COMMONWEALTH SECRETARIAT

COMMONWEALTH LAW BULLETIN

25TH ANNIVERSARY EDITION 1999

COMMONWEALTH LAW BULLETIN - CHRONICLER OF A QUARTER CENTURY OF CHANGE

The Hon Justice Michael Kirby AC CMG

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The Hon Justice Michael Kirby AC CMG**

SILVER COMPANION

The first edition of the *Commonwealth Law Bulletin* was published in 1974. That was the year in which I was appointed to my first judicial office as a Deputy President of the Australian Conciliation and Arbitration Commission. I was 35 years of age when offered the position. Without unseemly haste (but with no

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* Some of these thoughts are derived from an address given by the author to the Third Annual Colloquium of the Judicial Conference of Australia, Gold Coast, Queensland, Australia on 7 November 1998.

** Justice of the High Court of Australia. Formerly Deputy President of the Australian Conciliation and Arbitration Commission (1975-83); Judge of the Federal Court of Australia (1983-84); and President of the New South Wales Court of Appeal (1984-96) and of the Court of Appeal of Solomon Islands (1995-96).

great delay either) I accepted. So, in Australia, I am one of the silver servants of the judiciary: 25 years in the judicial harness. The first effective editor of the *Bulletin* was Kutlu Fuad, then head of what was called the Legal Division of the Commonwealth Secretariat. The *Bulletin* and I are metaphorical twins of the common law. It is perhaps for this reason that I, an avid reader, occasional contributor and always appreciative recipient, have been asked to contribute an essay to mark its first quarter century.

It is a tribute to Kutlu Fuad (who went on to distinguished judicial service as a judge of the Court of Appeal of Hong Kong) that the basic format of the *Bulletin* has remained remarkably unchanged since those early days in 1974. The collection of notes on legislation throughout the Commonwealth of Nations; the analysis of judicial decisions of the distinguished courts in the four corners of the world; the review of proposals from the family of law reform agencies, created after Lord Scarman's image to propose improvement and renewal of the legal system; notes on special topics of interest to the judiciary and the legal profession; a few articles; some miscellaneous items, announcements and the list of Secretariat publications bringing up the closing pages. It is a logical format for a highly useful publication, packed full of data of great utility to judges, lawyers and officials practising law throughout the Commonwealth of Nations.

The end of Empire brought the general termination of Privy Council appeals. But the links of common law principle, shared

appreciation of defects in the law inherited from colonial times, common ways of looking at problems and tackling their solution, a shared language and the willingness to learn from each other made the *Bulletin,* from the start, a precious ornament for the shelves of judges, lawyers and administrators around the world. It was so in 1974. It remains so today.

The high utility of the *Bulletin* has remained throughout the twenty-five years of its publication. This is an astonishing achievement, considering the changes which have come about in the world, the judiciary and the legal profession of common law countries in the past quarter century. Naturally, my own silver anniversary has caused me to look back on the quarter century and to reflect upon the changes which, even in the stable, and relatively prosperous circumstances of Australia, have occurred since 1974. Allow me to collect some of the continuities which can be observed; and some of the changes.

HIGH COURT OF AUSTRALIA AND CHANGE

Consider, for example, the changes that have come about in the High Court of Australia, the Court on which I now have the honour to serve. At the end of 1974, the *Commonwealth Law Reports* had reached volume 133. They now stand at volume 190. The Chief Justice was Sir Garfield Barwick. The other Justices at the time were McTiernan, Gibbs, Stephen, Mason and Jacobs. Life tenure was then the reward of those appointed to the High Court and

other federal courts of Australia in those days. So, if they wanted it, in the case of the High Court of Australia, was a knighthood and, in due course, membership of the Privy Council with the honorific "Right Honourable".

The Court was still peripatetic in those days. The building for the permanent seat of the Court in Canberra had not been commenced. Most of the Court's civil jurisdiction came to it on appeal as of right. The system of confining civil appeals to cases in which the Court grants special leave had not yet been enacted[1]. The business of a court which chooses its own cases tends to be quite different from that of a court whose work is litigant driven. Save for practice matters and cases invoking the constitutional writs, the original jurisdiction of the High Court of Australia has shrunk almost to disappearing in the past quarter century. So it also is in many of the ultimate courts of appeal around the Commonwealth, struggling to cope with burgeoning case lists from many more courts serving larger populations.

There was no conception in 1974 that special leave hearings could be conducted by telecommunications as frequently, in Australia, they now are. Parties either travelled to Melbourne or

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1 *Judiciary Act* 1903 (Cth), s 35(2).

Sydney or waited for the Court to make its annual visitation to their capital city. Personal attacks on the Justices of the courts - especially of the High Court of Australia - were extremely rare. Neither the *Banking Case*[2] nor the *Communist Party Case*[3], important and controversial as they were in their day, provoked attacks on the Justices as individuals. Any hint of such criticism and the Attorney-General would vigorously defend the integrity of the Court and its members - perhaps by bringing charges of contempt of court for scandalising the Bench.

Most Australian appeals to the Judicial Committee of the Privy Council had been abolished before 1974[4]. However, appeals still lay from the State Supreme Courts, allowing many Australian litigants to choose, in effect, the judicial tribunal of ultimate resort. To this extent, the Australian legal system was still yoked with that of England. It was to be my fate, as President of the New South Wales Court of Appeal, to sit in the last case which went on appeal to the Privy Council from an Australian court[5]. This followed the abolition of such appeals by the *Australia Acts* of 1986.

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2 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.

3 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

4 *Privy Council (Limitation of Appeals) Act* 1968 (Cth). See also *Privy Council (Appeals from the High Court) Act* 1975 (Cth).

5 *Austin v Keele* (1987) 10 NSWLR 283 (PC).

Back in 1974, the High Court Justices in Australia still wore wigs and robes of the traditional character. These were abandoned for a simple black robe, adopted in 1988 There was no formal consultation, and little public debate, about appointments to the Court in those days. They were in the gift of the federal government of the day. There were no women on the Court, and never had been. The first woman judge in Australia, Justice Roma Mitchell of the Supreme Court of South Australia (1965), was occasionally spoken of for appointment; but, in the law, women were still extremely rare birds[6].

There was not much talk of implied constitutional rights in Australia in those days, although the *Boilermakers Case*[7] had drawn from the language and structure of Chapter III of the Constitution implications, not spelt out in the text, about the separate exercise of the judicial power of the Commonwealth. There was little talk of the native title rights of Aboriginals and Torres Strait Islanders, especially after Justice Blackburn's decision in 1971 in *Milirrpum v Nabalco Pty Ltd ("Gove Land Rights Case")*[8]. *Mabo*[9] and *Wik*[10],

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6 Justice Gaudron was appointed to the High Court of Australia in 1987.

7 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

8 (1971) 17 FLR 141.

cases upholding the native title rights of Australia's indigenous peoples, were but dreams.

Both in 1974 and in earlier days international law occasionally arose in the business of the High Court of Australia[11]. But it was treated strictly in accordance with dualist theory, as a distinct and separate regime, of little relevance to Australia's domestic law. Now, hardly a sitting of the High Court goes by without consideration of the domestic implications of international treaty obligations[12] or other forms of international law[13] arising for the Court's consideration.

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9 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

10 *Wik Peoples v Queensland* (1996) 187 CLR 1.

11 For example, *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 concerning the power of the federal Parliament to make regulations to secure the execution of the *Aerial Navigation Convention.*

12 See eg *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 examining the *Refugees Convention* Art 1 as applied by ss 4(1) and 22AA of the *Migration Act* 1958 (Cth); *DeL v Director General, NSW Department of Community Services* (1996) 187 CLR 640 concerning the application of the *Convention on the Civil Aspects of Child Abduction.* See also *DeL v Director General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207; *Akai Pty Ltd v Peoples Insurance Co Ltd* (1996Z) 188 CLR 418 concerning the policy of the *Insurance Contracts Act* 1984 (Cth) and the insurance policy issued in that case in Singapore containing a clause to the effect that it was to be governed by the laws of England with disputes referred to the courts of England; *Croome v Tasmania* (1997) 191 CLR 119, relating indirectly to a decision of the UN Human Rights Committee under the *International Covenant on Civil and Political Rights* which resulted in the *Human Rights (Sexual Conduct) Act* 1994 (Cth); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 concerning the "refugee" status under the Convention and the "one child" policy in the

Footnote continues

In the elaboration of the law, and the elucidation of the issues of legal authority, principle and policy which it involved, there was relatively little consideration twenty-five years ago of the jurisprudence of common law countries other than England. The links of most jurisdictions of the Commonwealth and Empire still joined together in London. There were few interconnections with each other.

This is where the *Commonwealth Law Bulletin* and the *Law Reports of the Commonwealth* were to play an absolutely vital role. It is difficult in these days of comparative law, stimulated by the *Bulletin* and other publications and by the Internet, to recreate in the imagination the time when the light of English law was so dazzling that it blinded Australian and other Commonwealth judges and lawyers to every other foreign source of law. Early signs of rebellion

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Peoples' Republic of China; *CSR Ltd v Signa Insurance Australia Ltd* (1997) 187 CLR 345 concerning anti-suit injunctions in relation to concurrent proceedings in Australia and in the United States; *Project Blue Sky v Australian Broadcasting Authority* (1998) 72 ALJR 84 concerning the *Closer Economic Relations Treaty* with New Zealand; *Attorney-General (Cth) v Tse chu-Fai* (1998) 72 ALJR 782 concerning extradition arrangements with Hong Kong. There are many other cases.

13 See eg *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 765f concerning the relevance of international law to ambiguous provisions of the Australian Constitution.

could be seen[14]. But decisions appeared simpler, and certainly briefer in those days, because, in virtually every area of the law (at least outside constitutional law or statutes) the task of judges was commonly regarded as being that of discovering and applying the closest or most analogous precedent of English authority. An era which had lasted virtually from the beginning of Australia's establishment as a British colony in 1788 faded away in the last quarter of this century to the accompaniment of the successive volumes of the *Bulletin*. The externalities (such as titles, dress and wigs) were altered a little. But the truly profound changes in the work, procedures and methodology of the High Court of Australia - and other equivalent courts throughout the Commonwealth - were not always fully realised, including perhaps by all of those close to the Court.

CHANGES IN OTHER AUSTRALIAN COURTS

Changes equally profound have occurred in the other Australian courts, federal and State. Undoubtedly, these have their parallels in most Commonwealth jurisdictions. A quarter century ago, federal jurisdiction was distinctly limited in Australia and federal courts were few. That judicial remnant of the *Boilermaker's*

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14 See Dixon CJ in *Parker v The Queen* (1963) 111 CLR 610 at 632. cf *Skelton v Collins* (1966) 115 CLR 94.

decision[15], the Commonwealth Industrial Court, had began the process of gradually assimilating most of the federal judicial business under the High Court. The work of the Federal Court of Bankruptcy was merged with that of the Federal Court in 1976[16]. The ground was laid for an expansion which was, after 1976, to grow inexorably into the Federal Court of Australia - a major national court[17]. There have been similar moves in Canada.

The Australian Arbitration Commission to which I was appointed in 1974 was probably at the zenith of its national power and influence. Its Presidents, Sir Richard Kirby and Sir John Moore, had led it with great ability. Another national tribunal, the Trade Practices Tribunal, had just been established. But the great reforms of administrative law in Australia, and the creation of the Administrative Appeals Tribunal, still lay ahead[18]. The *Bulletin* accompanied, described and commented on those innovative reforms. Its pages took news of them to all countries of the Commonwealth.

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15 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

16 *Bankruptcy Act* 1966 (Cth), s 27(1).

17 *Federal Court of Australia Act* 1976 (Cth) s 5(1).

18 *Administrative Appeals Tribunal Act* 1975 (Cth).

What a different scene we behold today. The Federal Court of Australia has gone from strength to strength. In the same time, the Family Court of Australia[19] has become a national court of great significance. Swept away are the grounds of divorce and the discretion statements of my youthful days in the legal profession. In their place are entirely different problems, deriving from much higher levels of marriage breakdown and increasing numbers and kinds of personal relationships outside marriage. Now the Federal Attorney-General is proposing the establishment of a federal magistracy in Australia[20]. The autochthonous expedient, whereby Australia's State courts exercised federal jurisdiction, so brilliantly devised by the founders of the Australian Constitution, has given way to the rapid growth of federal courts and tribunals. Inevitably, this has had its impact on the State courts, the places in which virtually all of Australia's legal business was done twenty-five years ago. Re-thinking the court system is now a common theme in many Commonwealth countries.

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19 *Family Law Act* 1976 (Cth).

20 D M Williams, "Future challenges for the Family Court - minimising family law litigation", unpublished address to the Third National Conference of the Family Court of Australia, Melbourne, 20 October 1998. For recent comments see Law Council of Australia, Media Release, 21 October 1998 "Law Council Supports Judge's Legal Aid Comments, Asks Attorney for further Details on Federal Magistracy".

Yet in the period since 1974, the overall numbers of judges in State courts in Australia has more than doubled[21]. A particular feature of that interval has been the establishment of State Courts of Appeal to discharge the appellate functions of the State courts. Whereas such a court had been created in New South Wales in 1965, amidst much controversy, the establishment of such courts in Queensland, Victoria and the Northern Territory proved much less contentious.

Another development, which did not go as far as it might in the years since 1974, was the provision of commissions to judges serving in other Australian jurisdictions, to participate in appellate and other judicial work elsewhere in the nation. The Federal Court provides appellate judges for mainland and offshore territories. But in an interesting innovation, Justice Priestley of the New South Wales Court of Appeal, received a commission as a judge of the Court of Appeal of the Northern Territory of Australia. Judges of the Supreme Court of the Northern Territory were given reciprocal commissions in the Supreme Court of New South Wales in compensation. It always seemed to me that this was an imaginative precedent which might have been extended and used more often in

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21 In 1974 there were 37 Supreme Court judges in New South Wales. Now there are 44. In 1974 there were 48 District Court judges in that State. Now there are 56, together with more than 50 Acting Judges.

the deployment of Australia's judicial personnel. It is an expedient used under which Australian judges sometimes serve as judges in Pacific countries of the Commonwealth. One of the greatest experiences of my judicial life was to receive a commission as President of the Court of Appeal of Solomon Islands. Links between lawyers in Commonwealth countries in our part of the world are enhanced and reinforced by the regular receipt of the *Bulletin* with its wonderful collection of up to date information.

Many other things have changed. Judicial education has been introduced throughout Australia and in many Commonwealth countries. By a happy combination of the work of the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration, much has been achieved. Colleagues from a number of Commonwealth jurisdictions have attended. Media liaison and communication officers have been appointed to replace the previous indifference of the courts to, or their traditional reticence in, communicating with the public whom they serve. Jury trial, which was such a feature of the court system in Australia, twenty-five years ago has all but disappeared in most States at least in civil causes. Use of video hearings has spread from the High Court's special leave days to many of the bail decisions of State Supreme Courts. Whereas twenty-five years ago, Acting Judges were an exception in

Australia, only appointed as preliminary to permanent confirmation, now such appointments are common in several State jurisdictions. They present certain dangers to the independence of the courts[22]. In one State the *Constitution Act* has been amended to entrench protection for the tenure not only of judges but also of magistrates[23]. The integrity of State courts has also received a measure of protection by the decision of the High Court of Australia in *Kable v Director of Public Prosecutions (NSW)*[24], holding that State courts must, as contemplated by the Constitution, be worthy receptacles to receive federal jurisdiction under Chapter III.

The jurisdiction of District and County Courts throughout Australia has expanded greatly in the past twenty-five years as much of the work which was formerly performed in the State Supreme Courts has been divested or transferred to other courts. Magistrates' Courts throughout the nation have been greatly strengthened by legislative protection for their qualifications, independence, tenure

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22 M D Kirby, "Acting Judges - A Non-Theoretical Danger" (1998) 7 *Journal of Judicial Administration* (forthcoming).

23 *Constitution Act* 1902 (NSW), s 56(1)(2) inserted 1992. See K Gould, "Judicial Independent entrenched in New South Wales?" (1996) *Law Soc J* (NSW) 71. cf *Constitution Act* 1975 (Vic), s 18. cf C A Foley, "s 85 Victorian Constitution Act 1975: Constitutionally entrenched, right or wrong? (1994) 20 *Monash Uni L Rev* 110.

24 (1996) 189 CLR 51.

and conditions. The Australian magistrate today is proudly called a judicial officer and a colleague of every other judge throughout the nation. This is a big change. It is shared with many Commonwealth countries. The Local Courts are now a far cry form the Police Courts and the prevailing culture which existed when I was appointed to judicial office a quarter of a century ago. The same is true of many Commonwealth countries.

CHANGES IN THE LEGAL PROFESSION

The Australian legal profession has also undergone enormous changes in the past quarter century. In this it reflects changes in many jurisdictions faithfully chartered in the successive volumes of the *Bulletin.* In 1974 dock briefs and Bar Association assignments were still the means in Australia by which, prior to a decision of the High Court[25], many criminal accused received legal representation, generally from the hands of the most fresh and inexperienced members of the junior Bar. In civil cases, back in those days, *pro bono* work was often described as a "spec brief". Before substantial organised legal aid changed the scene, many civil cases only came to court because lawyers accepted instructions on the footing that they would not be paid if they did not win. It was not perfect. It did

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25 *Dietrich v The Queen* (1992) 177 CLR 292.

tend to concentrate the lawyer's mind. It put enormous pressures on the parties when offers of settlement were made. Just prior to my appointment to the bench, the Federal Attorney-General, Senator Lionel Murphy, had established the Australian Legal Aid Office. It revolutionised the provision of publicly funded legal assistance in 1974, its impact had not really been felt outside a few areas of federal law.

The Bar in Australia has greatly changed in the intervening period. The office of Queen's Counsel has been abolished in New South Wales, Queensland and the Australian Capital Territory. It was abolished in the Northern Territory; but then restored. In the abolitionist jurisdictions, leading counsel have not disappeared. They have simply been renamed "Senior Counsel", a title now used in many other Commonwealth countries. The proud old title, it seems, will gradually die out in most parts of Australia. Now appointees as silk are often reputed by the number of trolleys of books and exhibits which follow them, and their silken robes, into court. Somehow the retinue which gathers around the advocate seems to have expanded. The facilities in which barristers are housed have certainly become more grand. They are therefore presumably more expensive to rent. It may not be unconnected, but there has been a large increase in the number of litigants in person appearing in the courts. This phenomenon, which has reached the High Court itself, imposes great strains on the court system and on the judges who preside in it. Courts of our tradition do not work efficiently where those arguing before them lack the knowledge and

discernment that comes from legal training and court experience. Everywhere throughout the Commonwealth, litigants in person present challenges to the judiciary and the court system.

The work of the advocate has changed in twenty-five years. An increasing proportion of that work is now performed in writing. Because documents can be read five times more quickly than the equivalent words can be spoken, there has been a trend away from persuasion performed in public in an open court to that written down for consideration in the judicial officer's private chambers. The merits of public argument and decision have had to yield to the pressures of court business. A price must be paid for this. The daily demonstration in public of the manifest fairness of the court's proceedings was a great merit of the old system.

The work of solicitors has also changed in Australia in twenty-five years. There has been a growth of the mega-firms; the development of a national and even international legal profession; and the decline of the monopoly in land title conveyancing which has always been the staple of the practising solicitor in Australia. The introduction of time charging has altered radically the way many lawyers now go about their work. It promises to alter the relationship between the lawyer and the client. As Chief Justice Gleeson has

pointed out, it can sometimes amount to a reward for the slow thinking practitioner who lacks basic knowledge in the field of law in question[26].

THE ENGINE OF TECHNOLOGY

Although social change, the media, higher levels of community education and expectations and other forces have altered the world of the judiciary and of the legal profession throughout the Commonwealth from that in which we worked a quarter of a century ago, technology is certainly one of the most powerful engines of change. The use of video links for court and tribunal hearings is specially suitable for a country the size of Australia. In 1974 telephones would occasionally be used to secure urgent injunctions from a judge. However, the use of telecommunications in the business of the courts was rare indeed. This is an innovation which other large Commonwealth countries, such as India, could surely adapt from Australia. We, in our turn, adopted the facility from that other trans-continental Commonwealth country, Canada.

Our offices have been revolutionised by photocopying machines, facsimile, mobile phones and word processors. I

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26 *NSW Crimes Commission v Fleming & Heal* (1991) 24 NSWLR 116 at 126-127.

remember the first time we introduced word processors at the Australian Law Reform Commission when I was its first chairman in the late 1970s. One of our newly appointed Commissioners was Mr John Ewens, long-time First Parliamentary Counsel of the Commonwealth. When his eyes fell upon the miracle of word processing, I saw a look of anguish. He was thinking: if only he had had such a facility in the years of statutory drafting it would have avoided the repetitive retyping of corrected text which, with carbon paper and consequent delay, which was the feature of legal drafting twenty-five years ago. I imagine Kutlu Fuad had the same feeling when word processors became available for the first time for the painstakingly compiled pages of the *Commonwealth Law Bulletin*.

The Internet has liberated us, giving us access to a vast range of legal data from many sources. In a sense, the *Commonwealth Law Bulletin* was a kind of Internet of Commonwealth law before there was an Internet. I expect that its entire wonderful record will soon be available on the Internet. Commonwealth lawyers are no longer prisoners of their colonial legal origins.

But technology will go further. Voice recognition machines are being perfected. Within a decade such machines will be available to respond to oral commands to provide legal data. Like mobile telephones, they will become the constant companions of the judges and lawyers of the years ahead. Whether this makes judges even more depersonalised than their contemporary equivalents and

whether it helps in the essential functions of judgment, discernment and evaluation for relevancy, remain to be seen. When we reflect upon the technology which is now at our fingertips and where we have come from in so short at time, we can only begin to imagine what will be possible in an equivalent time in the future. Technology advances at a dazzling pace. With its changes come new perceptions of the function of the law and of the role of the courts in which, ultimately, the law is administered. We can be sure that the chronicler, the *Commonwealth Law Bulletin,* will continue to be our faithful companion into the next century.

CONTINUITY

Yet there are some things in the judiciary throughout the Commonwealth of Nations which are much the same today as they were a quarter of a century ago. Almost all appointees - wherever they take office - suffer a drop in salary when they leave private legal practice to take a senior judicial appointment. This is not, in my experience, a major concern to the kinds of people who are attracted to the judicial life. But the facilities in which they work are often shabby, overcrowded and neglected: all too frequently leftovers of colonial days. The relentless grind of judicial work is much the same. Indeed, the workload has greatly increased. The courts generally enjoy a low priority amongst politicians because, of their nature, they are peopled by discreet and generally reticent people, unwilling to make a fuss even about the intolerable.

With these abiding burdens come the continuities of the judicial life which represent the undoubted attractions of judging to those summoned to judicial service. The judicial office is a noble vocation. Judicial officers throughout the Commonwealth of Nations are committed to the search for justice under law. That is a highly moral, and even at times an inspiring, task.

Judicial independence is still generally respected throughout the Commonwealth of Nations. I commonly tell law students, and visitors, that one of my proudest boasts after a quarter of a century in judicial office in Australia is that, in all of that time, I have never had a single instance of improper pressure to reach, or change, a decision to favour a particular outcome. In Australia, no Minister telephones judicial officers. No rich corporation or individual would dare to do so. No political party, trade union or other lobby group seeks to put pressure on the judicial officer, except in court by public argument presented in public proceedings. Newspaper editorials occasionally thunder their advice and demands. But even there, limits are generally observed. Corruption, which is such a feature of judicial service in other lands, is wholly absent from ours. The choice of senior judicial officers from people of middle years who have, for the most part, already established a reputation in the private legal profession, is a sure means of maintaining a bench of people with an independence of mind. It is a powerful reason for adhering to our current procedures for appointing judges from the leaders of the private legal profession. That is, I believe, a reason why the judicial officers of the Commonwealth of Nations which

follow this tradition generally enjoy a higher respect (and greater power) than is enjoyed by the career judges of the civil law tradition.

The judiciary today therefore remains substantially as it was when I was appointed: a serious minded, hard working, earnest group of people who realise the privilege and responsibilities of the offices they hold. Not only because of judicial education, the judicial officers of today, like most citizens, are more open to, and knowledgeable about, questions which were never, or rarely, spoken of, a quarter of a century back. About the sometimes unfair impact of the law on women and children. Of its impact on ethnic and other minorities. Of the deservedly critical perceptions of the law held by refugees, by homosexuals, by prisoners and by the ordinary citizen for whom a day in court is commonly a most stressful, expensive and unpleasant experience. Judges are, at last, speaking more openly about issues such as judicial stress[27]. They are much more involved in the efficient management of their work: realising that access to justice depends upon the efficient throughput of court business and is concerned with the expenditure of public as well as private funds[28]. These are the themes which occupy many pages of

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27 M D Kirby, "Judicial Stress - An Update" (1997) 71 ALJ 774; J B Thomas, "Get up off the Ground" (1997) 71 ALJ 785.

28 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 141 at 166.

the *Commonwealth Law Bulletin.* They will do so as long as it is published.

Recently I visited the Supreme Court of Japan in Tokyo. The Supreme Court building in Tokyo is a mighty fortress. It abuts the Imperial Palace in the very centre of the city. It was built to impress, even perhaps to hold the visitor in awe. There is a great entrance hall, not dissimilar to that of the High Court of Australia's building in Canberra. Chief Justice Yamaguchi and I exchanged thoughts about the well guarded buildings in which we severally work. Doubtless many judicial colleagues in apex courts throughout the Commonwealth of Nations operate in like buildings. The background of the Chief Justice of Japan was substantially in family law. In Japan, as in Australia, litigants in person present particular challenges to the proper performance of the judicial function, particularly in family courts. Each of us agreed that a great building, and even wonderful facilities, were not the essence of the judicial role. That essence lay somewhere deeper in the mind and in the heart of the judge. It is found in big and powerful national and constitutional courts throughout the Commonwealth of Nations. It is found in small local and district courts working in run down buildings in rural areas, neglected by politicians and many members of the legal profession.

So the essence of the judicial life has not changed much in twenty-five years of my service and of the *Commonwealth Law Bulletin.* It remains the same. In the *International Covenant on Civil*

and Political Rights, the drafters suggested that the essence is to be found in the performance of the judicial function in a fair and public trial by competent impartial and independent persons[29]. I have sometimes thought that those three words - a verbal *troika* - should appear above the door through which each judicial officer enters to perform his or her work. To strive to be competent. To insist on independence. To aspire, always, to neutrality.

My visit to the Supreme Court in Tokyo culminated in an inspection of the Library, at the heart of the building. There are displayed three massive portraits of a great Crown Prince of the fourteenth century who is remembered as an important law giver. One portrait shows the Prince as a baby, surrounded by his mother and women of the Imperial household. "That shows benevolence", I was told. A second portrait shows the Prince, seated on a throne, giving out decisions and handing down the law. "That shows wisdom". The third portrait shows the Prince on horseback travelling to the far reaches of the Empire. He was armed with a sword and his retinue brandished spears. "That shows courage and resolution".

As I flew back to Australia, my mind played on the tripartite concepts of the *International Covenant* so profoundly influenced by

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29 Art 14.1.

the common law notions which we cherish throughout the Commonwealth of Nations. And on the notions inherent in the painted illustrations of judicial virtues displayed in the Supreme Court in Tokyo, a court wholly outside our tradition. Competence, neutrality and independence. These are the requirements *for* the performance of the judicial office. Wisdom, benevolence, courage and resolution. These are the requirements *of* the judicial office. The *Covenant* appears to look to the outward manifestations; whereas the Japanese portraits search for the inner qualities that are needed. All of the virtues and necessities must be found, however imperfectly, in each lawyer who assumes the judicial mantle.

The tradition of the common law which illuminates the pages of the *Commonwealth Law Bulletin* and animates the judiciary, the legal profession and the legal services throughout the Commonwealth stretches back to a time even before that of the benevolent, wise and resolute Crown Prince of Japan in the fourteenth century. Ours is a shared and inherited legal tradition virtually of a millennium. In twenty-five years much has changed. But much has also stayed the same. And doubtless will continue to do so.

The *Commonwealth Law Bulletin* has chronicled a remarkable quarter century of change and reform. Now it beckons us to an exciting new millennium. To all of its editors, those who have lavished love on its pages, to its contributors and to the abiding idea that lies behind it, I express grateful thanks. I do so as a

Commonwealth citizen and as a lawyer and judge. And I am confident that the best years of the *Commonwealth Law Bulletin* lie ahead.