An interview with the Chief Justice of NSW,

The Hon. J J Spigelman AC

By Justin Gleeson S.C.

The Hon. JJ Spigelman AC and the Editor.

Gleeson S.C.: Chief Justice, thank you for agreeing to being interviewed by *Bar News*. Your predecessor Chief Justice Gleeson was interviewed in 1988 shortly after he had taken office and then subsequently mid-term in 1994. We thank you for giving *Bar News* this interview.

Could I start by taking up one of the points you mentioned on your swearing-in, that you would now be dedicating your life to the law to a degree that you had managed to avoid up to that time. A quick glance at the Supreme Court web-site shows that you have been prolific in the speeches that you have delivered since taking office. Could you tell us where you see the role of public address as fitting with your office as Chief Justice?

Chief Justice: I regard the institutional position of the Court as critical to public confidence in the administration of justice. Obviously the primary way that is maintained is by the judgements of the Court on a day in, day out basis. However, there are many occasions on which public perception of justice is best served by engaging in or contributing to some kind of public discussion. Almost all of them are legal occasions, but not exclusively so.

Law and the market

Gleeson S.C.: One of the addresses you have given recently was the 14th Lionel Murphy Memorial Lecture which you entitled 'Economic Rationalism and the Law'. The topic of the market and its intrusion into legal institutions is one that has been of interest to you for some period of time. Could you indicate where your thinking on that topic first developed?

Chief Justice: I have Economics Honours qualifications from university and regard myself in many ways as economically literate. Most people would probably regard me as an economic rationalist. However, the application of market principles has gone beyond the area which I think is appropriate, particularly in the area of legal structures and institutions - by that I mean both courts and the profession. If taken too far it may threaten, in some respects, fundamental values of the administration of justice. The purpose of various comments I have made on that subject, of which that is the most recent, is to indicate that there is a line beyond which economic market ideology has nothing useful or interesting to say.

Gleeson S.C.: In that speech and others you have referred to the schools of law and economics which are very firmly established in the United States. Do you see in our universities there is a similar school of law and economics which has been strengthened by court decisions in Australia?

Chief Justice: Nothing like to the extent in the United States, but obviously anything from the United States has an influence here. Quite a number of Australian academics have studied in the United States. It is an approach to jurisprudence which I personally have not found very fruitful, but I can't say that I am as familiar with it as, no doubt, some Australian academics would be.

Gleeson S.C.: What of Richard Posner, now a Federal Court judge in the United States, who, although one of the foremost advocates of that school, has on occasion acknowledged some of the values of the English, Canadian or Australian legal systems, which cannot be reduced solely to economics?

Chief Justice: I think he acknowledges that in some respects the American system can't be either. Posner is a great polymath and what he writes is always worth reading, except in areas where he talks about the economics of rape and the like.

Gleeson S.C.: Just finally on that speech, there is a section in it where you describe some of the views that you have expressed on the importance of historical continuity in our government and legal institutions as being a conservative position. Does it trouble you at all to have to acknowledge that your views are conservative on this matter?

Chief Justice: No, it doesn't trouble me. I don't know if you are referring to my dim distant past when I may not have always been as conservative on many issues as I am today. I think part of my institutional position involves a requirement to advance a conservative position with respect to the administration of justice. I don't think it is the job of a Chief Justice to be in the forefront of radical reform.

'I don't think it is the job of a Chief Justice to be in the forefront of radical reform.'

The late Charles Perkins

Gleeson S.C.: Could I then ask you about the public address which you gave at the recent moving State Funeral for Charles Perkins. Could you tell us about your relationship to Charles Perkins and your feelings about his life and the passing of his life?

Chief Justice: As I said in the address, Australia is a better and a fairer place for his life. He made a very significant contribution to this country, particularly the contribution to his own people, but also in combating racial discrimination generally and encouraging understanding of other groups of people. My own association with him goes back to the early days in university in the Freedom Ride. It was a period of my life which I recall with great fondness, and it was the period which first drew Charlie to national prominence, a position which he never relinquished. I wasn't as close to him over the entire 35 years as I was at that stage, but we maintained a personal contact throughout.

Aspects of the office

Gleeson S.C.: If I could then ask you some questions more closely related to your first 2½ years in office, what are some of the major areas where you have been devoting your energies in that period of time?

Chief Justice: The major area is the writing of judgements. I thought I would enjoy that intellectual process and I do. Within that area, I think I have found the greatest degree of new intellectual stimulation from sitting in the Court of Criminal Appeal. I had a limited criminal practice at the Bar. I have found that the work in the Court of Criminal Appeal is wide ranging, stimulating and in many respects new. I am assured by my predecessor that this might change. The job also carries with it an administrative and policy type of role which I have found interesting, but not as intellectually exciting as judgment writing.

Gleeson S.C.: How does your time balance out between the Court of Appeal and the Court of Criminal Appeal?

Chief Justice: I probably spend about the same amount of time in each. The administrative and policy load fluctuates during the year. It is about a third of my time.

Gleeson S.C.: Would it be your intention ever to sit in trials at first instance?

Chief Justice: I have no present intention of doing so. My predecessor did on a number of occasions and I may well, but at the moment I have no plans to do so.

Acting Judges

Gleeson S.C.: The topic of acting judges has been a vexed one. The Bar has taken a consistent stance of opposition, but the force of Government and necessity has led to many acting judges sitting on the Court of Appeal, on the Supreme Court and also on the District Court. Where do we stand on this issue for the immediate future?

Chief Justice: At the present time, for some years now, and for some the foreseeable future, I expect the only persons to be appointed as acting judges, at Supreme Court level, will be retired judges, either of this Court or of the Federal Court.

Changes to the Court Rules

Gleeson S.C.: One of the changes that you, not single-handedly, but largely, have brought about is amendments to the Court rules, including rules designed to make justice 'just, cheap and efficient'.

Chief Justice: 'Just, cheap and quick'.

Gleeson S.C.: Thank you for the correction. And also some changes relating to the ability to make cost orders against practitioners personally. Could you comment on where you see those changes have taken the system, or where they are likely to take the system?

Chief Justice: I think we are moving in the right direction in the sense that a number of decisions have

been made and there is a growing awareness of the new rules. I don't maintain close monitoring of the number of such decisions, I simply become aware of them from time to time in the normal course. There seems to be a greater preparedness on the part of judges, and I believe practitioners, to understand that there is a very real problem and cases have to be run as efficiently and expeditiously as possible. As for the cost orders against practitioners, as you know, for a long time there have been rules which permitted that. A few amendments were made to those rules at the beginning of this year. There have been a number of orders made under those rules, although I don't monitor in any way the frequency with which orders of that character are made. It's a power which will coincide pretty well, I think, with the Bar's own adoption of new advocacy rules with respect to matters of this character. I would have thought that if a person is obeying the Barristers' Rules, they wouldn't run any risk of an order as to costs.

Court Technology

Gleeson S.C.: Our readers will be comforted by that. Could I move from that draconian subject to the question of technology? We have at least one court in the Supreme Court which has been set up as a technology court, and a great deal of effort and cost is spent in large cases in equipping them to be conducted in an efficient way with computers. However, are we still in a halfway house where there is a very lengthy duplication of the material through the paper? Can we really hope to move to a stage where large trials will be conducted with virtually no paper at all?

Chief Justice: I doubt if it will move to that point because the familiarity of many practitioners with paper will continue to make that the preferred form of handling information. There is no doubt that a very large volume of what is now produced in paper form can be more efficiently dealt with in electronic form. In all cases, however, there is a core bundle of documents that you have to go back to again and again. I anticipate for the foreseeable future most people will continue to require that in paper form.

Technology in court is not something that we have adopted as effectively as we should have. For a large number of uses, particularly information retrieval, I think Australians are extremely well served by a range of services of an electronic character, both CD and online. There is nothing remotely like that in England. By and large I don't think that what they have in the United States is of any higher quality or greater breadth.

In terms of the actual conduct of the trials, I think there is a lot more use that can be made, particularly in lower courts, of video conferencing, and the remote taking of evidence from all sorts of people like police officers and even medical practitioners. This would substantially improve the efficiency of the overall system in the sense that it will minimise the cost which the legal process imposes on other parties. We are only starting off with that. We do a lot of that already here in terms of bail applications. To a substantial extent evidence of witnesses is taken by video in the civil proceedings. That will become more common for a whole range of uses where currently face to face meetings and hearings occur. It could be used for directions hearings, as well as witnesses.

The other area in which we really have to develop a system is in the transition to filing and handling documentation in electronic form, right throughout the system. We are not as far advanced in that here as I believe we should be. Where the real efficiencies however will lie is when electronic files within courts are common throughout the court structure in the sense that a case starting in the District Court will have an electronic file created and that file may come to the Court of Appeal or the Court of Criminal Appeal. Once we get to that stage, when we aren't re-opening files at each stage up the hierarchy and when persons can file documents in court without having to deliver them by carrier pigeon, then I think some very real efficiencies to the system will occur.

They won't be efficiencies to the court. The court is not going to be saving any money, but it will be a substantial advantage in terms of reducing the amount of resources that the court demands be expended by litigants and by practitioners.

Gleeson S.C.: In the area of electronic filing, are there other countries or jurisdictions which are truly ahead of us and have implemented these systems, or are we at the forefront of what is developing?

Chief Justice: There are some in the United States. The Federal Court of Australia has a staged plan for implementing electronic filing. Other States have advanced plans for electronic filing, I think West Australia will be online before we will be. It's a direction which technology will inevitably drive us. The efficiencies are so clear that we just have to adapt and go in that direction. It is something that I would hope there can be some national perspective on and there is already discussion amongst courts and at the level of the Chief Justices Council to ensure some degree of uniformity. I would expect that Australia would be in the forefront of that with the United States. I think Singapore is quite advanced in that as well, and there may be a few other nations that have done so. But we are well ahead of, for example, England on all matters of this kind.

Gleeson S.C.: Speaking for a moment with your economic rationalist's hat on, assuming Australia develops such technology or other efficiency advantages, do you think we are more likely to see litigation associated in some way with the region being brought in Australia, as opposed to perhaps Singapore, Hong Kong, Malaysia or other such countries?

Chief Justice: We have a lot to offer in that regard. One of the difficulties we face is that it is so easy also to go to London or Paris for these purposes. In terms of dispute resolution the region's propinquity isn't of such great significance. It may be with respect to other services, where speed and immediacy of access is more significant. I would expect that we can develop the real strength that we have in terms of the quality and independence of the profession and of the judiciary and other forms of dispute resolution, particularly commercial arbitration. Our strength in that will, in a

sense, make us an exporter of services. I know that a number of people think that can be quite significant. I must admit I have no feeling about how significant it could become in terms of developing the profession and the infrastructure for alternative dispute resolution on a regional basis.

Gleeson S.C.: One of the other matters you mentioned a few minutes ago was the increasing use of video conferencing. Many traditional barristers would probably subscribe to the view that for a difficult cross-examination, one involving credit or taking longer than an hour or so, they would be significantly disadvantaged by doing that over the television screen.

Chief Justice: There is no doubt that is right. If there is any difficult questioning then video conferencing, save in exceptional circumstances, is not an alternative one should consider. A lot of evidence is not of that character. I am thinking particularly of the mechanical rote evidence that police frequently give in magistrates' courts, where there is never any cross-examination and never likely to be any cross examination. That is the kind of thing that I think is particularly appropriate for video presentation.

The Hon. J J Spigelman AC

Sentencing Regimes

Gleeson S.C.: You recently gave the opening address at the seminar at New South Wales University in relation to mandatory sentencing. In that address you made the points that the existence of the sentencing discretion is an essential component to the fairness of our criminal justice system; and that practical experience over centuries has led to the conclusion that the difficult process of weighing and balancing the various considerations (including deterrence, rehabilitation, denunciation, punishment and restorative justice) is best done by the impartial, experienced professional judge. With that in mind, the Court of Criminal Appeal has now delivered sentence guidelines in a number of areas. Where do you see the role of sentencing guidelines fitting with the importance of the broad discretion of the trial judge?

Chief Justice: Sentencing guidelines are expressly, and each of the decisions have said so, not binding in any formal sense. They don't have to be followed. However, what a guideline does do is to bring together what an appellate court believes is the relevant range in a quantitative sense or the relevant list of considerations, when a qualitative guideline. They don't in my view bind a sentencing judge in any formal way. I regard them as completely consistent with the existence of the wide ranging discretion. What one hopes they do is to provide a set of guidelines which indicates to sentencing judges that if they sentence outside those guidelines, then the Court of Criminal Appeal will be looking very carefully at why that has been done. The feedback I get from sentencing judges has been that the guidelines have been generally welcomed for providing guidance of a non-binding character.

They contrast with the kinds of statutory regimes that were under consideration at the conference.

Gleeson S.C.: One of the points that you made about the statutory regimes is that to some extent they are encouraged by the inadequate reporting one receives through the media of the sentences which day in, day out are imposed in a careful fashion by sentencing judges. Indeed, you lamented that, although there is an important task of educating the public about the actual level of sentencing imposed, the media with its understandable focus on high profile cases fails to inform the public about what judges are actually doing in the normal line of case. Is there any role for the courts, through their media officers, or for any other branch of government, to attempt to more accurately inform the public about the good work done?

Chief Justice: I would hope that there are such means. I do not know what they would be myself, but I wouldn't expect that they could successfully compete with the populist rhetoric that is overwhelmed by individual cases. It is an area in which people can and will and always have differed. The most one could expect in sentencing in any particular case is that the proportion of the population that thinks a sentence is too high is something like the proportion of the population that think it is too low. The public thinks that the judiciary sentences in a lenient fashion to a degree that is simply not an accurate reflection of what actually happens in sentencing practice. How one gets across the normal run of actual sentencing to the public is something that I don't really know. The only thing I can suggest is that the statistics of what actually happens in sentencing be distributed on a regular basis and one hopes that they become more generally known.

Judicial Workload

Gleeson S.C.: One of the points that your predecessor made when he was interviewed in 1988 was that notwithstanding his extensive experience as a barrister, he did not fully appreciate the workload of many of the judges, especially in the Court of Criminal

Appeal with the number of appeals listed every day. Is that a matter which also took you by surprise?

Chief Justice: Yes. Although I had at the Bar appeared in the Court of Criminal Appeal on a few occasions, it was not enough to really get a feel for it. I now have a better understanding of the workload. I have witnessed the quite extraordinary amount of work that the judges are called upon to do. Plainly, as with barristers, some do it more quickly than others, some are able to produce a number of judgments in a small period of time, exactly the same as barristers with opinions in that respect. However, the pressures are quite unremitting. A significant concern, particularly for intermediate appellate courts, is whether or not the pressures are such that there is insufficient time for reflection. It is a difficult balance.

Gleeson S.C.: Is there an ever increasing problem with New South Wales, being the most populous and litigious State in Australia, with a vast amount of appeals necessarily coming to a limited number of judges who can hear them in the Court of Appeal?

Chief Justice: We have made progress with the backlog in the Court of Appeal. What has happened in the Court of Criminal Appeal is that there have been two significant expansions in recent years. In 1998 there was a very large blow out in the number of appeals. This year the number of appeals has increased again by ten per cent, so that the Court of Criminal Appeal has to sit more. From next year and for the foreseeable future the Court of Criminal Appeal will be sitting continuously. That means that the Common Law division judges will be sitting more often than they have in the past. The Court of Appeal judges will now sit more often in the Court of Criminal Appeal than in the past. We have to adjust in that way because the workload in the Court has increased substantially over the last three years.

Barrister to Judge

Gleeson S.C.: How have you found the transition from the life of barrister to the life of a judge and Chief Justice?

Chief Justice: Well it now feels a substantial time ago. I do recollect a precipitous decline in the quantity of scotch and there is no doubt that the camaraderie of a floor of barristers is not replicated in judicial life. That is not to say there isn't some social interaction, but it is not as regular or as intense as I fondly recollect the Bar was. It is lonelier.

Medieval history

Gleeson S.C.: You have delivered a number of addresses on various topics displaying your continued interest in medieval history, including a first and a second lecture on Becket and Henry II. You have also delivered a speech in May of this year to the Seldon Society on the succession at York in the 12th century. For those who know you, that would be no surprise. But for others, could you explain a little of where your interest in medieval history was first nurtured.

Chief Justice: I decided long ago if you try to read everything you learn nothing. So I specialised in one or two subjects and researched them in depth and this happened to be one. There is no particular reason why it emerged, rather than others. When I gave myself a sabbatical from the Bar in 1992 I went to England. We were away some seven months in total and I wrote a first draft of a book on Becket. It was not really a book, it was organised research notes. It has never seen the light of day until John McCarthy asked me to address the Thomas More Society. I told him that actually I would address the society but on a very specific subject. So one lecture has now become a promise of five. The lecture to the Selden Society was really the introductory chapter to the background of the Becket story. It is a hobby and I thank the Thomas More Society for allowing me to indulge it from time to time.

Gleeson S.C.: Where did you find in Sydney the primary sources and the materials to draw upon?

Chief Justice: I am quite confident that no new primary sources have been discovered for several centuries now. I don't expect any surprises in that. But many are available in Sydney because there was a time when our libraries bought virtually everything published in England. There were other sources, particularly translations which were not available here, but which I was able to pick up on various overseas trips at various libraries. This research project has been going on for about 15 years and in that time I have looked at libraries in Paris, New York and London and various other places.

Bill of Rights

Gleeson S.C.: Just finally, the topic of the Bill of Rights for New South Wales is one which you are now regarded as having had a significant role in instigating. You must be tempted perhaps following the introduction into law of the *Human Rights Act 1998 (UK)* on 2 October 2000 to make further comment on that issue. Is that something that is appropriate for you to do in your office as Chief Justice?

Chief Justice: I think I will resist the temptation at this point. But may I say this, it was the introduction of the English Act in 1998 that led me to indicate that Australia would lose England as a source of inspiration and of precedent once this Act was implemented and that that would happen across a very wide area of the law, not just the criminal law, but administrative law and many aspects of civil procedure, also family law and industrial law and various other areas. So it was that event which prompted my interest in the subject a few years ago. There is a parliamentary committee looking at this. It is now primarily a political process and looks as if it might take some time.

Gleeson S.C.: Since I have received a cautious answer to that last question, I won't ask my final question which concerned a matter dear to the heart of barristers, namely the recent House of Lords decision concerning advocate's immunity from suit. Thank you, Chief Justice.