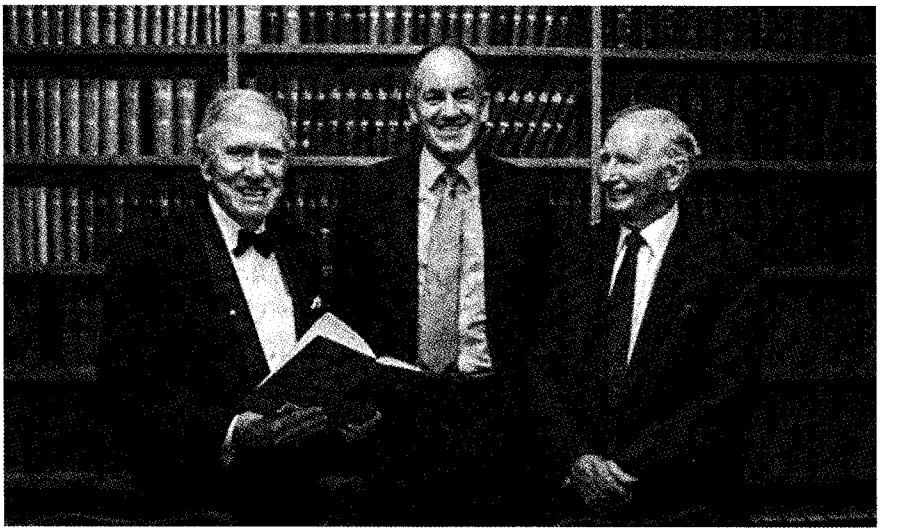
Interview with the Hon Michael Kirby by the Rt Hon Sir Edmund Thomas



Left to right: Hon Michael Kirby AC CMG; Dr Andrew Stockley (Dean); Rt Hon Sir Edmund Thomas. March 2012.

AULR Alumni Symposium 2011

Left to right: Dr Michael Littlewood (Faculty Advisor); Elizabeth Chan (co-Editor-in-Chief 2011); Dr Andrew Stockley (Dean); Rt Hon Dame Sian Elias (Chief Justice); Judge Andrew Becroft (Principal Youth Court Judge); Professor Margaret Wilson (The University of Waikato); Benedict Tompkins (co-Editor-in-Chief 2011); John Katz QC (barrister, Bankside Chambers). October 2011.

SPECIAL FEATURE

An Interview with the Hon Michael Kirby AC CMG† by the Rt Hon Sir Edmund Thomas‡ on "Judicial Activism"*

In this public interview, held at the Auckland Law School, Michael Kirby candidly discusses aspects of the judicial method. He starts with an analysis of what "judicial activism" means in practice. An element of activism is an inherent part of the creative feature of the common law, which has ensured its survival after the imperial age. By reference to Australian cases (including the Communist Party Case *of 1951) and New Zealand cases (*Quilter v Attorney-General *of 1998) he illustrates the choices judges have to make. They are not operating on automatic pilot. Judges also face questions as to how far they are obliged to reveal, and discuss, their choices and the considerations that have informed them. Michael Kirby contrasts this approach with positivist formalism, which perceives judicial law as a largely values-free exercise. Various differences arise, partly occasioned by the differing constitutional foundations of the law in New Zealand and Australia. These result in discussion of constitutional implications; rights that Parliament cannot supposedly repeal; and the need for, and value of, a formal charter or bill of rights. The merit of enshrining rights of an economic and social kind in a constitutional instrument is illustrated by reference to a recent South African case (the* Treatment Action Campaign Case *of 2002). The interview ends with Michael Kirby encouraging an awareness about the defects in the law and the duty constantly to reform and update it.*

Sir Edmund Thomas: Ladies and gentlemen, we are fortunate, indeed, to have my old friend, my very old friend, Michael Kirby with us this evening.

The Honourable Michael Kirby: Not that old!

Thomas: Michael Kirby arrived at Auckland Airport at about 2.30 pm. He volunteered to have this session at 5 pm–6 pm — we have to keep it short.

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* Held at the Auckland Law School, The University of Auckland, on 30 March 2012. The transcript has been edited to improve clarity and footnotes have been added to illustrate the points made.

† Former Justice of the High Court of Australia.

‡ Distinguished Fellow at The University of Auckland Faculty of Law, retired Judge of the Court of Appeal and former Acting Judge of the Supreme Court of New Zealand.

And then he is the guest speaker at a dinner organised by the Criminal Bar Association in aid of the criminal barristers in Christchurch at 7 pm. And after the dinner he returns to his hotel. He departs for Sydney at 5.30 am. Now you might think that punishing schedule is exceptional. It is not. It's a day in the life of Michael Kirby. He is the workaholic's workaholic. And I've always envied him, his ability to work.

Now I want to take this opportunity to pay a compliment to my old friend. I've never had the opportunity to do so in public before. It's this. I have always said that the qualities to look for in a judge (or the main qualities, because there are no doubt a number) are two: intelligence and empathy. Not one without the other, but operating in harmony one with the other. Michael Kirby has an abundance of both. Intelligence and empathy. And they work together in near perfect harmony.

But enough of that.

Kirby: Oh no, more, more. This is so moving.

Thomas: I was almost tempted to say: enough of our similarities, let's get on with the differences! And indeed, because I am an interviewer tonight and Michael is the guest, I want to establish my bona fide neutrality and objectivity when it comes to this ersatz subject of judicial activism. And, so, I just want to say that there are differences — contrasts — between us. For example, overseas visitors frequently ask me, "Are you the Michael Kirby of New Zealand?" But no one, no one, has ever asked Michael Kirby, "Are you the Ted Thomas of Australia?" And if you go to Australia at any time you'll find that Michael is worshipped as an icon, especially by the public. In contrast, I have never been called an icon. It's true that at 11.37 pm on the seventh of March last year someone did call me "a living legend", but the force of the compliment was somewhat impaired when the speaker, within a matter of only a few seconds, fell off the bar stool onto the floor.

And then we have this fundamental difference. You will notice that we are dressed differently. Michael will tell you he is in this fancy dress because he is going to a formal dinner. Don't believe it. He loves dressing up like that. And, in that tradition, Michael is a monarchist (a dedicated and committed monarchist) and I am a republican. Not in the sense that Rick Santorum in the United States is a Republican. No, I have my failings but I'm not that cranky. And I suppose I should also add that also in line with this, Michael is very envious of the fact that I am "Sir Edmund", or "Sir Ted", as you lot call me, and he is plain "Mr Kirby". For myself, if the knighthood were transferable, I'd put it on Trade Me tomorrow. If I did, Michael would be the top bidder.

Now we have an expert on judicial activism in Michael Kirby. He delivered his Hamlyn Lectures on the topic. The Hamlyn Lectures are probably the most prestigious lectures there are. They began with Lord Denning in 1946 and every outstanding jurist and academic since has been invited to give the Hamlyn Lectures. Only Lord Cooke has done so from New Zealand. And

Michael Kirby gave these lectures in 2003. He was much younger then, of course. It's called *Judicial Activism* and then as an afterthought he added *Authority, Principle and Policy in the Judicial Method*.[1] Well Michael, this is your show, but I would like to start with a soft, patsy question just to put you at your ease.

Kirby: I've heard you're a ruthless questioner. We're in for a treat.

Thomas: No, not at all! Now apart from the *numerous* times you've been called a judicial activist there are a number of descriptions of you. It's been said that you nakedly usurp the law-making power, that you're a purveyor of judicial wilfulness, that you're a subverter of the constitution (which is treason is it not?), that you're a "hero judge". And in a thinly veiled attack upon you by your colleague, Justice Heydon, just before you delivered the Hamlyn Lectures, it was said, or suggested, that you suffer from a "delusion of judicial immortality [in] its most pathetic form".[2] Now, are you bothered by these epithets?

Kirby: The only one of those that bothers me is the bit about nakedness. No, I'm not bothered. I mean the law is about free expression. We all have our different points of view. It's interesting how some of those who would regard themselves as judicial conservatives, when a matter touches something that is important to them, can become quite creative. Let's use that word, "creative". And Justice Heydon signed on to a case in Australia called the *Work Choices Case*,[3] which was about whether there was power under the Australian Constitution to deal with industrial relations under the heading of power dealing with corporations.[4] That had been there since 1901. It had never been able to be used for industrial relations purposes because the authority of the courts was against it. There were a thousand cases, which dealt with the matter. All swept away. And the law of conciliation and arbitration (which we copied in Australia from New Zealand) was replaced by dealing with industrial relations under the rubric of corporations law. And so that was, I thought, very activist. I thought it was very creative. I never said it was "activist" because I think that expression has become a sort of swear word. Interestingly if you go to India, they say, "Yes our judiciary is activist and that's a good thing because there are so many injustices, so many things to be dealt with, that a bit of activism is a good thing." But in my brilliant Hamlyn Lectures, I set out to show that it is the very essence of the common law. That it is creative. That's why it has lasted. The flag has been pulled down. The

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1 Michael Kirby *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (Sweet & Maxwell, London, 2004).

2 Dyson Heydon, Judge of the New South Wales Court of Appeal "Judicial Activism and the Death of the Rule of Law" (speech to the Quadrant dinner, Sydney, 30 October 2002), later published in (2004) 10 Otago LR 493 at 502.

3 *New South Wales v The Commonwealth of Australia* [2006] HCA 52, (2006) 229 CLR 1 [*Work Choices Case*].

4 Australian Constitution, s 51(xx).

Union Jack no longer flies in the colonies. The governors have departed. But the common law is still there. And this is because it's a very creative legal system. So there is activism. But it's activism within the parameters of what is permissible and what is appropriate in the case.

Thomas: I read in this book *Appealing to the Future: Michael Kirby and his Legacy*,[5] a volume collected, collated and compiled by two academics ...

Kirby: This is *so* 2009. It's on an iPad now. I don't suppose you have a Facebook page either?

Thomas: I do *not* have a Facebook page, I do *not* have a homepage. I would refer you all to Michael Kirby's homepage. It reads like a celebrity homepage.

Kirby: It's user-friendly!

Thomas: It has a beginning but, alas, no end, and I would venture to suggest that the video of this session will end up on the homepage of Michael Kirby.

Kirby: And why not?

Thomas: Now look at this book. I would be pleased to see this on the Internet because this book is very heavy, it's very weighty. It consists of 37 essays by contributors about the achievements and the contribution of Michael Kirby to the law and legal system.

Kirby: No, not about achievements. It's about the jurisprudence, about the decisions in tax law, environment law, constitutional law, etcetera.

Thomas: But some of the authors consider those to be achievements.

Kirby: *Oh well*, they are entitled to their point of view. Some are critical.

Thomas: Anyway, I'll put it down.

Kirby: Nobody's perfect.

Thomas: I'll put it down because it's very heavy and it's only the paperback copy. The hardback would be even heavier.

Kirby: But the iPad is light.

Thomas: You've turned your iPhone off?

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5 Ian Freckelton and Hugh Selby (eds) *Appealing to the Future: Michael Kirby and His Legacy* (Lawbook, Pyrmont, 2009).

Kirby: No, no, I'm ready for this.

Thomas: Alright, well this book says, somewhere in this book, that you actually changed the title of your lecture to include the phrase "judicial activism" after Justice Heydon's virulent attack upon you. Is that correct?

Kirby: No. As I explain in the foreword to the Lectures, it would have been normal, predictable and boring for me to have given a series of lectures on the great contribution of the High Court of Australia to common law jurisprudence. Or something of that type of approach. But Lord Cooke had actually given the lead. He was a very great judge. He gave his Hamlyn Lectures on the great moments in the common law[6] and they weren't only New Zealand moments. They were moments within the whole worldwide system of the common law. So I thought, what's a thing that's on everybody's lips? And judicial activism, the swear words, were on everyone's lips at the time. So I thought that would be the topic. Justice Heydon has his point of view. By the way, he is a very intelligent man and very, very interesting. He is an expert on imperial history. We always used to talk about battles long ago and far away; and we got on famously. You can get on very well in the law with people who have very different philosophies to you. That's professionalism. That's what the law is about.

Thomas: Michael, you are so tolerant. I don't think you have an intolerant bone in your body. Could you not have slipped into a speech — of which you make many — reference to Justice Heydon and say that you weren't going to criticise him, not because he's all these things you've just said, but because you found that his postal address is 25 Dead End Lane, Jurassic Park?

Kirby: No, no, no, I don't believe that.

Thomas: Or you could've said he's a great judge ... of the 18th century.

Kirby: There are values in the law. This is something that Julius Stone taught me (one-time Dean at Auckland Law School, one-time Professor of Jurisprudence at Sydney Law School). He taught that judges have values and that values are involved, at the cusp, in making decisions. You and I both know that. Some people don't like to admit it. But the point of my Hamlyn Lectures was to try to demonstrate, by reference to the cases, that it's inevitable that you have values. The question for a judge is: do you own up to them? Now Justice Heydon has his point of view — he's entitled to it. His point of view was what I was brought up on. I mean that was the remarkable thing. Julius Stone was teaching jurisprudence, about the creative element in the judiciary, at the very time when Sir Owen Dixon (a great Australian chief justice) was teaching that virtually everything is, and should be, on automatic pilot. That

6 Lord Cooke of Thorndon *Turning Points of the Common Law* (Sweet & Maxwell, London, 1997).

it's *all* there in the books. All the judicial decision-maker has to do is have the techniques and the abilities to find the law and that it's an objective science.[7]

Thomas: That's the legalism of the Dixon era.

Kirby: Yes and not only Dixon. Essentially, let's be frank, it's the legalism of the positivist approach of the English in the last two centuries. Followers of Austinian[8] jurisprudence like to think, and really sold it very cleverly to the legal profession, that they have no creative element. That it's all objective. Dixon said the law would have lost its meaning if it didn't pre-exist the decision. And so he didn't feel comfortable with the creative element. Yet if you read the *Communist Party Case* in Australia, which struck down the Communist Party Dissolution Act 1950 (Cth),[9] I defy you to say that that didn't reflect a great value (essentially a great British value) that you deal in the law with what people *do*. You don't try to invade their minds and deal with what they *believe* in or what they *think*. So Dixon was creative. But Stone taught that we must be more honest and more candid in acknowledging that law has a creative role, that judges have the duty to fill gaps by exercising what he described as the "leeways" for choice.[10]

Thomas: Transparent.

Kirby: Transparent yes. And honest, candid.

Thomas: You've made this point in the framework of a legal reformation, which suggests that the legal system or judicial process had started to come right, but then you say that there is a counter-reformation afoot.

Kirby: Yes, Justice Heydon is part of a counter-reformation. I think that he would accept that. He would say, "I am endeavouring to return things to the former way of the organisation and values of the law." And that is a battle. I mean, people of that view are entitled to their opinions. They are entitled to propound that view. Justice Heydon came over to New Zealand and did so in the Otago Law School.

Thomas: He did it up here too.

Kirby: So I responded. I sent a potted version of my Hamlyn Lectures. It is printed in the Otago Law Review.[11] So Justice Heydon's is a point of

7 Swearing in of Sir Owen Dixon as Chief Justice of the High Court of Australia (1952) 85 CLR xi at xiv.

8 So named for John Austin (1790–1859) whose work *The Province of Jurisprudence Determined* (Lawbook Exchange, Union (NJ), 1999) propounded "positive law" as an antidote to the confusion between law and morality in "natural law". See Julius Stone *Legal System and Lawyers' Reasonings* (Stanford University Press, Stanford, 1964) at 82–89.

9 *The Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 [*Communist Party Case*].

10 Stone, above n 8, at 241.

11 Michael Kirby "'Judicial Activism'? A Riposte to the Counter-Reformation" (2005) 11 Otago LR 1.

view. It's probably what uninformed citizens think. Don't you think out there — citizens — they're being nurtured in this uncreative element. Judges merely *apply* the law. They don't have any creative element. So citizens feel comfortable in that. Those lawyers of this persuasion try to give support to it. But the reality is, when judges come off the bench, especially the higher they go, they come off the bench and talk about a case. Immediately they're talking about the deep values that inform the ultimate decision in the case. In the High Court of Australia during my time, you would very soon see the San Andreas Fault. You'd see the line that showed the different values and the differences between them over reasoning and outcomes. That's just how it is. You know that. I know that. We've got to share the knowledge.

Thomas: Do you think that in a way that the division is between liberal judges and conservative judges?

Kirby: Well I'm not all that fond of such labels. As you so unkindly pointed out, on some things I'm quite conservative. Reassuringly so, for law students. I'm *very* conservative, on some things. I think basically that our constitutional institutions are pretty good. We have elected parliaments. We have uncorrupted judges: never in my 34 years did I have a minister ring me up and say, "Oh by the way Judge, we'd appreciate it if ...". Doesn't happen in Australia and New Zealand. Well, you can count the number of countries on a couple of hands where that is the case.

Thomas: It has happened to me.

Kirby: It has happened? What, a minister?

Thomas: A Minister of Defence, also the Attorney-General, speaking to me at a social function. He was trying to get authority through Parliament to purchase two new frigates and he couldn't get a majority, and he said to me, "Could you slip into a judgment a sentence 'the government is hereby authorised to buy two new frigates'?" Of course I was shocked and I said, "No, I can't do that." Whereupon, he said, "I don't know why not, you put everything else into your judgments."

Kirby: You should go to different social functions. But in fact in Australia it may be a bit different. I think it's partly connected with the comparatively strict constitutional separation of powers in Australia.[12] I never went to functions where there were ministers. I think that's a good thing — you don't mix.

Thomas: We do in Wellington, I'm afraid.

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12 See, for example, *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

Kirby: Well I don't think it's a good thing. I think judges should keep away from the politicians. We would go to the Federal Parliament only for the opening of a new Parliament and the swearing in of a new Governor-General. A few purely social events: that was it. And I think that's a good rule.

Thomas: Well, do you think this thing, judicial activism, this curse word, is it something more than just making law? Or the willingness to make law?

Kirby: My answer to that is the answer that Sir Anthony Mason (a great Chief Justice of Australia) said when somebody raised judicial activism. He just turned around to all those books on the shelf behind him and he said, "Where do you think the common law came from? Where do you think all of this came from?" It came out of the minds of judges. Every case was just slightly different. Every case was pushing the envelope a little bit, pushing it a bit more. Then it was written down. And then it was recorded so that it became part of the law. That's the creative element of the common law. Where did it come from if it didn't come from the judges? Why are we ashamed of this? Why don't we get more honest and acknowledge it, as Julius Stone did? He said judges have "leeways for choice" and the leeways require that you give effect to values in making the choice and the *real* controversy, and the legitimate controversy, is how far you reveal those values and how far you go in giving effect to the choices. And that, I think, is indeed a legitimate debate. I'm for having it out. Let it all hang out. Let us all talk about it. Let us talk about the reality of what happens in those rooms behind the courtroom when the Justices come out and actually talk about the case. Because that's when they get to the core and the essence of the deep values that affect them and inevitably influence their decisions.

Thomas: I wonder, though, if judicial activism may not be an appropriate term for the feeling many people have, especially in the United States, that the courts are intruding far too much into areas which should be left to the people's representatives, to Parliament.

Kirby: Well the new Justice of the Supreme Court of the United Kingdom, Justice Sumption, a former barrister of great ability, rather suggested, when he was appointed, that the court he was joining was being too creative.[13] That led to a very interesting exchange with Sir Stephen Sedley — which is published in the London Review of Books.[14] I commend it to everybody to get that up on the web because it's a really good expression of the different points of view. This is a lesson in living jurisprudence. And I'm with Sedley. I think that Justice Sumption seemed to want to get back to a day where *nothing* was done by the judges. Essentially that's what it is. Don't ever solve any new

13 Jonathan Sumption "Judicial and Political Decision-Making: The Uncertain Boundary" (FA Mann Lecture 2011, Lincoln's Inn, London, 8 November 2011).

14 Stephen Sedley "Judicial Politics" (2012) 34(4) London Review of Books 15.

problem. Don't ever create any new principle. Don't ever develop from the multitude of factual circumstances a new legal principle. Just pretend we're all back there in the 19th century. Well that's rubbish.

Thomas: Yes, Lord Sumption. Did you just call him Sumption or Lord Sumption? I know you're a stickler for these things. I don't want to put my foot in it.

Kirby: Well, I might have called him something else. But it wasn't a good way to start a glorious modern judicial career!

Thomas: I thought it was an astonishing way to start. It's about judicial review and Lord Sumption advocates that the courts, not just the ...

Kirby: ... defer to the executive government.

Thomas: ... defer to the executive and parliamentary policy in a way which, I thought, would undermine the rule of law.

Kirby: Stephen Sedley gave, I thought, a very persuasive answer. He suggested that Lord Sumption was confusing deferring to Parliament (which has been a rule especially in England and no doubt in New Zealand) with deferring to the executive government, which really formulates the policies and implements them and is committed to its viewpoint. Respectfully, I think he's confused those two. Let's hope he de-confuses himself quickly in his role as a Justice of the Supreme Court of the United Kingdom. Did he take a Lordship did he? Was he created a Lord?

Thomas: I'd imagined that when he became a member of the Supreme Court he'd become a Lord. He's not yet then.

Kirby: Yes ...

Thomas: Well that's by the by.

Kirby: In the light of your earlier comment, I don't wish to appear to be too interested in these things!

Thomas: In fact, I've read the article by Stephen Sedley. I wrote a letter to the London Review of Books, but unfortunately it was rejected. I made the point that, indeed, if one followed Sumption's line of thinking through, the rule of law is undermined because one is deferring to the executive and allowing them to act in a way which is unlawful.

Kirby: Do you feel a law review article coming on?

Thomas: Don't put the finger on me like that Michael. You know very well I am writing an article on it. I was already writing an article on it when ...

Kirby: *Oh*, I never knew. But I am far from surprised.

Thomas: And I promise you this. In the course of this article I am not going to show the level of tolerance which you do. I may call him a "legal fundamentalist". I won't go so far as to say that he's an "intellectual pygmy", but I will or may say that he's a legal ... but you don't like names I know that.

Kirby: No, no, no, I'm always courteous. I think that's a great rule of the legal profession: always be courteous and kill them with kindness.

Thomas: Yes, again, you haven't a discourteous bone in your body — and I want to stop there because you'll end up boneless before the evening's out. Michael, I'd like to come back to this point though, that there is perhaps a legitimate expression for the concept of judicial activism. Could we take an Australian case, the *Capital Television Case*.[15] Now, in that case, a state legislature put a cap on expenditure for political purposes leading up to an election. The object was clearly to try and ensure a level playing field so that the power of money was restricted or curbed. The High Court of Australia ... did you sit in this case?

Kirby: No, this was decided in 1992. I was appointed from February 1996.

Thomas: Before your time. The High Court of Australia, I think quite correctly, found that they had in the Constitution a right to annul legislation. The Court went on to hold that the legislation was contrary to the right to free speech. Now it seems to me that this was judicial activism at its worst. If there's any area in which the people should have a say it must surely be in how they elect their representatives and if they want to put a cap on electioneering expenditure, surely that is the prerogative of the representatives.

Kirby: Now let's get a bit analytical here. The first question was: is there an implication in the Australian Constitution that there is a necessity of free speech which has a limit, that Parliament can't go beyond? The High Court of Australia held that there was. A lot of people criticised the High Court at that time for saying that there was an implication. But the reasoning was convincing, I thought. In a constitution that doesn't expressly grant a right of free speech, and is very brief, there is an *awful* lot of detail about Parliament. And about elections. And about the Senate, and the House and so on. So the question was: why is the Constitution going to all this trouble to create a legislature and to have elections unless they will be genuine elections? Real

15 *Australian Capital Television Pty Ltd v The Commonwealth of Australia* (1992) 177 CLR 106 [*Capital Television Case*].

elections? Elections of the people. Not elections that are controlled by large money or other interests: power alien to the people? So my own view on that would be, with respect, that my predecessors in the High Court were right to say there was an implication. I mean, we in the law find implications in contracts and wills and in ordinary statutes. So why would you not find an implication in a national written constitution which is difficult to change and is intended to last for a long while? That was the important consideration in the case.

Thomas: No, I agree with you.

Kirby: Now, that's the very important matter on which there's a controversy as to whether they should've found it. I'm for those who found the implication.

Thomas: Well, so am I.

Kirby: But some judges and lawyers were not.[16] But then there was a second question of the application of the implication. My own view, I think, in that case would've been to say, "I find the implication. But in this case I don't find that the implication has been breached by this measure." There was another measure which the High Court of Australia struck down. This related to stopping the expenditure of money for advertisements two days before elections. We'd had this tradition and law in Australia that they stopped electioneering for two days in order to let people quieten down and think about it. That was the purpose. And they said you can't enact such a prohibition. You've got to just keep electioneering. Again, I would find that there is an implication, but would not agree with that particular application. Nevertheless, if you sit in a constitutional court, with a written constitution, there's nothing unusual about this. Every day of my life in Canberra I was drawing lines. That's what you do in a constitutional court. You may be right or wrong on the line you draw. However, the important question is: is there a line to be drawn? And on that, the High Court of Australia found that there was. I don't think that's now disputed.[17] There is an implied limitation on the power of the Parliament of Australia to impose restrictions that would make the elections a charade. So the real question is how far that implication goes into Chapter III of the Australian Constitution, into the judicial branch. Is there, for example, an implication that trials in our judicial branch must be "real" trials? And, if necessary for that purpose, does this mean that the government has got to provide legal aid and legal assistance so that real controversies can be dealt with. So, for example, it just doesn't depend on whether you've got a lot of money, in order to bring cases to court. That hasn't really been fully explored in Australia. However, implications are not unusual for lawyers.

16 Jeffrey Goldsworthy "Implications in Language, Law and the Constitution" in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (The Federation Press, Sydney, 1994) 150.

17 See, for example, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559–562.

Thomas: I was focusing more on the application.

Kirby: Well, I mean, anyone can have a different view about applications. I would concede that. The big controversy in Australia was about whether there was any right in the judiciary to find the implication. The opponents said, "Just stick to the words!" Well, unfortunately the words don't always yield the solutions. You have to find what the words *mean*. And that involves drawing lines, which judges do all the time.

Thomas: Well certainly two of the judges that you've mentioned, Lord Cooke and Stephen Sedley, have both taken the view that, yes, the implication is appropriate. But they have also said that the Court's application of that implication in that particular case was wrong. I've said the same. And now I think you're saying the same.

Kirby: Well, I think we might agree on that.

Thomas: We don't have to be antagonistic on this. You could be very courteous and agree with me.

Kirby: It's not something I have to solve. So I'm not going to say anything about it.

Thomas: Well one aspect that we perhaps haven't touched upon is the basic rationale of the law. What do you see to be the basic rationale of the law?

Kirby: To bring order and to prevent other sources of power — money, guns, influence, nepotism — taking over. To provide, as far as possible, opportunities for ordinary citizens to influence the nature of society and the way it runs. To bring in change in an orderly way and reform society through law. And, overall, to try to ensure that justice, as we conceive it in each generation, is available to the people. Things will obviously change over time. I've often said in written papers and in conversations with you: if I had sat in *Quilter v Attorney-General*, when *Quilter* was decided in New Zealand about equality in marriage,[18] I probably would've been with the majority, at least at that time. And that is speaking as somebody who, at that stage, was in the 30th year of my relationship with my partner Johan. It is to your great credit that you saw that that was discriminatory, and you were the only dissentient in that case. And that is a wonderful thing about our system. Unlike Continental Europe and the civil law countries, we have dissent. Somebody on a multi-member court may have that gift to see ahead. And to reveal what is seen as a very serious injustice and discrimination.

18 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

Thomas: Well I, I didn't really find ... *Quilter* is the case where all judges held that ...

Kirby: You couldn't read the statute down so that "marriage" in the Marriage Act already included marriage of "same sex couples".

Thomas: You couldn't read the statute so as to authorise same sex marriage.

Kirby: Now would you still have that view?

Thomas: I might go further now. I might go further.

Kirby: Yes. See this all proves, doesn't it, that we're all the victims of our generation? Of our age, of our upbringing, of our legal education?

Thomas: It's also a question, I think, of strategy. I learnt early on that it is of advantage to one's clients to be ahead of your time, but not too far ahead. And I think that going further probably would've been too much of a bite at the time. As it was, my dissenting judgment was criticised. But the reasoning in it has now been the reasoning that's been adopted by many courts in North America.

Kirby: *Absolutely.* You might even be the father of same sex marriage!

Thomas: Possibly even the mother as well.

Kirby: But you've always been creative. That's not so unusual. Yet I'm very critical of myself on this, that when I first read *Quilter*, I thought, "Well marriage is man and wife and Ted's really lost it on this one." But now I look back and I say to myself, "How could you have been so rigid? How could *you*, in your situation, and with your position and insight, have been so rigid?" I really had the legal blinkers on. I was not thinking in a human rights way. In Australia, we're a bit discouraged to think in human rights terms because we don't have a constitutional, or even statutory, national charter of rights.

Thomas: Well, you've certainly been able to dine out on *Quilter* for some time. How many speeches have you made about it now after your conversion?

Kirby: Well as you know the issue of marriage equality is on the public agenda in Australia. There's a lot of talk about it. So it's natural to refer to it.

Thomas: Ten times? Ten addresses?

Kirby: Oh no, *many* more than that. But it worries me. It worries me that I didn't see it. I did not see it.

Thomas: Well that is odd because, let's face it, we have thought in harness on most issues. It wasn't a problem to me. I just didn't see it as difficult at all.

Kirby: Well you said, it's discriminatory. You said that you can't read down the statute so that the legal word "marriage" is available to man and woman, man and man, woman and woman. Looking back now, maybe you could have held otherwise. You could have said, well, "marriage" is not defined; if it's not in the statute why should the court be bound by what was said in 1866 in *Hyde v Hyde*?[19] Why should you be bound by the vision of 1866 in defining what "marriage" is? If Parliament doesn't spell it out, the worst that can then happen is it goes back to Parliament. They can redefine it or define it in a way that excludes what the courts have said. It's not, after all, constitutional. At least in New Zealand.[20]

Thomas: Human rights and the approach that follows from a commitment to human rights must be the key. I didn't find it difficult because at base, it's about human dignity and I regard human dignity as the fundamental emanation of humanity, of humanness, and so on, and everybody has a right to dignity. And I just could not see why a person's sexual preference should be sufficient to deny them that basic dignity. That was it.

Kirby: Well at that stage I'd lived with my partner for 30 years — this year we've just celebrated our 43rd anniversary — and nobody should deny another human being the equal dignity or right of public recognition of a companion in life, of somebody who is always there, who'll be critical when you deserve it, who'll be supportive when things are good. Marriage is good for your health. The AMA in America and other medical bodies have all said so. This is a very important aspect of human health and the avoidance of depression. Depression and suicide amongst young gays is quite high. The people out there who oppose marriage equality are really very unkind people. They don't know enough gay people. They don't know enough people in this situation. And that's one of the reasons why my partner and I, and others, are much more open about it now. You can't really blame straight people for having nasty thoughts about gay people if they don't know gay people; if they've never met them; or don't think they've met them.

Thomas: I don't think that impinged on my thinking at all. Everyone's entitled to their dignity. They have a right to that dignity and sexual preference is not sufficient.

Kirby: But what about polygamy and polyandry? This is thrown in my face

19 *Hyde v Hyde* (1866) 1 LR P & D 130.

20 In Australia, the federal Constitution confers on the Federal Parliament the power to make laws with respect to "marriage": s 51(xxi). See the observations of McHugh J in *Re Wakim; ex parte McNally* [1999] HCA 27, (1999) 198 CLR 511 at [45] that "arguably 'marriage' now means, or in the near future may mean, a voluntary union for life between two *people* to the exclusion of others".

from time to time. What about the Mormons? Or what about Muslims? In Malaysia, they have a law permitting polygamy. Now what about the dignity of polygamy? I agree it's not exactly the same. But how would you feel about that?

Thomas: If you were in my shoes Michael, how would you answer that question?

Kirby: I would say that's not a current issue.

Thomas: I would say, Michael, "It's not a current issue." No, the right to dignity belongs to the individual and I would see the question of Mormonism as being more of a social issue and probably approach it accordingly. But as you know, before one reached any concluded view one would do a lot of reading and a lot of research and a lot of thinking.

Kirby: And a judge must have help from the bar and examples from other countries and look around the world. I think it's a non-issue in New Zealand and Australia at this time. Polygamy is not a feature of every society. But the equality of rights to access to the civil status and legal status of a one-on-one marriage *is* a current issue. It's all been unleashed by your decision in *Quilter*. You should be honoured for your perceptions and insight before a New Zealand audience. This is the first time I've mentioned it here. You should be honoured and respected for having seen it first. There were some very great minds on that court. Sir Ivor Richardson was there and Justice Keith, now of the International Court of Justice, was there. They said you can't read "marriage" as being available to same sex couples. And they held that this conclusion was not discriminatory because it's always been thus. And that's what I initially thought.

Thomas: Well, eminent they may have been. But their judgment wasn't logical.

Kirby: But then history is on your side there. Who's doing this interview anyway?

Thomas: Michael, where do you stand on the question of the supremacy or sovereignty of Parliament? I ask you this because you have in a previous address, differed with Lord Cooke who said there may be some human rights that run so deep that the courts will not enforce statutes that claim to override them.

Kirby: I think this is the difference between the New Zealand idea of constitutionalism and the Australian.[21] You see, in Australia, we accept

21 Michael Kirby "Robin Cooke, Human Rights and the Pacific Dimension" (2008) 39 VUWLR 119.

that at a certain point, our people agitated and then decided, and discussed, and voted in referenda to adopt a written constitution nationally. From that moment on, you take that as the *Grundnorm*, as Kelsen would say.[22] You take it as the fundamental norm of constitutionalism and you can change it by a process. Difficult, it is true, but you can change it. Whereas in New Zealand you don't have that foundation of a written document. So for me it is difficult to say that there are some rights "so deep" that they just bypass the Constitution; that they bypass the norms that are stated in the written constitutional charter. I don't know anyone in Australia who accepts Lord Cooke's view.[23] Even in England, over the centuries since *Dr Bonham's Case*, there's been a controversy as to whether there are some basic principles of law that run so deep.[24] For example, that Parliament must be convened every five years. Perhaps there are some rules of the common law that are so fundamental that Parliament can't abolish them.[25] I think that's a problem for you and the English, without a written constitution. It's not really so much a problem for us because there it is. Every three years we've got to have a poll and it's in the written document.

Thomas: Yes. Well how would you deal with legislation that authorised torture? Would you be able to bring that under the umbrella of the Constitution?

Kirby: Well, there you would get into the question of the text and the meaning of the text. Which takes you to the context and the purpose. You would then be in the realm of the issues of implications, whether there are implied limitations. And I would think there may be some implied limitations on what the executive government in a democratic society can do. It's not spelt out — we don't have a human rights charter in Australia — but I would think if ever we're in the unlikely circumstance that we got to that point, then we would have to consider that. We did get to that kind of point in the so-called *Kable* line of territory.[26] This was a decision that concerned a person who had served his criminal term: his criminal conviction and sentence. If the government asserts that they're dangerous to society so that one can throw away the key and they can just be kept in custody, a possible constitutional implication can be invoked. The High Court of Australia held in *Kable*

22 See Hans Kelsen *General Theory of Law and State* (Lawbook Exchange, Clark (NJ), 2009) at 111.

23 See the discussion in *Durham Holdings Pty Ltd v The State of New South Wales* [2001] HCA 7, (2001) 205 CLR 399 at [70]–[77]. Cooke P's decisions in the New Zealand Court of Appeal are discussed at [47]–[51]. See also *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 (NSWCA).

24 *Dr Bonham's Case* (1610) 8 Co Rep 113b, 77 ER 646 (Comm Pleas) discussed in *Durham Holdings Pty Ltd*, above n 23, at [44].

25 In India, the Supreme Court, interpreting the Constitution of India, held that the amendment power did not extend to permitting an amendment to the Constitution that would abolish or seriously impede judicial review, necessary to uphold the rule of law, or other changes to the "basic structure" of the written Constitution: *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461 at 1462. Compare Arvind P Datar *Commentary on the Constitution of India* (2nd ed, LexisNexis Butterworths Wadhwa Nagpur, New Delhi, 2007) vol 2 at 2022–2028 (art 368).

26 *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51.

(before I came onto the Court) that there are some things which, if you give them to the judiciary, and they are so inimical to the judicial role, Parliament can't confer that function on judges. And no one else can sentence people and put them in jail for a long time *but* the judges. If you can't give that power to the judges, that's a sort of implied limit on what Parliament can do. So there are constitutional implications that can be explored.[27]

Thomas: But what you're really doing is defending your stance on parliamentary supremacy by saying ...

Kirby: No, no, I don't believe in parliamentary supremacy. That is a completely wrong notion, at least in a federation. There is no supremacy of Parliament because every Parliament is subject to the powers of the other units of government: the federal, states and the territories and so no Parliament is supreme in the New Zealand or English sense. The rule of law, and the whole structure of the Constitution, which implies the rule of law in Australia, puts a limit on the power of everybody.[28] We are *all* non-supreme. We are *all* subject to the law and to the lawful powers of others. Every person, every institution is under the law. So "supremacy", and particularly "sovereignty", that's very English talk. Very Diceyan and very 19th century. I wouldn't go that way. I'd leave that alone.

Thomas: I do leave it alone, believe you me. But what would you do if you couldn't find the way out in the Constitution?

Kirby: Well, we had a case like that in the High Court of Australia. It's the case of *Durham v New South Wales*.[29] The government of New South Wales confiscated minerals and didn't provide just terms. Under the Australian Constitution there is a provision that, if the Commonwealth takes property it must give "just terms".[30] There's a whole jurisprudence about what that means. But there isn't such a provision in the states' constitutional sphere. And indeed there was a referendum in 1988, suggesting it be added to govern state acquisitions; but it was rejected by the people in a big media-driven, and conservative-driven, opposition to any bill of rights or any bill of rights-type provisions.[31] So, we don't have a constitutional limitation. It wasn't in

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27 See *Baker v The Queen* [2004] HCA 45, (2004) 233 CLR 513; *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46, (2004) 223 CLR 575; *Forge v Australian Securities and Investments Commission* [2006] HCA 44, (2006) 228 CLR 45; *Gypsy Jokers Motorcycle Club Inc v The Commissioner of Police* [2008] HCA 4, (2008) 234 CLR 532; and *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4, (2009) 237 CLR 501.

28 *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22, (2002) 209 CLR 478 at [69]–[70].

29 *Durham Holdings Pty Ltd v The State of New South Wales* [2001] HCA 7, (2001) 205 CLR 399.

30 Australian Constitution, s 51(xxxi).

31 Tony Blackshield and George Williams *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, The Federation Press, Sydney, 2006) at 1452. The referendum, which included proposed additions covering trial by jury and religious freedom, secured only 30.33% of the total electors casting a vote in the affirmative and failed to pass in a single state. By s 128 of the Australian Constitution, a majority is required in the overall vote nationally and in a majority of the states.

the statute. There was nothing in the federal Constitution that could help the complainants. It was within the powers of the State Parliament. So I had to say that this was unjust; but the answer to the complaint had to be a political answer. You have to raise this in the democratic context and persuade the electorate that it is very unjust to take away people's property without just terms. Of course, getting people agitated about mineral corporations and coal owners and so on is not going to be easy in a democratic election. Yet, since I wrote those words, we've had, in Australia, the proposal for a mining super tax. *The Australian* and other national newspapers said we should be very, very worried and concerned for the multi-billion-dollar mining companies. In the result, the tax was greatly modified. So, it did become part of the political process. It can happen.

Thomas: It can happen, but my thought is that it is best to leave this whole issue up in the constitutional air.

Kirby: Well I understand that in a New Zealand context. I just think that you take a different starting point for constitutional analysis.

Thomas: Will you find human rights in the Constitution?

Kirby: Oh yes of course we do. All the time. We have some spelt out.

Thomas: But there is this controversy that Australian states, except for Victoria and the Australian Capital Territory, do not have bills of rights.

Kirby: Well that's true. The federal Constitution doesn't have a full bill of rights, in respect of matters of federal concern. There are certain rights, such as the right to a jury trial in indictable criminal offences (federal).[32] And there are other scattered rights; not very many. We don't have a statutory federal charter of rights. We don't have a bill of rights. So any rights that are found are deep in the common law, or in particular and specific statutory enactments. Of course, there's a very strong presumption that you construe legislation in a way that does not take away people's fundamental rights or the fundamental rights of the common law. And that's considered regularly. Courts will interpret legislation consistently with respect for fundamental rights. But sometimes, the legislation is absolutely and abundantly clear. And if it is then, in Australia, if the statute is within the power of the enacting Parliament, then the duty of courts is to uphold the law. Any anxiety about it has to go into the political domain. Still, the legislatures are not "sovereign" Parliaments. I think we should drop that language. It's very 19th century.

Thomas: No, no, no, I agree with that. Well I never use the term. I think in

32 Australian Constitution, s 80.

New Zealand and in the United Kingdom you can speak of the "supremacy of Parliament" — that's the doctrine that has been accepted by the courts — and that's the doctrine that I would accept may well be modified by a court at some stage. You undoubtedly have great respect for human rights, do you think the courts might be able to develop the same respect for, and the same application of, substantive human rights: the right to education, the right to housing, the right to medical care, and so on?

Kirby: Well I think that's a big ask. Again, this may be my blinkers. I might be going back to my positivist legal education. The South Africans have put economic and social rights into their Constitution. A jolly good thing it was too. When I hear people in Australia going on and on about how horrible it is to have substantive rights, I remind them of President Thabo Mbeki in South Africa — and his crazy idea that HIV/AIDS was not caused by a virus but that it was a form of poverty and it was only being treated as a virus so the big pharma corporations could make a lot of money out of South Africa. Because they had included a right to health in the new South African Constitution, the Treatment Action Campaign of South Africa went to the courts. It secured an order from the Constitutional Court that required that the government provide Nevirapine, which was a drug then available.[33] I think this cost about a dollar for one or two treatments. That reduced the transmission of HIV, mother to child, by about 80 per cent. It was a huge, extremely cheap, solution and the Court did it. They had the power in the Constitution. But if you went to the High Court of Australia — where are our tools? Where would be our weapons? We don't have them. And you don't really have them in New Zealand, unless you can find substantive rights in the common law and some specific statute to provide a basis for such relief.

Thomas: Well, perhaps, in the rule of law. If you broaden the concept of the rule of law enough you can embrace both political and civil rights and substantive rights.

Kirby: I think you're a couple of steps ahead of me on this too.

Thomas: Well could I finally touch on a topic? In the Hamlyn Lectures, you frequently direct your comments and criticism to a phrase used by Justice Heydon, "strict logic and high technique",[34] and his claim that that is all that is necessary to ensure the administration of the law. I got the feeling reading the Lectures that in a way all logic, and logical thinking, is being deprecated, whereas I would put great value on logical thinking. I'll tell you why: since I've been at this Law School, I read decisions from a different point of view from what I read them before. I am more concerned (and I discussed this with Andrew Ashworth just the other day), I'm more concerned with the

33 *Minister of Health v Treatment Action Campaign* SA 721 (CC) (2002).

34 See Kirby, above n 1, at 61.

logic of the reasoning, the soundness of the reasoning, than the outcome. And so I would like to import into judicial methodology (I didn't do it in my book, which is much bigger than *your* Hamlyn Lectures) the need to reason logically, because logic itself can be a curb on the so-called unruly horse of discretion. If your thinking is logical, you can't go too far, you can't be too activist. How does that appeal to you?

Kirby: I believe in logic. Of course I believe in it. I've often thought that the reason why we have found human rights in our current age, historically, was because of the devastation of the Second World War, and the amazing discovery that the Germans, in one of the most civilised nations on earth, had been so cruel and wicked to minorities and particularly the Jews. I've often thought that what is at the heart of it is not really human dignity. I'm a bit suspicious about that phrase. I think what's at the heart of it is human love. Love for one another because we understand what it is to feel pain, to feel injustice and to feel oppression. That is something we share with one another as human beings. Therefore, I think the foundation of universal human rights is not dignity, which is an outward manifestation. It's the love which is deep in human beings for one another. And similarly, I think we're genetically programmed, as a species, to be rational. That supports the notion that logic and the search for rationality are a natural, even evolutionary, tendency in us. Therefore, generally a good thing.

Having said all that, there are difficulties in taking it too far and giving it any role you want to give it. It's often said of the common law: your big problem is you are concerned with *how* people have done things and not really with *what* they've done. This is the substance and procedural thing. Your concern, it is said, is with whether the party complained about has acted in a fair, rational and just way; not with what the outcome is. There's a reason why that's so. It is because lawyers feel comfortable looking at *how* things are done; whereas *what* is done is something on which reasonable minds can often differ. So I wouldn't take logic too far. Don't forget the Germans are amongst the most logical people on Earth. Their state under the Nazis was not a lawless state. It was a law-bound state. But as Aharon Barak, the great President of the Israeli Supreme Court, said — and he was rescued from Lithuania in a hessian bag as a baby — he said the problem with it was there were "black holes". The problem with law was, often, there was no discretion. No discretion can be a very bad thing. Too much unaccountable discretion, bad. No discretion, worse.

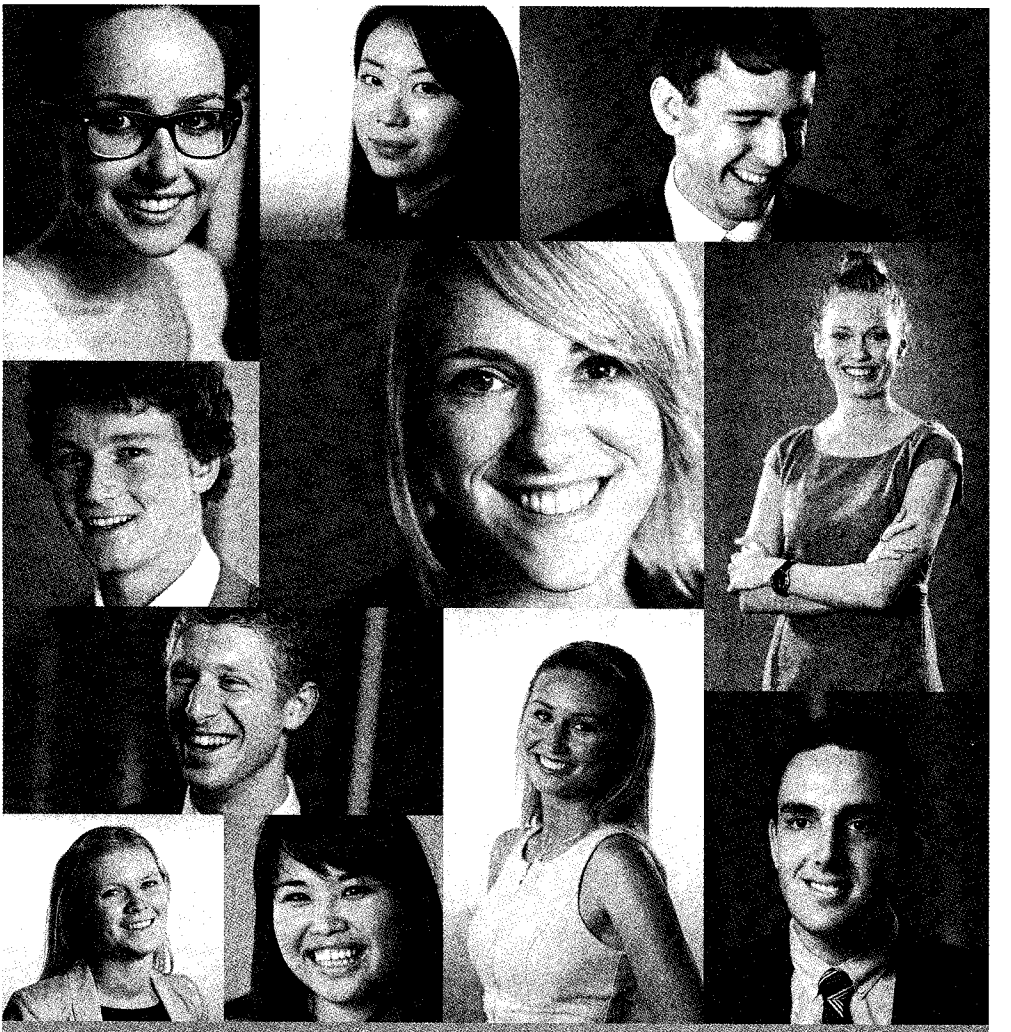
Thomas: Yes, I agree with that.

Kirby: So, keeping discretion, keeping logic but keeping it in its place, also being concerned, as your earlier question to me was, with the substance in with what is actually done, is very important. There's a very good essay written by your Chief Justice, Dame Sian Elias, which has just been published

in The Judicial Review in Australia. It is about the role of women in the law and about the role of women judges.[35] She really turns the question on its head. She says, "I don't think it's a bad thing that women are going to have some different viewpoints because of their life experiences." This is the substance of law impacting on society. Indeed she says, "I think it's a good thing that women have a different viewpoint and can bring a different perspective." Maybe, in retrospect, my life in the law was bringing to the judicial seat the different life experience of a homosexual man. It was not fully revealed through most of my early judicial life. But it was revealed at the end. Giving people, including other judges and talented lawyers, a bit of an idea that the law isn't always lovely. It isn't always just. It would once criminalise me and criminalise millions of others. It was unequal and is still unequal. It's a good thing in our law that we have people who raise these questions and make us think and question about it. About women. About Māori and Aboriginals. About refugees. About Islamic people. And about gays, and about other minorities. That is what makes our institutions good and strong. Our wonderful creativity as lawyers gives us a chance to play a special role in our society. That's why law is such a marvellous vocation. We are not on automatic pilot. We have choices. We have values. Just as Julius Stone taught in this law school 60 years ago. And in the Sydney Law School in the decades that followed. So that is a privilege for us. We should always be mindful of the privilege. We should be mindful of its limitations and we should not reject the fact that the privilege is there. And it is entrusted to us — lawyers and judges — for the people.

Thomas: Michael, as always, it's a delight to talk to you. Thank you very, very much.

35 Sian Elias "Justice for one half of the human race? Responding to Mary Wallstonecraft's challenge" (2012) 10 TJR 399.



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