Seven Ages of a Lawyer

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The author traces the seven ages of his life. The first age was as a law student and clerk where he learnt a fascination with the law and an admiration of its institutions. The second age was as a solicitor where he learnt the importance of dealing with and helping clients. The third age, as a barrister, involved intense instruction in the art of advocacy and the task of efficient time management. The fourth age as a law reformer taught the importance of conceptual thinking, and of the way each piece of the law fits into a large mosaic. The fifth age as an appellate judge offered instruction in the possibilities and limits of judicial exposition and development of the law. The sixth age on the High Court has brought home the choices which a final court must make in our system of law and the importance of legal principle and policy in making such choices. The final point is reached in the seventh age when it is realised that all of life's endeavours are nothing without insistence on one's own human dignity. Lawyers as human beings have a duty to uphold fundamental human rights and human dignity.

INTRODUCTION

It is a privilege to be invited to give the Leo Cussen Lecture. On his retirement from the High Court, Sir Owen Dixon lamented that Cussen had not been appointed to the High Court of Australia.[1] Sir Arthur Dean, another fine Victorian judge, considered that, 'by many standards, he was our greatest'.[2] On his death, *The Age* obituary remembered him not only for his great learning as a lawyer and his deep wisdom as a judge, but also for his 'unassuming disposition and kindliness as a man'.[3] Sir Edward Mitchell KC said of him:

> I [have] never met a more lovable nature — a man of robust, manly qualities which he united with consideration for the feelings of others, and a tactful way of doing things which enabled him to get matters adjusted where a more peremptory way may have failed.[4]

In his family Cussen was held in the greatest of affection, regarded by his sons as their faithful friend and counsellor. By every report, he was a man who knew the essence of the virtues of love, compassion and reconciliation.[5] These descriptions of Sir Leo Cussen, the man, got me thinking about the theme for this lecture which honours his name.

* Justice of the High Court of Australia. This article is essentially derived from the Leo Cussen Memorial Lecture presented by the author to the Leo Cussen Graduates' Association at Melbourne, Victoria, on 25 October 1999.

1 (1964) 110 CLR v at x.

2 A Dean, *A Multitude of Counsellors: A History of the Bar of Victoria* (1968) 176.

3 'Death of Sir Leo Cussen: Great Lawyer Passes: A Brilliant Career' *The Age* (Melbourne), 18 May 1933, 10.

4 *The Age*, 19 May 1933.

5 Cf F G Brennan, 'Pillars of Professional Practice: Functions and Standards' (1987) 61 *Australian Law Journal* 112, 113. This was the inaugural Sir Leo Cussen Memorial Lecture.

Sir Leo Cussen died six years before I was born. As a lawyer, I am acquainted with him only through the casebooks[6]. Yet I am encouraged by the contemporary descriptions of him as a man (rather than as a lawyer) to offer a lecture of personal reflections. As the Graduates' Association which sponsors this lecture derives from the Institute which took Sir Leo Cussen's name, and as that Institute is concerned in the preparation of young lawyers for a life in the law, my reflections may be of passing interest to the alumni. My thoughts relate to the stages in the life of a lawyer and the particular lessons that I have learned at each stage of my journey, not yet over.

SEVEN AGES

All the world's a stage
And all the men and women merely players:
They have their exits and entrances;
And one man in his time plays many parts,
His acts being seven ages.

The profession of law is commonly divided into distinct segments. Of course, those segments differ from one lawyer to another, depending upon where life's journey takes him or her. Some may go into government service. Some may enter commerce. Some (alas a declining number) may opt for politics. Some may become actors or otherwise participate in the public media. Some may opt out altogether and become beachcombers. Some, like two notable members of my class at Law School, become experts in wine, giving away the law for the delights of the grape. A few will fall by the wayside and leave the law in disgust (as it is said that the brilliant Jeremy Bentham did).[7] A small percentage will be expelled from the company of lawyers. One or two in gaol hath tarried.

However, the majority of lawyers follow a fairly predictable path. Most (but by no means all) judges will observe a settled road on their way to the judicial seat. Sir Garfield Barwick would frequently tell legal audiences about the stages of his life, contrasting his time as a junior barrister, as a leading Silk, as a Minister and finally as Chief Justice of Australia. I remember vividly how he would always conclude with the assertion that the happiest time for him was when he was a junior barrister — rushing from court to court, learning the vocation of law.[8] It always seemed to me a little sad that such a powerful and influential man looked back, not to his days of achievement and glory but to the days of powerless youth. My career has substantially followed the orderly course of many a judicial life in the law. I wish to reflect upon the seven ages of my life as a lawyer. And upon some of the lessons which I have learned in each of those ages. The lessons are too numerous to mention. In the law, when

6 An often repeated example may be found in the citation of 'Sir Leo Cussen's great guiding rule' as recorded in *Alford v Magee* (1952) 85 CLR 437, 466. See *Melbourne v The Queen* (1999) 73 ALJR 1097, 1125 (Hayne J).

7 H L A Hart, biographical entry on Jeremy Bentham in A W B Simpson (ed) *Biographical Dictionary of the Common Law* (1984) 44.

8 cf Sir Garfield Barwick, *Speech on Retirement* (1981) 148 CLR v at vii

one ceases to learn lessons, it is time to retire. But at each stage in my seven ages, I have learned particular lessons which I wish to share. Of course, I offer them with a proper realisation that the lessons which each one of us learns in the law will depend upon the opportunities that we are afforded. All of us need to learn the wisdom that has not already been imparted to us by our parents, teachers and friends.

ARTICLED CLERK

At first the infant,
Mewling and puking in the nurse's arms.

My family had no connections with the law. I cannot now say what it was that attracted me to law's faculty rather than any other — unless it was a distaste for dissecting rats or using slide rules (the primitive equivalent to the computer). I have told elsewhere of my first encounters with the legal profession.[9] I found it difficult to secure articles of clerkship, despite my good examination passes. I applied to many of the large firms, only to be rejected. I recall that one interview was with Mr Russell Scott, a partner in the firm then known as Dawson, Waldron, Edwards and Nicholls. He received me courteously. But the rejection slip soon came in the mail. It was later to be my duty to interview people seeking appointment as Commissioners of the Australian Law Reform Commission. One such person was Mr Scott. The tables were turned, as often they are in life. As it happened, I recommended that Mr Scott be appointed. So he was. He proved an outstanding colleague and is a good friend. That experience shows how careful one must be with interviews and rejection slips. My experience at that time made me very suspicious of the old boy network that operated in the legal profession. Over the years it has caused me to apply strict equal opportunity principles in the recruitment of my own staff.

Eventually I obtained articles with a small solicitors' firm, M A Simon and Co. Articles of clerkship were duly signed by my father and me with Mr Ramon Burke. He was then a young solicitor. Later he went to the Bar and is now a senior judge in the Compensation Court of New South Wales, nearing retirement.

In my work as an articled clerk, I quickly assumed responsibility for a large number of cases. I was interviewing clients, organising their litigation, sending briefs to counsel, arranging witnesses. In the morning and after work I had to rush to the decrepit building in Phillip Street, Sydney that was the Sydney Law School in those days. These were times before the Sydney College of Law or the Leo Cussen Institute. Experience was learned on the run. The principal lesson I acquired in those years was of the fascination of the law and its endless excitement. As I sat behind the young barristers presenting our client's case to the court, or watched opponents cross-examining and sometimes

[9] M D Kirby, 'Lessons for Life as a Solicitor' (1999) 37 *Law Society Journal (NSW)* 62.

demolishing that case, I learned respect for the law as we practise it. I watched the judges as they struggled to reach conclusions that were lawful and just. I watched them give reasons (usually off the cuff) in language that ordinarily seemed convincing as well as eloquent. I watched civil and criminal juries at work — for in those days the civil jury was much in use in New South Wales. I saw the way that juries of ordinary citizens would usually get it right.

I was constantly amazed in those far off days that more people were not sitting in the back rows of the court, watching as these dramas unfolded. I have never lost my fascination for the law or my sense of respect for most of the players who make it work. Of course there are tedious days where the fascination is elusive. There are occasional players who command little respect. Yet in Australia, by and large, once you get to a court, it strives earnestly to do justice according to law. I realise that getting to justice, and especially getting to a court in a disputed case, is often difficult or even impossible for many ordinary Australians. But once there, the integrity of the players, the absence of corruption, the conscientious endeavour to secure just outcomes are important features of law in the courts that we may take for granted. If anything, I believe that in the time since I was an articled clerk, the concern with substance over form has increased. The willingness to allow meritless procedural objections to succeed, has diminished. So in my time as an articled clerk, I learned a fascination for the law. I learned to appreciate its excitement and endless variety.

SOLICITOR

> *And then the whining schoolboy, with his satchel,*
> *And shining morning face, creeping like snail*
> *Unwillingly to school.*

At the end of my articles of clerkship, and with a good law degree, I began looking for appointment as an solicitor. The principal of the firm, the irascible Mr Simon, asked me to establish a branch office in Newcastle. However, I declined that opportunity. At first I was recruited by Ebsworth and Ebsworth, a leading firm of Sydney solicitors who specialised in maritime and commercial work. But for the hand of fate I might well have continued in that firm. However, Mr Menzies, the Prime Minister, called a snap election in which one of his Ministers, Mr Fred Osborne, lost the seat of Evans. Alas, Mr Osborne was a partner in Ebsworth and Ebsworth. He returned to the fold. There was no room for me. So it was that I began my six years as a solicitor with Hickson, Lakeman and Holcombe in Hunter Street, Sydney.

The principal of that firm was Mr Bruce Holcombe. He had tried the Bar but had not succeeded. He had a strongly developed dislike for barristers (although he made one exception for Trevor Morling, later a judge of the Federal Court of Australia). Bruce Holcombe wanted me to be a kind of in-house counsel for the firm. In that sense, he was ahead of his time. I began appearing in court as advocate for a growing number of insurance companies willing to use a young solicitor in place of Mr Holcombe's unloved barristers. I quickly adapted to the new life. It was very demanding. Returning to the office at the end of a hard

day of advocacy, I had to pick up the threads of my work as a solicitor. I came to realise that, without support within the firm, it is very difficult to combine the life of an advocate with the ordinary life of a solicitor.

In my time with Bruce Holcombe and his colleagues, I learned to respect the work of solicitors. I learned how important it was to listen to clients. The preparation of cases, the taking of statements and the conscientious pursuit of witnesses and of the law by a solicitor will often make or break a client's cause. I came to appreciate how important it was to know the comparative skills of barristers and to choose amongst them for particular problems. I never released the choice of counsel to another barrister or to a barristers' clerk. In my time as a solicitor, I was learning every day the arts of the profession. I learned the premium placed on honesty, integrity and conscientious attention to detail. I never regretted the years I spent as a solicitor. And I have never forgotten those testing times.

Since my days in that office in Sydney, the work of solicitors in Australia has become in some ways more difficult. Protected monopolies of legal practice have fallen away. Medium sized firms have collapsed or been amalgamated. The practice of time-charging rules in many offices. But the most important lesson for me from those years came from looking across a desk at a person with a problem. Never forgetting that I was dealing with a human being who expected that I would be a help and supporter, viewing his or her predicament as more than a cold legal case.

BARRISTER

And then the lover,
Sighing like furnace, with a woful ballad
Made to his mistress' eyebrow.

I was admitted to the New South Wales Bar in 1967. That admission was moved by Mr Antony Larkins QC, later a judge of the Supreme Court of New South Wales. He wore a monocle. He was truly an advocate of the old school. With the decline of civil juries in New South Wales, advocates of his kind have largely faded away. At the very mention of my name in the old Banco Court, he allowed his monocle to fall dramatically to his Bar jacket.

My years as a barrister were divided by two long intervals in which I pursued a fascination for overseas travel. Twice I journeyed overland from Australia to Europe. Many barristers, looking at my brief-filled desk, warned me that my departure for India would be the end of my practice — if not of civilisation as we knew it. I discovered quite the contrary. Each time I returned, my practice changed. My first years involved heavy engagements in compensation and damages cases. The next phase was often before the industrial courts. The last phase involved important litigation, including constitutional, commercial and appellate cases. Often I was led by the great Silks of the time. It is often in the close company of leaders at the Bar that the observant junior will learn the greatest skills of advocacy, of tactics and of juggling the heavy burdens of work and somehow surviving to the end of each week.

I found life as a barrister intense and often highly stressful. The dramas which had seemed so fascinating to the eyes of an articled clerk can become oppressive responsibilities for the conscientious advocate. I could never take the responsibilities lightly. I began a habit of life (followed by many members of the Bar) of working six or seven days each week. Efficiency and the throughput of cases became a kind of emotional reward. The reason for such conscientiousness was not financial. It was the hopeless desire to catch up, to clear the desk, and to respond quickly to the problems that others had put there.

I learned many things in these years at the Bar from the judges, leaders and opponents with whom (or against whom) I laboured. To the extent that it is possible, one learns most of the attributes of advocacy by doing it. Some people are better communicators than others. But ways of doing things can be learned. The Australian Advocacy Institute, nurtured in the Leo Cussen Institute, has played a vital role in teaching advocacy skills; but it was not around when I was at the Bar. After a successful day, there are few lives that seem more worthwhile than being a barrister. Perhaps it was because he had so many successful days that Sir Garfield Barwick looked back with nostalgia to his time as junior counsel.

If I had to single out one vital lesson from my years as a barrister, it would be time management. Keeping one's head above the waves. Putting the tasks in hand in a proper order of priority. Avoiding mental blanks in the work awaiting attention. Conscientiously checking every brief regularly to ensure against the imminent descent of a limitation period. Realising that in the law, the blank page is a major enemy. Problems do not become easier by prevarication. Addressing them and moving onto the next one is the prerequisite of a life at the Bar. Forgetting yesterday's case and concentrating on the new task in hand, is an imperative for professional and emotional survival. I left the Bar in December 1974 after seven years. I was never appointed to the Inner Bar — a disadvantage I share with at least two predecessors on the High Court, Sir Hayden Starke and Sir Cyril Walsh.

LAW REFORM

> *Then a soldier,*
> *Full of strange oaths, and bearded like the pard,*
> *Jealous in honour, sudden and quick in quarrel,*
> *Seeking the bubble reputation*
> *Even in the cannon's mouth.*

At the age of 35 I was appointed a Deputy President of the Australian Conciliation and Arbitration Commission. Within a few weeks of this appointment Lionel Murphy chose me to be the first Chairman of the Australian Law Reform Commission. At a very young age I held a major national office. There had never been a Law Reform Commission for the Commonwealth. There had been State and Territory Commissions. It fell to me and the small team of foundation Commissioners to set up the national Commission. All of the first Commissioners were people of great talent. Mr F G Brennan QC, who was to

become Chief Justice of Australia. Mr Gareth Evans, who later became a Federal Minister and Deputy Leader of the Parliamentary Labor Party; Mr John Cain, who was to become Premier of Victoria; Professor Alex Castles, the leading writer on Australian legal history and Professor Gordon Hawkins, criminologist and humanitarian.

The story of my years in the Law Reform Commission was one of great excitement[10]. I was fortunate that the colleagues in State and Territory bodies soon rallied to support the national Commission. I would single out for particular mention three great Victorian judges — Tom Smith, Sir Oliver Gillard and Clifford Menhennit. I made it the Commission's business to secure the support of politicians of all parties in the Federal Parliament. The most important innovations of the Australian Law Reform Commission concerned the techniques that were used to engage the legal profession and the public in debates about the topics which were referred to the Commission by the federal government. Law reform became a matter of public involvement. In the decade that I spent in the Commission, I worked with some of the finest lawyers in Australia. I saw the magic way in which Mr John Ewens QC, one-time First Parliamentary Counsel of the Commonwealth, translated proposals for law reform into draft Bills for enactment by the Parliament. The Commissioners, consultants, and staff with whom I worked were, virtually without exception, remarkable and highly dedicated. It was an exciting time to participate in institutional law reform in Australia.

Many were the lessons that I learnt in those years. The most important one, I think, was taught to me by one of the first full-time Commissioners, Professor David StL Kelly. He came to the Commission from the University of Adelaide. He is a brilliant intellect. He was famous for blunt speaking. When I presented him with a draft report on breathalyser laws for the Australian Capital Territory[11], it contained a vast amount of data on how the problems in that area had been tackled in countries as far apart as Denmark, South Africa, Canada and New Zealand. Soon after he received the draft, Professor Kelly entered my office and threw the pages of my draft in the air. They fell to earth like confetti. 'We were asked for legal analysis; not a geography lesson', he declared. David Kelly set about teaching me the importance of conceptual thinking in the law.

One of the defects of the common law arises from one of its great strengths. It is a problem solving system of law using a unique kind of legal analysis. It generally moves from precedent to precedent by analogical reasoning. This occasionally results in the clarification of a large legal concept. But often this will be by accident rather than by design. Law reform, Professor Kelly instructed, had to concentrate on the concepts of the law. It had to clarify how a particular situation fitted into the mosaic. Thus, the project on breathalyser laws required not detailed exposition of foreign legislation but a close analysis of the problems to be tackled and the options that were available for doing so.

[10] M D Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (1983).
[11] It became: Australian Law Reform Commission *Alcohol, Drugs and Driving*, Report No 4 (1976).

If foreign laws were to be mentioned at all, it must be in the context of illustrating the alternatives on offer in Australia and arguing their comparative advantages.

This lesson of conceptualisation is one, I hope, that has never left me since that morning in 1976. It is inevitable that my approach to judicial work should have been influenced by my decade as Chairman of the Law Reform Commission. Behind every rule of the common law is a case in which the rule was expounded and also the principles and policies that informed the development of the law to that point.

COURT OF APPEAL

And then the justice,
In fair round belly with good capon lin'd,
With eyes severe, and beard of formal cut,
Full of wise saws and modern instances.

In 1984 I was appointed President of the New South Wales Court of Appeal. The Courts of Appeal and Full Courts of Australia are, effectively, final courts of appeal in all but about 2% of their work. In that sense, they are contingently final appellate courts, ie contingently on the grant of special leave to appeal to the High Court of Australia. This means that lawyers, the judges and the judges of appeal themselves, must conceive of the intermediate court as it in practice is — the last port of call for all but the most exceptional case.[12]

My arrival at the Court of Appeal was somewhat bumpy. There were other senior judges (and some senior barristers) who had legitimate claims upon appointment. Yet institutions are powerful things in the law. When it emerged that I would work conscientiously and conduct the court in an efficient manner, agreeable to the profession, the initial resentment that had existed against my appointment melted away. The Court of Appeal became, and I expect still is, a most agreeable collegiate court. Reading the biographies of Benjamin Cardozo[13], I could see some analogies between the New York Court of Appeals in his time, as he viewed it, and the Court of Appeal of New South Wales in mine. Justice Cardozo often lamented his elevation to the Supreme Court of the United States and described his six years in that Court as an "imprisonment". He missed the variety of the work at Albany which he regarded as infinitely more satisfying, intellectually, than labouring over the sparse words of the United States Constitution. Whilst I do not quite feel the same way about my translation as Cardozo did, I confess to a full understanding of his point of view.

In my work as an appellate judge, I learned that the cross-over from law reform was not quite as radical as some would think. True, an appellate judge

12 cf *DJL v Central Authority* (2000) 74 ALJR 706 at 727 [101]–[108].

13 A L Kaufman, *Cardozo* (1998) 178. See Cardozo's advice to Robert H Jackson noted in C Spillenger, 'Cloistered Cleric of the Law' (1999) 66 *University of Chicago Law Review* 507 '... on this Court there are two kinds of questions — statutory construction, which no one can make interesting, and politics'.

is not free simply to abolish long-standing authority or substitute rules congenial to himself or herself. True also, in at least two out of three cases, the rule to be applied is ascertainable. If established by the High Court of Australia it is binding. The Judge of Appeal then has no choice but to give effect to it.[14] Yet in a number of cases (many of which later went on to appeal to the High Court) the Court of Appeal had a choice. The statue under scrutiny was ambiguous. There was no clearly applicable rule of the common law. Or the suggested rule of the common law had become overtaken by events or by other legal developments[15]. In such circumstances, an appellate judge in our system has an inescapably creative function. He or she has what Professor Julius Stone taught were leeways for choice.[16]

Most members of the community, and not a few members of the legal profession, think that the role of a judge, including an appellate judge, is semi-mechanical. But it does not take long service in the law, and especially in an appellate court, to discover that this is not universally true.

In the New South Wales Court of Appeal there was a great pressure of the caseload. And yet, I believe, very high standards were set by a court of diverse personalities in identifying the applicable rules of law and specifying, where the choices had to be made, the principles that would guide the judges' decisions. All of this was done, in an atmosphere of civility and courtesy, not only to each other and to lawyers but also to any litigants in person who appeared before the court. These were happy days. Arduous, it is true; and disciplined because of the rules binding in many cases, but days affording sufficient creativity to give energy and meaning to life as a judge.

HIGH COURT

And so he plays his part. The Sixth age shifts
Into the lean and slipper'd pantaloon,
With spectacles on nose and pouch on side,
His youthful hose well sav'd a world too wide
For his shrunk shank; and his big manly voice,
Turning again towards childish treble, pipes
And whistles in his sound.

It is premature for me to speak at length of my time on the High Court of Australia. I have now served less than few years on the High Court. According to the Constitution[17] and my birth date, I have nearly nine years of service left. It would be wholly inappropriate to single out particular decisions. The tradition of the judiciary in Australia is that reasons offered by judges for their decisions must speak for themselves. They ought not be elaborated by published second thoughts expressed in memorial lectures. Nor should they need further argumentation, unless provided in later cases where the judge extends the earlier reasoning or confesses to error and recants.

[14] *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403, [17], 420, [64].
[15] Cf *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26, 36–41.
[16] J Stone, *Social Dimensions of Law and Justice* (1966) 649.
[17] *Australian Constitution*, s 72.

Of course, like every appellate judge, I am sometimes in dissent. This is not a badge of honour; but neither is it a mark of dishonour. The dissent is an appeal to the future.[18] It is a feature of the judiciary of the common law which is not shared with all other legal systems. Sometimes, where opinions of mine in the Court of Appeal have been overruled opportunities may present to reconsider those rulings. Recently, for example, the Supreme Court of Canada has held that in some cases administrators are bound in law to give reasons for their decisions.[19] This was a view advanced by me soon after my appointment to the Court of Appeal.[20] It was overruled by the High Court[21]. One day, in the light of developments in the understanding of the common law in other jurisdictions, I may have the opportunity of reconsidering that earlier authority. But I keep an open mind.

In the High Court, more than in the Court of Appeal, I have learned the importance for judicial decisions of legal policy. This does not mean the whim of the Justice or the Court. But it is important to recognise that an ultimate appellate court has responsibilities for legal exposition that are somewhat different in kind from those of other courts. Those responsibilities, in Australia, extend to constitutional elaboration, which presents special challenges in the case of a text (such as the Australian Constitution) that is so brief, difficult of formal amendment and often opaque in its meaning.

A final court must endeavour to bring clarity to the law. Sometimes, it must seek to reclassify legal rules, when appropriate, into new categories that are simpler, easier to apply and more principled. As well as that, a final court has the responsibility, in appropriate cases, to develop the common law and to articulate the principles that will govern the interpretation of legislation and the elaboration of the Constitution.

I venture to hope that an interpretative principle which I have offered in a number of cases[22] will be accepted in due course by the High Court. This principle would hold that, in a case of ambiguity, it is permissible, indeed essential, to construe an Australian statute and the Constitution itself in a way that would resolve ambiguities consistently with the norms of universal human rights law. The reconciliation of international law (including the international law of human rights) and municipal law is one of the major challenges which the Australian legal system faces in the coming century. It is essential that a final court of appeal should keep its eye on the past, and the great body of authority and learning that comes with the casebooks. But it is also important that such a court should look to the future. It should seek to understand the large trends that are occurring in society and the major challenges that face the law in its jurisdiction. In Australia, a comparatively small legal jurisdiction by

[18] See Lord Steyn in *Fischer v Minister of Safety and Immigration* [1998] AC 673 cited by Thomas J in *Neumegen v Neumegen & Co* [1998] 3 NZLR 310, 321 noted [1999] *New Zealand Law Journal*, 305.

[19] *Baker v Minister of Citizenship and Immigration* [1999] 2 Can SCR 817.

[20] *Osmond v Public Service Board* (NSW) [1984] 3 NSWLR 447.

[21] *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656.

[22] *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, 657–62; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417–419, [166]–[167].

the world's standards, it is specially important to keep in mind significant legal developments that are happening in other countries, especially countries of the common law. There is always a danger in a small jurisdiction of succumbing to parochialism and an inward looking attitude to the law. Rescue lies in ensuring acquaintance not only with legal developments that are occurring in other countries of the common law but also in the legal systems of the countries of the civil law tradition and in international and regional courts and tribunals.[23] The latter have an increasing importance which is acknowledged by the frequent use to which their decisions are now put by the High Court of Australia. In the past we were saved from myopia by our link, through the Privy Council, to the great legal system of England.[24] That link has gone. But I have learned from my experience in the High Court how important it is to retain contact with the major world systems of law. Comparative jurisprudence and international law will have an increasing significance for Australian lawyers of the future. This much, and more, my service in the High Court has taught me.

HUMAN RIGHTS

I reach the final stage. The Christian hope is life everlasting. On the other hand, Buddhism would have it that we are on a journey, doomed to be repeated until we finally reach the peace of Nirvana — a state of supreme enlightenment bringing total awareness of one's own condition and that of humanity.

Largely by chance I have had the opportunity to serve in a number of international posts connected with the pursuit of human rights. The common law usually reflects the principles of human rights. In the future, it will do so under the stimulus of the decisions of courts and also bodies such as the Human Rights Committee of the United Nations.[25]

The first complaint to that Committee, after Australian subscribed to the First Optional Protocol of the *International Covenant on Civil and Political Rights* was made by Nick Toonen of Tasmania. His complaint, as a homosexual man in Australia, that the *Criminal Code* of Tasmania interfered in his enjoyment of fundamental rights under the Covenant was upheld by the Committee.[26] It led to reform of the last of Australia's laws which rendered criminal the sexual conduct of adults although they were consenting and acting in private.[27]

In March 1998 I asked *Who's Who in Australia* to introduce a new category to permit people to acknowledge their partners (p) — long term companions of either sex to whom they were not married (m). This was agreed by the editor. In November 1998, the edition for 1999 was published. It contained, in

[23] cf *Perre v Apand Pty Ltd* (1999) 73 ALJR 1190 at 1243, [273].
[24] F C Hutley, 'The Legal Traditions of Australia as Contrasted with Those of the United States' (1981) 55 *Australian Law Journal* 63, 69.
[25] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42.
[26] *Toonen v Australia* 1 Int HumRts Reports 97 (No 3, 1994) reproduced in H J Steiner and P Alston, *International Human Rights in Context: Law Politics, Morals: Text and Materials*, (1996) 545–8.
[27] *Human Rights (Sexual Conduct) Act 1994* (Cth).

my over-long entry, an acknowledgment of my partner of thirty years, Johan van Vloten.

This entry was not noticed by the Australian media until April 1999. When it was, most of the coverage was factual; some of it even supportive.[28] But letter writers to the press urged that, to restore respect and confidence to the Bench, I ought to be removed from office; that I ought to be prosecuted; and that by admitting my 'liaison', I had evidenced how far moral standards had sunk.[29] One commentator asserted that 'no matter how much the Oxford Street friends of Dorothy may wish, "p" can never equal "m"'.[30] He mused on what he saw as an admission to "breaking the federal and state laws regarding homosexual relations".[31] Another journalist demanded "did he prima facie break the law at the time by participating in a homosexual relationship".[32] Such commentaries pass for serious journalism in contemporary Australia.

The lesson I learned from my work for international human rights was this: working for the human rights of disadvantaged people or people suffering from discrimination is a moral obligation. It is especially an obligation for lawyers whose calling inescapably involves them in the use of state power. When opportunities to do something arise, it is a privilege to respond. The response may, by chance, involve, as it has in my case, constitutional reform in Malawi or labour law in the new South Africa. It may concern defending the rights of people living with HIV/AIDS. It may relate to protecting privacy rights in the context of international data flows. It may concern human rights and the human genome.

But these activities, worthy as they are, cannot excuse the lawyer — or anyone else — from upholding that person's own human dignity and basic rights. Silence about one's own human rights, in the name of modesty or politeness or saving the embarrassment of others, is not excuse enough. For centuries people have been playing the game of shame over human sexuality. That game was long reinforced, in countries such as Australia, by criminal laws which invaded the bedrooms of adults, and promoted in virtually all, an undeserved feeling of inferiority and deep unworthiness.[33] It led to serious problems of suicide which persist in Australia to this day, especially amongst the young.[34] There are of course still some in our society who would wish to perpetuate those feelings. Astonishingly, some of them masquerade as religious people.[35]

[28] P Clark 'Few Blink as High Court Judge Kirby Goes Public on Homosexuality', *The Age* (Melbourne), 19 April 1999, A4; M Gibson, 'Coming right out with style', *Daily Telegraph* (Sydney), 21 April 1999, 10; B Lane and L Slattery, 'Without Prejudice', *Weekend Australian*, 20 April 1999, 15.

[29] F E Vagg 'Kirby Must Go', *Daily Telegraph* (Sydney) 30 April 1999, 12; C M Reid 'Life Choice' *Sydney Morning Herald* (Sydney), 26 April 1999, 12; A De Angelis 'The Judge Outside the Law', *Daily Telegraph* (Sydney), 5 May 1999, 12.

[30] P Akerman '"P" Marks a Spot in History' *Daily Telegraph* (Sydney), 22 April 1999, 11.

[31] P Akerman, 'Are All Men Really Equal Before the Law?' *Daily Telegraph* (Sydney), 29 April 1999, 11.

[32] G Milne, 'High Court Pushed to Brink of Abyss', *Australian*, 21 June 1999, 13.

[33] J Jose, 'Drawing the Line: Sex Education and Homosexuality in South Australia, 1985' (1999) 45 *Australian Journal of Politics & History* 197, 208–9.

[34] C N Kendall, 'Killing Me Softly' (1999) 12(6) *National AIDS Bulletin*, 10.

[35] See report of discipline against religious personnel in Maryland, USA who initially declined to acknowledge that homosexuality is 'intrinsically evil'.:C Murphy, 'Judgement Day For a Priest' Washington Post (Washington, USA), 7 August 1999, C1.

Some of them are in the law. Discrimination on the basis of sexuality is an important human rights issue; but only one. Lawyers who are committed to a vocation concerned with equal justice for all under the law, must resist unjust discrimination. They must help rid the law of its residuum of legal injustice. This applies whether the discrimination rests on a person's gender, race, genetics, age, sexuality or other like ground.

I received many letters following the media disclosure of my entry in *Who's Who*. A judge wrote that my step was 'another contribution to the development of Australia as a liberal democracy ... not without considerable personal risk in a world where liberal reform seems on many fronts to have stalled'. A senior churchman wrote: 'The entry will be an encouragement and comfort to those who take a stand against homophobia in the Church and the community' From India, a student emailed me with the instruction to 'stand tall ...'. An Australian police officer (later a volunteer serving in East Timor) wrote:

> 'Young gays and lesbians have frequently lacked role models in what can still be a hostile society ... The visibility of successful, happy people making a useful contribution to the community is one of the most important ways to change attitudes and to give hope to the young. A person's sexual orientation should be unremarkable and indeed an irrelevant factor in the performance of their public duties.'

And a young gay lawyer of considerable attainments wrote to thank me:

> 'So often I felt that if I worked harder than anyone else and achieved all the external indicia of success, no one would be in a position to judge me. But what you have shown me is that there is much more beyond self-protection ...'

These then, are some of the lessons I have learned in my life as a man and as a lawyer. Excitement in a profession that offers great opportunities and challenges, and significant chances of public service. Attention to the legal and human needs of clients with legal problems. Efficiency in the performance of professional duties. Conceptualising and reconceptualising the law. Treating everyone, no matter what the pressure, with courtesy and respect. Accepting the responsibilities of developing the law, as judges and lawyers of the common law have done for centuries. Doing so in the face, sometimes, of ignorant attacks. Seeking to explain to others the genius for adaptability that is our legal system. Acknowledging honestly the policy choices that have to be made in adapting the system to a time of rapid social and technological change. Standing up for the human rights of others, in Australia and anywhere else when the opportunity presents.

And finally, in the dignity of one's own existence — not as a judge, nor as a lawyer, not even as a citizen but as a human being — standing up for one's own humanity and dignity. And doing so before the ...

> *Last scene of all,*
> *That ends this strange eventful history,*
> *Is second childishness, and mere oblivion,*
> *Sans teeth, sans eyes, sans taste, sans everything.*