

**Index to compilation of speeches delivered by
the Hon. J J Spigelman, AC, Chief Justice of NSW in 1998**

Date speech delivered	Description	Page number reference within pdf compilation
10 December 1998	Rule of Law: Human Rights Protection	Page 2 of 33
5 December 1998	Sydney Grammar	Page 6 of 33
15 October 1998	Address to PIAC and PILCH Anniversary Dinner	Page 9 of 33
12 October 1998	New Approach to Criminal Sentencing	Page 12 of 33
7 September 1998	Foundations of Administrative Law - 1998 SPANN Oration - Institute of Public Administration New South Wales Division	Page 14 of 33
26 August 1998	Launch of the Australian Law Reform Commission's Report - Australia's Federal Record: A Review of the Archives Act 1983	Page 23 of 33
20 August 1998	New South Wales Ethnic Affairs Commission - Second Annual Oration	Page 25 of 33
25 May 1998	Swearing In Ceremony of The Honourable J J Spigelman QC as Chief Justice of The Supreme Court of New South Wales	Page 27 of 33

[Print Page](#)[Close Window](#)

Rule of Law: Human Rights Protection

Address by the Honourable JJ Spigelman
Chief Justice of New South Wales

The 50th Anniversary of the Universal Declaration of Human Rights National Conference
Human Rights and Equal Opportunity Commission
Sydney 10 December 1998

Rule of Law - Human Rights Protection

I have been asked to speak for fifteen minutes on a subject on which there is an enormous literature. I have decided to concentrate on one theme and to make one suggestion.

The theme is the recent enactment of the *Human Rights Act* by the Parliament of the United Kingdom, which incorporates the European Convention on Human Rights. The most interesting feature of this legislation from Australia's point of view is that it adds to the range of models for the incorporation of human rights values in domestic law.

Such incorporation can be effected with varying degrees of legal force. The most fully entrenched provision is a Bill of Rights, incorporated in a Constitution which overrides legislation. A level of entrenchment somewhat below that form is found in the Canadian Charter of Rights and Freedoms. That Charter provides constitutional protection but does allow the legislature to exempt a particular enactment by means of a "notwithstanding" clause.

The next level down in terms of entrenchment is to incorporate human rights values in legislation in a form which does give direct rights (such as the *Racial Discrimination Act* of the Commonwealth) and which, in a federal system, has significance by overriding State legislation.

Finally, there is the model of ordinary legislation, capable of amendment by the Parliament. Such legislation affects other Acts of the same Parliament by a process of reconciliation of inconsistencies through statutory interpretation. Examples of a specific character include the *Racial Discrimination Act* vis-a-vis the Commonwealth. Examples of this model of general application include the Canadian Bill of Rights of 1960 and the New Zealand Bill of Rights of 1990.

Ordinary legislation incorporating human rights norms may modify the law of statutory interpretation. This represents a logical development of the common law. Insofar as the common law has protected human rights in the past, that protection has been secreted within the law of statutory interpretation. I refer to the operation of presumptions such as that legislation does not violate the rules of international law; that legislation does not interfere with the equality of religion; that legislation does not alienate property without compensation; that legislation does not invade common law rights, eg protections against self-incrimination, the right of freedom of expression, the right to natural justice, the right to personal liberty, the right to trial by jury and the right of access to the courts.

The first provision of the British *Human Rights Act* 1998 to which I wish to draw attention in this context is s3(1) which provides:

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

There is in prospect a considerable body of case law around the phrase "so far as it is possible to do so". It bears some resemblance to the provision of the New Zealand *Bill of Rights Act*, which requires the Courts to construe other legislation consistently with the protected rights, "wherever an enactment can be given such a meaning".

The White Paper for the British *Human Rights Act* makes it clear that s3 is not limited to the identification of what might be called an “ambiguity”, namely the use of words which are capable of more than one meaning. It will also apply to read down general words so that they are not given their widest or, perhaps, even their usual meaning. There is in the common law of statutory interpretation a similar principle, where giving words their widest meaning would conflict with a fundamental principle, which Parliament is presumed not to have intended to infringe in the absence of irresistibly clear language. Section 3 of the *Human Rights Act* 1998 may go further if a test of “impossibility” is strictly applied.

The second innovative feature of the *Human Rights Act* 1998, to which I wish to draw attention is contained in s4. This empowers British Courts to make a declaration of incompatibility between a Convention right and a statute. Where a declaration of incompatibility has been made, a Minister of the Crown may take steps to make amendments to Acts of the Parliament, which the Minister “considers necessary to remove the incompatibility”. Such “remedial orders” by a Minister may be retrospective and accordingly have effect on the case in which the declaration of incompatibility was made.

Such orders require approval by resolution of each House of Parliament. However, there is provision for a Minister to make a declaration in the remedial order that “because of the urgency of the matter it is necessary to make the order without” such approval. In the latter case, the order ceases to have effect, but not retrospectively, if both Houses do not subsequently approve the order.

Obviously there is a range of permutations in this legislative scheme which give rise to important issues in terms of the relationship between the executive and the legislature. However the basic idea of a declaration of incompatibility, with a possibility of retrospective amendment of legislation on a fast-track basis, is a significant innovation. It represents a form of incorporation of international human rights norms in domestic law of a stronger character than incorporation by means of amendment of the law of statutory interpretation, albeit not as strong as incorporation in a Constitution. For those who are concerned about the way in which a Bills of Rights shifts the balance of authority between the judiciary on the one hand and the legislature and executive on the other hand, this mechanism of declarations of incompatibility constitutes an interesting compromise position.

The incorporation of the European Convention in British law occurs against a distinctively different background from anything that might happen in Australia. This is because of the acceptance by Great Britain in 1965 of the two optional clauses of the European Convention on Human Rights, namely the right of individual petition and the compulsory jurisdiction of the European Court of Human Rights. Since that time British Courts have become used to the fact that British citizens have alternative rights of redress.

This is not the occasion on which to attempt to review how significant this alternative route to legal redress has been. I will give one recent example, the case of *Osman v United Kingdom* (*The Times* 5 November 1998). In that case the European Court of Human Rights reviewed the House of Lords decision in *Hill v Chief Constable of West Yorkshire Police* [1989] AC 53. That case had decided that for public policy reasons, no action could lie against the police for negligence in the investigation and suppression of crime. The European Court had to decide whether this common law rule was compatible with Article 6.1 of the European Convention on Human Rights which provides for a fair hearing.

The decision of the European Court turned on the absolute nature of what it called “the exclusionary rule” formulated by the House of Lords in the *Hill* case. The Court recognised that the public interest in the maintenance of the effectiveness of the police service was an important public interest. However English law did not permit any balancing of that public interest against competing public interests. This prevented any consideration of the degrees of negligence or of the harm suffered or of the justice of a particular case. The European Court held that the rights under the Convention which conferred an entitlement to a hearing were unjustifiably restricted by what it called the “blanket immunity of the police for their acts and omissions during the investigation and suppression of crime”. There had been a violation of Article 6.1, because the restriction on the applicants’ right of access to the Courts was “disproportionate”. The Court awarded the applicants £10,000 each to compensate them for their loss of the opportunity to have their case considered on the merits by a Court.

This decision of *Osman v The United Kingdom* is a dramatic, but not atypical, example of the extent to which human rights norms now impinge on British law. The new European Court of Human Rights, which formally opened in November of this year, will streamline the procedures available for litigants to take British cases to Strasbourg. In place of the former part time two tier structure, of the European

Commission of Human Rights and the European Court of Human Rights, there will now be a single Court operating full time. Nevertheless, this route is slower and more costly than domestic courts. The *Human Rights Acts* will prove a practicable alternative.

In the area of administrative law, the Act expressly provides for a new basis for judicial review. Section 6 states that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Under s7 a person may bring proceedings against an authority which it alleges has done so. The Courts are given a wide discretion to grant relief for the contravention by a public authority of a Convention right.

The Act requires further elaboration of the concept of "public authority", which had already emerged as a matter of some difficulty in the English administrative law jurisprudence. More significantly there will arise the phenomenon of what is described as "horizontal", which is the mechanism by which a treaty obligation directed to "public authorities" impinges upon private relationships. One of the issues to be resolved is the full import of the fact that a "public authority" is defined in s6(3) to include a Court or tribunal. It appears that this will require all Courts to determine disputes between private parties in accordance with the rights contained in the Convention.

The *Human Rights Act* will dramatically escalate the incorporation of the values enshrined in the European Convention on Human Rights into domestic English law both substantive and procedural. When I was in England, recently, virtually every area of specialisation was engaged in a process of detailed consideration of the implications for their specialisation. There was a flow of seminars, articles and drafts of books on the impact of the new *Human Rights Act* in such fields as administrative law, family law, employment law and criminal law.

There will be very few areas of the law upon which this new system does not impinge. This is not the occasion to do anything more than to indicate just how widespread this effect will be. The case of *Osman*, to which I have referred, itself indicates how significant the right to a fair trial in Article 6 will be. I will confine myself to a few remarks on the part of Article 6 which says:

"Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Issues will arise as to whether or not this Article is breached by denial of right of access to legal assistance by reason of legal aid rules; whether the English statutory provision enabling juries to draw adverse inferences from the silence of an accused is compatible with this provision; whether pre-trial publicity is in a specific case a denial of the Convention rights; whether the rules of standing applicable in a particular area of the law are compatible with this right; or whether a statute of limitations is compatible; whether rules requiring leave for the admission of evidence are compatible, etc. The obligation of courts and tribunals as "public authorities", to provide a hearing "within a reasonable time", will probably entitle a litigant to compensation for delay beyond a reasonable time.

British Courts will develop their jurisprudence with the assistance of the jurisprudence of the European Court. We have ahead of us a transition of great significance for Australian lawyers. At the present time, for the vast majority of Australian lawyers, American Constitutional Bill of Rights jurisprudence is virtually incomprehensible. Within a decade it is quite likely that in substantial areas of the law, British cases will be equally incomprehensible to Australian lawyers. Indeed, it is already the case that the common law in England is developing, on a pre-emptive basis, in the shadow of the jurisprudence of the European Court to an extent that limits the use of British cases as precedents for the development of Australian common law.

This is an important turning point for Australian lawyers. One of the great strengths of that Australian common law is that it has been able to draw on a vast body of experience from other common law jurisdictions. Now, both Canada and England, and to a lesser extent New Zealand, may progressively be removed as sources of influence and inspiration. Australian common law is threatened with a degree of intellectual isolation that many would find disturbing.

I said at the outset that in addition to the theme that I wish to develop about the British *Human Rights Act* there was also one suggestion I wish to make. Discussion in Australia on the incorporation of human rights treaties in Australian law has focused on the Commonwealth Parliament. It is, after all, the Commonwealth executive that signs and ratifies international treaties. There have been continuing debates about the implications for the balance of the federal system which arise when the

Commonwealth uses the external affairs power to directly legislate for a new regime in a particular area of law.

The suggestion I wish to make is that in a federal system there is every reason to encourage experimentation with respect to the incorporation of human rights law. There is nothing to prevent a State, acting on its own, from incorporating human rights provisions with respect to the laws of that State. Any of the international conventions which Australia has signed can be adopted, on one of the possible models of incorporation to which I have referred, for purposes only of the laws of that State. The English *Human Rights Act* model with its innovative provisions could be so adopted: changes to the law of statutory interpretation; judicial review of actions by public authorities which breach convention rights; declarations of incompatibility which trigger fast-track and retrospective legislative amendments. All of these provisions are capable of adoption by a single State with respect to the laws of that State. So long as the Commonwealth has not itself moved to incorporate the convention in Australia by legislation of the Commonwealth Parliament, no issue of inconsistency would arise under s109 of the Constitution. It is an option which is worthy of consideration.

Print Page

Close Window

Speech Day Sydney Grammar

**Address by the Honourable JJ Spigelman
Chief Justice of New South Wales
5 December 1998**

Professor Harris, Dr Townsend, Ladies and Gentlemen, young men, the students of Sydney Grammar.

Mr Chairman, thank you for your kind words of introduction. However, they require me to make a confession. My Who's Who entry does list my recreations as tennis, swimming and recumbency - the last means I like lying down. What's more I am good at it. Its probably my best sport.

The confession is that I stole the idea of recumbency from Dr Townsend's Who's Who entry - with his permission. I knew as soon as I read the word, that this was something I had always done, like Mr Jourdain, in Moliere's *Le Bourgeois Gentilhomme*, who suddenly realised one day that he had been speaking prose all of his life, without knowing it.

It is customary on occasions such as this to identify some of the challenges and some of the difficulties which lie ahead of you as young men soon to embark on the great adventure of adult life. I regret to say that I must begin with a note of self criticism. One of the great barriers your generation will face is the size and the determination of my generation, the so-called baby boomers. The main problem that you will face is that there are an awful lot of us.

It was my generation, the baby boomers, that coined the phrase "Don't trust anybody over 30". It's been a decade or two since any of us believed that. The person who coined the phrase is now a grey suited Wall Street banker. Many advances in medical science, in which we take an increasing interest, have extended longevity and, perhaps more significantly for many of you, extended our working lives.

What are you going to do *with*, or indeed, *to* a generation that refuses to get out of the way? the answer to this, as for so many things, is to be found in Jonathan Swift's marvellous satire "*Gulliver's Travels*". Swift visited the island of Luggnagg where there lived a group of Immortals called the Struldbruggs. When you come to deal, as you will, with members of my generation who refuse to retire, it will do you no harm to recollect what happened to the Struldbruggs, who had to live with the awful burden of knowing they were immortal. This is what Swift said:

"They commonly acted like mortals until about thirty years old after which by degrees they grew melancholy and dejected, increasing in both until they came to four score ... which is reckoned the extremity of living in this country, (when) they had not only all the follies and infirmities of other old men, but many more which arose from the dreadful prospect of never dying. They were not only opinionative, peevish, covetous, morose, vain, talkative; but incapable of friendship, and dead to all natural affection, which never descended below their grandchildren. Envy and impotent desires, are their prevailing passions. ... They have no remembrance of anything but what they learned and observed in their youth and middle age, and even that is very imperfect: ... The least miserable amongst them, appear to be those who turn to dotage, and entirely lose their memories; these meet with more pity and assistance, because they want many bad qualities which abound in the others."

And so it may be predicted for the baby boomers. Swift also says how members of the younger generation, like yourselves, should deal with these immobile immortals:

"As soon as they have completed the term of eighty years, they are looked on as dead in law; their heirs immediately succeed to their estates, only a small pittance is reserved for their support; and the poor ones are maintained at the public charge. After that period, they are held incapable of any employment of trust or profit; they cannot purchase lands,

or take leases; neither are they allowed to be witnesses in any cause, either civil or criminal."

Be warned and learn.

Swift described their final condition:

"At ninety they lose their teeth and hair; they have at that age no distinction of taste, but eat and drink whatever they can get, without relish or appetite. The diseases they were subject to, still continue without increasing or diminishing. In talking they forget the common appellation of things, and the names of persons, even of those who are their nearest friends and relations. For the same reason, they never can amuse themselves with reading, because their memory will not serve to carry them from the beginning of a sentence to the end; and by this defect, they are deprived of the only entertainment whereof they might otherwise be capable."

That is what we have to look forward to.

For those of you who may be interested in a career in the law there is some good news. Judges in New South Wales have to retire at the age of 72 and Commonwealth Judges have to retire at the age of 70. I have heard my Federal colleagues lament how could they possibly have voted for that referendum?

I was appointed the Chief Justice of New South Wales about six months ago. I would like to make two comments about my appointment: first, about the office and, secondly, about my personal background.

Australians think of this as a young country. But with respect to the rule of law and our parliamentary processes, this is not so. In these matters, Australia is an old country. The Court of which I have become Chief Justice has an uninterrupted institutional history from 1824. Very few nations have judicial institutions as old as that.

As we approach the centenary of federation it is important to recognise that the institutions we have fashioned in this country for ensuring democracy and for protecting freedom, are old well established institutions.

The centenary of federation, to which I have referred, will occur on the 1st January 2001, that is the first year of the new century, the first year of a new millennium. Those who chose 1st January 1901, as the foundation date for the new Commonwealth of Australia did so, believing that a new nation would commence with the new, twentieth, century.

Those who propose to celebrate the millennium on 31 December 1999 are wrong. In the sixth century the anno domini system was created by the cleric Dionysius Exiguus - a rough translation is Dennis the Short. At that time the Arab mathematician who invented the concept of zero, had not done his work. So the year 1 BC was immediately followed by 1 AD and the first century ended on 31 December 100. The 21st century and the new millennium will begin on 1 January 2001. The second matter on which I wish to comment is personal. Professor Harris referred to my role as an organiser of Student Action for Aborigines and a participant in the freedom ride of 1965. I was nineteen at the time. The objective of this student group was to expose discrimination against aborigines through publicity. That was successful. For the first time in Australian history, aborigines were front page news for two weeks.

I have done a number of things since that time, most recently my appointment as Chief Justice. However, it may well be that the most important thing I have ever done was what I did at nineteen. All of you should be aware that you can make a difference, even at that age.

The second personal matter is the fact that I was not born in Australia. I came here at the age of three. It might be worth reflecting on this for one moment.

If one looks around the world, the nations in which it could be seriously expected that a transition to an office like the Chief Justiceship could be achieved by a migrant in one generation, can be counted on

the fingers of one hand. This says something very positive about Australia. By the standards of history, and of other contemporary nations, Australia is a society which affords extraordinary access to opportunity. It is a comparatively open society.

My migrant story, like that of many others, is a tale of access to opportunity. In recent years such opportunity has been fully available to migrants from a non-Anglo Saxon background, who have not been required to deny their origins in order to avail themselves of the best this nation has to offer.

For me as for so many others the most important single thing enabling me to take advantage of these opportunities, was my education. All of you are fortunate to attend a school which still regards academic excellence as its basic function. This school has not embraced the defeatist educational philosophies which seem to regard the education process as some form of therapy.

From time to time you will find comments made which characterise the pursuit of excellence in education as in some way "elitist". I refute that. My personal experience and that of many other persons who have come from family backgrounds that do not offer any particular privilege, is that excellence in education is the way we have broken through the existing elites.

In my opinion those who would undermine the achievement of, or the recognition of, academic excellence in our schools are the true elitists. For they place barriers in the path of those who can overwhelm the entrenched elite.

Grammar's proud tradition in this respect has been continued under the Headmastership of Dr Townsend. In conclusion, I would wish to add my personal recognition of the contribution he has made, to say that I will miss his intellectual contribution to our community, and to wish him well in his new post.

Address to the PIAC and PILCH Anniversary Dinner

**The Honourable JJ Spigelman
Chief Justice of New South Wales
15 October 1998**

The occasion for this address is the 15th Anniversary of the Public Interest Advocacy Centre ("PIAC") and the 5th Anniversary of the Public Interest Law Clearing House ("PILCH"), an initiative of PIAC in partnership with the New South Wales Law Society and the New South Wales Bar Association.

I welcome the role that both PIAC and PILCH play in ensuring that legal issues of broader than usual public concern are effectively litigated with legal representation.

PIAC has by its research and educational programme, as well as its involvement in litigation, contributed significantly over the period of fifteen years to public discourse in a number of important fields including public health, community welfare, consumer protection, judicial review of administrative decision making and other areas of public policy.

PILCH is one of a number of "pro bono" schemes by which members of the legal profession make available their services to persons who would not otherwise be able to afford litigation. I am aware that consideration is presently being given as to how the PILCH scheme can be effectively integrated with other pro bono schemes available elsewhere from the profession.

Over recent years there have been significant reductions in the amount of public funding available for purposes of legal aid. This has had the inevitable consequence of a noticeable increase in the number of litigants in person appearing before the Courts. One effect of this increase is, of course, that it consumes a greater proportion of the administrative resources of the Court system and of judicial time, than would be the case if those litigants were represented by trained lawyers.

The activities of both PIAC and PILCH stand as significant examples of the recognition by members of the legal profession that participation in a profession which carries with it certain privileges, also has correlative obligations. Specifically there are obligations of a commitment to service of the public, an acceptance of duties which go beyond advancing the interests of a particular client and also an acceptance of obligations which qualify the pursuit of financial self interest by the lawyer.

Many aspects of the law constitute a business or a job, but the practice of the law is not only a business or a job. Every lawyer has obligations to the Court, to the public and to the profession, which obligations may override the direct financial self interest of the lawyer and the indirect financial self interest of that lawyer, through the pursuit of the interests of his or her clients.

There is a tendency in our society to measure success by purely economic standards and significant institutions are organised on that principle. This is perhaps best reflected in the architecture of our cities. Until this century the dominant buildings in our cities were public institutions - Parliaments, Courts, Town Halls - and religious buildings, like cathedrals. Now, all are dwarfed by commercial office blocks.

In a period of this nation's history when more and more things are judged by merely economic standards, it is important that some spheres of conduct affirm that there are other values in life. For the legal system, values of justice, truth and fairness should prevail over money. A plurality of organising principles for our social institutions is as important to the health of our society as bio-diversity is to our ecology. The significant role that public service, rather than self interest, plays in the activities of the legal profession is such an organising principle.

We must as a profession resist the dominant perspective that people who put duty and service to the public ahead of self interest are eccentric or, at least, subject to significant suspicion. No sin is more effective in projecting itself on others than the sin of greed.

There are many people associated with both PIAC and PILCH, the employees of the organisation, the law firms and barristers who give their time to pursue the objectives of the organisation, who fulfil their professional obligations going beyond self interests. I commend all of you for your example, in affirming that a profession should not be seen as just a means of making money. The distinction

between a profession, and a business or job is maintained, by conduct of this character.

The role of the legal profession is not confined to the provision of particular services to individuals. The legal system served by that profession manifests fundamental values about the nature of our society. It provides the framework within which our communal decision making occurs and, together with the parliamentary system, provides the forum for the public discourse by which our society and polity affirms its core values, applies them and adapts them to changing circumstances.

Much commentary on the operation of the legal system begins with the premise that what is involved is merely a publicly funded dispute resolution mechanism. This is false and dangerously so. In some quarters this approach is a manifestation of the narrow ideology that everything can be reduced to matters of economics. The legal system is the exercise of a governmental function, not the provision of a service to litigants as consumers. The enforcement of legal rights and obligations is a core function of government.

The litigation in which PIAC involves itself, and the provision of legal services through organisations such as PILCH, help maintain our adversary system of legal decision making. That system does not work well, some would say or at all, when litigants appear in person. That is one reason why Legal Aid and the provision of pro bono services is of broader social significance than the interests involved in specific proceedings.

The adversary system is of systemic significance in our society. It stands in contrast with the inquisitorial system. The common law tradition of the adversary system operates on the basis of an assumption that truth is often difficult and sometimes impossible to identify and that the mechanism of the Socratic dialogue is an appropriate means of discovering or approximating it. Investigatory systems manifest a naive rationalism that truth is comparatively easy and always possible to find, so long as one is dedicated to the task of doing so.

More significantly, however, the distinction between an adversary system and an inquisitorial system reflects fundamental issues about the nature of the society in which one wishes to live.

History shows that the inquisitorial legal system is compatible with either democracy or dictatorship. The adversary system is compatible only with democracy.

In an adversary system the administration of justice is one of the protective devices for democracy. That is not a function performed by an inquisitorial system.

In an adversary system even though the Courts exercise the judicial power of the State, when the State appears before the Court in one of its many guises - either as the police or as a taxation authority or some other guise - it appears on the basis of complete equality with the citizen. The procedures of our adversary system are such that even in a criminal case the prosecution is required to conduct the entirety of the proceedings as if it was an ordinary litigant before the Court. It receives no privileges, it receives no special access to the magistracy or the judiciary, its right to call or interrogate witnesses or to make submissions is no different from that of any other litigant in the Court.

The central aspect of our adversary system is that it is the individual litigants that determine what issues are raised and how they are fought. This reflects a fundamental aspect of our society, namely the importance that we attach to the autonomy of individuals and to the maintenance of personal freedoms. Individuals are entitled to exercise control over their own lives and to participate in decisions which affect their lives to the maximum degree possible. No arm of the State controls how they conduct their legal affairs in Court, not even the judiciary.

Personal autonomy and participation have very deep roots in this country, much deeper than in countries which follow an inquisitorial model. That is why personal freedoms have a much longer history and, in my opinion are, even today, more secure than they are in nations with a history of an inquisitorial system. These values of personal autonomy and participation are reflected many times every day in the procedures within all our Courts, indeed they are seen in the very structure of our courtrooms.

I would not for a moment wish to be understood to suggest that there are not aspects of our adversary system that are capable of improvement. But in discussions about the adversary system it is important to understand that that system is a manifestation of deep structural values that lie at the core of our traditional institutions. The adversary system is not a matter that can be assessed merely by the

standards of what may or may not be seen to constitute an efficient, or indeed an effective, decision making process in particular factual situations.

I am acutely conscious of the fact that there are limits to the proportion of the gross national product that this, or any other, country can afford to expend on its legal system. The legal system is not immune to the effects of the substantial shift in attitude to the provision of public services which has had substantial and adverse impacts on many other areas of government. However our adaptation to this most recent swing of the pendulum about the proper role of government, must not occur at the expense of institutions that have taken centuries to develop. In particular we should be careful of those who display a glib ignorance of the significance of institutions and a complete innocence of constitutional history.

[Print Page](#)[Close Window](#)

New Approach to Criminal Sentencing

New South Wales's highest Criminal Court the Court of Criminal Appeal (CCA), has adopted an innovative and different approach to the determination of criminal sentences. For the first time in Australia, the CCA will issue guideline judgments for trial judges which establish principles and indicate a range of appropriate penalties for particular offences.

As Chief Justice of New South Wales I am very conscious that there is from time to time criticism of sentencing decisions. In this article I explain the new system of guideline judgments which will, in due course, ensure that there is consistency in sentencing practices for particular offences. Inconsistency is a form of injustice and contradicts the principle of equality for all before the law.

The first guideline judgment was delivered yesterday by a special bench of the CCA comprising five judges including myself. The appeal involved a conviction for the offence of dangerous driving causing death or grievous bodily harm. The judgment states that it appeared that sentences imposed by trial judges for this offence did not reflect the seriousness with which the community regarded these particular offences.

The CCA has pointed out on more than one occasion that the substantial increase in penalties for these offences by the Parliament in 1994, should be reflected in a sharp upward movement in penalties. The number of instances in which this has not occurred is sufficient to warrant a guideline judgement.

The CCA has laid down two guidelines. First, sentences which do not involve imprisonment should be exceptional and ordinarily confined to cases in which there had been a momentary inattention or misjudgment by the driver. Secondly, in cases where the abuse of alcohol or drugs, excessive speed or the manner of driving indicated that the offender had abandoned responsibility for his own conduct, sentences should usually commence from a period of two years imprisonment (for the offence of occasioning grievous bodily harm) and three years imprisonment for an offence occasioning death. The CCA also identified a list of aggravating factors which would justify higher sentences.

Aggravating factors relating to the conduct of the driver are:

- 1 Degree of speed.
- 2 Degree of intoxication or of substance abuse.
- 3 Erratic driving.
- 4 Competitive driving or showing off.
- 5 Length of the journey during which others were exposed to risk.
- 6 Ignoring of warnings.
- 7 Escaping police pursuit.

The presence of one of these aggravating features may indicate that the driver abandoned responsibility for his or her conduct.

The presence of, and the degree of, these aggravating features, coupled with the extent and natures of the injuries inflicted and the number of people at risk, will determine the appropriate penalty.

The CCA's decision regarding the offence of dangerous driving is itself a manifestation of the ability of the courts to respond to community concerns. The decision affirms the long established proposition that the community's wish to denounce conduct and to deter others from engaging in conduct are relevant matters for judges to take into account when determining sentences.

However, denunciation and deterrence are not the only considerations relevant to ensuring that justice

is done in an individual case. Sentencing is also directed to protecting the public by rehabilitation of offenders. These various objectives of sentencing may sometimes conflict. It is a fact that there is no simple way of determining the appropriate relationship amongst such conflicting objectives. That is why the discretion sentencing judges have is important and must be maintained. The exercise of that discretion must, however, occur within bounds of consistency. The new approach of sentencing guideline judgments is designed to ensure that this occurs.

It is an important, indeed, characteristic, aspect of our system of criminal justice that sentences can be tailored by judges to the circumstances of an individual case. Guideline judgments allow for the flexibility necessary to ensure that the great variety of particular circumstances are properly reflected in the sentences that are imposed by the courts. The requirements of justice and the requirements of mercy do not always coincide. However, in our society both are important objectives which must be served by the decision of judges.

I said in the CCA's reasons for judgment, which all four other judges agreed:

"Guideline judgments should now be recognised in New South Wales as having a useful role to play in ensuring that an appropriate balance exists between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed and the judiciary as a whole, on the other."

Other proposals are sometimes made for restricting the discretion which judges exercise in making decisions on sentence. However, there are always exceptional cases and special circumstances. The adoption of a system of guideline judgments will enable the courts to structure the exercise of discretion, whilst retaining the ability of the trial judge to adapt a sentence to the facts of the particular case. The guidelines which will, in the future, be issued by the CCA will not propound rules that have to be followed in every single case. Rather they will provide indicators, departure from which will be explained in the published reasons of sentencing judges.

Consistency in sentencing does not mean that all judges must adopt the same approach. Judges reflect the wide range of differing views on such matters that exist in the community. However there are limits to the permissible range of variation. As I said in the judgment:

"Public criticism of particular sentences for inconsistency or excessive leniency is sometimes justified."

It does not appear that the normal course of appeals against sentences has been able to satisfy significant sections of the community that consistency in sentencing does occur. The system of guideline judgments is designed to promote such consistency and to confirm public confidence in the administration of criminal justice.

12 October 1998

Foundations of Administrative Law - 1998 SPANN Oration - Institute of Public Administration New South Wales Division

1998 SPANN ORATION

INSTITUTE OF PUBLIC ADMINISTRATION NEW SOUTH WALES DIVISION

THE HONOURABLE J J SPIGELMAN CHIEF JUSTICE OF NEW SOUTH WALES

7 SEPTEMBER 1998, SYDNEY

FOUNDATIONS OF ADMINISTRATIVE LAW

For four years, between 1963 and 1966, I was a student in the Department of Government at the University of Sydney. I was, from time to time, taught by Professor Spann who then held the Chair of Government and Public Administration. He was a man of considerable learning but my most abiding memory of him is his immense charm. He taught me in a number of fields, the course I particularly remember is an Honours class in the history of British political thought in the 19th Century. He also encouraged me in my extra-curricular activities, one of which is relevant to today's Oration. During the Christmas vacation of December 1996 to January 1997 I travelled to the United States of America. On the introduction of Professor Spann I met the late Professor Aaron Wildavsky of the Department of Political Science at the University of California at Berkeley. One of Wildavsky's numerous areas of research at the time was the subject of "Program Budgeting". I do not now recall whether I was aware of this when I arrived at Berkeley, but I definitely left Berkeley armed with all of the latest literature on the subject. This visit was an extremely enriching experience, not only because of Wildavsky, but because of the student turmoil occurring at Berkeley at the time. I recall addressing a student meeting from Sproul Hall steps.

With the direct encouragement of Professor Spann, the material I brought back became an article entitled "Program Budgeting for New South Wales" published in the December 1967 edition of *Public Administration*, as the *Australian Journal of Public Administration* was then known. There is, for me, a certain serendipitous quality to the fact that the very first Spann Oration was delivered, in 1983, by Professor Aaron Wildavsky on the subject of "The Transformation of Budgetary Norms".

The December 1967 edition of *Public Administration* also contained two centenary essays. One by Professor Spann himself, entitled "Bagehot on Public Administration". This celebrated the centenary of the publication of Walter Bagehot's great work *The English Constitution*. The article commenced with a wonderful quote from Bagehot:

"The reason why so few good books are written, is that so few people who can write know anything".

The article continued with the same wit, wisdom and tinge of intellectual humility, all of which qualities I regret to say I do not discern in my own contribution to that journal, an article which displays all the brash self-confidence of a 21 year old.

The other centenary essay published in this edition of *Public Administration* was by Professor J A La Nauze entitled "Hearn and 'The Government of England'". This textbook on the British Constitution and political system had been published in 1867 both in Australia and in England. W. E. Hearn was the Professor of History and Political Economy at the University of Melbourne. As Professor La Nauze pointed out in this article, Hearn was the first scholar to achieve an international reputation on the basis of a book written and published in Australia.

Of particular significance for the themes I wish to develop this evening is the praise which Hearn received from the Vinerian Professor of English Law, A. V. Dicey in his classic work, *Introduction to the Study of the Law of the Constitution*, which from the time of its publication in 1885 became the definitive work on constitutional law and on administrative law, or rather the lack thereof, and remained so for many years. In the field of constitutional law, it may still be appropriately so characterised today, as providing the primary source of propositions to which others respond.

In his Preface to the first edition, Dicey acknowledged six persons by name including Blackstone,

Hallam and Bagehot two other contemporary constitutional lawyers and also:

“Professor Hearn’s ‘Government of England’ has taught me more than any other single work of the way in which the labours of lawyers established in early times the elementary principles which formed the basis of the Constitution”.

The philosophy of the Constitution shared by Hearn and Dicey raises the basic theme which I wish to address today.

As is well known, Dicey considered the sovereignty of Parliament to be our dominant political institution. To him, an essential aspect of the sovereignty of Parliament - perhaps the key to the legitimacy of public power - was that, directly or indirectly, Parliament had a monopoly of public power. As one English academic has put it:

“[P]arliamentary monopoly ... means that all governmental power should be channelled through Parliament in order that it might be subject to legitimation and over-sight by the Commons ... Democracy was for Dicey unitary in the sense that all public power was channelled through Parliament ... The less well known face of sovereignty, that of parliamentary monopoly, ... demanded an institution to police the boundaries which Parliament had stipulated, and the ultra vires principle was the doctrinal tool used to achieve this end.”

P P Craig *Administrative Law* 3rd ed (1994) 4-5. See also Craig “Dicey: Unitary, Self-Correcting Democracy and Public Law” (1990) 106 LQR 106.

It was this unitary conception of democracy, in the context of parliamentary monopoly, which justified the exercise by the judiciary of such control as it exercised over administrative decision-making. Judges were simply interpreting the will of Parliament. Abuse of administrative power meant that the act was *ultra vires*, in a narrow or a broad sense. In the narrow sense, the statute had to be interpreted to identify the precise power which was being exercised. In the broad sense, a number of constraints on the way in which power could be exercised were found to exist on the basis that, absent any indication to the contrary, Parliament was *presumed* to intend such constraints. These included all the well-know categories constituting grounds for judicial review: denial of natural justice, exercising a discretion for improper purposes, taking into account irrelevant considerations or not taking into account relevant considerations and acting unreasonably.

In the paradigm of the constitution propounded by Dicey, all of these matters involve questions of statutory construction. In this way the sovereignty of Parliament, understood in the sense of a Parliamentary monopoly of public power, is affirmed. The role of the Courts is the limited role of ensuring that administrative decisions are kept within the bounds which Parliament itself has laid down. Administrative law has now gone beyond these limits by the recognition that common law principles apply of their own force and not on the basis of the intention of Parliament. It now appears that many of the grounds for judicial review are not merely propositions of statutory construction. Rather they are imposed on the exercise of public power by the common law. Like all rules of the common law they are capable of repeal or amendment by legislation - express or implicit - so long as such legislation complies with any constitutional restrictions on the relevant legislature.

Of course, there is no necessary contradiction between Parliamentary sovereignty and the common law insofar as the doctrine of Parliamentary sovereignty is seen to be an expression of the common law. As Sir Owen Dixon expressed it: the common law is the “ultimate constitutional foundation”.

Dixon *Jesting Pilate* Melbourne (1965) 203ff. See also Atiyah “Common Law and Statute Law” (1985) 48 *Mod L Rev* 1.

Indeed the opening sentence of Hearn’s *The Government of England* was:

“The English Constitution forms part of the Common Law.” W E Hearn *The Government of England: Its Structure and its Development* London (1967) 1.

Nevertheless recognition that some grounds of judicial review are principles of the common law, rather than manifestations of statutory construction of the presumed intention of Parliament, is a

comparatively recent phenomenon. See Aronson & Dyer *Judicial Review of Administrative Action* Sydney (1995) 17-23; 103-126.

The best established case concerns the principles of natural justice and, particularly, the requirement to give persons a fair hearing. This is a requirement which the common law attaches to the exercise of public power.

As his Honour Justice Mason, as the former Chief Justice of Australia then was, said in a seminal authority:

"The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention." See *Kiao v West* (1985) 159 CLR 550, 586. Quoted with approval in *Annetts v McCann* (1990) 170 CLR 596 @ 598-599 per Mason CJ Deane and McHugh JJ who also referred to the doctrine of natural justice as a "common law right". See also *Attorney-General v Quinn* (1990) 170 CLR 1 @ 57 per Dawson J.

Sir Anthony's successor as Chief Justice, Sir Gerard Brennan, always approached issues of administrative law, including the application of natural justice principles, on the basis that he was dealing with an issue of statutory interpretation. See *Kiao v West* supra 609-616; *FAI Insurance Limited v Winneke* (1982) 151 CLR 342, 407-413; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 584-585.

However this view has not prevailed. The authorities are discussed in Bayne "The Common Law Basis of Judicial Review" (1993) 67 ALJ 781; *State of Victoria v The Master Builders' Association of Victoria* (1995) 2 VR 112, 138-139, 148, 149-160; See also Oliver "Is the Ultra Vires Rule The Basis of Judicial Review?" (1987) *Public Law* 543. The doctrine of procedural fairness is a common law requirement which, subject to statutory modification, applies generally to the exercise of public power whenever a custodian of public power has an ability to "destroy, defeat or prejudice a person's rights, interests or legitimate expectations".

Annetts v McCann supra 598 per Mason CJ Deane and McHugh JJ, quoted with approval in *Ainsworth v Criminal Justice Commission* supra per Mason CJ Dawson Toohey and Gaudron JJ 576.

The broader basis for judicial review as reflective of the common law, rather than the interpretation of statutes, is most clearly manifest in the extension of judicial review to the exercise of prerogative powers.

See Aronson & Dyer supra 156-161; De Smith Woolf and Jowell *Judicial Review of Administrative Action* 5th ed London (1995) par 3-038-3-039 and 6-038-6047; Wheeler *Judicial Review of Prerogative Power in Australia Issues and Prospects* (1992) 14 Syd L Rev 432; *State of Victoria v The Master Builders' Association* supra 133-139, 147-149, 154-159.

The first edition of one of the basic English texts in this field, Professor De Smith's *Judicial Review of Administrative Action* published in 1959, could state baldly that prerogative powers, such as those of the Foreign Secretary to refuse and withdraw passports, were "unreviewable on any ground whatsoever".

S De Smith *Judicial Review of Administrative Action* London (1959) 118. The latest 1995 edition indicates that this is no longer the law and cites the authorities which indicate that review of the power to issue passports has occurred.

De Smith, Woolf and Jowell supra par 6-043.

As Lord Diplock put it in the *GCHQ* case, the seminal authority which extended review to the prerogative:

“For a decision to be susceptible to judicial review the decision maker must be empowered by public law ... to make decisions that, if validly made will lead to administrative action or abstention from action by an authority endowed by law with executive powers”.

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 409.

The legal restriction on review of prerogative power is now that of justiciability. There is no reason why this approach would not extend to executive exercise of common law powers, not technically part of the prerogative.

Harris “The ‘Third Source’ of Authority for Government Action” (1992) 109 LQR 226; Wheeler op cit 443-448. The prerogative itself is only one manifestation of common law power.

A second, not so well established, manifestation of the proposition that the principles of judicial review are based on the common law, rather than statutory interpretation, is the extension of judicial review to decisions by private bodies which make decisions of a public character. The issue is what is meant by “public law” in the sense used by Lord Diplock in the *GCHQ* case. The ability to draw a line between public and private is a matter of some controversy and of a considerable literature.

See eg Harlow “‘Public’ and ‘Private’ Law” (1980) 43 *Mod L Rev* 241; H Woolf “Public Law - Private Law: Why the Divide?” (1986) *Public Law* 220; G Samuel “Public and Private Law: A Private Lawyer’s Response” (1983) 46 *Mod L Rev* 558; M Hollowicz “History of the Public/Private Distinction” (1982) 130 *U Pa L Rev* 1423; Allars “Introduction to Australian Administrative Law” Sydney (1990) 33-35; Sanford “Law Institutions and the Public/Private Divide” (1991) 20 *Fed L Rev* 185; Airo-Faiulla “‘Public’ and ‘Private’ in Australian Administrative Law” (1992) 3 *Pub L Rev* 186; J Beeton “‘Public’ and ‘Private’ in English Administrative Law” (1987) 103 *LQR* 34; Wade & Forsyth *Administrative Law* 7th ed Oxford (1994) 686-688; Aronson “A Public Lawyer’s Responses to Privatisation and Outsourcing” and Craig “Public Law and Control over Private Power” in Taggart (ed) *The Province of Administrative Law* London (1997) 51-56, 207-211; Oliver “Common Values in Public and Private Law and the Public/Private Divide” (1997) *Public Law* 630.

In England the public/private dichotomy is a product of the special, and exclusive, procedure for judicial review under order 53 of the Supreme Court Rules. *O’Reilly v Mackman* [1983] 2 AC 237.

The distinction is of less significance in Australia.

The extension of public law to private organisations is unresolved in the authorities. For example, there is a divergence of approach as to whether the doctrine of natural justice can apply to the exercise of powers of exclusion from the activities conducted by private bodies. In such cases there is no “vires” to be “ultra”.

The New South Wales Trotting Club sought, unsuccessfully, to exclude a professional punter from the tracks it conducted at Harold Park and Menangle. The judgments of the Court emphasised how trotting was controlled by the New South Wales Trotting Club, effectively, with the consent of the government. For two judges of the majority it was the public nature of the powers exercised by this private organisation which attracted the rules of natural justice. (The other two members relied on an express concession by the parties).

The rules of trotting thus enforced had no statutory basis. Nevertheless they were subject to a public law doctrine.

His Honour Justice Gibbs, as the former Chief Justice of Australia then was, said:

“An owner who uses his land to conduct public race meetings has a moral duty to the public from whose attendance he benefits; if he invites the public to attend for such a purpose, he should not defeat the reasonable expectation of an individual who wishes to accept the invitation by excluding him quite arbitrarily and capriciously. The rules recognise the public nature of the race meeting by placing some restrictions on the rights of the owner of the course. Speaking broadly, the effect of the rules is that on a day on

which a race meeting is being held the respondent cannot use its powers by preventing, for no apparent reason, a member of the public who is in a decent condition and behaving properly from entering the course". Forbes v New South Wales Trotting Club Limited (1979) 143 CLR 242 @ 269. Two other members of the majority relied on an express concession that the rules of natural justice applied if the conduct could be characterised as a general warning off. (Stephen J @ 272; Aickin J).

The broadest basis for the application of the principles of natural justice to the New South Wales Trotting Club is to be found in the judgment of Justice Murphy. It is worth quoting at length because it highlights the issues involved.

"... the respondent exercises power which significantly affects members of the public, tens of thousands of whom go to watch the spectacles, many to bet as a hobby, and some, like the appellant, to try to make a living by betting. Many hundreds depend on it for their livelihood in occupations such as bookmaking, training and driving. The functions of the respondent in relation to the conduct of race meetings on its land are qualitatively different from that of the ordinary householder exercising his private property rights.

...

... When rights are so aggregated that their exercise affects members of the public to a significant degree, they may often be described as public rights and their exercise is that of public power. Such public power must be exercised bona fide, for the purposes for which it is conferred and with due regard to the persons affected by its exercise. This generally requires that where such power is exercised against an individual, due process or natural justice must be observed. ... There is a difference between public and private power but, of course, one may shade into the other. When rights are exercised directly by the government or by some agency or body vested with statutory authority, public power is obviously being exercised, but it may be exercised in ways which are not so obvious. In my opinion, a body, such as the respondent, which conducts a public racecourse in which betting is permitted under statutory authority, to which it admits members of the public on payment of a fee is, exercising public power."

Forbes v New South Wales Trotting Club Limited supra 274-5. See also generally Taggart "The Province of Administrative Law Determined?" in Taggart supra 10-12.

So broad a basis for judicial review - "the exercise of power which significantly affects the public" - has not been authoritatively established. However his Honour's approach reflects, in a most extended form, a dictum of Lord Scarman in the *GCHQ* case:

"Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter."

Council of Civil Service Unions v Minister for the Civil Service supra 407.

As I have said above the issue, on the current state of the authorities, is what is meant by "public law". The identity of the person or body exercising the power is not determinative. Nor is it necessarily determinative that the power is, or is not, derived from statute.

The English decisions manifest a resistance to the broad basis suggested by Murphy J. It has been decided that similar racing authorities in England are not subject to judicial review. In reaching the decision that the Jockey Club was not a public body, and that it was not "woven into any system of governmental control of horse racing", Brightman MR and Hoffmann LJ (as Lord Hoffmann then was) rejected a test in terms similar to that propounded by Murphy J.

R v Jockey Club ex parte Aga Khan [1993] 1 WLR 909 @ 923G and 932E. However in refusing to apply the Privy Council decision on the Australian Jockey Club (*Calvin v Carr* [1980] AC 574), Bingham MR relied (923E) on the special procedure under Order 53 as construed in *O'Reilly v Markman* supra. See also 931-933 per Hoffman LJ. English cases must be treated with care. Judicial review in Australia does not stipulate a single procedure. The continued development of relevant remedies, both equitable remedies and the prerogative writs in the form of equivalent orders, permits of a more flexible approach. The decision in *R v Jockey Club ex parte Aga Khan* has been criticised. See eg, Beloff "Judicial Review - 2001 A Prophetic Odyssey" (1995) 58 *Mod L Rev* 163 @ 146-147. Neither the

House of Lords nor the High Court have resolved the matter.

However English decisions have extended judicial review to private bodies like the Panel On Takeovers and Mergers in the United Kingdom which, although entirely private, was found to exercise public power.

See *R v Panel on Takeovers and Mergers; Ex-parte Datafin* [1987] QB 815. Other private bodies have also been found to exercise such powers eg the Law Society, Bar Council, Advertising Standards Authority, a product accreditation committee in the pharmaceutical industry and a service provider regulatory committee of telecommunications companies.

In Australia there are strong arguments for the proposition that some of the public powers exercised by the Australian Stock Exchange are such as would attract judicial review on administrative law grounds. As with the British Takeover Panel, the ASX plays a significant role in a governmental regulatory scheme.

Black "Judicial Review of Discretionary Decisions of Australian Stock Exchange Limited" (1989) 5 *Aust Bar Rev* 9; Gillooly "Public Law Review of ASX Listing Decisions" (1995) 13 *Aust Bar Rev* 220; Butterworths *Australian Corporations Law: Principles and Practice* vol 3 pars 10.1.0940 - 10.1.0950; Latimer "Legal Enforcement of Stock Exchange Rules" (1995) 7 *Bond L Rev* 1 @ 15, 16 and (1996) 8 *Bond L Rev* 210. To use Lord Hoffman's terminology it is "a private body established by the industry but integrated into a system of statutory regulation".

R v Jockey Club; Ex parte Aga Khan supra 931-932. His Lordship's alternative formulation "privatisation of the business of government itself" may have wide applications as self-regulation becomes more prevalent.

Ibid 931H; See Aronson "A Public Lawyer's Responses to Privatisation and Outsourcing" supra esp 45-51; and Craig "Public Law and Control over Private Power" supra esp 200-205; Taggart "Public Utilities and Public Law" in Joseph (ed) *Essays on the Constitution* Wellington (1995) 214-216 which propose a revival of common law doctrines to control "public utilities", whether operated by a private or a public body. The Federal Court has held that decisions of the Australian Stock Exchange are not subject to review under the *Administrative Decisions Judicial Review Act*, because there is no "decision under an enactment"

Chapman Limited v Australian Stock Exchange Limited (1996) 67 FCR 402.. However, the common law is not limited to the review of decisions "under an enactment".

The characteristics of decisions by private bodies which render them of a sufficiently public character to attract judicial review have not been reduced to a simple test. Perhaps they cannot be. One can anticipate a series of factual situations arising for judicial decision which will clarify the basic principle. Similar issues have arisen in statutory contexts, when deciding whether or not legislation of an administrative law character should be extended to private bodies. For example, there have been proposals to extend privacy legislation to the private sector.

See Attorney-General's Department Discussion Paper "Private Protection in the Private Sector", September 1996; Batskos "Administrative Law and Potential Litigation: Proposed Extension of Privacy Act to the Private Sector" (1997) 12 *AIAL Forum* 20.

Another example is the joint report of the Australian Law Reform Commission and the Administrative Review Council reviewing the Federal *Freedom of Information Act* 1982 which considered, and rejected, the extension of that Act to the private sector.

See Australian Law Reform Commission Report No 77 and Administrative Review Council Report No 40: "Open Government: A Review of the Federal Freedom of Information Act 1982" Commonwealth of Australia (1995) Chapter 15.

However, this Report did not consider the case law which applies public law principles to the exercise

of public functions by private bodies. It may have benefited from considering the special situation of private bodies which do exercise public power.

As is well-known, Dicey announced that there was no such thing as administrative law in the British legal system. He was referring to a special set of laws conferring legal privileges and unique status on State officials, which he interpreted the French *droit administratif* to provide. It has long since been recognised that, even at the time Dicey wrote, British lawyers did in fact practice administrative law - in the same way as Monsieur Jourdain in Molière's *Le Bourgeois Gentilhomme* realised one day that he had been speaking prose all his life - without knowing it.

The development of administrative law has been the great creative enterprise of the common law in the second half of the Twentieth Century. Its practical significance has been reinforced by legislation. This includes legislation directly impinging upon the system of administrative law, such as the *Administrative Decisions Judicial Review Act*. There is also legislation creating a wide range of tribunals which conduct reviews of particular administrative decisions on the merits, some specialist tribunals and others with a multi-faceted brief. There is also legislation of general application: such as freedom of information acts, both at State and Federal level, the creation of Ombudsmen, the extension or creation of a wide range of checking and accountability mechanisms, including special institutions such as, in New South Wales, the Independent Commission Against Corruption.

In my opinion the cumulative impact of this entire body of reform, both judicial and statutory, has been to introduce a new and distinctive character to our mechanisms of governance. What we now have, operating in parallel to the system of ministerial responsibility - both individual and collective - is a system that is appropriately characterised as "administrative responsibility". By "administrative responsibility" I mean a system by which public servants have a direct responsibility for their conduct, not merely a derivative responsibility, through their Minister and Parliament.

The desirability of such a system was raised in these terms as long ago as 1940. See Carl Joachim Friedrich "Public Policy and the Nature of Administrative Responsibility" in C J Friedrich and Edward S Mason *Public Policy* Harvard University Press (1940); Herman Finer "Administrative Responsibility in Democratic Government" (1941) *Public Administration Review* 335; See also my own discussion in Spigelman *Secrecy: Political Censorship in Australia* Sydney (1972) @ 167-170. More recently the issues have generally been discussed under the heading of "accountability".

See eg Kinley "Governmental Accountability in Australia and the United Kingdom: The Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices" (1995) 18 *UNSWLJ* 409; Barker "Accountability to the Public: Travelling Beyond the Myth" in Fidd (ed) *Essays on Law and Government Vol 1: Principles and Values* Sydney (1995) 228. However the true significance of the change is best appreciated by adopting the long recognised terminology of "responsibility", and applying that terminology to the burgeoning range of mechanisms by which administrators are subject to review and correction of the decisions they have made. The terminology of "responsibility" enables recognition of the fact that this development is of constitutional significance.

Because we have a written Constitution, the area of constitutional law is generally identified with exegesis of the terminology of the written document. I believe, however, that we have a broader Constitution, of which the *Constitution Act* 1900 is simply one, perhaps the most significant, component. Our Constitution, like the British Constitution, includes a number of statutes which, theoretically, can be amended by Parliament. In practice, however, these statutes are as entrenched as many enactments long accepted to be part of the British Constitution.

A good example is the system of proportional representation for the Senate. This is an electoral law that can be changed at any time, at least in theory. However, it plays a central role in the dynamic of our polity. It has significance, and a degree of permanence, quite different from other statutes, including other sections of the *Commonwealth Electoral Act*.

Broader significance can also be attributed to particular provisions of some administrative law statutes. One such is the formal recognition of a right of access to government information in the *Freedom of Information Act*. Another is the right to reasons under s13 of the *Administrative Decisions Judicial Review Act*. Most provisions of the *ADJR Act* reflect the common law. Section 13, however, changes the balance of authority between the citizen and the State in a way the common law never recognised.

Osmond v Public Service Board of NSW (1986) 159 CLR 656.

The developments in administrative law by judges over recent decades are, like any aspect of the common law, theoretically subject to change by legislation. However, many of the doctrines which are now regularly applied to review administrative and ministerial decision-making processes and outcomes, are as unlikely to be changed as many rules which have long been accepted as part of the British Constitution. None of them are immutable, but the prospect of change is so remote that the relevant rules - not in their detail but in their broader significance - are entitled to be regarded as part of the Constitution.

The emergence of a system of administrative responsibility, as I have suggested above, is the way I would express the constitutional significance of the judicial and statutory developments I have identified. It has turned subjects into citizens.

The concept of administrative responsibility would, however, have been an anathema to both Hearn and Dicey.

There is no better statement of the traditional position than that by Hearn in 1867:

"In the relations between the political and the non-political servants of the Crown, it is a fundamental rule that all non-political officers who hold office during pleasure must be subordinate to some responsible minister. This rule arises from the very nature of our political system. Ministers who are responsible to Parliament are the heads of the great departments of the State; and their responsibility relates to the proper administration of these departments. They therefore are by their official position entitled, and by the theory of the Constitution are required, to direct the policy of the departments over which they severally preside. For that policy they are answerable, at the peril of censure and consequent loss of office, to Parliament. But no such responsibility rests with non-political officers. They have merely to execute with fidelity the instructions of their chiefs. When they have with due diligence performed all his lawful commands, their obligations are at an end."

Hearn op cit 253-254.

The cumulative effect of the developments in administrative law, both judicial and legislative, have fundamentally changed this classic model. The obligations of administrators are no longer "at an end" when they have "performed" all of the "lawful commands" of their Minister.

I wish to conclude by drawing attention to the significance which remedies available from courts have played, and will continue to play, in the further development of the law. It is through the law of remedies that any extension of a common law basis for judicial review, rather than the statutory construction basis, as discussed above, will proceed.

The circumstances in which the prerogative writs - or orders to the same effect - are available, should not be regarded as frozen. In the context of suggesting that common law judicial review - unlike the *ADJR Act* - could extend to the exercise of functions which may be characterised as legislative, one English textwriter said:

"The line between decisions made individually or ad hoc, and those institutionalised into rules, may be fine and fortuitous. The more one looks at the early development of the prerogative orders, the greater is the impression that those remedies were interpreted flexibly to meet the new types of institutions developing at that time. Real conceptual restrictions appeared later. Is it an inevitable development that, once flexible, tools become, like equity has on occasion, ossified and confirmed?"

Craig *Administrative Law* op cit 523; See also *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 3 WLR 348 @ 357-358 per Lord Parker CJ: Jaffe and Henderson "Judicial Review and the Rule of Law: Historical Origins" (1956) 72 *LQR* 345.

Whilst framed as a question, the answer is in the negative, so long as the mechanisms of the common law may continue to operate freely. The exclusive nature of the application for judicial review in Britain, may prove more rigid than the continued common law development of remedies.

Increased attention has been paid in recent years to the role which the traditional doctrines of equity have played in the development of public law. Indeed it has been proposed that government should be seen as a form of public trust, so that public powers ought to be understood as exercised by a trustee on behalf of the people.

Finn "A Sovereign People, A Public Trust" in P D Finn (ed) supra 1.

As Sir Anthony Mason put it:

"Equitable relief in the form of the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days has mirrored the way in which equity has regulated the exercise of fiduciary powers."

Mason "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *LQR* 238.

In a recent joint judgment three members of the High Court, Justices Gaudron, Gummow and Kirby, have referred to the historical development of public law in terms of the application of principles developed in equity.

See *Batemans Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* (1998) HCA 49 @ 24-32.

The focus of their Honours' attention was the use of equitable remedies as more flexible and less technical relief than the prerogative writs. This is a timely reminder that the development of our law, unlike continental systems, focuses on remedies not abstract principles.

There are similarities between the regulation of the exercise of public power and the traditional control by courts of equity of the exercise of fiduciary powers. In both cases something like what equity calls "fraud on a power" is involved.

In both public law and equity, powers granted for a particular purpose can only be exercised for that purpose and not to achieve some collateral purpose. Also, in both cases, powers must be exercised bona fide for the persons or objects for whom or which the power was conferred. Finally, in both cases powers must be exercised rationally, without reference to irrelevant considerations and within bounds of reasons. (I should note a trustee does not have to observe natural justice - that may be a distinctive public law requirement.)

Public law rules are very similar to the rules for the exercise of powers by other institutions. If one can set aside its now substantial statutory overlay, many of the rules of corporations law with respect to the structure and operations of corporations are manifestations of an overriding principle that powers conferred on various arms of the corporate entity can only be exercised for the purposes for which they are given and must be rationally exercised for the benefit of those in favour of whom they have been given. Similar principles apply if one looks at the legal rules governing the internal affairs of trade unions and other organisations.

It may be that what the future holds is the emergence of general principles of "institutional law", rather than parallel principles in each of administrative law, corporations law, trade union law and the law of associations. There are core principles, in all these areas, many of which are derived by way of analogy from equity and its control of fiduciary powers.

Perhaps one day we will come full circle. As noted above Dicey proclaimed in 1885 that England did not have a system of "administrative law". A good deal of ink was spent in establishing the proposition that it did. Whilst, at present, it appears that there are distinct principles of the common law applicable to the exercise of public power, perhaps further development of the law will show that many such rules are specific applications of more general principles applicable to the exercise of power by all institutions. Such an approach may explain why, and to what extent, private organisations can be subject to judicial review. This, as I have indicated above is an unresolved issue.

Dicey may be proven right, after all.

[Print Page](#)[Close Window](#)

Launch of the Australian Law Reform Commission's Report - Australia's Federal Record: A Review of the Archives Act 1983

ADDRESS BY THE HONOURABLE J J SPIGELMAN

LAUNCH OF THE AUSTRALIAN LAW REFORM COMMISSION'S REPORT

AUSTRALIA'S FEDERAL RECORD: A REVIEW OF THE ARCHIVES ACT 1983

WEDNESDAY, 26 AUGUST 1998

My function today is to launch ALRC 85: the most recent Report of the Australian Law Reform Commission entitled "*Australia's Federal Record: A Review of the Archives Act 1983*". Eighty-five Reports and thirteen years ago this Commission was established under the initial Presidency of his Honour Justice M D Kirby, now of the High Court of Australia. A few years after its establishment I was pleased to serve as a member of the Commission and remember that period - an interregnum in my personal career - with some fondness.

In reviewing ALRC 85, I am pleased to note that the Commission has maintained the high quality of its research and of its publications. This Report thoroughly reviews a significant area of Government activity and produces a comprehensive set of practical recommendations. I congratulate the authors and the Commission on the work they have done.

It is not appropriate for me to comment on the specific recommendations. Suffice it to say that the basis for each recommendation is set out in the Report, with the logic and detail that we have all come to expect from the reports of the Australian Law Reform Commission.

The *Archives Act* is part of a package of Commonwealth administrative law measures which includes the *Administrative Decisions (Judicial Review) Act*, the *Administrative Appeals Tribunal Act* and, the *Freedom of Information Act*. The principles developed for the purpose of the *Freedom of Information Act* have been of particular significance for the review of the *Archives Act*.

Indeed, as this Report points out, the creation of a freedom of information type statutory access regime for Commonwealth archival records in the 1983 legislation, was a radical innovation by the standards of other jurisdictions in Australia and overseas. In particular, the creation of an appeal process and the introduction of a requirement for a statement of reasons to support exemption claims was of great significance. Nevertheless, this access regime has, according to the Australian Law Reform Commission's Report, displayed a number of weaknesses which its recommendations are designed to overcome.

One of the central themes of this Report is to reinforce the proposition that access to Government information is an essential aspect of a democratic society. The recognition of the significance of freedom of information is a comparatively recent development in our system of representative democracy. As many of you know, this was one of the early themes of my own involvement in Australian public life: first, in January 1972 at the Annual Summer School of the Australian Institute of Political Science and later that year, the publication of my first book "*Secrecy Political Censorship in Australia*".

Consistent with its general approach to freedom of information legislation, which was the subject of

the Australian Law Reform Commission's Report No. 77, ALRC 85 adopts as its basic premise the recognition of a right of access, with clearly defined exceptions and a right of review. Formal recognition that Australian citizens have rights of access to Government information is less than two decades old. This compares with centuries of debate over freedom of speech. This relatively recent development shows the continued vitality of our representative democracy. Our Constitution can and does change and improve. Freedom of information is usually categorised under the heading of "Administrative Law" and much of its detail is appropriately so categorised. However, I believe, it is more appropriately described as a matter of constitutional significance. Because we have a written Constitution, the sphere of constitutional law is generally identified with exegesis of the terminology of the written document. We should, however, now recognise that we have a broader Constitution, of which the *Constitution Act 1900* is simply the most significant single component. Our constitution, like the British Constitution, includes a number of statutes which, theoretically, can be amended by the Parliament. In practise they are as entrenched as many enactments long regarded as part of the British Constitution.

For example, one of the most fundamental aspects of our present national system of government is contained in legislation which theoretically can be amended by the Parliament. I refer to the system of proportional representation for Senate elections. This electoral law is a fundamental element in the dynamic of our present political system. Its significance is, in a general sense, constitutional. Similarly, I regard s13 of the *Administrative Decisions (Judicial Review) Act*, which establishes a right to reasons for administrative decisions, to be of constitutional significance. This right is also reflected in the *Archives Act*. The ability to obtain written reasons for decisions from the executive government is of considerable practical significance. It enlivens administrative law challenges which would not otherwise be feasible. It is one of the most innovative aspects of the legislative package of administrative law measures which, to a substantial degree, was otherwise only reflective of developments in the common law.

The right to reasons has a more fundamental aspect, which it shares with the creation of a basic right of access to documents by any citizen under both the *Freedom of Information Act 1982* and the *Archives Act 1983*, as each are proposed to be amended by the respective Reports of the Australian Law Reform Commission. Such rights to information make it clear who is "on top". They affirm that the people, not an executive sovereign, is the ultimate source of legitimacy for all our political institutions. These Acts recognised in a practical way, that each Australian is a citizen, not a subject. In my opinion they, together with other developments in administrative law, establish a foundation for a new principle of responsible government: the executive is responsible for its actions to the people, especially those affected by its decisions. That responsibility is not only enforceable via the medium of Parliament. It is also a direct responsibility: Public servants have a direct personal responsibility for their conduct, not merely a derivative responsibility through their Minister and Parliament. This is why these Acts deserve to be recognised as having constitutional significance.

The Commission's Report deals with matters other than freedom of information issues. It contains numerous recommendations: the creation of a new organisation for the maintenance of our archives; reforms to detailed aspects of the record keeping process and, in particular, recognition of the challenges for the record keeping function that arise from technological advances, particularly in electronic record keeping.

All of these recommendations are of significance for the practical accessibility of the historical records of Australia. We will soon celebrate the centenary of the Australian Federation. It is particularly appropriate at this time, that the Commonwealth Parliament reviews the system for the maintenance and accessibility of the historical record of our very successful experiment in government.

This has been a turbulent century. There are very few nations anywhere in the world that have been able to maintain the continuity of their institutions of governance for the whole of the century. As we focus our minds on the centenary of federation, we will come to appreciate just how extraordinary our achievement has been in this regard.

The maintenance of the archival record and the enhancement of access to it for historians and citizens, is part of the continuing public discourse by which we affirm our basic values and ensure their adaptation to changing circumstances. In this discourse, the Australian Law Reform Commission has made a substantial contribution with this Report.

New South Wales Ethnic Affairs Commission - Second Annual Oration

NEW SOUTH WALES ETHNIC AFFAIRS COMMISSION

SECOND ANNUAL ORATION

DELIVERED BY THE HONOURABLE JJ SPIGELMAN

CHIEF JUSTICE OF NEW SOUTH WALES

ON THURSDAY, 20 AUGUST 1998

I was born in Europe and came to Australia at the age of three. I have received the honour of appointment as Chief Justice of New South Wales. The number of nations in which it could seriously be expected that a transition to an office of this character could be achieved in one generation, can be counted on the fingers of one hand. This says something very positive about Australia. It is worth dwelling on the positive for a moment.

In the public rhetoric of this country, we seem to have lost the capacity for praise. These days no-one seems to say that someone else has done something right, or that something that happens in this country is good and just. If they do, it is not regarded as newsworthy.

Accordingly, it is appropriate to celebrate, not least on an occasion such as this, the extraordinary degree of opportunity that Australia has afforded its migrants.

My appointment is not unprecedented. Sir Frederick Jordan, who was the Chief Justice of New South Wales between 1934 and 1949, was born in London and came to Australia at the age of five. Whilst it is true that, unlike myself, he had an Anglo-Saxon background, he was not the son of privilege. He was brought up in Balmain in a working class environment.

My migrant story, like every successful migrant story, is a tale of access to opportunity. My path, like that of Sir Frederick Jordan, was the path of the law. For me, as for him six decades ago, Australia was a comparatively open society. Not a perfect one - human institutions do not admit of perfection. But by the standards of history and of other contemporary nations, Australia was and is a society which affords extraordinary access to opportunity.

In recent years such opportunity has been fully available to migrants from a non-Anglo Saxon background, who have not been required to deny their origins in order to avail themselves of the best this nation has to offer.

It is incumbent on those of us who have benefited from the tolerance and inclusion of other Australians, to emphasise the gratitude that we feel and, perhaps, by our example, to convince others of the benefits Australia has received from past tolerance and inclusion.

In these remarks I wish to focus on some fundamental values which are reflected in the administration of justice and which, in my opinion, constitute a firm basis for the recognition of cultural diversity in a tolerant, cohesive and inclusive society.

The institutions of governance, both parliamentary and judicial, together with certain aspects of our history, of our environment and the English language, constitute the central components of Australian national identity.

Whilst this audience will readily acknowledge the significance of cultural diversity in our nation, we must always remember the overriding importance of those institutions which give cohesion to the whole. Amongst them is a long and proud heritage of the rule of law.

The most striking thing to note about the rule of law in Australia, is how old the institutions which administer it are. The Court of which I have become Chief Justice has a continuous uninterrupted institutional history from 1824. In the context of discussion of ethnic issues, it is customary to refer to Australia as a young country. With regard to the rule of law, that is not so. This is an old country. Very few nations have judicial institutions as old as the Supreme Court of New South Wales.

One of the central characteristics of the administration of justice in Australia is the adversary system. The legal process is driven by the parties not by the judge.

Judges are a manifestation of the authority of the State. They exercise the judicial power of the State. We regard it as essential that the judge is impartial, even when the State, in one of its numerous manifestations, is a party to proceedings. The most common manifestation of the State in the courts is, of course, the police force. It also appears as a taxation authority and in many other guises.

In our courts, based on common law traditions, the State appears on a basis of complete equality with the citizen. The procedures of our adversary system are such that even in a criminal case, the prosecution is required to conduct the entirety of the proceedings as if it was an ordinary litigant in the court. It receives no privileges. It receives no special access to the magistracy or the judiciary. Its right to call or interrogate witnesses, or to make submissions, is no different from that of any other litigant in the court.

In any proceedings, including those in which the State is a party, the litigants determine, in large measure, what issues are raised and how they are fought. This is fundamentally different from the inquisitorial system, common in Europe, where the judge is in control of what happens; the judge decides what the issues are, what inquiries are made, what witnesses will be called and he or she asks the questions.

This aspect of the adversary system reflects the significance our society attaches to the autonomy of individuals and to the maintenance of personal freedoms. Individuals are entitled to exercise control over their own lives. They are entitled to participate in decisions which affect their lives to the maximum degree possible. No arm of the State controls how they conduct their legal affairs, even in Court. Not even the judiciary.

Personal autonomy and participation have very deep roots in this country, much deeper than in virtually all of the countries from which immigrants to Australia have come.

One of the reasons why these values are so secure, is because they are reflected many times every day in the procedures within our Courts, indeed in the very structure of our Court rooms.

I am, of course, very conscious that aspects of the adversary system are capable of improvement: to enhance the efficiency of the administration of justice and to reduce costs to parties. Nevertheless, whatever reforms are appropriate, we must not permit them to undermine the fundamental nature of the adversary system which manifests the high value we place on personal autonomy by maximising the control citizens have over the processes of legal decision which affect their lives.

Significantly, it is these same values which represent a secure basis for support of cultural diversity.

All Australians have the right to choose to conduct their lives in a cultural group which differs from what other Australians regard as the norm. That is because in Australia we value the right of all Australians to maximise the control they exercise over their own lives and to participate to the maximum feasible degree in decisions which affect them.

This philosophical support for the recognition of cultural diversity is a manifestation of deep structural values which lie at the core of our traditional institutions. Australians should not hesitate to invoke such values in any aspect of our social arrangements.

In conclusion, I make some observations about how these values are reflected in the legal system.

Everyone involved in the legal process, including the judiciary, must remain sensitive to any aspect of the process which may create barriers to justice and impinge on the ability of citizens to participate in the decisions which affect their lives. Furthermore, that participation in the legal process should occur, as near as we can achieve it, on the basis of equality, notably with the large institutions whose conduct affects us all, including both public and private bureaucracies.

The right to participate in legal decisions, on the basis of equality before the law, must be a real right, not merely a theoretical one. That requires that all people have access to legal advice and representation and to the courts and tribunals which make decisions.

Ensuring equality before law, requires continuing vigilance on a range of issues which affect access to justice. We must do what we can to minimise costs of participation. In the particular case of migrant groups, interpreters must be available when necessary, and there should be reasonable access to legal aid for those in need.

It is, of course, essential that legal decisions are made by impartial unbiased decision makers and that parties believe that to be the case. Furthermore, the process by which decisions are made must respect the rights of parties as people.

Respect from persons in authority, like judicial officers, is important for the self-esteem of litigants and for their sense of acceptance by, and security in, the society in which they live. Judges must be sensitive to the cultural diversity of our society to eliminate the risk that they may give offence to a party, or reach an unjust decision, because of cultural ignorance.

The judiciary, in common with other occupants of positions of authority, has a significant and continuing role to play in ensuring that Australia remains a tolerant, cohesive and inclusive society. It is necessary that the judiciary fulfils that role to ensure that the reservoir of legitimacy which our legal system has long enjoyed, and the maintenance of which is of such significance to our social stability, is continually replenished.

Print Page

Close Window

Swearing In Ceremony of The Honourable J J Spigelman QC as Chief Justice of The Supreme Court of New South Wales

THE SUPREME COURT OF
NEW SOUTH WALES
BANCO COURT

MASON P AND THE JUDGES
OF THE SUPREME COURT

Monday 25 May 1998

SWEARING-IN CEREMONY OF THE HONOURABLE J J SPIGELMAN QC AS CHIEF JUSTICE OF THE SUPREME COURT OF NEW SOUTH WALES

SPIGELMAN CJ: Justice Mason, President of the Court of Appeal, I have the pleasure to announce that I have been appointed Chief Justice of this Court. I present my Commission.
(Commission read)

MASON P: Mr Wescombe would you please read the Commission. Chief Justice, I ask you to take the oaths of office.

(Oaths of office taken)

Sheriff, I return the bible and the oaths so that the oaths may be filed in the archives of the Court and the bible may have the customary inscription inserted therein in order that it may then be presented to the Chief Justice as a memento of the occasion.
Chief Justice, on behalf of the Judges of this Court I congratulate you and welcome you to the Court.

THE HONOURABLE J W SHAW QC MLC ATTORNEY GENERAL OF NEW SOUTH WALES:

May it please the Court, on behalf of the Bar it is with great pleasure that I congratulate you on your taking up the office of Chief Justice of New South Wales. Your Honour brings to this high office of State an intellect informed, not only in the service of the law, but also by insights gained from experience in a wide range of activities outside the limits of legal practice.

It is fortuitous that you are the first Chief Justice of New South Wales to have been born in Europe. Those who know you have never detected any attraction to rural life, so it is perhaps fitting that you chose to be born in the Polish Silesian city of Sosnowiec, a coal mining and steel city, perhaps the equivalent of Wollongong, without the surf.

You were admitted to the Bar in 1976 and became a Queen's Counsel in 1986.

In practice as a barrister your experience has been broad: Constitutional and Administrative Law; Commercial; Corporate Crime and Fraud; Defamation and Media Law, being your major areas of interest. I would like to briefly touch upon some of your more prominent cases.

In *Kartinyeri v The Commonwealth of Australia* (1998) 195 CLR 337 (the Hindmarsh Island Bridge case) you represented the plaintiffs. The case required the High Court to consider the race power contained in the Constitution, on your submission, in light of the 1967 referendum. In particular, the Court was asked to decide whether the race power could ground legislation which was detrimental to indigenous Australians. While your clients were unsuccessful, the case posed further questions of great significance to race relations in Australia which may need to be resolved in subsequent cases.

In *Ha v State of New South Wales* (1997) 189 CLR 465 (the Excise case), your Honour put an innovative construction of s90 of the Constitution before the Court. As Acting Solicitor General for New South Wales, your submissions were widely admired as forceful and replete with

economic expertise. The majority rejected your reading, and also took the opportunity to close what some had argued as a loophole in the regulation of excises. It was an expensive day for your client, the State of New South Wales.

Your Honour's advocacy skills are illustrated by the remarkable results you had in two very recent cases before the High Court. In *Newcrest Mining (WA) Limited v The Commonwealth* (1997) 190 CLR 513 your Honour represented the mining company. You successfully argued that the extinguishment of mining leases, as a result of the proclamation of Stage 3 of Kakadu National Park was an acquisition of property by the Commonwealth and therefore subject to s51 (xxi) of the Constitution, that is the Commonwealth was obliged to acquire the property on just terms. Just months later, in *The Commonwealth v WMC Resources Limited* (1998) 194 CLR 1, your Honour appeared before the High Court on behalf of the Commonwealth and successfully argued that the extinguishment of oil exploration permits in the Timor Gap did not constitute an acquisition of property. Such a juxtaposition of advocacy is, of course, part of the attraction of life as a barrister.

From 1976 to 1979 you acted as a part-time Commissioner with the Australian Law Reform Commission, where you completed a report on "Unfair Publication" and a monograph on "Sanctions, Remedies and Law Reform".

In 1997 you served this State as Acting Solicitor General for three months.

You came to Australia in 1949 and were brought up in Maroubra, so it follows that your commitment to Souths, the South Sydney Leagues Club, was inculcated decades before you took a brief for the Australian Rugby League, of which Souths had stayed a loyal member. Maroubra Public School provided your primary education, then you went on to Sydney Boys' High, now providing that distinguished public school educational institution with its first Chief Justice.

When you appeared for Commonwealth and State governments, you brought to the conduct of the cases your breadth of experience in public administration gained from your experience as a Senior Advisor and Principal Private Secretary to the Honourable Gough Whitlam, during his Prime Ministership and then as Permanent Head of the Department of the Media. I might that say that Mr Whitlam is overseas and is not able to be here today.

In 1972 you published a pioneering work for this country "Secrecy-Political Censorship in Australia". In 1981 a substantial work on world nuclear policies "The Nuclear Barons", co-authored by you, was published in the United States to critical acclaim.

Your capacity as a lawyer has been reinforced by your experience on the boards of public cultural institutions. You are now serving as President of the Powerhouse Museum and as a member of the Council of the National Gallery of Australia. In the past you had been Deputy Chair of the Art Gallery of New South Wales and Chairperson of the Australian Film Finance Corporation. Your interest in film pre-dated your appointment to the Corporation. In the days before government funding you were involved in a company which raised money for George Miller's first film which, given his later career, showed good judgment.

One essential part of your character is your Jewish heritage, which you have always carried with a robust, easy and unaffected style. Your loyalty is firm enough to allow you to engage in Jewish jokes, long before Woody Allen's rise to fame. As with another Australian minority, the Irish, Jews can be tough with the jokes about themselves. But Jim Spigelman has always been able to turn Irish jokes to his own purposes. Many have heard you tell the story of how you were staying at the same hotel in New York as Mick Young and Eric Walsh, names not unknown in politics. On returning to the hotel Mick Young rang the switch to enquire if there were any messages. The operator asked him to spell out his name, then Eric Walsh took the phone and he, too, was asked to spell out his name. You followed and, having heard the others, without prompting, started to spell out the name, but were interrupted by the operator "I know how to spell Spigelman". Such spelling out was redundant in New York.

You are our second Jewish Chief Justice, and the welcome you have received is eloquent testimony to how far we have become an open, tolerant society since the time of our first, more than a century ago. When Julian Salomons was appointed the fifth Chief Justice of New South Wales, his appointment was gazetted on 13 November 1886, but hostility from his colleagues led him to resign six days later, before he had been sworn in. In his professional life, it was not the only time that he came under attack for his race. But that is long past history.

On a happier note you have followed your predecessor in other ways. Like yourself, Julian Salomons acted for a time as Solicitor General, which was then an office within the ministry, and as a trustee of the Art Gallery. You do not have Salomons' cross eyes or squeaky voice, but other likenesses may be found in the contemporary description of Salomons as having a mordant wit and being quite the fastest, long distant talker of his time. However, the option of following him into a knighthood has passed.

Minorities who have known persecution tend to bring up children who are keen to seek justice for all people. It is perhaps literature's loss that you did not follow a vocation as a writer of fiction. But it prefigures the adult that the boy in his last year at Sydney Boys' High wrote in its magazine "The Record" a short story that condemned the White Australia Policy and criticised

the treatment of the Chinese in our history. The story did not flinch from saying harsh things about trade union phobias against the Chinese. When you were at school the few Chinese students in our schools tended to be side-lined. Young Jim Spigelman, provoked by some gush of enthusiasm from the authorities over an American student, formed the Asia Society, as a forum for communication with the Chinese students.

Your part in the Freedom Rides of 1965 has been much reported in recent days. They were times of hope when it was possible for the young to believe that the walls of prejudice must inevitably fall. We have made gains, but the struggle against intolerance and injustice continues. While the Freedom Riders are well-remembered, the student activist took up many other issues. You advocated a 'poverty law' option at the Law School and, as President of the Students Representative Council, championed student representation on Faculty committees.

Your career has been marked by both hard work and intellectual brilliance. These characteristics were evident as an undergraduate. In the Arts Faculty, you took a double honours degree by the rare feat of doing both subjects (Government and Economics) in the one honours year. Despite frenetic activity in extra-curricula matters and very sporadic attendance at lectures you topped the Law course and were awarded the University Medal in Law.

It is a cliché, alas too often true, that legal practitioners, read little outside the law. However, no-one could level that accusation at you. We will have to wait to see whether you can resist citing in obiter dicta the New York Review of Books, or The New Yorker, where you have the family connection of a cousin, who designs some of the covers. It is the vast scope of your omnivorous reading that has earned you recognition as one of the better conversationalists of our city.

Sometimes your conversation has had unintended consequences. Our former Sydney playwright, David Williamson, likes to tell how he was attracted to the idea of writing his play, Top Silk, by your stories. All this and you have found time for tennis. More importantly, your commitment to your family (Alice and three children) is a major feature of your life.

The law makes heavy demands on those who practice it well and the burdens of the office of Chief Justice that you are undertaking are even greater. I and your colleagues have faith that you will carry out your duties with great energy and effectiveness.

There are temptations even for Judges. Shakespeare etched out a portrait of a functionary of the Venetian State who was one of the kind of men "whose visages do cream and mantle like a standing pond" and who would say "I am Sir Oracle and when I open my lips let no dog bark". You will, I am sure, maintain the appropriate dignity of this high office (the leadership of the New South Wales judicial structure), but I hope that you will retain that capacity you share with your distinguished predecessor, Julian Salomons, for a little mordant wit from time to time. If the Court pleases.

MR R HEINRICH PRESIDENT LAW SOCIETY OF NEW SOUTH WALES: May it please the Court, it is an honour and pleasure for me to be here this morning at this special sitting of the Court to welcome your Honour as Chief Justice of the Supreme Court of New South Wales. Representing the solicitors' branch of the profession, I seem to be strangely suffering the effects of the cab-rank rule, at least in being last in a very long queue of congratulations which have been extended to you over the week since your appointment was announced by the Premier of New South Wales.

However, being last has its advantages. I do not have to say a lot other than to make some observations about the great changes taking place within our Courts and your suitability amidst these changes for the highest judicial office in New South Wales.

That you are eminently suitable is beyond question. Throughout your student days and professional life, you have distinguished yourself as a person of great analytical and technical ability. The people of New South Wales will be well served by your considerable talents.

That great changes are occurring in our Courts is unquestionable. Rarely have we experienced in such a short period of time so many new appointments to Courts in New South Wales and to the High Court of Australia.

And rarely have we seen such intense scrutiny, speculation and expectation surrounding our Courts and those men and women appointed to the challenging task of delivering justice to the citizens of New South Wales. That the judiciary shares responsibility for what goes on in our daily lives is without doubt, but it is in the sharing that some pressures seem to be emerging. Perhaps the pressures have always been with us, but the level of scrutiny and of media and political criticism means the judiciary and their decisions are more exposed, creating new challenges for the justice system.

For solicitors in New South Wales, we look to a judiciary which remains steadfastly independent of the State and unrelentingly committed to applying the rule of law. We look for analysis and insight, thoughtfulness and thoroughness in judgments. We also seek a justice system which is well managed where parties appearing before the Courts can reasonably expect the efficient handling of matters through well-managed administrative systems.

While saying this, such efficiencies should never be a reason to disadvantage a person to a fair hearing. Legal representation should always be a question of right, not of money.

With your qualifications, experience and wide background, we are confident that you are well suited to the leadership role to which you have been appointed and to meet the challenges ahead. In this, you will have the full support of the New South Wales legal profession. The solicitors of New South Wales congratulate you and wish you well in your new appointment. If the Court pleases.

SPIGELMAN CJ: Your Honours, Your Excellency, Mr Premier, Mr Attorney, Mr Heinrich, distinguished guests, men and women of the legal profession, and of the public, your presence honours me. It honours the Court.

On this, the first occasion that I address the Court as Chief Justice, my initial remarks are to my immediate predecessor, Chief Justice Gleeson, now Chief Justice of Australia. No successor could wish for a better inheritance. The Court is in good shape.

Further, as you pointedly reminded us at the ceremony to mark your retirement, exactly a week ago, no-one could wish for more informed surveillance.

Mr Attorney, thank you for your personal comments. As you and others would recognise, it takes a lot for a South supporter to willingly wear rabbit fur.

Mr Heinrich, thank you for your comments, and I will have some comments of my own on the matters you raised.

The media has given considerable attention to the fact that I was not born in Australia. I came here at the age of three. It has happened before.

Sir Frederick Jordan (Chief Justice between 1934 and 1949) was born in London. He came to Australia at the age of five and lived humbly in Balmain. Like myself, contrary to something the Attorney said, he attended Sydney Boys High School.

Setting aside my two living predecessors, there can be no doubt that he is the most intellectually distinguished Chief Justice in the history of this Court. Sir Owen Dixon thought so. On his retirement as Chief Justice of Australia, Sir Owen expressed his regret that Sir Frederick did not serve with him on the High Court. I do not compare myself in that regard but, rather, I simply note, other than my non-Anglo Saxon background, there are some personal parallels.

By the 1930s Australian society, at least in the legal profession, was already a comparatively open one. If one surveys the world, the nations in which it could be reasonably expected that a transition from migrant to an office of this character could be accomplished in one generation, can be numbered on the fingers of one hand.

I am lucky that my late parents brought me to live in one.

Furthermore, such a transition is also a manifestation at the rigorously meritocratic tradition at the Sydney Bar. It does not matter where you came from, who your father and mother were, or what other privileges you had, you make it or you don't on your own abilities.

I was recently reminded of the competitive pressure at the Bar by David Jackson QC. On the announcement of my appointment he forwarded an extract from volume 9 of the Commonwealth Law Reports at page 16. The judgment of Justice O'Connor or, rather, Mr Justice O'Connor, as his Honour was then, somewhat redundantly, known.

Jackson had read in the newspaper that my age was 52. Justice O'Connor said this:

"A man in search of employment at 52, even if his limbs and health are perfect, begins to feel the competition of the younger men who will eventually drive him off the field."

The first thing to note about this extract is that it manifests the extraordinary depth of the jurisprudence of the High Court of Australia.

Secondly, it raises the issue of competition of the Bar. I must confess, that oblivious as I am to these things, I was not conscious of pressure from younger rivals. It may be that Jackson feels differently. His letter to me was a warm one.

It is a matter of bewilderment to me that the Bar, or the solicitors' branch of the profession, would be under attack for being inadequately competitive. Attempts to proscribe some professional rules or restrict the recognition of a special status, like Senior Counsel, are sometimes advanced in the name of competition.

I do not know of any area of commercial activity in Australia that is more intensively competitive than the law. Practices which were real barriers to competition have long since gone.

In the light of such attacks the status of the legal profession as a profession is one of the matters which I wish to highlight in these remarks.

There is a view abroad that because one aspect of the profession's activities constitutes a business the profession should be treated and regulated as if it were nothing other than a business. In this lies great danger.

The independence and integrity of the legal profession, with professional standards and professional means of enforcement, is of institutional significance in our society. It is an essential adjunct to the independence of the judiciary.

The ideology of the free market forces, which I do not doubt has a significant and appropriate role in many spheres of discourse, has been elevated by some to a universally applicable

orthodoxy. It should not be accepted to be such.

Economic rationalism has its place. In the administration of justice that place is a limited and subsidiary one. A plurality of organising principles for our social institutions is as important to the health of our society as biodiversity is to our ecology.

There are parts of our society in which the ideology of free markets simply has nothing useful or interesting to say. The requirements of justice is one of them. Some have advocated applying the doctrine of "user pays" to the Court system. That would fundamentally diminish its capacity to deliver justice.

The work of this Court cannot be assessed as if it were merely a publicly funded dispute resolution centre.

There are some specific points of contrast between markets and the profession worthy of note. The first and, in my view, foremost, is the significance of historical continuity. This is at the heart of the legitimacy of our legal system. A profession values such traditions. Markets are different. A market wakes up every morning with a completely blank mind, like Noddy.

Secondly, a profession has an ethical dimension and values justice, truth and fairness. The market recognises self-interest and self-interest alone.

Third, the operation of a market gives absolute priority to a client's interest. A profession gives those interests substantial weight, but it is not an absolute weight. In many circumstances, the lawyer's duty to the Court prevails over a client's interest, let alone a client's enthusiasms.

This Court knows that it can generally rely on the professionalism of those who appear before it. If that were to change the resources needed to administer the law would explode, perhaps to American dimensions.

I do not intend to suggest that venality is unknown in the legal profession, but it is not its central organising principle.

As Justice Posner, of the United States Court of Appeal, indicated in his 1995 Clarendon Law Lectures at Oxford University, the special role of the English Bar, with which he was making comparison, and particularly the greater significance of duties to the Court, make American practices inappropriate in our system.

We do not have and must not create the situation reflected in the American aphorism:

"A town that cannot support one lawyer can always support two."

There is a comprehensive review of lawyers' duties to the Court by Justice Ipp of the Supreme Court of West Australia, published in the January 1998 issue of the Law Quarterly Review, which I commend to the practitioners present today.

The duties of a lawyer to the Court include:

- * A duty of full disclosure of the relevant law;
- * A duty of candour not to mislead the Court as to fact, nor to knowingly permit a client to do so. In this regard greater recognition is now given to the many cases in which mere silence constitutes misleading conduct.
- * There is a duty to prepare the case properly and to know the relevant law.
- * A duty to refuse to permit the commencement or continuance of baseless proceedings or proceedings brought for an ulterior purpose, such as malice, or to exploit the advantage of Court delay.
- * There is a duty to exercise care, by testing any instructions, before making allegations of misconduct against anyone.
- * There is a duty not to assist improper conduct, whether illegal or dishonest or otherwise improper.

All of these duties will override the perceived interests of the client.

There is another significant duty that may coincide with the interests of the client. Contemporary pressures on the administration of justice require the recognition of a professional duty owed to the Court, as well as to the profession, to conduct cases efficiently and expeditiously. Pursuant to this duty practitioners must identify, at the earliest possible stage, the real issues in dispute. Practitioners have a duty to ensure that legal costs and Court time are not unnecessarily spent. It is no longer permissible, if it ever was permissible, for a lawyer to take every point, and this also applies in criminal trials.

It may now be appropriate for the Court and the profession to review the means of enforcement of the duty to conduct cases efficiently and expeditiously. We simply must recognise that inability to make concessions is often a cloak for incompetence. So is prolixity.

To brace me for my new role I turned to Justice Kirby's articles on the subject of "Judicial Stress".

My immediate predecessor as Chief Justice has established a clear tradition for the conduct of this office with respect to that subject: "Stress" is not something you get. "Stress" is something you give. I will do what I can.

In his original article Justice Kirby had a separate section on Chief Judges in which he said:

"The skills that were required of Chief Justices in earlier times have radically

changed in the last two decades. At least, to some extent, Chief Judges are expected now to keep abreast of Court management, social change, legal trends, judicial philosophy, law reform, macro economics, the law reviews, world events, cultural occasions, legal conferences and suitable charities".

Now, I have to confess to you that I have, in the past, had a very real problem with legal conferences. I have in fact only ever attended one, an excellent conference in Melbourne on the Mason Court. However, notwithstanding its quality, it did confirm my worst fear about legal conferences: They are full of lawyers.

Today I am dedicating my life to the law to a degree that I have hitherto managed to avoid. It is, I believe, important for all lawyers, especially judges, to participate in community life beyond the law. This is not a monastic order. Plainly there are restraints on such participation. It is not desirable for members of the judiciary to place themselves in situations where they seek favour from the executive, whether Commonwealth or State. Subject to that, the performance of judicial functions will be enhanced by engagement with the broader community. That is something which I do and will encourage.

What I join today is a vocation of service. It is well to remember that the role of the Judge of this Court is to serve the people of Australia and, in particular, the people of New South Wales. Sir Gerard Brennan, on his swearing in as Chief Justice of Australia, explained the oaths, in particular the Oath of Allegiance. He identified the Oath of Allegiance as a commitment to the head of state under the Constitution, in my case, under the Constitutions of both Australia and New South Wales. He identified that now, as the ultimate sovereignty resides in the Australian people and, relevantly, in the people of New South Wales, the Oath of Allegiance is a promise of fidelity and service to the Australian and, in my case, New South Wales people. I adopt his Honour's analysis.

However, the people whom we serve should not be understood in any immediate populist sense. Judges serve the people understood as a historical continuum: We owe debts to prior generations and obligations to succeeding generations. However, a vocation of service to the people it remains.

I approach my new task with enthusiasm. In particular, I look forward to what I see as the most intellectually satisfying manifestation: The crafting of judgments. The law to me is an intellectually creative process. As the great American jurist Oliver Wendell Holmes put it:

"The law is not the place for poets or artists. The law is a calling for thinkers."

I hope to participate in my new role in the future development of the law to the best of my abilities. The judgments of this Court are part of a broader public discourse, by which our society and polity affirms its core values, applies them and adapts them to changing circumstances.

I also accept a representative and administrative function in the maintenance and enhancement of our system of justice, a system which most nations have cause to envy.

Australians like to think of this as a young country. With regard to the rule of law that is not so. This Court has a continuous institutional history from 1824. Very few nations have judicial institutions of such antiquity. Whatever criticisms there may be of current practice, whatever reforms appear appropriate, historical perspective shows that our legal system is a great source of national strength.

Finally, I wish to emphasise the role of an independent judiciary as a bulwark of personal freedom, particularly against the hydra-headed

Executive arm of government, which history suggests is the most likely threat to that freedom.

The profession, no less than the judiciary, operates as a check on Executive power. Indeed, if there should ever be an indication that a member of the judiciary was unduly favouring the Executive, the profession would play a primary role in preventing such conduct.

Our history, in that regard, stands in marked contrast to the continental inquisitorial system where blatant political interference with the legal process, including in criminal trials with political implications, has been a recurring feature.

We are the inheritors of an 800 year old tradition which represents one of the most extraordinary of human constructs. The common law and the adversary system - a manifestation of the power of Socratic dialogue - is one of the greatest mechanisms for the identification of truth and the maintenance of social stability that has ever been devised. It is an honour to serve it.

Justice is like oxygen: There is no reason to notice it if you have it in abundance, as we do.

However, as you constrict the flow it becomes more and more important until a point is reached where nothing else matters at all.

There is nothing fragile about justice in this country. However, it can be gradually attenuated by seemingly inconsequential decisions. Eternal vigilance is required. Such vigilance is my primary duty.

This is a civic occasion of some significance. We have too few in this country to allow it to be taken over by personal indulgences. However, one great thing about an opportunity such as this is to allow me to publicly acknowledge the degree of support I get from my wife and my three

children. I appreciate the opportunity of acknowledging that support. If I try to elaborate any further it would embarrass you all.

The Court will now adjourn.
