HICKSONS
LAWYERS

Lawyers and the Underdog talk by The Hon. Michael Kirby AC CMG

Speakers

John Markos, Hicksons

The Hon. Michael Kirby AC CMG

Alan Blanch, Hicksons

17 December 2014

Level 32, 2 Park Street, Sydney NSW 2000 Australia
DX 309 Sydney
t: +61 2 9293 5311 f: +61 2 9264 4790
www.hicksons.com.au
SYDNEY · CANBERRA · NEWCASTLE · MELBOURNE · BRISBANE

Introduction by John Markos, Hicksons

So thank you ladies and gentlemen. Thank you very much for attending, it's my pleasure to welcome you this afternoon, and I can see Nicholas Cowdery here, thank you for coming, ladies and gentlemen it's a pleasure to be here and introducing Michael Kirby to you.

It comes out of a discussion that we were actually going to try and advance as a discussion for our lawyers to understand a bit more about the nature of the history and legacy of the firm around pro bono work and where we want to take it moving forward, but a number of clients have expressed interest to hear what Michael has been doing most recently and in that sense, we are welcoming clients as well, so thank you all for attending.

You will understand and many of you will know of Michael's history in looking after and advocating for the underdog, it's a legacy he has left for Hicksons since he was a partner of the firm. Since those times as the firm has flourished in a number of ways, while we have dealt with a pro bono work as an ad hoc sort of thing, the way the firm developed with insurance work we were constantly getting referrals for work to sue insurance companies which was just a commercial conflict but we did find many causes, we didn't sing the praises of the work that we did, but we have helped a number of displaced people along the way.

Today the firm has a much more structured program which is still being structured and developed around assisting, displaced persons and clarities, we are helping CanAssist and Mission Australia, I am really pleased that we have got a body of lawyers who have formed a team working with Sarah Jones who is co-ordinating with PIAC, investigating work for the International Crimes Evidence Project. Now that is a project that is assessing crimes in Sri Lanka arising out of the Civil War and we have a got a team of young lawyers who are involved in taking evidence from a number of people all over the country but our involvement has been in Sydney and Melbourne at the moment.

We are also working with PIAC to look at whether we can assist them with the homeless persons legal service in Newcastle, so while those are formative enquiries we will continue the work to look after displaced persons as best as is possible for us. It's a much more structured program today and we can probably take it even further, and all of this as I say is really something that we take from where Michael has been with the firm in the work he did, perhaps he might touch on that when he addresses us.

Michael has either been in the capacity of advising people, helping underdogs, helping with the guidance as a Judge in the Law Reform Commission or as a Justice of the Superior Courts and since his retirement from the High Court I notice that Michael is still working at a cracking pace starting each day at 5:30, I know he is under a lot of pressure for his time so I won't dwell on it other than to say I had enormous trouble trying to find a cartoon that I saw quite some while ago, depicting Michael Kirby as Slim Piggins or Dr Strangelove, riding a nuclear bomb down upon North Korea with UN painted over the bomb.

I congratulate Michael for the work he has done for the UN and thank him dearly for being associated with the firm and leaving us with his thoughts. Would you please welcome Michael Kirby?

The Hon. Michael Kirby AC CMG

Thank you very much John Markos. I acknowledge the presence of Alan Blanch and other friends from Hicksons, I am very glad to be here because I am an alumnus of an earlier manifestation of the firm, in the form of Hickson Lakeman & Holcombe (HLH). I joined them in 1962, soon after my graduation in law. I remained with them until 1967 when I went off to be a member of the New South Wales Bar.

THE HOSTAGE EVENT AT LINDT CAFÉ SYDNEY

These remarks are divided, like Caesar's Gaul, into three parts. First I want to ask all us to reflect upon the horrible events of this past week and the pain that so many families will be suffering tonight, as we meet here on the eve of Christmas.

It is important for us to remember Katrina Dawson, a member of the NSW Bar. A young woman. A brilliant young woman. Top HSC results. One of the top, if not the top student in the State of New South Wales. She had three young children and a family life. She was just in that place, Lindt Restaurant, for a peaceful activity of a civil society. The Premier, Mr Baird, has correctly said that we are a civil society. Nothing is going to change that.

Also Tori Johnson, a young man originally from the United Kingdom, with gifts of hospitality and running, imaginatively, a new enterprise. John Markos didn't mention it but the fact is that Alan Blanch, John Markos and I met in the Lindt Café to talk about the pro bono work of Hicksons. It was a congenial place. A lively place. A place known to lawyers.

It's no doubt because of that fact that the gunman knew it. Because he was a person who had had many cases. No doubt he was taken there by lawyers. Instead of looking about and seeing the business as a peaceful and lovely atmosphere, he took his rage and anger and sense of injustice out in a deadly way.

Tori Johnson was a gay man. According to the reports that I read today on the internet, it is suggested that it was his attempt to disarm the gunman (and thereby to protect those who had come into his care in his restaurant) that led to his murder. The full facts will not be known fully, of course, for a long while. But he was an admirable person. There has been some comment, that I received today, complaining about the fact that no reference was made to the fact that Tori Johnson had a partner of 14 years. That partner is alone tonight, without the kind of support that many partners have. He deserves to be mentioned and honoured.

So we should just think on these terrible events. Yet, as Mr Baird said, we are not going to be changed by them. Uruguay, during the horrible times of the military tyrants in Latin America, was the one country which had adhered to democracy and the rule of law. But when the Tupamaro came along and challenged their society, gradually they enlarged, step by step, the legislative, judicial and police responses, until they destroyed their civil society. They became one of the worst cases in Latin America. Uruguay is a constant reminder that you have got to be on your guard. That you don't fall into the trap of vindicating the terrorists, and those who are violent people, by overreacting to their challenge.

I am not saying that the assailant in this case was a terrorist. It appears that he acted alone. It appears that his actions may have been triggered by the decision of the High Court of Australia last Friday to deny him special leave to appeal in yet another case that he was bringing. However that may be, I was very glad that Premier Baird said that none of this is going to change us. We are going to adhere to our temperate ways. It is very important that we do so; and remember Uruguay; and remember the important role that lawyers have to speak up for those values. I see Nick Cowdery here. He has been outstanding in advocating these truths over so many years. As a citizen, I thank him for doing that.

So that's the first thing I wanted to say. It would be impossible to start this event, on Wednesday, without reflecting upon those two fine people. And all the others who suffered. And their families. And the Police services. And all the others who have attempted to deal with the situation on our behalf.

PRO BONO WORK AT HICKSONS – TIMES PAST

The second thing I wanted to mention is my part in the pro bono activities of Hickson Lakeman & Holcombe. The reason that John, Alan and I met in those pleasant circumstances was a feeling that Hicksons hadn't been quite as active in pro bono as the firm had been during the time of Bruce Holcombe. That it would be good if a new impetus could be given to pro bono work today.

It would be no surprise to the lawyers who are present, but perhaps it would be to the clients who are present, that pro bono lawyering is a very important part of the activity of all significant law firms now. They do it, partly, because it's the right thing to do. But, partly, they do it because they have found that this is the way they keep really good staff. Young people are leaving our profession or at least the larger firms, because of a sense that the high ideals and noble causes that led them into the law in the first place are giving way to the grim realities of ordinary life. That there isn't enough mobility in law. So a pro bono element in the work of law firms, big and responsible law firms, is designed to give a leavening. I am here to affirm that, in my life, it was a very important feature of what made me happy as a young lawyer in Hickson Lakeman & Holcombe. Pro bono lawyering was a very important feature of the work that I was doing. And it was performed with the total encouragement and support of Bruce Holcombe, one of the leaders of the firm in the 1960s.

Bruce Holcombe was a very unusual man. He was a person who was given to very strong opinions. He was a person of great energy. He had gained his first class honours degree from the Sydney Law School when it was very rare to hand out first class honours. One or two a year generally were the most that there were. Roger Lakeman was also a first class honours graduate. These two fine lawyers were at the helm of the law firm then. Both of them were supporters of pro bono. Roger perhaps less energetically than Bruce. Roger's great passion was art and the world of culture. Bruce's great passion was the law. Bruce Holcombe saw the law as the champion of the underdog and the disadvantaged. So he was right behind my efforts to incorporate this work in my extremely busy, ever growing and very prosperous, practice in the firm (mainly for insurance companies). He was very keen to encourage me to engage in pro bono lawyering. As far as he was concerned there was no limit. He employed other lawyers including a young lawyer, Geoff Williamson who comes to the alumni luncheons from time to time. We worked together. He was to help me in that and other aspects of the work. Bruce Holcombe knew that it lifted my spirits. Bruce knew that because it was the sort of thing that lifted his spirit. He understood what I was on about.

When I first came to the firm in 1962, it was as a result of one of the most cruel and disappointing acts that a law firm has ever inflicted on a young graduate. This was the act of Ebsworth & Ebsworth (as it was named then). They invited me to see then senior partner, John Bowen, in their offices, then in George Street, facing Bridge Street. They offered me a key position as a maritime law expert, promising me vistas of the most magnificent practice in maritime law, maritime insurance law, arresting ships and doing all the interesting things that maritime lawyers do. Suddenly, they withdrew their offer of a post with Ebsworths. This was because one of their partners, the Honourable Fred Osborne, Minister for the Navy in the Menzies Government, had lost his seat in Parliament. This was the seat of Evans. He lost it in the Federal Election of 1962. So he had to come back to the firm. There was no space for me. Who knows what might have happened to me if only I had become a maritime lawyer at Ebsworths? Every time I get a chance I denounce them for their cruelty. In fact, if anyone here knows of the way to overcome the Statute of Limitations (by reason perhaps of my infancy at the time), then I would be most appreciative of their pro bono advice.

However, when I came to the firm I came, strangely enough, as the President of the Sydney SRC. I had started a glorious career in student politics in my late years of my time at the Sydney Law School. I was elected as the President of the Sydney University SRC (Students' Representative Council). In that capacity, during that first year that I was with Bruce Holcombe, I was performing pro bono legal work for students who got into legal problems. I am sorry to say that some of our clients at the time, were people who later found their way into high offices in the judiciary in our country. They became clients of mine for offences such as offensive behaviour, (which was extremely popular with police in those days) and fare evasion. These defendants later became distinguished lawyers. I represented them down in the little Police Court which is now the Police and Justice Museum, down at the bottom of Phillip Street. I represented them on the most abominable crime of fare evasion. Who could believe that these towering figures could ever have been guilty of even thinking about fare evasion? I was able, on most occasions, to convince the Magistrate that such was the case. It was unthinkable that these young pillars of society should not walk unblemished from the court room. As many of they did, at the end of my efforts.

So I undertook this work for students. And then, at the end of the year, the students in their very proper gratitude to me for my work, appointed me to preside in a delegation of the Australian National Union of Australian University Students. We were invited to go to Nigeria which had only then secured its independence. Nigeria became independent of

Britain in 1960. So we are talking about 1962. Prior to this sparkling offer I had never been further from the Sydney CBD than Manly. I was asked to hop on a Boeing 707, then the latest creation of international air travel. So I said to Bruce Holcombe: "I am sorry Mr Holcombe" (In those days there was no Bruce, it was Mr Holcombe) "I am very sorry Mr Holcombe, but I will have to offer my resignation because I am going on an international trip."

Bruce Holcombe was absolutely delighted with my selection. He looked on it as an honour for the firm and certainly an honour and a good thing for me. He said: "No, I will not accept your resignation. You must stay on. You must come back after you have been there, to broaden your mind. It's a great thing. It's wonderful for you. It's good for the firm. I am going to give you £1,000 in a letter of credit to spend as you will. I am also going to promise you, that when you come back, you will go on the letterhead as a partner of the firm. You will not be a capital partner. But you will be on the letterhead. Who knows where the future may lie?" That was the generous spirit of Bruce Holcombe. He was a very unusual, quirky, sometimes difficult, imaginative, creative person. He founded this firm and I honour him today.

He appointed me (without many resources, I should say) to be one of the first in-house counsel of those days. In those days law firms didn't have in-house counsel. I was one of the first in Sydney. I had to do everything myself. But I received the title of partner when I came back from Nigeria. The important feature immediately relevant was that Bruce Holcombe was very keen for me to continue in pro bono work.

There are many such cases that I was involved in. Some of them were reported cases. Some of them quite important reported cases. I will only have time today to mention four, and that very quickly.

THE CORBISHLEY CASE: LESSONS IN LAW

One of them was a case concerning Mr Glenn Corbishley. Mr Corbishley was an invalid pensioner who was involved in a fight with somebody in Paddington. He had then the great misfortune to come before Mr Locke SM in the little Court of Petty Sessions in Jersey Road, Paddington.

Until very recently, when you went into Jersey Road, you could look into that Court House from the Street. It was very beautifully and delicately lit at night. You would see the bench on which Mr Locke SM used to sit. I went past it only last week. They have now blocked it off. Now it's a Police Station, I hope they haven't touched the internal

arrangements. They probably haven't because it would be a heritage building. But you can no longer look into where there was an Australian courtroom.

Anyway, Mr Corbishley was dealt with very severely by Mr Locke. He was given a long good behaviour bond and a dressing down in a most unjust way. He came to the firm, referred I think by the Council for Civil Liberties of which I was then a committee member. He sought relief against the great injustice that Mr Locke had visited on him, in the way he conducted the case and, as he thought, in the penalty imposed.

I then made a mistake. It was a legal mistake. It's very important for people like me to acknowledge that it's human to make mistakes. I initiated two procedures. One was a procedure by way of Quarter Sessions appeal. The other was a procedure by way of statutory prohibition against Mr Locke. There was a lot of law about whether you could have both of those remedies. The statutory prohibition was a kind of Prerogative Writ in statutory form that allowed you to go up to a superior court and seek immediate relief on grounds of law and have the orders set aside. The Quarter Sessions appeal was, as Mr Craig Thompson discovered in Victoria this week, a full new appeal. It involved a new hearing. So we went up first to the Court of Appeal on the statutory prohibition. I thought: if I succeed there, I will not need to pursue the Quarter Sessions appeal.

So horrible were the circumstances of Mr Locke's treatment of Mr Corbishley that the Court of Appeal said, through the voice of Justice Holmes, a very able Judge with a huge High Court practice before he became a Judge of Appeal of New South Wales: "It would take a Dickens to describe in words, or a Hogarth to describe in sketch what happened to the unfortunate prisoner on that occasion." See: ex parte Corbishley; re Locke [1967] 2 NSWR 547. Accordingly, the Court of Appeal held, in effect, that it would undoubtedly have given the relief of the statutory prohibition. Except that the prisoner (the appellant) had also taken proceedings seeking a Quarter Sessions appeal. Accordingly, he should go to Quarter Sessions, said the judges. No doubt he will have complete justice there. Therefore, it was unnecessary for the Court of Appeal to give the relief that it otherwise certainly would have been given. No costs were ordered against Mr Corbishley. But we went off, full of confidence, to the Quarter Sessions. Alas, lightning struck twice. Mr Corbishley, in the Quarter Sessions appeal drew Judge Torrington.

Now, Judge Torrington was quite a nice sort of a person, I suppose, if you like that sort of Judge. But he did not, shall we say, view with sympathy invalid pensioners who were argumentative and difficult. And who were appealing against what he thought to be an appropriate sentence; actually an inadequate sentence. So Judge Torrington said that he

would, in the exercise of his individual and separate powers, record a conviction and sentence Mr Corbishley to six months imprisonment. I went out to see Mr Corbishley at Long Bay Gaol that night. Mr Corbishley said "How can it happen to a person whom it would take a Dickens to describe it words and a Hogarth to present in sketch what happened to me before Mr Locke. And yet here I am now being punished much more severally?"

I lay in wait to cancel what happened on that unfortunate day. Years later in the Court of Appeal, as President, the court established a rule which is now observed throughout Australia. Parker v Director of Public Prosecutions (1992) 28 NSWLR 282. It was observed this week by the Judge hearing Mr Craig Thompson's appeal. She gave Mr Thompson a clear warning that she had the power to, and might, increase his sentence, if he were convicted. From what one reads in the papers about her decision she might well have done that, if she had felt able to uphold the conviction. In fact, she changed the orders in Mr Thompson's case so that situation didn't arise. However, it's now the standard practice throughout Australia that a Judge, who is hearing a case similar to that before Judge Torrington, has to give a warning so to give the person who is appealing has the opportunity to seek leave to withdraw the appeal. So that they do not suffer double jeopardy.

Anyway, that was one of my less glorious efforts at pro bono representation of HLH. Yet, even then, it ultimately gave rise to an important and curative legal principle.

OWEN WESTCOTT AND THE WALGETT CINEMA

The second case concerned Aboriginals. It was a case in which the Aboriginals, in Walgett, sought to challenge the rule of the cinema proprietor in Walgett that Aboriginal patrons were not allowed upstairs in the cinema. They were not allowed in the seats that were covered in velvet. They were required to go downstairs, where the seats were covered in vinyl. And where there was no carpet on the floor. Presumably, just in case they might vomit or cause other such trouble.

A number of university students challenged this practice. One of them was named Owen Westcott. He was the son of Judge Noel Westcott a Judge of the Workers' Compensation Commission. Young Owen went up with a number of other students, in the fashion of the freedom rides in the United States of America at the same time. Arm in arm with Aboriginal patrons Owen Westcott and the students marched upstairs. As they went upstairs, they were stopped by the manager. He said Aboriginals must go downstairs.

They tried to pass. They said "We have got the tickets. We want to go upstairs." They were ultimately hauled downstairs. The police were called. The students and their friends were arrested. This was Australia of 1966. This was our country in that time.

A very wise magistrate later presiding in Walgett gave all of the accused the benefit of what was then section 556A of the Crimes Act. (The First Offenders Provision). He let them walk free without a conviction. This was important in the case of some of the students who went on to become lawyers or public servants where a conviction could be fatal. Another such freedom ride was actually organised by James Spigelman, later Chief Justice of New South Wales. Those were days of high student ideals.

A couple of weeks after the case was concluded, the Walgett cinema quietly changed its discrimination rule. Apparently as a result of pressure within the town. It was in those ways that matters of principle were fought and litigated but practices changed.

THE VIETNAM WAR & WYNYARD DEMONSTRATIONS

The third case concerned protests in Wynyard Square against the Vietnam War. A large number of university students protested outside the United Sates Consulate. It is very difficult to explain to people today how controversial that conflict was and how deeply resentful of it young people were. This was particularly because of the National Service Act 1951 and the requirement of a ballot which effectively balloted you into a very real risk of being killed in the Vietnam War. The requirement for a National Service exemption was fought out in many cases. The legal principle was established in a case called ex-parte White (1966) 116 CLR 644. It laid down a requirement that, to be exempted, the applicant had to prove that he would never fight in any war. That was what conscientious objection was held to mean. You would never fight in any war. So in many cases, undertaken pro bono in those days, I heard the police prosecutors putting to the applicant: "But if your mother was being raped and you were in this war situation wouldn't you consider taking up arms?" "No Your Worship. I would never take up arms." The magistrates would hold that they did not believe that the appellant would not take up arms in those circumstances. Therefore, the claim of conscious objection was rejected. It was very hard to win on the face of the High Court decision in ex-Parte White.

Still the problem with the Wynyard Square incident was that many television cameras had been there. They had taken lots of moving film. The moving film was made available to us. I remember going down to Chippendale, to a place where we went through each film, one by one, frame by frame. We worked out which ones were about our clients and what they

appeared to be doing before they were arrested. Unfortunately for the police, their oral testimony did not coincide with the facts displayed on the moving film. Accordingly, this was one of those cases where we turned the experience we were gaining in workers' compensation litigation for insurers, asking police questions designed to enlarge the horror of the students' behaviour. What did you do there? Did he hit you? Then did he raise his arm? Was it violent? "Yes it was very violent. He was most violent." Then a film was shown. I simply copied in the magistrate's court what I saw barristers doing so successfully against the workers in workers' compensation cases. The secret was to build up the case. Then it was smashed to pieces. I don't think a single one of the students who were arrested in Wynyard Square was ultimately convicted. That was a glorious victory for the right of free expression and assembly.

Back in those days, we really didn't have an effective right to assemble. People didn't feel it was their right to assemble and cause trouble and to interfere with traffic. Traffic was the great God. Now, I have my chambers opposite Parliament House in Sydney. Virtually every day I see and hear a demonstration. "What do we want? Freedom. When do we want it? Now!" And that's a wonderful thing, to live in a society where people can peacefully express their views. If it disturbs the traffic for a little while, so be it.

THE TATAR CASE & POLICE SHOOTINGS

The fourth and final pro bono case I would mention was a case of police shooting. It was the case of Tatar. The case is described, and my role in it is recorded, although the role of Hicksons as the pro bono lawyers is not recorded. The story is told in a book by Professor Richard Harding of the University of Western Australia: Police Shootings in Australia. The story begins when two young men were seen by police in Granville. The police asserted that they were trying to break into a petrol station. The petrol station was the Golden Fleece petrol station. The older members here will remember that Australian company. The police needed to say that the young men were breaking into the petrol station in order to have authority, under the then Police Regulations, to use their firearms. Which they proceeded to do. They could use their guns only in a case of a suspected felony. Breaking into a petrol station would then have been a felony.

One of the two young men concerned was George Tatar. He was not really a man. He was more a boy of 16. He was shot and he was shot by a policeman who later showed tremendous remorse.

The policeman did not know, and had not been properly trained, that if you shoot a bullet at a person over a trajectory of 70 metres, the bullet will travel in a trajectory of a curve. Although he said he was shooting above the head of the accused, as a warning to try and get the boy to stop attempting to escape, in fact the bullet entered the head of George Tatar. It killed him.

The other boy involved, Raymond Smith, ran away. The police claimed that they could not find him. The theory which the Council for Civil Liberties propounded, and which we were seeking to advance, was that this was because the police did not want to find Mr Smith. This was so because he would establish that what the two boys were involved in was a statutory offence of stealing a motor vehicle. That did not warrant the use of police firearms under the law and the Police Regulations at that time. It was not a felony. The police said they could not find Mr Smith. We at Hicksons had no difficulty finding Mr Smith. We simply got in touch with the Tatar family. We asked whom their boy had been with. In this way we found out his name and his whereabouts.

Raymond Smith was in hiding because he was greatly frightened, so he claimed. He feared that he would also be shot by police to prevent the truth coming out. We then discovered a provision in the Jury Act (or it might have been in the Coroners Act at that time) permitting the summoning of a jury of six persons to hear a coronial inquest. The Coroner is the oldest judicial officer in English legal history. Our law provided for a coroners' jury. I think that this practice has now been repealed from the Coroners Act. But it was there then. So we summoned a jury.

There were a lot of tricky legal questions in the case. To hide a witness could constitute the common law crime of misprision of felony. Our duty was to get Mr Raymond Smith to the authorities as quickly as possible. Otherwise, we would ourselves be in trouble. This rare offence was brought to my notice because, if I had ever been taught it, I did not remember it. The principle of misprision of felony arose because the very last thing Raymond Smith wanted to happen to him was to be turned over to the police. When we examined the law carefully, the rule that was laid down in the courts of England, about misprision of felony, was that the duty was not, as such, to take the witness to the police, but to an independent justice. So Kevin Holland QC drew this arcane rule to our notice. We immediately took young Mr Raymond Smith to see a chamber magistrate. We reported the matter to him. And we summoned a Coroner's jury.

The matter was then heard by the jury. The jury was forbidden by the Coroners Act from making a finding that any particular person was responsible for an indictable offence.

However, the Act allowed the jury to make recommendations. Very sensibly, they made a suggestion that there was an urgent need for police to receive proper training in the use of firearms. My understanding is that, after that jury recommendation, steps were taken to ensure that the police in New South Wales were given more careful firearm instructions.

If you look at this week's Economist newspaper, it contains a contrast between the number of police shootings in the United States of America and Britain. Last year fatal shootings by police in the United States numbered about 550. However in the United Kingdom firearms were presented by police on only three occasions. There were no fatalities in Britain. The shooting of suspects by police in the United Kingdom is extremely rare. Without any comment on the fatalities in the Lindt Café this week in Sydney, if the Coroner's inquiry follows the course of the Tatar case, a lot will be revealed by the scientific analysis of the bullets. When the bullets that led to the fatalities are examined, it will be revealed as to whether they were bullets from the weapon of the hostage taker, or whether they were bullets from the weapons of the police officers. These things can be very easily discerned by forensic ballistic expertise.

So these four cases are just a sample of the pro bono work of the Firm long ago. They are an indication of the type of work we did. They are an indication of how important it is for any country to have an independent judiciary that determines contested matters patiently and carefully; but with a very strong sense of the nature of our society. It is, as Premier Baird said – a civil society, where official authority operates under the law. Such authority includes the army, police service, indeed all officials. The pro bono lawyer can make the rule of law a reality. There is no way young Raymond Smith would ever have been able to represent himself to the level of the expertise of Kevin Holland QC (later a Judge in the Supreme Court of New South Wales). He could not have done so if it hadn't been for the pro bono lawyering. Similarly, the young Aboriginals and students who wanted to go upstairs in the cinema. There was no way they could have defended themselves effectively in Walgett. Likewise, Mr Corbishley, an invalid pensioner with Hogarth and Dickens in mind. There was no way he could have established the beneficial principle in his case, without legal assistance. Even the young students who protested against the Vietnam War or fought changes of fare evasion. Most of them could not effectively represent themselves without assistance. So pro bono lawyering is important. Above all, it is interesting. It makes people remember what took them into law in the first place.

THE UNITED NATIONS COI ON NORTH KOREA

The third part of my talk relates to the United Nations inquiry on North Korea. I was appointed in May 2013 to chair the Independent Commission of Inquiry (COI) established by the Human Rights Council in Geneva to investigate the crimes against humanity and other serious international crimes which were alleged against the regime of the Democratic People's Republic of Korea (DPRK). Once the COI was appointed we went about our investigation. We did it in a way unusual for the United Nationals. It was a way that was influenced by the traditions of the English common law. That tradition deals with matters of contention in public, not in secret or in private. Most of the UN commissions of inquiry in the past have been conducted in private, because they operate in accordance with the continental or civil law tradition. By way of contrast, the English common law always put a great store on openness. That is why Royal Commissions sit in public, even with embarrassing and difficult testimony like the sex abuse Royal Commissions. Or ICAC, where it is sometimes hears prejudicial, sometimes no doubt untruthful testimony, generally operates in public.

In courts of law it is very hard in our tradition to secure an order closing the court. I don't think I ever received such a request when I served on the High Court. But from time to time you receive applications to close a court in the Court of Appeal. There is a provision for that course under the rules. However, I never agreed to close the court. It is very rare, in our tradition, to do so.

So that's the approach we took in the COI. We had public hearings. We had video films of the evidence. They were uploaded online. International media developed an interest. The report was duly delivered. The report created a sensation when it was delivered because it was very compactly written. It was actually quite readable. Every word of the report was weighed by me to make sure that it would not be boring. There were so many boring United Nations reports. This one is gripping. It is the reason why steps were then taken to follow it up.

The Human Rights Council voted by 30-6 to refer the issue of human rights in DPRK to the UN General Assembly for action by the General Assembly. The General Assembly received the report last month, debating it at length. Very fiery meetings were held and ultimately by a vote of 111 to 19 with 55 abstentions, the GA voted to refer the report on North Korea to the Security Council. This was something that had no exact precedent in the case of a commission of inquiry on human rights. The reason for that appears in the conclusions in the Commission of Inquiry on DPRK. The General Assembly concluded

that the Security Council, with its duties for international peace security, was involved because of the great instability caused by the regime in North Korea, with its grave deprivations of human rights. That was a decision of the Third Committee of the General Assembly. The full General Assembly will receive that report on Friday of this week. It is expected that the report will be endorsed and then sent on to the Security Council.

In the meantime, two weeks ago, ten of the 15 members of the Security Council, signed a letter to the President of the Security Council asking that the situation in North Korea should be put on the agenda of the Security Council for consideration by the Council. Under the Charter of the United Nations, and the rules governing the Security Council, (which is the highest organ of the United Nations) a veto applies to decisions of substance. However, a procedural decision can be made by a two third majority of all members, without access to the veto. The majority for that purpose must be 9 members of the Security Council, the Security Council membering being 15. Five permanent members and 10 non-permanent members voted in favour. At the moment Australia is itself a member. So the step was taken by Australia to circulate the request to the UN Secretary-General and to ask him to circulate the whole membership of the Security Council of the United Nations. The fact that the ten members of the Security Council had asked for the procedural resolution to be adopted, placing human rights in North Korea on the agenda of the Security Council. It showed that the requite two thirds majority was established.

One of the recommendations which the Commission of Inquiry on DPRK made was that, in considering human rights in North Korea, the United Nations Security Council should exercise its exceptional jurisdiction to invoke the jurisdiction of the International Criminal Court in respect of the situation in North Korea. This was so although that country was not a party to the statute setting up that court. This exceptional power in the Rome Treaty allows the Security Council, under the Charter, to refer the matter, as it has done in two cases in the past. For this to be done in the case of North Korea would require a substantive motion. That would raise the question of a Chinese or Russian veto to it.

That matter is likely now to come before the Security Council, if the General Assembly in full session endorses the decision of the Third Committee. And the procedural motion is likely to come to the Security Council on Monday or Tuesday of next week. So this is literally breaking news. This is what is actually happening in the United Nations right now.

Two things I would say. First of all, as an Australian citizen, I am proud to have been involved in this inquiry. But I don't count it a great success unless something practical

comes of it. By that I mean something advantageous to the people of North Korea, who have suffered very greatly. We will just have to see how this plays out.

As a small boy at the Summer Hill Opportunity School, I received a copy of the Universal Declaration of Human Rights in 1949. It had just been adopted by the General Assembly in December 1948. I have always been idealistic about the United Nations. I have always liked to believe that it is a body that is important for the protection of peace and security, international equity and freedom and justice and universal human rights. In the case of the inquiry into North Korea, everything that should have been done by the UN, has been done.

If it finally comes unstuck at the level of the Security Council, with the vote of the two permanent members who may cast the veto, that is exactly how the Charter is expected to operate. We would not have had the United Nations without the veto belonging to the Great Powers. Therefore, if a veto occurs, the problem of North Korea will be left to a future time and future action. However, if it gets onto the agenda of the Security Council, that will be a very important step, in itself. It will mean that North Korea is under the constant review of the highest organ of the United Nations. So these are really quite historic developments in recent days.

Now, how do I link my work on the Security Council with those early days as a student trouble-maker and student politician working for Aboriginals in Walgett and for invalid pensioners in Paddington and the Vietnam War protesters and the rule of law in respect to police shootings? Well, I think it is all interrelated.

It comes out of a commitment to the idea that law, including international law, is important for peaceful and just societies. In my work as a young lawyer, and later in my work as a barrister, and finally in my work as a Judge, I never lost my sense of idealism and belief in the essential morality of the law. The work at the United Nations is simply a continuation of this. But the rule of law also takes in the law in the legal profession, evident in day to day work of legal practice. I know from my own experience that this can be very gruelling. Lawyers have to be totally concentrated on what they are doing. No excuses will be entered into. It's very important that a space be found to remind lawyers, especially young lawyers, that law is noble vocation. There are important causes. The law has an important role. That role will not be fulfilled without pro bono lawyering. Especially today.

Therefore, Hicksons should continue the distinguished record of the 1960's. Its leaders then gave absolute support for this. They were not only tolerating it. They were strongly

for it. They knew it was good for me. They knew that if I was happy, I would work very hard. As I did. They knew I would do my work better if I was doing some work that I felt was fulfilling my ideals. In any case, it was the right thing to do. That was Bruce Holcombe's basic philosophy. It was sometimes pretty unstructured. Essentially, it was just what came through the doors in many cases. Many cases came from the NSW Council of Civil Liberties. Those cases did not have any conflict of interest with insurance companies, because there are no real insurance issues in Hogarth and Dickens. However, there is work to be done. It is good to see that the firm is now doing work in respect of the international activities in Sri Lanka because, truly, it is a very serious case. Still there are lots of little cases around our own city and State.

It would be good if all the lawyers at Hicksons were to do a little bit of voluntary work. It is good for you. It makes law enjoyable. Some of it is even fun. Winning a case against the 'forces of darkness' and in favour of the 'little guy' is a good thing. So we will have a big round of applause. And then a few questions. And then there will be a big feast. Now onto questions? Any questions or comments? Does any of what I said resonate with anybody, with any pro bono case that they have had? I wonder whether anything that's happened in legal practice between 1962 and 2014 that has made it more difficult to fit in pro bono lawyering? Maybe time charging and things of that kind which didn't exist back in my day? Maybe that makes it less encouraging? If that is so, then something has to be done to make sure people are not penalised for undertaking pro bono work. They should be rewarded and encouraged with the work that they do. Anyone any comments on that?

Questions and Answers

Question 1:

Yes I was admitted in 1977

The Hon. Michael Kirby AC CMG:

You are so young.

Question 1 (continued):

And I remember the demonstrations in the 1970's. I remember the one outside the Town Hall between the government buses and unions and thousands of other people and I was sitting there cross legged in the middle of George Street.

The Hon. Michael Kirby AC CMG:

Yes that's right. That was shown in the film. You were probably a star!

Question 1 (continued):

The huge change in the law from these days is that law has become a big business in the last couple of years

The Hon. Michael Kirby AC CMG:

Chinese Walls are built into firms to allow lawyers in the government business to deal with an action against government. If not, there is a real question as to whether or not the firm should only do government work.

In those early days, the legal work of the government, especially the Federal Government, was done by a very small office of the Crown Solicitor of the Commonwealth. At the Bar, I received work from them. I came to know them. They were people of most enormous knowledge about public law. Much more so than most lawyers because they literally lived their lives every day with the Constitution. It was on their bed table at night. They were reading it and thinking about it.

In the mid 1960s the Commonwealth had appointed a woman to be the Deputy Crown Solicitor for the Commonwealth in New South Wales (Jean Austin). That was unusual. That's another matter where Bruce Holcombe and Roger Lakeman were in advance of the times. Miss Yvonne Patterson became a partner. That was unusual in those days. I am glad I did work for the Commonwealth. I don't think I did anything for the State. But I did for the Commonwealth. It was a great privilege to work alongside these knowledgeable people. I didn't really return to that sort of life until I was appointed to the High Court. Then I too had to live everyday with the text of the Constitution.

On one occasion, I invited all of the people whom I have known in the Commonwealth Crown Solicitors office and also in the Attorney Generals Chambers (the policy area) over to my chambers in the High Court in Canberra. Most of them had only ever been in the court rooms, and seen cases argued there. Yet here were all of these top lawyers, of tremendous devotion and ability, coming backstage in the Court. So I brought them up to my chambers. I had a magnificent balcony overlooking the fountain in the front of the High Court. It was looking out on the Old Parliament House and new Parliament House and the old Administrative Building, which is near the Old Parliament House. That is where AG's was in those days. They were all pleased to come into the High Court to see it

from the inside because it must at the time have seemed to be the 'enemy' over there striking down their 'well conceived' statutes.

Anyway, we work in a very honourable profession where people do their duty. The best thing I feel I can say about my time as a Judge was that I never once received a telephone call from a Minister about a case. They wouldn't dream of doing it. I never received a brown paper envelope with money. I never had somebody at a club or other place trying to put pressure on me in a case. It just doesn't happen in Australia. We are really very lucky. We must keep this. The recently reported cases in the ICAC in New South Wales have been rather disturbing. I don't know if you feel that. I really think we have got to come down like a tonne of bricks on any suggestion of corruption of public officials. If we lose an uncorrupted public institution (and this is not only Judges but public officials, the civil service and so on) I think we have really lost the plot. Any other comments before I wander off into further ruminations?

When I came back from Geneva, where I was for UNAIDS as well as North Korea this week, I came in on Monday and I saw across a crowded room a very overworked customs area a young man who is studying at Oxford, doing post graduate legal studies. He went to school at Fort Street, where I also went to school decades earlier. He went virtually straight from the airport out to the school to speak to the Year 10 students about being a lawyer and what law was like. I thought that was terrific that he would pay back in this admirable way. I agree with you, lawyers do a lot of things. It's often not heralded. It's not world shattering. But anyone in the room who gets a chance should go back to their school. They should ring up and say "Look I am a lawyer. Do you think it would be interesting if I came out and just gave a talk about what the real life of a lawyer is? The up side and the down side?" If many of us did that, lawyers would be thought of better in the community. People would know the variety and importance of the work we do.

An interesting discovery I made about the Victorian Charter of Rights and Responsibilities was revealed to me by Gemma Varley. She is First Parliamentary Counsel of Victoria. She said the most important values of the Charter in Victoria were not the cases that come up before the courts and all the publicity and the challenges the court holding that the government or legislature was in breach of the Charter. She said the two things as to the value of the Charter, from her point of view. The first was that there is a provision under the Victorian Charter that requires the head of department to sign off with Parliamentary Counsel that the legislative provision or policy is Charter-compliant. That means that any infringements of fundamental human rights tend to get filtered through the process before they gets ever to a court. If the Government, having received the

certificate that a law is not Charter compliant, considers that it should still go ahead with the provision (because they feel notwithstanding the Charter that it's necessary for society) they have to justify it in Parliament. If necessary, also to the electorate.

The Brumby Government in Victoria, for example, introduced a stop and frisk power for police. Parliamentary Counsel and the Department of Justice advised that this Bill was not Charter compliant. You have to have reasonable cause. You can't just go around frisking people without cause. The Government said, notwithstanding the qualified certificate, "We believe it is justifiable in the current circumstances." They had to wear it. They argued in that way. They lost the next election. I don't think it was for that reason. But at least that is the process of ensuring that the question may be democratically considered.

The second value of a Charter that Parliamentary Counsel of Victoria developed, was its utility in teaching children at school, fundamental principles. That is a very useful thing. In America, children have the United States Constitution. In Australia, we haven't any precise equivalent. Children do not learn such fundamentals. At least in my opinion. In my day, we were taught about the Universal Declaration of Human Rights. We had just come through a big war. Even as little children we knew that it had been a terrible conflict. That it finished with the Holocaust. And with atomic bombs. Therefore, we understood it. But I wonder today if children in Australia learn about these things. How important it is to keep a civil society and to keep these universal principles fresh. Not only on paper but in our hearts and minds. If anything, the events of this week show how important it is to support the fundamental principles. And to keep a tolerant, free, democratic rule of law community. Yes?

Question 2:

I worked for a community leader. My dreams are tormented by the faces of many people whose rights we can't defend. Some of these we are partnering with actually make much more of a difference than we can in addressing our society and sticking up for the fundamental rights of those vulnerable people. I was wondering if you would be willing to comment on the difference between a country like Australia where there is a strong professional ethic and where the legal profession is committed to pro bono work.

The Hon. Michael Kirby AC CMG:

Certainly it's a great advantage to have a strong commitment in the legal profession. I have sat in many cases involving pro bono. I would always look at the front of the appeal

book and see who were the lawyers who took the case up. Mostly, they were the big firms. They took the cases up. I think of Mallard from Western Australia. There a man who was wrongly convicted of murder. On his first attempt to appeal to the High Court, Justices Toohey, McHugh and I refused special leave to appeal. He advanced an argument which had no legs concerning the failure to allow evidence of the use of a 'lie detector' to move his innocence. Subsequently, he came back to the High Court. It was Clayton Utz that brought him back. His counsel was Mr Malcolm McCusker who later became the Governor of Western Australia. A brilliant QC. He had actually put the jigsaw of the facts, the objective facts, together. They did not fit. When Mr Mallard was at the Perth lockup. When the murder took place in another part of Perth. Where Mr Mallard was filmed in a taxi doing a 'runner'. Those three things didn't fit together. He could not have been at the place of the murder at the time of the murder. Therefore, the conviction had to be quashed. But that was on the second attempt. It was only because Malcolm McCusker and James Edelman (who later became a professor at Oxford and then came back to be a Justice of the Supreme Court of Western Australia now a Judge of the Federal Court of Australia). They took the case on pro bono. They appeared in the High Court. I revealed that I had been on the first refusal of special leave. I offered to stand aside. But counsel indicated that they didn't object to my sitting. That was one case.

The case of prisoners' voting rights is another. That case was taken to the High Court by Allens. These firms do it and that is important. I want to see it in the law reports (because I still read them) that Hicksons is appearing in these cases. If you look at ex parte Corbishley, down the bottom of the law report where the solicitors are recorded, you will see Hickson Lakeman and Holcombe. It would be good if you sought out the equivalents to the Council for Civil Liberties in my day. In my day there was nothing else besides the CCL. They are still there. They are still doing useful things. We shouldn't look down on them. This is about the rule of law. These are the citizens who may have a good case. If they haven't, then they will be filtered out. The lawyers will not take it on. But if they have a good case, or if it is a good cause that is emerging (like the cause of Aboriginal documentation), then it will be good to see Hicksons take those cases on.

In a way it is easy to take on a little case and do it whilst other cases are bubbling along. Just do this and it can be intensely interesting. I will tell you this. You will talk more about that little case then you will about the big cases. There are the real live issues of the rule of law and justice. So I hope that what I have said tonight will encourage the idea.

It has to be planned. But all the big firms are doing this now. In a way it is not as good as it should be. We should have a better system, of legal assistance: a system where it doesn't depend on hand outs. There is a proper way of making sure that a person, as of

right, gets a really serious case into the courts of law. It's a weakness of our legal system. We talk about various topics of law reform. But access is the greatest weakness of the common law system. The strength is its transparency and its integrity. The weakness is its cost, which is probably bound up in the very aspects of transparency and openness. Things have to be done very thoroughly and by highly talented people in an adversarial setting. Still, I think we could do better. I hope that Hicksons will be in the lead. That would be the dream of Bruce Holcombe. It would certainly have his encouragement. My brother David Kirby came to HLH. He came partly this was because I was always talking about my pro bono cases. I was never talking about the big fat insurance companies I was grabbing from all those legal firms who had become complacent and had not been having enough wins. I was having lots of wins. I was downing the worker in court. But then I get talking about by all the Corbishley and the Westcotts of this world. It's something that I can strongly recommend. It's a motivation that never left me, right through my practice of the law. Good luck to you all. But let us reflect, as I said at the beginning, on the terrible week that we have been through. The people who are not happy with their families tonight. Merry Christmas.

Conclusion and thanks by Alan Blanch, Hicksons

Alan Blanch:

Michael, thank you very much. Thanks for your interesting and entertaining talk. It always is. You remind me of the history of Hicksons. And you remind us all of the principles and obligations we do have, which unfortunately get buried in business. I have worked with your brother David Kirby and the Council for Civil Liberties and the Aboriginal Legal Service. I can still remember those cases probably more than cases for the insurance companies.

The Hon. Michael Kirby AC CMG:

They are still there in my phone book. And there are more now. There are all these hungry community legal centres.

Alan Blanch:

Thanks very much for your support. We are very proud of you.

The Hon. Michael Kirby AC CMG:

I am very proud of you too. I want to be more proud!

Alan Blanch:

You will, you will. I would like you to accept this on behalf of Hicksons and thanks very much and it is alright I am told you can take it to your brother David's for dinner.

The Hon. Michael Kirby AC CMG:

Alright I may do that. But no promises. Thank you very much.

Alan Blanch:

Join me in thanking Michael. Thank you. I am sure Michael will stay for a little while if anyone wants to have a private talk I am sure that's ok.