JOHN BRAY ESSAYS

BRAY'S IMPACT ON AUSTRALIAN JURISPRUDENCE

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The Honourable Justice M D Kirby AC CMG*

A PANORAMIC VIEW OF LAW

In Dr John Bray's addresses as Chancellor of the University of Adelaide a recurring theme is the role of the modern university and its impact in shaping the individual, the generation, and community values[1]. Bray's views on these matters were unapologetically and characteristically strongly expressed. In an address entitled "Ultimate Sounding Off"[2], he speaks of the changing face of the modern university. He did not much like

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* Justice of the High Court of Australia. The author acknowledges the assistance in the preparation of his essay provided by Mr Bernard Quinn, his research associate, 1996-7.

1 J J Bray, *The Emperor's Doorkeeper. Occasional Addresses* 1955-1987, University of Adelaide Foundation, 1988.

2 "Ultimate Sounding Off" Jubilee Commemoration Address, 1 October 1987 in J J Bray, *The Emperor's Doorkeeper, Occasional Addresses*, 1955-1987, University of Adelaide Foundation, 1988 at 192.

what he saw. Contrasting the modern university with that of his own student days, he described the education he received[3]:

> "I would stress three things about these courses: the panoramic view of the field of each discipline, the complete absence of options between courses, and in each field the importance of the historical approach."

On the other hand[4]:

> "If a hostile critic were asked to encapsulate in two words the distinguishing novelties of the new dispensation, I think he would choose fragmentation and myopia."

These comments are highly instructive about Bray the jurist. For Bray brought with him to his practice of the law and jurisprudence and to the judicial craft, the values which he regarded most highly in the learning of any body of knowledge. His grasp of the law was not fragmented. His application of it was never myopic. Indeed, it is apt that I should use his own words to describe his qualities as a jurist: he maintained a panoramic view of the field of law. He brought to it the depth of insight which derives from an historical and contextual approach.

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3 *Ibid*, 194.

4 *Ibid,* 195.

At the same time, in giving voice to his legal ideas, Bray was ever the poet-jurist[5]. He was able to conceptualise abstract legal concepts with the poet's gift of unusual, vivid expression which is at once succinct and comprehensive, efficient and powerful. Bray made legal writing his literary *genre,* enhancing the impact of his legal reasoning with a brilliant use of the language which he evidently enjoyed.

Take for example Bray's comments in *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Lt*[6]. He is here shown discussing the origin and rationale for the rule that alteration avoided a deed:

> "Originally, I think, the rule springs ... from an archaic notion of the sacrosanct and talismanic effect of the seal of the obligor on the wax on the parchment of the deed. The deed was surrounded with a magic aura. Anything that violated its integrity destroyed its mana. ... There may well have been reasons, which do not exist now, why there should be strong sanctions against tampering with the text of the deed, even in the most immaterial of particulars."

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5 For Bray's poetry see his *Poems* (Cheshire 1992); *Poems 1961-1971* (Jacaranda 1972); *Poems 1972-1979* (ANU 1979; and *The Bay of Salamis and Other Poems* (Friendly Street Poets 1986).

6 1978) 17 SASR 259 at 275 cited in *Warburton and Ors v National Westminster Finance Australia Ltd* (1988) 15 NSWLR 238 at 243.

The qualities evident in this example - a great depth of knowledge, concern for the rationale behind legal principles and a rare lucidity of expression - have resulted in Bray's legal writing bearing two particular hallmarks. First, one is struck by the very large range of legal subject matters in which he was an accepted authority. Secondly, his jurisprudence was of universal application, reaching into every jurisdiction in the Australian Commonwealth and, in that way, to the greater common law world beyond.

BRAY IN HIGH COURT JURISPRUDENCE

Bray's depth and breadth of knowledge, coupled with his clarity of expression were qualities well recognised in all of the superior courts of Australia. An examination of the cases in which the High Court of Australia has cited and approved Bray's judgments, given in the Supreme Court of South Australia, reveals the astonishing range of legal subjects in which his opinions were regarded as providing legal authority. In many areas of the law it is Bray CJ's judgment which is often considered to contain the soundest and most quotable summation of the legal principle in question.

Criminal law

Perhaps it is in the area of criminal law and procedure that Bray CJ was most highly regarded as a source of helpful judicial authority. Of the numerous examples of reliance by the High

Court of Australia upon his opinions, I need only mention a few. In *Ilich v The Queen*[7], Wilson and Dawson JJ cite Bray CJ in *Reg v Potisk*[8] regarding the circumstances in which fundamental mistake will prevent possession and ownership passing for the purposes of establishing the crime of larceny. Bray's approach to the question was followed. At common law, larceny involved the carrying away of the possession of the goods of another with the intention permanently to deprive that other of the possession thereof. Bray pointed to a distinction between cases where possession (or ownership) had been held *not* to pass despite delivery of chattels, and the delivery of money under the same circumstances. Money, he held, should not be treated like chattels: property in it passes with possession.

In *He Kaw Teh v The Queen*[9], Bray CJ's words in *Mayer v Marchant*[10] on the onus of proving a defence of honest and reasonable, but mistaken, belief in a criminal case were adopted with approval:

> "The implications of *Woolmington's Case* have only gradually been recognised. ... Once they are, it must, in my view, be accepted that the ultimate

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7 (1987) 162 CLR 110 at 127.

8 (1973) 6 SASR 389.

9 (1985) 157 CLR 523 at 574 (per Brennan J).

10 (1973) 5 SASR 567 at 570.

> onus is always on the Crown, except in the case of insanity or where the onus is shifted by statute ..."

In *Williams v The Queen*[11], Mason and Brennan JJ turned to *Drymalik v Feldman*[12] on the issue of criminal procedure, in which area too Bray CJ was an acknowledged expert. Bray had pointed out that, if a person could not be taken into custody for the purpose of interrogation under a statute, he or she could not be retained in custody for that purpose. If Parliament empowered an arrest for the purposes of bringing a person before a justice as soon as practicable, there is no justification for interrogating the person between those two events. The High Court Justices accepted Bray's impeccable reasoning.

More recently, in *Dietrich v The Queen*[13], a case of enormous significance for the criminal justice system throughout Australia, Bray CJ and the other members of his Court in *Reg v Hanias*[14] and *Reg v Bicanin*[15] were cited with approval. His opinion was basically adopted. This opinion was that Australian law acknowledges that an accused has the right to a fair trial

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[11] (1986) 161 CLR 278 at 295.

[12] [1966] SASR 277 at 62.

[13] (1992) 177 CLR 292. Contrast *McInnis v The Queen* (1979) 143 CLR 575.

[14] (1976) 14 SASR 137.

[15] (1976) 15 SASR 20, at 25.

and, depending on all the circumstances of the particular case, a lack of legal representation might mean that an accused person was unable to receive, or did not receive, a fair trial. Bray emphasised that such a finding was, extricably linked to the facts of the case and the particular background of the accused. There was no right, as such, to publicly-funded legal representation. But the Court had a duty to ensure the integrity and fairness of the process in which it was engaged. This was essentially the way that the majority of the High Court reasoned in *Dietrich.* I believe that the powerful support of Bray CJ made easier the action of the High Court in reversing its own earlier authority.

The development of the law of perjury also owes something to the opinions of Bray CJ. *Reg v Davies*[16] was quoted by the High Court in *Terrence Joseph Mellifont v Attorney-General of Queensland*[17]. The following approach by Bray was approved:

> "Where evidence in some previous proceedings is the subject of a charge of perjury the question whether the statement in question was material to the issues in the original proceeding must, in many cases, be a question of law. ... Material ... in this context must mean, not only relevant, but practically relevant."

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[16] (1974) 7 SASR 375, at 377.

[17] Unreported decision 91/045.

Notice the magisterial writing style. Notice too the broad and commonsense approach typical of a great judge of the common law.

Damages and costs

Bray's opinions on issues relating to legal remedies and the award of costs were also highly respected. An example may be found in his description of the approach to be taken by a court in assessing damages where the plaintiff would probably have succeeded in an action but was barred by the statutory period of limitation. This passage from *Tutunkoff v Thiele*[18] was approved by the High Court in *Johnson v Perez*[19] and later in *Nikolaou v Papasavas, Phillips and Co*[20].

> "... what I have to decide is what the plaintiff has lost by the defendant's negligence and what he has lost is what a court would have awarded him in an action by him against his employer, not what I would aware if the present action were an action against the employer and there was no other evidence than that before me."

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[18] (1975) 11 SASR 148 at 150-151.

[19] (1988) 166 CLR 351 at 365 per Wilson, Toohey and Gaudron JJ.

[20] (1988) 166 CLR 394 at 399 per Mason CJ.

In *Latoudis v Casey*[21], Dawson J looked to Bray CJ's opinion in *Hamdorf v Riddle*[22] regarding the appropriate interpretation of statutory provisions giving a court of summary jurisdiction power to award costs. Bray had noted the practice of awarding costs against unsuccessful defendants as a matter of course but rarely against police complainants. He thought that the courts should exercise their discretion as to costs in a police prosecution of a summary offence essentially in the same way as it was exercised in the trial of a civil action. Although Dawson J took a different view, his conclusion led him into dissent. The majority's approach more closely approximated the principle espoused by Bray.

Evidence

Bray CJ was also accepted as an authority on the law of evidence. For example, in *Phillips v The Queen*[23], Deane J cited Bray's opinions in *Reg v Pfitzner*[24] and *Reg v Beech*[25] on the issue of the discretion of a judge to permit cross-examination of

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[21] (1990) 170 CLR 534 at 548.

[22] [1971] SASR 398 at 398-400.

[23] (1985) 159 CLR 45 at 63.

[24] (1976) 15 SASR 171 at 181.

[25] (1978) 20 SASR 410 at 418.

an accused as to the accused's character where the judge was satisfied of the existence of the exceptional circumstances specified by the statutory provision. Bray emphasised that the overriding obligation in the exercise of the discretion must be that it should be utilised for the purposes of ensuring that the trial of the accused was fair. However, it was not confined by any presumptive rule that it ought, or ought not, be exercised in a certain way. Once again Bray returned to basic principle, as a great judge of the common law usually does. Parliament had provided a direction. It was to be exercised for the broad purposes stated or implied in the statutory grant. It was for the courts to fulfil the parliamentary grant and not to hedge it about with judicial gloss, introducing limitations or requirements which Parliament had held back from enacting.

Legal ethics

The opinions of Bray CJ on ethical issues affecting the legal profession have also been identified as leading authorities. In a most important Australian case in the High Court of Australia on legal ethics, *Giannarelli v Wraith*[26], Bray CJ's opinion in *Feldman v A Practitioner*[27] was cited with approval

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[26] (1988) 165 CLR 543 eg at 606 per Toohey J.

[27] (1978) 18 SASR 238 at 239.

and applied. On the issue of the liability of a solicitor when acting as a solicitor in jurisdictions where the professions of solicitor and advocate are united, Toohey J wrote, in the High Court:

> "It is of further interest that in *Feldman v A Practitioner* Bray CJ reached the same conclusion as Cordery had reached nearly one hundred years earlier."

Toohey J went on to quote Bray:

> "Nevertheless, of course, a solicitor-barrister remains liable to an action for negligence for what he does while acting as a solicitor ..."

Bray was willing to fashion new common law principles from old. In the manner of the best judges of our tradition, he did so in a broad way keeping in mind the purpose and not just the language of the earlier rule. Then he adapted that rule to new circumstances to make the law a living instrument of justice.

Bray CJ's opinion in *Reg v Goodall*[28] was approved (Mason CJ, Wilson and Toohey JJ) in the High Court in *Hamilton v Whitehead*[29] by for its exposition of the fundamental principles of company law. Faced with the issue of whether a

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[28] (1975) 11 SASR 94 at 100-101.

[29] (1988) 166 CLR 121 at 128.

director of a company could be said to have aided and abetted what the company, through his own conduct, had done, Bray CJ conceptualised the correct approach as:

> "... some sort of metaphysical bifurcation or duplication of one act by one man so that it is in law both the act of the company and the separate act of himself as an individual."

The justices of the High Court approved this conclusion and approach that, as a logical consequence of *Saloman's Case,* the director:

> "... in his personal capacity can aid and abet what the company speaking through his mouth or acting through his hand may have done."

Negligence

The High Court has also looked to Bray CJ for persuasive reasoning on questions of tort law. In the important negligence case of *Cook v Cook*[30], Mason, Wilson, Deane and Dawson JJ referred to Bray CJ's judgment in *Netherwood v Sebastyan*[31] as authority for the proposition that, in negligence, the standard of care which the plaintiff may expect depends upon the precise

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[30] (1986) 162 CLR 376 at 385.

[31] Unreported. Quoted by Sangster J in *Ranieri v Ranieri* (1973) 7 SASR 418 at 429.

relationship which he or she proves to have existed with the defendant. Hence, if a passenger knowingly accepts a ride from a drunken driver, the duty of care that can be expected is no more than that reasonably expected of a person in such a state of intoxication.

BRAY AMONGST HIS PEERS

The preceding, necessarily brief, analysis illustrates the diversity of the legal fields in which Bray's insights were recognised by Australia's highest court. This, however, is only one indication of Bray's contribution to the development of Australian law. The other hallmark of the jurisprudence of Bray CJ was that it illuminated the decisions of other Australian courts, under the High Court. I consider that this was so because Bray brought with him to his judicial reasoning a great depth of insight. He looked beyond legal rules to their historical origins and philosophical and social foundations. For this reason he is often cited as an authority because his analysis of legal problems tends to impart an understanding not just of verbal formulation of the law in a wide range of subject areas, but of the rationale for the law's particular path of development. By throwing light on history and purpose, Bray was able to point with conviction and assurance to the way ahead and likely future developments of the law.

This approach on Bray's part tends to make much of what he wrote of universal application. His understanding of law was

one which transcended the jurisdictional boundaries of the Australian states and territories. Many judges, in all Australian jurisdictions, have sought and found guidance from Bray in uncounted areas of the law. The law reports of the several jurisdictions of the Australian States bear repeated witness to the impact which Bray's opinions have had on the Australian legal landscape.

New South Wales

Amongst the principles enunciated by Bray CJ which were of greatest help to me in my own judicial writing in the New South Wales Court of Appeal were those relating to the constitutional principles applicable in the Australian states. In *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations and Anor*[32] the New South Wales Court was called upon to consider the modern scope of the principle of Parliamentary supremacy as it applies in New South Wales. Bray CJ in *Gilbertson v South Australia and the Attorney-General for South Australia*[33] was profoundly influential upon my reasoning as an Australian decision reinforcing the principle of parliamentary

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[32] (1986) 7 NSWLR 372 at 405.

[33] (1976) 15 SASR 66.

supremacy embodying an unyielding respect for the democratic will of the people as expressed in Parliament.

Guidance from Bray CJ in *Re Poore*[34] was also sought by me in the case of *R v Rose*[35] on the doctrine of *res judicata*. Bray had held that the right to compensation under the *Crimes Act* was a right created by statute in addition to a victim's common law right to compensation. It was not in substitution for the common law. Although I dissented from the conclusions reached by the other members of the Court of Criminal Appeal of New South Wales (Street CJ and Slattery CJ at CL) the difference was confined to the interpretation of the particular provisions of the New South Wales *Crimes Act*. Upon the point of principle addressed by Bray CJ, the Court was unanimous.

On the question of the test to be applied in determining judicial bias Bray CJ's opinion in *Fingleton v Christian Ivanoff Pty Ltd*[36] was accepted as sound authority in *S & M Motor Repairs Pty Ltd and Ors v Caltex Oil (Australia) Pty Ltd and Anor*[37]. Again, my opinion was in dissent; but the statements of

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34 (1973) 6 SASR 308 at 310, 311.

35 (1987) 10 NSWLR 509 at 518.

36 (1976) 14 SASR 350 at 354-5.

37 (1988) 12 NSWLR 358 at 368.

principle were not disputed. And Bray CJ was a powerful source of the fundamental rules assuring the right of access to a manifestly impartial judge.

Bray had held that because the magistrate and the prosecutor had become members of the same department of the public service, and were subject to the same departmental head, the magistrate was disqualified by imputed bias from hearing and determining a complaint. Actual bias did not have to be proved. Disqualification was required in the case to uphold the appearance of justice and the high standards and reputation of the judiciary.

Bray CJ's guidance was also a valuable source of authority in *Chow v Director of Public Prosecutions and Anor*[38]. Considering a plea of guilty I had resort to Bray CJ's exposition in *Law v Deed*[39]. He there held that a plea of guilty was to be taken as an admission of the essential legal ingredients of an offence; but nothing more. To go beyond the facts necessarily contained in the plea required that the additional facts had either to be expressly admitted or proved by admissible evidence. This strict rule of fair procedure had to be observed "despite

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[38] (1992) 28 NSWLR 593 at 605.

[39] [1970] SASR 374 at 377.

whatever inconvenience may be caused". In matters concerning the integrity of judicial process, Bray was a stickler for the proprieties. His approach has informed and reinforced my own.

Other judges in New South Wales have likewise benefited from Bray CJ's judicial learning. In *Young v Jackman*[40] Young J cited Bray CJ's opinion in *Short v Short*[41] on a point of the law of contempt in the context of disobedience to an order of the court. Young J noted that the leading English book on the law of contempt relied on decisions in Bray CJ to conclude that the preferable view was that, in the case of such contempt, the court had a discretion whether or not to hear a party. Young J accepted that view.

Gleeson CJ in *Environment Protection Authority v Australian Iron and Steel Pty Ltd*[42] cited Bray CJ's judgment in *R v O'Loughlin; Ex parte Ralphs*[43] on the rule against double jeopardy. Bray took an expansive view of that doctrine. He applied it where a second charge related to the same set of facts as those in respect of which there had been an earlier conviction.

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[40] (1986) 7 NSWLR 97.

[41] (1973) 7 SASR 1 at 11; 22 FLR 320 at 330.

[42] (1992) 28 NSWLR 502.

[43] (1971) 1 SASR 219 at 225-6.

Bray emphasised the problem of defining the relevant sets of facts:

> "... but it is necessary to define with some care the precise act or omission for which he was previously punished in order to see whether it was the same act or omission which is in question in the second prosecution."

The same passages were relied upon by Abadee J in *State Pollution Control Commission v Tallow Products Pty Ltd*[44] in which Abadee J cited Bray CJ in *O'Loughlin* and also *Hallion v Samuels*[45] which re-stated the principle in *O'Loughlin.*

The approaches taken in these cases on double jeopardy cited were considered by the Full Court of the Supreme Court of Queensland in *Collins v Murray; Ex parte Murray*[46] and by the Full Court of the Federal Court of Australia in *Travers v Wakeman*[47].

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[44] (1992) 29 NSWLR 517 at 533.

[45] (1978) 17 SASR 558 at 563.

[46] [1989] 1 Qd R 614.

[47] (1991) 28 FCR 425.

Victoria

The respect shown by Victorian courts for the jurisprudence of Bray CJ was no less plain than by New South Wales. This can be seen in numerous reported cases. In *City of Collingwood v State of Victoria and Anor [No 2]*[48] Brooking J relied upon Bray CJ's opinion in *Gilbertson v South Australia*[49] in finding that, as under the South Australian constitution, no strict principle of separation of powers was written into Victoria's Constitution.

Clarke v Foodland Stores[50] was a Full Court decision in Victoria regarding awards for interest upon a judgment for personal injuries. The *dicta* of Bray CJ in *Marziale v Hathazi*[51] were accepted as providing sound authority for the proposition that delay in instituting proceedings should not be ground for a judge to refuse interest from the commencement of proceedings. This has since been accepted as the rule in New South Wales.

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[48] [1994] 1 VR 652 at 660.

[49] (1976) 15 SASR 66 at 84-85.

[50] [1993] 2 VR 283.

[51] (1975) 13 SASR 150.

In matters of practice and procedure, Victorian courts also looked to Bray CJ for guidance. For example, in *Finlay v Littler*[52] Crockett J cited Bray CJ in *Victa Ltd v Johnson*[53] regarding the relevance of the time bar set up by a statute of limitations on an application to renew a writ. Bray wrote:

> "It is not correct to say that the defendant has acquired an absolute right to immunity when a writ issued within the limitation period is not served within twelve months of its issue and the limitation period has in the meantime expired ... The efficacy of the writ does not expire absolutely at the end of the twelve months, it only expires if and in so far as the Court sees fit not to renew it."

This passage was also cited with approval in *Fox v Brown*[54] and by Mason J and Stephen J in *Van Leer Australia Pty Ltd v Palace Shipping KK*[55].

Tasmania

Similar reliance on Bray CJ's jurisprudence is evident in much Tasmanian case law. In *Mersey Public Hospitals Board v*

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52 [1992] 2 VR 181 at 186-7.

53 (1995) 10 SASR 496 at 503-4.

54 (1984) 58 ALR 542 at 548.

55 (1981) 34 ALR 3 at 10.

McLennan[56], Green CJ approved Bray CJ's opinion in *Vickers v Jarrett Industries*[57] regarding the interpretation of workers' compensation legislation in relation to injuries suffered on a journey between the worker's workplace and home. Bray had said:

> "I think that the force of the preposition 'between' has been underestimated. I agree that the governing concept is the concept of a journey but not necessarily the whole of the journey but only so much of it as is between the two areas ... What is between two areas is exclusive of both."

Tasmanian courts also found Bray CJ's reasoning particularly instructive on matters of sentencing. In *Reg v Dowie*[58] Wright J cited Bray CJ in *Reg v Thompson*[59] on the principles underlying the judicial approach to sentencing:

> "... there are offences where the deterrent principle must take priority and where sentences of imprisonment may properly be imposed, even on first offenders of good character, to mark the disapproval by the law of the conduct in question and in the hope that other people will be deterred from like behaviour."

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[56] (1987) Tas R 27 at 31.

[57] (1977) 15 SASR 525 at 529.

[58] (1989) Tas R 167 at 185.

[59] (1975) 11 SASR 217 at 222.

Bray's grasp of the underlying rules supporting the judicial approach to sentencing was also recognised by Cox J in *Maher v Hamilton*[60]. On the issue of whether increased penalties could operate retrospectively to apply to offences committed before the penalties were increased sentencing, Cox J quoted Bray CJ in *Samuels v Songaila*[61]:

> "Penalties are imposed in order to deter the forbidden conduct and we have to assume that they have some deterrent effect. A man cannot be deterred from committing a forbidden act by fear of a sanction which is not in existence at the time he commits the act."

This is yet another instance of Bray returning to first principles and deriving from them a legal rule consonant with their instruction.

Western Australia

Neither was Bray CJ's approach to sentencing overlooked in Western Australia. In *R v Peterson*[62] and *Urquhart v The Queen*[63] Burt CJ and the Court of Criminal Appeal respectively

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60 (1990) Tas R 199 at 204.

61 (1977) 16 SASR 397 at 399-400.

62 [1984] WAR 329 at 332.

63 Unreported No 25 of 1995.

cited Bray CJ's opinion in *Giles v Barnes*[64] as persuasive authority for the proposition that the prevalence of a particular crime in a locality is only one of the many factors relevant to increasing the normal penalties in a particular case. It was not the decisive factor; for otherwise courts might be, or become, hostages to the clamour of the local crowd. In *Daniel Tampalini v Helen June O'Brien*[65] the same court looked to *Elliot v Harris (No 2)*[66] for Bray CJ's explanation of the merits and rationale for the use of the suspended sentence.

West Australian courts have also taken instruction from Bray CJ's opinions in various other areas of the law. For example, in *Warner and Anor v Magden* and *Magden v Warner*[67] the Supreme Court of Western Australia cited Bray in *Armor v Coatings Pty Ltd*[68] at some length as to the circumstances in which a contract would be discharged by alteration. In *Douglas Brown v The Commissioner of Police*[69] the Supreme Court of Western Australia referred to *Samuels v Centofanti*[70] regarding

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64 [1967] SASR 174.

65 Unreported.

66 [1976] 13 SASR 516 at 527-8.

67 Unreported No 1474 and 2223 of 1994.

68 (1978) 17 SASR 259 at 275.

69 Unreported.

70 [1967] SASR 251 at 268.

the meaning to be attributed to the statutory expression "suffer and permit". The court drew on Bray's analysis of the historical development of the use of the word "suffer" in penal statutes dating back to 1269. In *E (A Child) v Dirk Willem Staats*[71] White J looked to *Dalton v Barlett*[72] for judicial indication of whether certain four-letter expletives were necessarily indecent. Perhaps unsurprisingly for a literary figure, Bray was of the opinion that the context in which such words were uttered was the determining factor.

Bray's exposition of the elements of the tort of inducing breach of contract in *Davies v Nyland*[73] was relied upon by the Western Australia court in *Ludowici v Pembroke Securities*[74].

Queensland

Bray's jurisprudence is also regularly to be found in Queensland law books. An example is the reliance by the Queensland Land Court in *Thirty-Forth Philgram Pty Ltd v The*

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[71] SJA 1091 of 1994.

[72] [1972] 3 SASR 549 at 555.

[73] (1974) 1 SASR 77 at 98.

[74] Unreported Supreme Court judgment No 1449 of 1990.

Crown[75] and *Kabale Holdings Pty Ltd v Director General Department of Transport*[76] on Bray CJ's opinion in *Arkaba Holdings Ltd v Commissioner of Highways*[77] with regard to the proper approach to be taken in assessing the compensation to be paid in compulsory property acquisitions.

Again on sentencing Bray CJ has regularly been accepted in Queensland as providing compelling authority. In *The Queen v Ernest peter Dales*[78] and *R v Corinis*[79] Bray CJ's opinion in *R v Reiner*[80] was considered as providing the correct approach in holding that the court can use the surrounding circumstances of the crime to extend leniency; but the evidence of the commission of other crimes, not the subject of process, could not be used to increase an otherwise proper sentence. Such crimes must be charged if the prosecution is to rely upon them. Anything less would be a departure from the rule of law.

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75 Unreported judgment of the Queensland Land Court, May 1993.

76 Unreported judgment of the Queensland Land Court 34/1994.

77 (1970) SASR 94 at 404.

78 Unreported No 32 of 1995, Court of Appeal.

79 Unreported No 153 of 1993, Court of Appeal.

80 (1974) 8 SASR 102 at 105-6.

As a final example of the scope of Bray's impact, the Supreme Court of Queensland in *Brisbane City Council v Georgeray Contracting Pty Ltd*[81] looked to *Paull v Lewis*[82] for Bray's opinion on an issue of statutory interpretation: whether dumped materials were "rubbish" under the local government ordinances. Even in such a minor particular the exposition of meaning was found useful. Who better to explain a common word of the English language than a poet turned judge? After all, in his last address as Chancellor to the University of South Australia, he had urged all present to strive for perspective so that they could "rate distant peaks over neighbouring rubbish heaps to distinguish the ephemeral from the enduring"[83]. Bray knew rubbish when he saw it.

POET TURNED JUDGE

South Australia is a special place. Fiercely proud of its unique origins amongst the Australian colonies and peopled by many dissenters who sought refuge in its orderly, tolerant environment, it saw a golden age in statute and common law when the successive governments of Steele Hall and Donald

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81 Unreported No 528 at 1995.

82 (1971) 3 SASR 230 at 236.

83 J J Bray, address, above n 2, at 175-176.

Dunstan introduced enlightened legislation that were copied in most parts of the Commonwealth. At that same time an acknowledged genius of the common law, John Jefferson Bray presided as Chief Justice over a Supreme Court of high distinction. That Court included many experienced and scholarly jurists whom it was my privilege to know in my early days as Chairman of the Australian Law Reform Commission. One of them, Justice Roma Mitchell, was the first women to be appointed to silk and the first woman elevated to sit on a superior court in Australia. In so many ways, at that time, in the law, South Australia gave a lead, an encouragement, and even an inspiration to the laws of the other jurisdictions of the Commonwealth.

I am conscious of the inadequacies of this review. It falls far short of the detailed and scholarly analysis which John Bray's judicial work, and its impact on jurisprudence in Australia, deserves. I have not cited from the many other cases in which Bray's expositions were used in the High Court and the State Supreme Courts. I have left unanalysed the use of Bray's writing in the nascent federal courts which came upon the scene just about the time he was departing the office of Chief Justice of South Australia. Nor has time permitted an analysis of the manner in which his thinking about, and exposition of, the law has found its way into judicial decisions in other common law countries. Such an analysis will doubtless be undertaken in the future. A son (or daughter) of South Australia, encouraged by the unique attractions of Bray's combined skills as judge and

poet, will surely be inspired to venture further where I have just begun.

Happily the advent of computers and word processors will make the task less cumbersome than once it might have been. Yet machines can only produce the citations. What is needed is time to think about Bray's contribution, to analyse its impact and to reflect upon why it was greater in Bray's case then in the case of many others. Let there be no doubt that Bray is recognised as a great judge. It is another of those misfortunes of which Sir Owen Dixon[84] spoke in the case of Chief Justice Jordan of New South Wales, that Bray was never appointed to the Bench of the High Court of Australia which he would at once have graced and strengthened.

Some things can be said as to why Bray tends to be cited, to this day, more than other judges. In part, his very reputation as a fine judge sends the judicial researcher to his writing where it is noted that he has had something to say on the subject matter in hand. But that cannot be the whole explanation. Certainly, it cannot explain so much use of his writing in courts all over the nation. What, then, are the additional factors?

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[84] See (1964) 110 CLR v at x-xi.

Clearly they include the catholicity of his knowledge of the law. He came to his post of Chief Justice in 1967 at the age of 55, a scholarly and experienced lawyer at the height of his powers. He left, at a time of his own choosing, in 1978 at the age of 66. One gets the impression that he was fulfilling his period of service as Chief Justice out of a noble sense of obligation. No urgent ambition pressed him on.

Two intellectual features stand out. I hope I have illustrated them by some of my citations. The first is his powerful grasp of basic common law principle. Our system of law, so practical in the solving of problems, has a tendency to disdain concepts and to content itself with verbal formulae. The books are full of them. They satisfy most legal minds. But not Bray's. By his knowledge of legal history, the wide spectrum of his learning, and the power of his inquisitive intellect, he searched amongst the cases and the verbal formulae for the concepts and the great themes at work. Such inclinations come relatively infrequently to visit the common law. When they are combined with the capacity to deliver analysis of great insight, they tend to have a lasting impact.

Add to this the second quality. It is very much bound up in Bray's love of words so evident in his poetry but also in his judicial writing. Some people have the power to express themselves in vivid word pictures. Not all of them are poets. Only a small proportion of them are lawyers. But when to discontent with verbal formulae alone is added a very

considerable power in the use of language, you have a judicial writer of rare talent. Such was Bray.

I can pinpoint with exactness the last time I saw him. It was on the eve of the federal election in March 1993 which unexpectedly delivered the Government of the Commonwealth into the hands of Mr Paul Keating. At the invitation of the South Australian Society of Labor Lawyers[85], I went to Adelaide to endeavour to explain the advantages of retention of the Crown in the Australian Constitution, even for one not otherwise much attracted to the hereditary principle, *primogeniture* and social rank as destiny. Bray, I found, shared similar feelings. He did not have much time for the angry critics of the harmless and in some ways protective feature of our law and the Constitution. Perhaps he was thinking of one of the limericks of an earlier South Australian poet, John Shaw Nielson which he cites in an essay on the history of poetry in South Australia[86]:

> "A savage old critic named Dyer,
> Renounced for his gloom and his ire,
> Went to Hell he went down
> He arrived with a frown
> And began to belittle the fire."

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[85] The address is published. See M D Kirby "Australia's Monarchy" in G Grainger and J Jones (eds) *The Australian Constitutional Monarchy*, ACM, Sydney, 1994, at 87.

[86] See J J Bray, above n 1, 3 at 7.

Bray distained the trivial, polemical and ephemeral. He kept his eye on the long haul, stimulated by a deep respect for history and informed by an appreciation of the strengths, as well as the weaknesses, of our laws and institutions. He was a special judge; a fine poet; and an engaging man. It is right that we honour his memory. In courtrooms around Australia it is still invoked. Still it illuminates the search for justice under the law. As he knew, that is the legacy that a good judge leaves behind to the generations that follow.