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FOREWORD FOR *INTER
ALIA*

La Trobe University
School of Law

Foreword

The Hon. Michael Kirby AC CMG

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I welcome this issue of *Inter Alia*. I congratulate the authors and all those involved in its production. From the very beginning of an association with the discipline of law, it is essential that those who are trained in its ways should not only learn the rules that are necessary to its operation, but also the problem areas, controversies and value judgements that are involved, together with the needs for law reform and ongoing improvement of the law in operation.

This issue of *Inter Alia* tackles some of the important controversies that came before the High Court of Australia during my service on that Court.

These include:

- * How judges should approach the interpretation of the Australian Constitution, whether by adopting an ‘original intent’ approach or by embracing the ‘living tree’ idea or something in between;
- * The controversies inherent in family law in the re-location of children as a consequence of the re-location of custodial parents;
- * The operation of disability discrimination legislation and the new and additional international obligations assumed by Australia under the *Convention on the Rights of Persons with Disabilities*;

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- * The respect necessary from the courts for prosecutorial discretions, given the undesirability of involving courts in the prosecution process, but the occasional need for intervention where that process have been arguably abused; and
- * The variable practice of prosecution in sexual assault cases and what can be done to enhance victim confidence in the legal process as providing an effective and just response to the grave affront of unconsensual sexual assault.

I know from more than three decades of service in the courts and a decade in the formal process of institutional law reform, that all of these issues are important, difficult and worthy of close attention. Sometimes there is no easy answer to the controversies that are examined. But out of the description of a legal problems and analysis of the ideas that compete for resolution, comes a civilised and responsive legal system.

One of the most interesting essays in this issue of *Inter Alia* is the one that examines the 1986 decision of Pincus J, then a judge of the Federal Court of Australia. Although s116 of the *Australian Constitution* appears to give explicit protection for freedom of religion in Australia (and, as Justice Lionel Murphy often pointed out, 'freedom from religion'), generally speaking, the High Court has adopted a narrow and literal interpretation of that provision. Pincus J proposed a slightly more liberal interpretation of s116, although this was later reversed by the Full Federal Court, based on its understanding of High Court authority.

The intervening years and the growing importance, internationally and domestically, of the issues of religion and secular society, make this a subject specially worthy of re-examination. One day, the High Court

may have to revisit s116 of the *Constitution*. Breathing life into a constitutional protection for freedom of/from religion may be a very urgent problem in the years to come. Secularism is not simply the negation of religion in public life. It is one of those great constitutional principles, inherited in Australia from England. Secularism emerged because England was exhausted by the wars of religious intolerance. Secularism affords a protected space in society for the religious and the non-religious. Whether such a constitutional principle can be derived from the actual language of s116 is the challenge for future constitutional lawyers and future High Court Justices.

In addressing this and other challenges, the examination of the issues in publications like *Inter Alia* makes an important contribution.

MICHAEL KIRBY