever people who have more time usually to think through their consensual problems. Practising lawyers are just so flat out winning a case, that we don't always have the time, therefore there should be no tension here, the academic community looks at the principles, looks at the policies and they help the judges. It's very noticeable in recent years, all the justice's of the High Court and Judges of the Intermediate Court are now referring much more than they ever did when I first started out to academic writing and consensual thinking.

Number seven. I believe that I have played some useful role in an outreach to the media. The media is the way most people get the knowledge about law, for good and ill. Often it's sort of incorrect knowledge, and we have to admit that the way our discipline is reported in Australia, on a whole, is pretty abysmal. But part of the problem is, that judges have not recognized the time difference, the deadlines, the constraints that media work to, and I think learning from my time in the law reform commission, I have played some little part. Not all judges are like those judges in Rumpole, the Judges in Australia, by and large, are earnest, hard working, and democratic people who are doing

a very difficult job, and its important that the community knows that and respects them, because otherwise the judicial ranks won't get the proper support.

Number eight. Purposely, interpretation is something that I was always on about. This idea is taking the statue and just looking at the words. Just looking at them in isolation, was the traditional way that I learnt when I started out on this journey, but now, increasingly - and part of the credit should go to Justice McEwen for saying this - the idea of doing that is now rejected. We have to look at the words, look at them in their context. We have to look at them in context of the statutory history, and why the Act has been enacted. And I think that now, it is pretty uncontroversial, and I played a part of that in the High Court.

Number nine. I always tried to be user friendly in communication. Communication in the law shouldn't be too difficult, I mean, if you read that marvellous decision in the High Court in the Communist party case, it's a wonderful decision, but truly page after page without even a paragraph break, it is cruel, it is a cruel and unusual punishment to read those messages. And so, I introduced at the beginning the statement of the facts that is user friendly. Well I tried to make it so the headings, the sub headings, and the sub-sub headings, and that is useful, because if you are flat out on a case, you are on your feet and something blows up, "what is the authority for that!" Then you can go straight in, look over those paragraphs, they were getting mauled, it's the paragraphs with the sub-sub heading.

And the final point, number ten. And I hope you will let me say this, I think on the issue of sexuality. I have done something useful, something useful for our country, for the law world, and for our profession. One of the most moving things in recent weeks is the number of pages I have received from people. Some of them gay people, many of them parents of gay people, and most of them from straight people saying that they appreciated this step, and its made them think through things now. Don't think that Johan and I don't realize that's it's a little bit awkward, and a bit unusual and a bit of a challenge to what you think to see us around, well you're going to see us around today and tonight. And in a way, you are doing us the honour of adjusting your minds to these things, and once we wouldn't have talked about this up here in the Territory, or anywhere, but I think it has been a good step. It's been a good step for everyone, and anything that is rational and legal and scientific is a good thing for us all to accommodate to and get over it.

Now I'm now going to as candidly as I can, say the things where it wasn't too successful.

Number one. I was not a barrister for long enough. I was plucked from the bar, I was a solicitor for six and a half years and then a barrister for seven years and then I was appointed to the Arbitration commission. People said to me, "Well you must have known you were going onto the Law Reform Commission and then onto the High Court," and well, no, I didn't know that at all. I thought the Arbitration Commission, in those days, was a great national career. People of my age realize with the High Court, it was the only big federal show on in town and it's a very important tribunal. And I had a big practice in the area, including the appellant work in the area, but I never had the practices as a barrister which is a very important and very useful practise to be a really good judge. I was never a QC, my brother David was a QC, he is now a judge of the Supreme Court in NSW. He has a really hard job, a really hard job. I often think to myself, could you do that job? That is really hard stuff and of course I suppose I could do it, but I really admire and honour the people who fight murder cases or big criminal cases and you sit in judgement those things. So, that is something where my life was a bit unusual, I didn't have that experience.

Number two. I was never a trial judge. In most cases, I was an appellant judge. That gave me a particular outlook, which was useful, good, but maybe I would have been a better appellant judge, if I had some time as a trial judge. I did some trial work in the Arbitration Commission and in the Federal Court, but not much, because I was pushed off to the Law Reform Commission and that is a weakness in my career. I recognize it, I have been candid, and that was something where it wasn't all that successful.

Number three. I was really good as a presiding judge in Appellant work and when I was appointed in the High Court and was banished to the far side, only in my dying days am I to be elevated further into somewhere close to the central seat. A Justice of the Supreme Court of the United States told me he had a similar experience. When he was a Chief Justice in the federal circuit, he was appointed to the Supreme Court he said, "Half your personality goes out window when you are removed from that central seat," and I was really good at that. I am a very good chairman, I have to say so myself. I could chair international committees, they keep asking me back. And that is something which I haven't been able to maximise in the judicial branch because, in the High Court, I was on the sidelines, and even then, I asked too many questions because I had been used to asking a lot questions. When you're in the middle, you ask the questions and that was something

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I was good at and did.

Number four. Dissent rates, well they should have dissented for the reasons I have told you. And you have to look at them in the context of all the other things, and frankly I think there probably should be more dissents in other cases. Why aren't there more disagreements in cases which of their nature have been chosen to do, to have special leave. Maybe I should have tried harder to get dissent, buy myself a big finger bun on the weekend and go in and say, "Michael, read these cases and try to agree." Try to agree, and then I'll agree to a decision, and unfortunately I couldn't agree with the reasoning or with the outcome. Now what does a judge do then? Just agree because then life is easier and more convenient, so everyone likes you a bit more, or do you give your honest opinion.

I mean, I do think, Justice McEwen used to say to me in the court of appeal where my dissent rate was only about 12% he used to say, "The president musn't dissent so much, I mean 12%!" Now it's more like 30%, but they still have 70% agreement. And so maybe I should have been better at building consensus. They say Justice William Brennan, from Supreme Court of United States, was a great man for building consensus within court. I would challenge Justice Brennan if he were still around to build a consensus of his liberal views of the constitution in those days. The philosophical differences are important, they are legitimate, and they are legitimate in our look. I never question the integrity and honesty of those who have a different view, but I do think somehow, maybe, I could have done better in that respect. I don't know.

Number five. International human rights. Well I go on about this but I think it's just every time you look on the Internet, every time you go on a jumbo jet, every time you go to a foreign place, every time you speak to judges overseas, you realize the amount you have to think in a bigger dimension. But I haven't really been too successful of persuading others of this view. There have been decisions in Roach, the case of prisoners voting rights, and in that case the majority, and I, did believe in national human rights, but on a whole that hasn't really been accepted.

Number six. I believe I haven't been entirely successful in policy, the consideration of policy in the cases. And in fact, the Administrator showed me a very interesting book which he had been sent, by Rachael Gray on the methodology of the High Court, rather suggesting that the High Court has returned to the legalism of the vixen period though perhaps even more so. And so that is something where that view, which I think is important, hasn't really been accepted.

Number seven. I have to admit by all charges, that I have made mistakes in court, I have made mistakes. I sat in the first special lead up application in Mallard. You know Mallard, Mr Mallard in Perth, Mr Mallard who was convicted by the jury and was convicted on the basis largely by his own statement but also other evidence but subsequently because of pro bono lawyering it was demonstrated beyond doubt, not only was he wrongly convicted, but he was almost certainly innocent. Justice Duncan, who did an enquiry in Perth, has found him innocent. He applied for special leave after the first hearing after his conviction. And I sat with Justice McEwan, with Justice McEwan refusing special leave. And then I asked myself, could I have prevented that? Their argument on that special leave was that the judge had excluded polygraph evidence, and we all know that that is very rarely accepted in our courts. So I don't feel too guilty. But I then asked myself, well if you had spent a bit more time reading that book, would you have seen that it didn't fit together, that he couldn't have been at this part of Perth, at a time when he was in the watch house and another part of Perth at the same time when he was seen in Perth on a camera on a taxi doing a runner.

That was essentially the way in which it was demonstrated, but it just didn't fit together. But that is something that worries a judge, it should worry all of us and so I have made mistakes and for those to whom I have made mistakes, I apologize. I regret it. I also made occasional mistakes in out of court statements, one of the prices you pay if you try and communicators who say things that are in appropriate. For example, in SA they couldn't fit me in the law graduation, so they shoved me in the education graduation. They were all the teachers, so I offered my teachers, and people going on about the time attacking public school teaches. Well my entire education was public school. For a long time I've been the only justice in the High Court who was public school educated beginning to end and I had wonderful teachers. So I said a few things that maybe I shouldn't have said about public education and the funding of private education, but I felt that was appropriate to the occasion of an education graduation; and anyway, I couldn't think of anything else to say to all the teachers! There was an occasion also, where I had referred to the work choices legislation, at one stage and industrial Ayatollahs. That was an honourable miss-choice; you know that was a

mistake. So for all those mistakes, I beg your indulgence. I was trying to communicate and when you do so, you can say the wrong thing but that shouldn't happen, especially to judges.

Number nine. I didn't always get the work-life balance right. I mean, they say when you're on your death bed your not going to say; oh I wish I could go out and write another article for the City Law Review! But, we had wonderful exhibitions in Canberra but I didn't go and see them because I was just to busy working on the law. There is another life outside the law; it's not the only thing in the world, probably not the only thing that enriches the spirit which is a long time dead. So I'm hoping that that will all change.

The tenth thing, which was not at all nice, was the attack in parliament, which was a breach of the relationships between the parliament and the judiciary. And I do think, I may be unfair, but I do think, that that in part became as a reaction to Johan and my decision to be out and open in our sexuality. That upset some people, we understand that that upset some people, but we all have to get over that and get used to that. And so, it was just something that I had to get through, but it wasn't nice, and it was failure in the sense of the constitution of Australia at the time.

So that is the scorecard, quite a few good things. "Michael needs to be more analytical in thought," said one of my teachers, but I think I took that one seriously, and he certainly has pride, he has been very trying, he has done his best but there have been quite a few things where it hasn't really been all that good. And you've got to put that into the balance. Under the constitution, I get the chop on 2 of February 2009, and I say at the end, as I said at the beginning, it's been a wonderful privilege to come here and be with you. I like it up here; I have since my law reform days. I always love coming here, I feel comfortable and welcome here. But it has also been a great privilege to be a judge in the Independent Judicature of the Commonwealth of Australia. And all of us who have worked with, and been associated with it; we all know its faults. Everyone who's a lawyer in this room knows it weaknesses, its faults, its inaccessibility, its costs; it's sometimes impatience, its stresses and pressures. But as a system of justice of the world, it's pretty good, and it's our job to continue that and make it better.

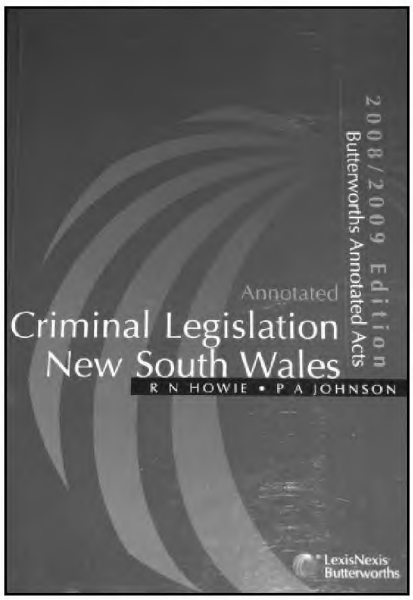
Book Review – Criminal Legislation New South Wales, by RN Howie and PA Johnson

Published by Lexis Nexis Butterworths, 2008/2009 Edition

Review by Mark Johnson, William Forster Chambers

As a novice criminal law lawyer in New South Wales in the mid-1980s, I soon became aware that there were two main reference sources available to criminal law practitioners. The main one was a loose-leaf service (*Criminal Law NSW*) published by LBC (as it then was) - generally referred to as "Watson and Purnell", they being the authors at the time. The other (*Criminal Practice and Procedure NSW*) was published by Butterworths (as it also then was). It was first published in 1968 (by K.J.McKimm). For all criminal law lawyers, it was well accepted that access to either of these publications was a virtual necessity.

In 1989, the Butterworths (now LEXIS-NEXIS) service became loose-leaf (then in three volumes)



with its current authors - NSW Supreme Court Justices Rod Howie and Peter Johnson, who were/are both eminent criminal law lawyers. It soon became the most popular resource for criminal law lawyers.

Criminal Legislation New South Wales was first published in 1996. It is essentially an extract (or drop-out), in one single book (now c.1900 pages), of the four-volume loose-leaf service, *Criminal Practice and Procedure NSW*. However, at an initial cost of c.$2,500, plus annual instalments of a similar amount, this four-volume loose-leaf service does not come cheaply. Compared to that, at c.$70, Criminal Legislation New South Wales is a much more affordable compromise/option. This book has now also established a good reputation with criminal

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