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Précis Paper

The Futures of Advocacy, Human Rights Protection, and Treatment of Refugees in Australia

A discussion of some contentious issues in the law today between with the Hon Michael Kirby AC CMG, former Justice of the High Court of Australia, and Barrister David Buchanan SC

Discussion Includes

- Advocacy, and how it is changing
- An Australian Bill of Rights
- Refugee cases: where does detention stop, and imprisonment start?

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The Futures of Advocacy, Human Rights Protection, and Treatment of Refugees in Australia

1. In this edition of BenchTV, The Hon Michael Kirby AC CMG (Former Justice of the High Court of Australia) and David Buchanan SC (Barrister, Forbes Chambers, Sydney) discuss trial and appellate advocacy and how it is changing, the ongoing debate as to whether Australia ought to have a national human rights law, and the treatment of refugees in Australia, particularly with regard to differentiating between, as a matter of law, detention and imprisonment.

Advocacy, and how it is changing

2. Essentially, the change has been a move from orality to writing. The change occurred as a consequence of the simple discovery that a page can be read four times more quickly than it can be read aloud.

3. The time of courts - a precious commodity in rare supply - had to be conserved as much as was possible, so that the oral part of the persuasion was limited to what was essential, and the rest was converted into written text.

4. In both trial and appellate advocacy, we have shifted towards textual argument. The change is regrettable, in that there is nothing quite like looking a judge in the eye and making sure that he or she has truly grasped the point of an argument, which is much better done orally, than in writing, because the latter depends upon the conscientiousness of a judge, and whether or not the judge has truly understood the argument, particularly as it relates to the opponent's arguments.

5. So the problem is how to get the efficiencies of written text, while preserving the efficiencies of oral argument.

6. Orality used to be the king in advocacy. The best barristers were very good in oral persuasion. Nowadays, the best barristers have to have an extra skill - they must be able to persuade very succinctly, because the rules of Court preserve limits on how much space can be taken up.

7. Some people are very good in oral argument, and not so good in written argument. For the purposes of judging, and writing reasons, the writing is extremely helpful. But for the purpose of advocacy, oral persuasion has a very important place.

8. In 2016, the High Court moved to the point that the default position for special leave applications was that they were to be determined on the papers.

9. This must be understood in its historical context. In the 1960s and 1970s, a litigant was able to get into the High Court substantially as of right. Criminal cases required leave, but in most cases, if the amount in issue could be demonstrated to be of sufficient size, an appeal could be brought *as of right*. That meant, in the broad area of the High Court's jurisdiction in civil matters, if a litigant could establish that a matter involved a stake that was of the designated amount, there was nothing the High Court Justices could do but hear the case.

10. The upshot of this can be evidenced in the Common Law Reports of the early part of the 20th Century right up until the 1970s (when the *Judiciary Act 1903* (Cth) was changed to include the special leave requirement). The Reports are a record of the very broad gamut of cases the High Court heard during that time, which included lots of will, contract, equity, and tort cases, as well as statutory interpretation cases.

11. By the mid-1970s, it had become too burdensome for the High Court, which led to the special leave amendments in the mid-1970s.

12. In 2004, new High Court rules introduced the default arrangement, whereby for a special leave hearing an oral hearing had to be asked for. At this time, if an oral hearing was asked for, it was given. Exceptions to this were introduced in respect of unrepresented parties. These parties were put into a category where two Justices could determine the matter on the papers.

13. But in 2016, the exception became the rule. The rule was that the Justices would examine the written submissions, and decide whether the Court would be assisted by oral argument.

14. The issue is one that comes down to a matter of marginal utility against marginal costs. The question is whether the marginal utility of having more oral argument is worth the marginal cost of Justices' time. The High Court is hearing fewer cases now. Most of them are federal statutory interpretation cases. Very few of them are cases on wills, contracts, torts, etc. – cases which are the lifeblood of the law, and of its influence.

15. The Queen once said of her office that 'you have to be seen to be believed'. The same can be said of the High Court - the High Court has to be seen in the outposts of this huge Commonwealth to be believed. The way the High Court is generally seen is on special leave days, and some appeal days, where the profession can see the Justices of the High Court at work.

An Australian Bill of Rights

16. Australia seems to be quite alone in the fact that it does not have a national human rights law (like a *Freedoms and Responsibilities Charter*, a *Human Rights Act*, or a *Bill of Rights*) unlike so many other countries that do. It is likely that this will change, and at the very least, should change.

17. Australia has not yet adopted any such instrument because of the conviction that Parliament will always fix things up. But the theory that Parliament will fix everything up is not a reliable postulate. When the work of parliamentarians is actually examined to determine whether they do indeed consider or act upon particular needs for modifications of the law to reflect fundamental human rights, the story is sometimes quite disturbing. The postulate is based on a false premise, and therefore needs to be re-examined.

18. In Australia, we have the Human Rights Commission. We also have the adherence to international instruments of human rights, and we are answerable in a number of them to various Committees of the UN in Geneva.

19. Originally, we had a very good record of responding and conforming to opinions expressed by the UN Committees, but lately we have become rather neglectful, even dismissive, of the decisions of these Committees. Indeed, in the current candidature of Australia for election to the Human Rights Council, a big negative exists in the follow-up of reports to UN Committees in respect of Australia's breaches of international instruments.

20. Again, the postulate that is put forward for leaving it to Parliament needs to be re-examined, especially in light of how few Australians, who are members of political parties, *actually elect* members of Parliament. A very small number of Australians can be bothered joining the major political parties that determine the government of the country. Sir Anthony Mason has commented that it is a very romantic notion to think that our Parliament is truly representative of the whole people.

21. Victoria has the *Charter of Human Rights and Responsibilities Act 2006* (Vic). When the question to put to Victorians: has the Charter been a valuable innovation in Victoria?, the first answer is often: yes, because it has helped teach in civics classes at school basic principles of Australian governance, and the deep values that Australians agree to. The deep values of our society derive from the international instruments of the UN.

22. The second answer is often: yes, because when the principles are expressed, a lot of litigation on bills of rights can be avoided. The drafters of the legislation have to try to

ensure that the legislation is in conformity with these principles. If the government considers that it cannot live with the expression that is conformable to the legislation, then it has to certify that it has considered this as such, and gone ahead for particular reasons. This is beneficial to the operation of Parliament, not damaging.

23. The argument mounted by those in opposition to having a standalone or basic human rights law is that it would require the vesting of political power in the Courts. The response to this is that judges have power anyway. When examining very difficult problems, judges have to look sometimes for sources of the reasoning that explain the values they adopt.

24. In the case of *Mabo v Queensland (No 2)*, the High Court, by majority of 6:1, held that the old common law principle that Australia had been *terra nullius* before settlement was factually incorrect. But the High Court had to find a legal principle that would authorise re-stating the common law (which had lasted for virtually the whole of the period of Australian settlement).

25. The principle expressed by Justice Brennan in *Mabo v Queensland (No 2)* [1992] 175 CLR 1 at [42] was the principle of universal human rights.

26. Australia is a party to a number of international human rights treaties. The one principle that is absolutely clear in those instruments is that rights cannot be taken away from people on the basis of their race (which was effectively what the old common law had done to the Aboriginal people). This provided the key to unlocking the door that permitted the High Court to state a new common law principle, one that is more appropriate to the age in which we live.

27. Most citizens of Australia look back on the *Mabo* decision as a correct decision, and the right thing to do. It is important to reflect upon the fact that for 150 years, Australia had democratically elected legislatures that had not done this. The decision by the High Court to finally sweep aside the *terra nullius* error was done on the basis of universal principles of human rights.

28. The benefit of having basic human rights enshrined in a statute would be that the promulgation of those rights would be in the forefront of people's considerations, rather than something that judges would have to follow up on at the rear. It would also teach children at school the deep principles of basic human rights that underpin Australian society.

29. Australia has ratified all these international instruments of human rights - presumably, we take them seriously. It would simply be a matter of bringing these principles into our own domestic law.

Refugee cases: where does detention stop, and imprisonment start?

30. Another aspect of human rights law is brought into consideration a lot these days by refugee cases, especially in regard to the difference, as a matter of law, between detention and imprisonment.

31. Detention is described as being the circumstances in which refugees who arrive in Australian by boat are held in foreign countries like Nauru and Papua New Guinea.

32. Imprisonment is described as the characterisation of the circumstances of someone who is, by a process of law, put in a jail.

33. This is a very hot issue in Australia today because of two things:
    - Firstly, the step that was taken by Australia to detain everybody who came on a boat without the necessary visas
    - Secondly, the step that was taken more recently to send people offshore, that is, outsource the detention of people who seek to come to Australian on boats.

34. This has led to the detention of people in offshore processing units, funded by Australia, but taking place in a number of other countries.

35. Malaysia, Cambodia, Manus Island in Papua New Guinea, and Nauru are all places to which very large numbers of people who have come to Australia seeking refuge and asylum are outsourced, which cannot possibly be consistent with our obligations under international law.

36. Australia promises to consider and determine applications for refugee status under the *Convention Relating to the Status of Refugees* 1951, and the *Protocol Relating to the Status of Refugees* 1967. There is nothing in the Convention or Protocol about contracting some other country to do it. The assumption of the Convention and Protocol is that the country itself makes the determination as to whether it accepts a refugee or not.

37. The issue of whether the poor conditions, violence, sexual abuse, and resulting high number of suicides taking place in these detention centres are constitutionally permissible has come before the High Court on a number of occasions. The High Court has been

divided, as often happens in constitutional cases because of the porous nature of the language and principles involved.

38. Detention by a provision of an Act of Parliament, or by an action of the executive under the provision of an act of Parliament, is permissible, so long as it is detention. A point will be reached where either the length and duration of the incarceration, or the rigours and burden of that loss of liberty, will become a punishment. The Court will draw that distinction; but doing so is not easy. The difficulty lies in how to judge the criteria by which detention and punishment are differentiated.

39. This difficulty was considered in the case of *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* [2016] HCA 1. In this case, Justice Gordan said in his dissenting opinion that to keep a person in Nauru in the conditions described in the evidence, has moved from detention by the executive, to a form of punishment. And when that happened, it moved out of the constitutional power of anything that Parliament could permit, and the executive could perform, because imprisonment as a punishment can only be imposed after an exercise of judicial power, under Chapter III of the Constitution.

40. There is a difference between night and day. When night becomes day, or when day becomes night, may be a matter of argument and disagreement - but criteria can be defined, and applied, as it can also be done by the neutral and independent judiciary when determining at which point detention becomes punishment.

41. The reports of the intolerable conditions in these places of detention are very concerning. The response of the judiciary in the future is going to be to look at when night becomes day – that is – when detention becomes so long, so arduous, and so burdensome, that it is no longer detention, it is punishment, and it has lost its link to Australian constitutional power because it is not authorised by judicial order.

42. Papua New Guinea's highest Court held that the imprisonment of people in Papua New Guinea was inconsistent with their Constitution.

43. Australia is going to have to face up to the differentiation problem, its international law obligations, its own statutory obligations, and its obligations in common decency to other human beings, in particular, children – hopefully sooner rather than later.

BIOGRAPHY

The Hon Michael Kirby AC CMG

Former Justice of the High Court of Australia

Michael Kirby is an international jurist, educator and former Justice of the High Court of Australia. In addition, he has served as Deputy President of the Australian Conciliation and Arbitration Commission, Chairman of the Australian Law Reform Commission, President of the NSW Court of Appeal, Judge of the Federal Court of Australia and President of the Court of Appeal of the Solomon Islands. He has also undertaken many international activities, serving as Commissioner of the UNDP Global Commission on HIV and the Law and leading the UN Commission of Inquiry into human rights abuses in North Korea. He was also a Member of the UN Secretary General's High Level Panel on Access to Medicines and the UNAIDS/OHCHR's panel on Overreach of Criminal Law.

David Buchanan SC

Barrister, Forbes Chambers, Sydney

David Buchanan SC was admitted to practice in 1975, called to the Bar in 1977 and appointed Senior Counsel in 1997. His areas of expertise include criminal law, administrative law, public law and dealing with OH&S, environmental and other regulatory offences. He has been involved for many years in the community response to HIV/AIDS both in Australia and overseas. He has a particular interest in the role of the criminal law and of public health interventions in the HIV/AIDS epidemic.

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