

2016 Sir Ronald Wilson Lecture

“The High Court: Legal Answers to Contemporary Political, Social and Administrative Issues”

Presented by
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Introduction

I am honoured to be invited to give this lecture, bearing in mind the jurist it honours and those who have previously delivered it.

It is a further honour to be welcomed to present the lecture on the land of the Wadjuk people of the Noongar Nation.

I first met Ron Wilson QC (as he then was) in 1973. I was representing the Blackstone Society, which is the society of law students at the University of Western Australia, at meetings of the Justice Committee of the New Era Aboriginal Fellowship. The Committee had set up a voluntary legal service for Aboriginal people in 1972. Ron Wilson QC was then Solicitor General for the State of Western Australia. The Committee was chaired by Robert French (now Chief Justice French). He was then a young practitioner, who had been admitted to practice in 1972. The Committee welcomed the experience which the Solicitor-General brought to the Committee. He had been admitted in 1952. The only other experienced committee member was Fred Chaney. He had been admitted in 1963. The voluntary legal service secured Commonwealth funding and became the Aboriginal Legal Service of Western Australia (Inc) in 1974.

Sir Ronald maintained an abiding concern for the welfare and rights of Aboriginal people, which reached its high point in 1997, when, as President of the Human Rights and Equal Opportunity Commission, with Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson, he delivered the Bringing Them Home report on the Stolen Generations.

This lecture, following the theme of its title: “*The High Court: Legal Answers to Contemporary Political, Social and Administrative Issues*”, focusses on three topics the subject of recent consideration by the High Court:

- the constitutional limits of the Executive power of the Commonwealth;
- the role of statutory interpretation in according human dignity to citizens; and
- the role of the courts in making law, as applied to legal practitioners appearing before the courts.

The lecture will be structured around three cases:

- [*Plaintiff M68/2015 v Minister for Immigration and Border Protection*](#)¹ is a constitutional law case. It questions the constitutional legality of offshore detention. The judgment applies relevant sections of the Commonwealth *Constitution* giving the Commonwealth Parliament the power to make laws relating to aliens as a foundation for provisions in the Commonwealth *Migration Act* and limiting the power of the Executive.

¹ [\[2016\] HCA 1](#)

- [NSW Registrar of Births, Deaths and Marriages v Norrie](#)² is a case about statutory interpretation. The Court was required in that case to rule on the meaning and intention of a State statute dealing with gender reassignment. It had to decide what power the statute gave to the Registrar to decide how to register the gender of a person.
- [Attwells v Jackson Lalic Lawyers Pty Ltd](#)³ is a case about advocate's immunity. Advocate's immunity is a rule created by judges which affects lawyers involved in Court cases. It forms part of the common law or judge-made law, which is distinguishable from statute law made by the Parliament or what is set out in the *Constitution*.

The High Court's role

The High Court of Australia operates as the highest Court determining law in Australia.⁴ Under Australia's Constitution it is the final appeal Court for all other Australian State, Territory and Federal Courts⁵. It has jurisdiction to hear cases which are not appeals, but commence in the High Court (in what is described as its 'original jurisdiction') in certain circumstances specified in the Constitution. The most common of those is where the Commonwealth Government is a party or an order is being sought against a Minister of the Commonwealth Government.⁶ The Constitution also provides for the Parliament to make laws conferring original jurisdiction on the High Court in matters arising under the Constitution or involving its interpretation or arising under any law of the Commonwealth Parliament.⁷ The *Judiciary Act 1903* conferred original jurisdiction on the High Court in matters arising under the Constitution or involving its interpretation.

TOPIC 1: CONSTITUTIONAL LIMITS OF EXECUTIVE POWER

Separation of powers

It is a fundamental principle of the Australian Constitution (taken from other written constitutions of federal states, such as that of the United States of America) that there is a separation of powers between three elements of government: the Legislature, the Executive and the Judiciary. The separation of powers is designed to protect the people against the power of government, by distributing power between those three arms of government.

² (2014) 250 CLR 490; [2014] HCA 11.

³ [2016] HCA 16; [Attwells & Anor v Jackson Lalic Lawyers Pty Limited \[2016\] HCATrans 48 \(8 March 2016\)](#)

⁴ *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330. Since the *Australia Act*.

⁵ *Constitution 1901*, s 73.

⁶ *Constitution 1901*, s 75.

⁷ *Constitution 1901*, s 76; *Attorney-General (NSW) v Commonwealth Savings Bank* (1986) 160 CLR 315; 65 ALR 74.

Under the Australian Constitution, where the Parliament enacts a law which is beyond the law making power given to it by the Constitution, the High Court has power to declare the law invalid. It is often called upon also to determine that a law is validly enacted within the Parliament's heads of legislative power set out in the Constitution.

The Executive Government is made up of the Governor-General and Ministers and other officers and public servants acting as their agents.⁸ It is able to be controlled by laws of the Parliament.⁹ The Executive's powers include –

- powers given to the Executive by statutes of the Parliament;
- powers of the Executive to interfere with the rights of others without statutory authority (known as 'prerogative powers');¹⁰
- power to protect and advance the nation;¹¹ and
- power to do what any other citizen might do, subject to the operation of the law¹² and subject to limitations upon the power of the Commonwealth to contract and to spend money, only in respect of matters conferred upon the Commonwealth by the *Constitution*, either expressly or impliedly.¹³

The High Court has power to determine that the Executive has acted beyond the scope of its Constitutional power. The limits of the Executive power are not defined in any specific terms in the *Constitution*. It follows that it is a complex task for the High Court to determine in any case whether the Commonwealth is acting within one of the several areas which give rise to executive power.

⁸ Gageler J in [Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors \[2016\] HCA 1](#) at [128]; *Victoria v The Commonwealth and Hayden* [1975] HCA 52; (1975) 134 CLR 338 at 380, quoting *Attorney-General (Vict) v The Commonwealth* [1935] HCA 31; (1935) 52 CLR 533 at 566; [1935] HCA 31.

⁹ *Re Residential Tenancies Tribunal (NSW): Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 441; [1997] HCA 36; Gageler J in [Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors \[2016\] HCA 1](#) at [121].

¹⁰ For example, the power to request extradition of an accused person from a country without an extradition treaty with Australia, resulting in the *Extradition (Foreign States) Act 1966* not applying; *Barton v Commonwealth* (1973) 131 CLR 477; 3 ALR 70.

¹¹ For example, power to create a national flag, commemorate the Bicentenary, foster national initiatives in science, literature and the arts and establish the Australian Federal Police Force and ASIO; *Davis v Commonwealth* (1988) 166 CLR 79; 82 ALR 633.

¹² Gageler J in [Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors \[2016\] HCA 1](#) at [132]-[136].

¹³ Gageler J in [Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors \[2016\] HCA 1](#) at [122]; *Williams v Commonwealth (No 1)* [2012] HCA 23; (2012) 248 CLR 156 at 193 [38], 237-238 [154]-[155], 253-254 [204], 352-353 [518]-[524], 373-374 [595].

Executive and legislative power and offshore detention

The limits upon executive power are illustrated by the case of [Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors](#),¹⁴ in which it was decided that the detention of an asylum seeker in Nauru Regional Processing Centre was not unlawful and the Commonwealth was participating in that detention pursuant to the *Migration Act 1958* (Cth). The focus in that case was upon the capacity of the Commonwealth to deprive a person of liberty.¹⁵

Since September 2012 more than 2000 asylum seekers, described as “*unauthorised maritime arrivals*” in the *Migration Act*, who have arrived within Australia’s migration zone, have been taken to the Republic of Nauru and detained at a Regional Processing Centre pending processing of their claims to be refugees within the meaning of ‘*refugee*’ in the Refugees Convention.¹⁶ The Refugee Convention¹⁷ defines a refugee as:

"A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.."

In the case of [Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors \[2016\] HCA 1](#) the Plaintiff was a Bangladeshi who was an “*unauthorized maritime arrival*” as defined in the *Migration Act*.¹⁸ Upon her entering Australia's migration zone she was detained by officers of the Commonwealth and taken to Nauru pursuant to of the [Migration Act](#).¹⁹

The [Migration Act](#)²⁰ provides that an officer may place and restrain the UMA on a vehicle or vessel, remove the UMA from the place at which he or she is detained or from a vehicle or vessel, and use such force as is necessary and reasonable.²¹

¹⁴ [2016] HCA 1. [2016] HCA 1.

¹⁵ Gageler J in [Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors \[2016\] HCA 1 at \[146\]](#).

¹⁶ See Gageler J in [Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors \[2016\] HCA 1 at \[106\]](#).

¹⁷ Article 1 of the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

¹⁸ *Migration Act 1958* (Cth) s 5AA.

¹⁹ Section 198AD(2) provides that: "An officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country.

²⁰ Section 198AD(3). Directions have been made under s 198AD(5) of the [Migration Act](#) by the Minister as to the particular classes of UMAs who are to be taken to Nauru.

²¹ French CJ, Kiefel and Nettle JJ [Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors \[2016\] HCA 1](#) at [1].

Nauru is a country designated by the Minister for Immigration and Border Protection under the [Migration Act](#)²² as a "regional processing country". The reference to "processing" is to a determination by Nauru of claims by UMAs to refugee status under the Refugees Convention. Both Australia and Nauru are signatories to that Convention.

On 29 August 2012 and 3 August 2013, the Commonwealth and Nauru entered into successive Memoranda of Understanding setting out arrangements relating to persons who have travelled irregularly by sea to Australia and whom Australian law authorises to be transferred to Nauru.²³

The High Court held that there can be no doubt that Commonwealth had the statutory power to remove the plaintiff from Australia to Nauru and to detain her for that purpose.²⁴ The Court noted that in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*²⁵ it was held that s 198AD(2) of the [Migration Act](#) is a law with respect to a class of aliens and so is a valid law within [s 51\(xix\)](#) of the [Constitution](#), and the case of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*²⁶ holds that the legislative power conferred by [s 51\(xix\)](#) encompasses the conferral upon the Executive of authority to detain an alien in custody for the purposes of deportation or expulsion. That power is limited by the purpose of the detention and exists only so long as is reasonably necessary to effect the removal of the alien.²⁷

Plaintiff M68/2015 contended that her detention on Nauru was "*funded, authorised, caused, procured and effectively controlled by, and was at the will of the Commonwealth*"; and relied upon a statement in *Lim* that an officer of the Commonwealth Executive who "*purports to authorize or enforce the detention in custody of ... an alien*" without judicial mandate will be acting lawfully only to the extent that their conduct is justified by a valid statutory provision.²⁸

Chief Justice French and Justices Keifel and Nettle (in a joint judgment) held that it was Nauru who detained the Plaintiff, not the Commonwealth.²⁹ They held that the Commonwealth materially supported, but did not authorise or control the plaintiff's detention.³⁰ They noted that *Lim* established that the Commonwealth has power to make laws for the expulsion and detention of aliens and their restraint in custody to the extent necessary to make their deportation effective; and provisions of the *Migration Act* authorising the same did not interfere with the exclusivity of the judicial power under Chapter III of the *Constitution*.³¹ They concluded, however, that it was nevertheless necessary for the

²² Section 198AB(1).

²³ *Ibid* at [2] and [68].

²⁴ *Plaintiff M68/2015* at [31].

²⁵ [\(2014\) 254 CLR 28](#) at 42-43 [22]-[25], 46 [38]; [\[2014\] HCA 22](#).

²⁶ [\(1992\) 176 CLR 1](#) at 10, 32-33.

²⁷ *Plaintiff M68/2015* at [31].

²⁸ *Ibid* at [38].

²⁹ at [32] - [35].

³⁰ at [39].

³¹ at [40].

Commonwealth's participation in the detention of the plaintiff on Nauru to be authorised by the law of Australia.³² They held that s 198AHA of the *Migration Act* which authorised the Commonwealth to 'take any action' in relation to the regional processing functions of a country provided the requisite authorization by law.³³

Justices Bell and Gageler, in separate judgments, concluded that section 198AHA(2) of the *Migration Act* conferred authority on the Commonwealth to make payments and take action in relation to regional processing functions of Nauru, including exercising restraint over the liberty of a person.³⁴

Justice Gordon dissented, holding that –

- the Commonwealth detained the Plaintiff on Nauru;³⁵
- the MOU, authorised under s 198AHA says nothing about and so does not provide the basis for detention;³⁶ and
- section 198AHA is not a valid law under:
 - (a) the aliens power – s 51(xix) of the *Constitution*³⁷;
 - (b) the immigration power – s 51(xxvii) of the *Constitution*³⁸;
 - (c) the external affairs power – s 51(xxix) of the *Constitution*³⁹; or
 - (d) relations with the Islands of the Pacific – s 51 (xxx) of the *Constitution*⁴⁰.

Section 198AHA was inserted into the [Migration Act](#) by the *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth). It was passed by both Houses of Parliament in record time, having been introduced into the house of Representatives on 24 June 2015, gone to the Senate on 25 June 2015, been passed by both Houses on the same day and assented to on 30 June 2015. The Parliament, in enacting this legislation, took the extraordinary step of enacting that the provision had **retrospective** effect from 18 August **2012**. That was related to the fact that it was on 29 August 2012 that the Commonwealth had first entered into a Memorandum of Understanding with Nauru relating to the transfer of persons to Nauru.

³² at [41].

³³ at [41]-[46].

³⁴ at [71] and [259]-[265]. Justice Gordon dissented, holding that the Commonwealth detained the Plaintiff on Nauru (at [355]); that the MOU, authorised under s 198AHA says nothing about and so does not provide the basis for detention (at [371]); and s 198AHA is not a valid law under the aliens power, the immigration power or the external affairs power of the Commonwealth (at [375]-[412]).

³⁵ at [355].

³⁶ at [371].

³⁷ at [376]-[402].

³⁸ at [403].

³⁹ at [404]-[411].

⁴⁰ at [412].

The agreement the Executive Government had entered into with Nauru and the Commonwealth funds and assistance the Executive had provided to Nauru it had provided between 29 August 2012 and 30 June 2015 had been without a legislative base and beyond the power of the Executive. The passing of the 2015 Act retrospectively validated the Executive's action. If a case such as that of Plaintiff M68/2015 had come before the High Court before the enactment of the retrospectively operating *Migration Amendment (Regional Processing Arrangements) Act* on 30 June 2015, an entirely different result might have been expected.

Retrospectivity and the Rule of Law

The enactment of retrospective law is not possible in some parts of the world. The US constitution states that "*No ...ex post facto Law shall be passed*" by either the State or Federal government.⁴¹ The enactment of retrospective law is generally regarded as undesirable if we are to be governed by the Rule of Law.

The Rule of Law means that government is bound by rules fixed and known beforehand – rules which make it possible to foresee how the government will use its coercive powers and behave accordingly.⁴²

The Rule of Law dictates that people must know what the law is, so they can abide by it. A general resort to the exercise of a power to make retrospective laws would place us under a "*government of men*", rather than a "*government of laws*".⁴³

The Australian legal perspective on retrospective legislative enactments

However, there is no provision prohibiting the enactment of retrospective legislation in the Australian Constitution.

The Federal government has enacted retrospective laws in other circumstances: taxation laws, including the '*bottom of the harbour tax laws*' passed in 1982; retrospective war crimes legislation in *Polyukhovich v Commonwealth*;⁴⁴ and retrospective social security legislation.⁴⁵

⁴¹ [Article I, section 9](#) and [section 10](#) respectively.

⁴² F A Hayek, *Road to Serfdom*, 1944.

⁴³ <http://skepticalawyer.com.au/2011/11/03/retrospective-legislation-against-the-rule-of-law/>; Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 QR 195 at 198.

⁴⁴ (1991) 172 CLR 501. See the Australian Parliament's *Legislation Handbook*, which provides recommendations for legislative procedure, at [6.18].

⁴⁵ *Commonwealth Director of Public Prosecutions v Poniatowska* [2011] HCA 43.

Individual freedoms and Constitutional protection

On 26 April 2016, following the High Court's decision relating to the Commonwealth's powers in relation to detention of asylum seekers on Nauru, the Supreme Court of Papua New Guinea has held that detention of asylum seekers in the Manus Island Regional Processing Centre in Papua New Guinea is contrary to the Constitution of Papua New Guinea.⁴⁶

There are 850 men in the detention centre on Manus Island. Approximately half of them have been found to be refugees.⁴⁷

The PNG Supreme Court has ordered that –

*"Both the Australian and Papua New Guinea governments shall forthwith take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees at the relocation centre on Manus Island and the continued breach of the asylum seekers or transferees constitutional and human rights."*⁴⁸

The PNG decision arose from an application before a five-member bench of the Supreme Court of PNG by the PNG Leader of the Opposition, Belden Namah against the PNG Minister for Foreign Affairs and Immigration, Rimbink Pato and the National Executive Council and Independent State of Papua New Guinea. The PNG Supreme Court noted that the PNG government entered into two MOUs on 8 September 2012 and 5 and 6 August 2013 "under which the asylum seekers who were seeking asylum in Australia were forcefully brought into PNG... [T]he two governments proceeded to bring in the asylum seekers who consist of men, women and children, under Australian Federal Police escort and have them held at the MIPC against their will. The MIPC is enclosed with razor wire and manned by security officers to prevent the asylum seekers from leaving the centre. All costs are paid by the Australian government".⁴⁹ The Court found that these "arrangements were outside the Constitutional and legal framework in PNG" and "the forceful bringing into and detention of the asylum seekers on MIPC is unconstitutional and therefore illegal".⁵⁰ The Court held that an attempt to amend the PNG Constitution to validate the arrangements was invalid and unconstitutional. The Court noted that the UN High Commission for Refugees had reported that "the facilities on Manus Island lack some of the basic conditions and standards required".⁵¹

⁴⁶ *Namah v Pato & others* SC 1497 (SCA. No 84 of 2013) delivered 26 April 2016.

⁴⁷ <http://www.abc.net.au/news/2016-04-26/png-court-rules-asylum-seeker-detention-manus-island-illegal/7360078> .

⁴⁸ *Namah v Pato*, at [74](6).

⁴⁹ at [20].

⁵⁰ at [39].

⁵¹ at [27].

The PNG Constitution, s 42(1) provided that: “No person shall be deprived of his personal liberty”, subject to certain exceptions. The only exception applying to migration⁵² provided for “preventing unlawful entry ... or... effecting lawful removal of a person from Papua New Guinea”.

Section 1 of the *Constitution Amendment (No. 37) (Citizenship) Law 2014* sought to add a paragraph to the exceptions which gave a power to deprive a person of personal liberty “for the purposes of holding a foreign national under arrangements made by Papua New Guinea with another country ... that the Minister, in his absolute discretion, approves.”

The PNG Court noted that when an amendment to the Constitution relates to rights and freedoms the amendment must –

- take into account “the extent that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind”;
- “be expressed to be a law that is made for that purpose”; and
- “specify the right or freedom that it regulates or restricts”.⁵³

The PNG Constitution stipulates that to determine that a law is “reasonably justified in a democratic society having a proper respect for the rights and dignity of mankind” the Court must have regard to –

- the National Goals and Directive Principles,
- the Basic Social Obligations,
- the Charter of the UN,
- the Universal Declaration of Human Rights,
- UN decisions concerning human rights and fundamental freedoms,
- the European Convention on Protection of Human Rights,
- opinions of the International Court of Justice, European Commission of Human Rights and European Court of Human Rights,
- the Final report of the pre-Independence Constitutional Planning Committee; and
- declarations of the International Commission of Jurists.

The Court concluded that it was not demonstrated that the law was “reasonably justified in a democratic society having a proper respect for the rights and dignity of mankind”;⁵⁴ and “treating those required to remain in the relocation centre as prisoners irrespective of their circumstances or their status save only as asylum seekers, is to offend against their rights and freedoms as guaranteed by the various conventions on human rights at international law and under the PNG Constitution”.⁵⁵

⁵² Section 42(1)(g).

⁵³ Section 38.

⁵⁴ at [65].

⁵⁵ at [69] and [117].

The Australian Constitution does not provide for any similar protection of individual freedoms.

Indefinite detention

This lacuna in Australia's legal framework has given rise to decisions such as that in the case of *Al-Kateb v Godwin*⁵⁶ in which the High Court, by a 4 to 3 majority held that although the applicant was a stateless Palestinian, the Migration Act sections 189 and 196-198 authorised the government to detain him indefinitely.

Al Kateb was born in Kuwait and moved to Australia and applied for a temporary protection visa. The Minister refused his application. He declared he wished to return to Kuwait. However, no country would accept him. He was declared stateless and detained under the policy of mandatory detention. The Government identified that at that time there were 24 stateless persons in indefinite detention. The government subsequently granted bridging visas to 9 of those persons, including Al-Kateb. A bridging visa is subject to conditions that the visa holder may not work or study, and is not entitled to social security or health-care benefits. So Al Kateb, and those like him, exist in limbo with no capacity to exercise any control over their lives.

I receive regular calls from a 47 year old man, who was born in Iran in 1969. At the age of 10 he left Iran with his parents and arrived in the USA in 1981 with his mother, who was granted refugee status in the USA. In 1991 he entered Australia on a Tourist visa. In 1993 he was recognised as a refugee and 1994 he was granted a Bridging visa, in association with his application for a Protection Entry Permit. His imputed religion is Bahai (from his Mother) and his actual religion is Christian. His Father's role with the Iranian secret police, domestic security and intelligence service (SAVAK) is enough to impute him with a political opinion, which, together with his long absence from Iran, opening him to the suspicion of being a spy, was sufficient to conclude that he had a reasonable fear of persecution. His permit to re-enter the USA expired in 1992 and he has never been given permanent residency in Australia. In 2003 an International Treaties Obligation Assessment concluded that Australia's non-refoulement obligations applied to him. He has over 200 convictions in Australia for property related offences and has served 15 years' imprisonment during the 22 years he has been in Australia. In 2012 his visa was cancelled on character grounds, because of his convictions. While he has undoubtedly 'done-the-crime', he has also 'done-the-time'. However, with no visa, upon completing his latest term of imprisonment, he was moved into immigration detention at Yongah Hill Detention Centre, near Northam, and from time-to-time is shuttled between there and Christmas Island.

The Administrative Appeals Tribunal⁵⁷ upheld the Minister's decision cancelling the visa on character grounds, but observed that the Minister would be unable to deport him. A judicial review application to the Federal Court⁵⁸ and appeal to the Full Federal Court⁵⁹ have

⁵⁶ [2004] HCA 37.

⁵⁷ *BHFC v MIC* [2013] AATA 166.

⁵⁸ *BHFC v MIC* [2013] FCA 1049.

concluded that there was no jurisdictional error and noted that following *Al-Kateb v Godwin*⁶⁰ he is likely to remain in immigration detention indefinitely.

When he calls me, there is nothing I can offer him which will change his situation. Absent an intervention by the Minister for Immigration in the 'public interest',⁶¹ he seems destined to remain in detention for the rest of his life.

TOPIC 2: STATUTORY INTERPRETATION AND ACCORDING HUMAN DIGNITY

Interpretation of statutes

The High Court has an ultimate role in interpreting the words of Australia statutes. It is a very nuanced task. The High Court, in *AB v Western Australia*⁶² said -

*In Commissioner for Railways (NSW) v Agalio,*⁶³ Dixon CJ referred to the importance of the context, general purpose, policy and fairness of a statutory provision, as guides to its meaning. The modern approach to statutory interpretation uses "context" in its widest sense, to include the existing state of the law and the mischief to which the legislation is addressed.⁶⁴ Judicial decisions which preceded the [Act](#) [in question] may be relevant in this sense, but the task remains one of the construction of the [Act](#).

The Court in *AB*⁶⁵ also noted that –

*the principle that particular statutory provisions must be read in light of their purpose was said in Waters v Public Transport Corporation*⁶⁶ to be of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation "the courts have a special responsibility to take account of and give effect to the statutory purpose". It is generally accepted that there is a rule of construction that beneficial and remedial legislation is to be given a "fair, large and liberal" interpretation.⁶⁷

As stated by Brennan CJ and McHugh J in *I W v City of Perth*,⁶⁸ 'when ambiguities arise, [courts and tribunals] should not hesitate to give the legislation a construction and

⁵⁹ *BHFC v MIBP* [2014] FCAFC 25.

⁶⁰ (2004) 219 CLR 562.

⁶¹ Pursuant to the *Migration Act 1958* section 195A.

⁶² [2011] HCA 42, at [10].

⁶³ [\[1955\] HCA 27](#); [\(1955\) 92 CLR 390](#) at 397; [\[1955\] HCA 27](#).

⁶⁴ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [\[1997\] HCA 2](#).

⁶⁵ At [24].

⁶⁶ [\[1991\] HCA 49](#); [\(1991\) 173 CLR 349](#) at 359 per Mason CJ and Gaudron J; [\[1991\] HCA 49](#).

⁶⁷ *IW v City of Perth* [\[1997\] HCA 30](#); [\(1997\) 191 CLR 1](#) at 12 per Brennan CJ and McHugh J, 39 per Gummow J; [\[1997\] HCA 30](#), referring to *Coburn v Human Rights Commission* [\[1994\] 3 NZLR 323](#) at 333.

⁶⁸ [\[1997\] HCA 30](#); [\(1997\) 191 CLR 1](#).

application that promotes its objects' provided they 'faithfully give effect to the text and structure of these statutes without any preconceptions as to their scope.'⁶⁹ Brennan CJ and McHugh J also acknowledged:⁷⁰

No doubt most anti-discrimination statutes are legislative compromises ... Because of the restricted terms of a particular statute, however, even a purposive and beneficial construction of its provisions will not always be capable of applying to acts that most people would regard as discriminatory.

High Court Justice Michael Kirby, delivering the Hamlyn Lectures at the University of Exeter on the subject of judicial activism,⁷¹ rejected the doctrine of [strict constructionism](#), and declared that:

"Clearly it would be wrong for a judge to set out in pursuit of a personal policy agenda and hang the law. Yet it would also be wrong, and futile, for a judge to pretend that the solutions to all of the complex problems of the law today, unresolved by incontestably clear and applicable texts, can be answered by the application of nothing more than purely verbal reasoning and strict logic to words written by judges in earlier times about the problems they then faced... contrary to myth, judges do more than simply apply law. They have a role in making it and always have."

As Lord Simon of Glaisdale said in *Maunsell v Olins*:⁷²

Statutory language, like all language, is capable of almost infinite gradation of "register" – ie it will be used at the semantic level appropriate to the subject matter and to the audience addressed (the man in the street, lawyers, merchants, etc). It is the duty of the court to tune in to such register and so to interpret the language as to give it the primary meaning which is appropriate in that register...

In some cases, as Dennis Danuto submitted to the Court in *The Castle*⁷³, "It's the vibe".

⁶⁹ Ibid 15.

⁷⁰ at 15.

⁷¹ Michael Kirby (19 November 2003). [First Hamlyn Lecture 2003 – "Judicial Activism" – Authority, Principle and Policy in the Judicial Method](#) (Speech). [University of Exeter](#). Retrieved 14 October 2006. Michael Kirby (20 November 2003). [Second Hamlyn Lecture 2003 – "Judicial Activism" – Authority, Principle and Policy in the Judicial Method](#) (Speech). [University of Exeter](#). See also Michael Kirby (6 January 1997). [Bar Association of India Lecture 1997 – Judicial Activism](#) (Speech). [New Delhi Hilton Hotel](#). Retrieved 14 October 2006. Kirby is critical of the term "judicial activism" as applied to himself and other judges. Kirby believes the term is "code language", applied chiefly by conservative commentators to views and to people with which they disagree: ["The Great Dissenter: Justice Michael Kirby"](#). [Sunday Profile](#). 25 November 2007.

⁷² [1975] AC 373 AT 391.

⁷³ [http://en.wikipedia.org/wiki/The_Castle_\(film\)](http://en.wikipedia.org/wiki/The_Castle_(film)).

Registration of Sexual Identity

The Common Law has traditionally only contemplated male and female identification.⁷⁴

In the 1988 case of *R v Harris*, the existence of a category of sex identification other than male or female was explicitly rejected.⁷⁵ A submission was made to the NSW Court of Criminal Appeal that, where a person underwent medical or surgical sex reassignment treatment but not to a sufficient extent to be legally recognised as the other sex, it was 'open for the Court to say that there is a third state' that they could fall into Justice Carruthers dismissed this submission as 'lack[ing] substance'.⁷⁶ Mathews J commented that there was 'no place in the law for a "third sex", because '[s]uch a concept ... could cause insuperable difficulties in the application of existing legal principles' and 'would also relegate transsexuals to a legal "no man's land"'.⁷⁷

*In the Marriage of C and D (falsely called C)*⁷⁸ Bell J determined the validity of a marriage between a cisgender woman and a person born with ambiguous sex who identified and lived as male. He applied the test from *Corbett v Corbett (otherwise Ashley)*⁷⁹ and held that 'the husband was neither man nor woman but was a combination of both, and a marriage in the true sense of the word ... could not have taken place and does not exist'.⁸⁰ Beazley ACJ in the NSW Court of Appeal commented in *Norrie v NSW Registrar of Births, Deaths and Marriages* that if similar facts were to ever 'arise again for determination, the outcome would depend upon the terms of any relevant legislation and any scientific or medical evidence that may be adduced', rather than upon the application of this now outmoded legal test.⁸¹

In the *Norrie* case⁸² the High Court, in 2014, was called upon to consider whether the Registrar of Births, Deaths and Marriages of the New South Wales had statutory power to register a person's sex as "non-specific".

Norrie was born in Scotland with male reproductive organs. In 1989 she underwent a "sex affirmation procedure".

A sex affirmation procedure is defined⁸³ as:

⁷⁴ Bennett, Theodore --- "No Man's Land": Non-binary Sex Identification in Australian Law and Policy" [2014] UNSWLAWJ I 31; (2014) 37(3) University of New South Wales Law Journal 847

⁷⁵ [http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/UNSWLawJl/2014/31.html?query=\(1988\) 17 NSWLR 158](http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/UNSWLawJl/2014/31.html?query=(1988) 17 NSWLR 158).

⁷⁶ at 170.

⁷⁷ at 194. See also *W v W (Physical Inter-Sex)* [2001] Fam 111, 144.

⁷⁸ (1979) 35 FLR 340.

⁷⁹ [1971] P 83 ('*Corbett v Corbett*').

⁸⁰ at 345.

⁸¹ (2013) NSWLR 697, 724 [134] ('*Norrie v NSW Registrar*').

⁸² *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490; [2014] HCA 11,

⁸³ in s 32A.

"a surgical procedure involving the alteration of a person's reproductive organs carried out:
(a) for the purpose of assisting a person to be considered to be a member of the opposite sex, or
(b) to correct or eliminate ambiguities relating to the sex of the person."

Norrie considered that the surgery did not resolve her sexual ambiguity. She applied on 26 November 2009 for her sex to be registered under the Act as "non-specific".

The Administrative Decisions Tribunal of New South Wales found that Norrie does not identify as male or female, but as "*non-specific*" and considers that identifying herself as male or female would be a false statement. The Tribunal concluded that the Registrar did not have power to register a change of sex as "*non-specific*" and that, under the Act, it is assumed that "all persons can be classified into two distinct and identifiable sexes, male and female".⁸⁴

The Court of Appeal of New South Wales heard an appeal by Norrie and set aside the Tribunal's decision. It held that the Act contemplated that Norrie might be assigned to a specific category of sex other than male or female, such as "*intersex*", "*transgender*" or "*androgynous*". The Registrar appealed that decision to the High Court.

The Registrar argued throughout that the Registrar was required to decide whether the applicant's sex should be recorded in the Register as being either male or female. Even, as in this case, where the application showed persisting ambiguity in the sex of the applicant following a sex affirmation procedure.

The High Court noted that the New South Wales [Births, Deaths and Marriages Registration Act 1995](#) expressly recognises that a person's sex may be ambiguous.⁸⁵ It also recognises that a person's sex may be sufficiently important to the individual concerned to warrant that person undergoing a sex affirmation procedure to assist that person "*to be considered to be a member of the opposite sex*".⁸⁶ When a person has undergone a sex affirmation procedure the [Act](#)⁸⁷ empowers the Registrar to register a change of sex of the person upon an application by that person.

The question in the appeal to the High Court was whether it was within the Registrar's power to record in the Register that the sex of the respondent, Norrie,⁸⁸ was, as she said in her application, "*non-specific*".

⁸⁴ at [23].

⁸⁵ Section 32A(b).

⁸⁶ Section 32A(a).

⁸⁷ Section 32DC.

⁸⁸ The respondent used, and the Court's reasons used, the personal pronouns "she" and "her" to refer to the respondent.

The High Court concluded⁸⁹ that:

The provision of the Act which acknowledges "ambiguities" and the context of the 1996 Amending Act, which referred to persons of "indeterminate sex", are a sufficient indication that the Act recognises that, as this Court observed in AB v Western Australia,⁹⁰ "the sex of a person is not ... in every case unequivocally male or female."

In *AB v Western Australia*⁹¹ the High Court, in 2011, decided an appeal which related to the interpretation and application of the Western Australian [Gender Reassignment Act 2000](#). The Act creates a Gender Reassignment Board with power to issue recognition certificates which, upon production to the Registrar of Births, Deaths and Marriages, require the Registrar to alter the register in view of the reassignment and issue a birth certificate in accordance with the register. A person can apply to the Board if a reassignment procedure.

There were two appellants in this case, AB and AH, who identified themselves as male although they retain some gender characteristics of a female. Each of the appellants had undergone gender reassignment procedures, in the nature of a bilateral mastectomy and testosterone therapy.

The Board was satisfied in each case that the appearance of each of the appellants is that of a male person and that all the indications were that they had adopted the lifestyle of such a person. The sole reason why it determined not to issue a certificate to them was that they retained a female reproductive system. The Board reasoned:

"The fact of having a female reproductive system is inconsistent with being male. Because it is inconsistent with being male, it is inconsistent with being identified as male."⁹²

The Board went on to say that there would be adverse social and legal consequences should the appellants be issued a recognition certificate whilst they have the capacity to bear children.

Following a review of the Board's decisions in each case, the State Administrative Tribunal set the decisions aside, granted each application for a recognition certificate and directed the Board to issue such a certificate.⁹³ The Court of Appeal of the Supreme Court of Western Australia allowed appeals from those decisions and set aside the Tribunal's decisions.

The Court of Appeal had to consider the definition of the term "*gender characteristics*" and, in particular, whether each of the appellants has the "physical characteristics by virtue of

⁸⁹ at [37].

⁹⁰ (2011) 244 CLR 390 at 402 [23]; [2011] HCA 42.

⁹¹ (2011) 244 CLR 390; [2011] HCA 42.

⁹² [2011] HCA 42, at [12].

⁹³ *AB & AH v Gender Reassignment Board (WA)* (2009) 65 SR(WA) 1 at 21 [145].

which a person is identified" as male. The majority (Martin CJ and Pullin JA) did not consider this question could be answered in the appellants' favour, because the appellants retain some characteristics of a female. Martin CJ held that each of the appellants "*possess none of the genital and reproductive characteristics of a male, and retain virtually all of the external genital characteristics and internal reproductive organs of a female*" and that "[t]hey would not be identified, according to accepted community standards and expectations, as members of the male gender."⁹⁴

Martin CJ recognised the nature of the legislation to be beneficial, but said that it was of no assistance on the approach which he took because Parliament had determined "*that value judgments are to be made, involving questions of fact and degree, as to the gender with which a particular applicant is to be identified.*"⁹⁵ He rejected the prospect that a person's gender characteristics might be determined by the observation of a casual bystander.⁹⁶

Buss JA dissented. He expressed the view that the physical characteristics by which a person is identified as male or female are confined to external physical characteristics, for the purposes of the [Act](#)⁹⁷ and observed that the purpose of the [Act](#) is to alleviate the condition of persons suffering from gender dysphoria, by providing a legislative mechanism which will enable their reassigned gender to be legally recognised. Buss JA observed that, if the physical characteristics by virtue of which a person is identified as male or female were intended to include internal physical characteristics, such as organs associated with the person's gender at birth, the definitions would respectively have referred to the physical characteristics by virtue of which a person "*is*" a male or female or "*will be*" a person of the opposite sex.⁹⁸ Instead the definitions refer to the physical characteristics by which a person is, or will be "identified" as a person of the opposite sex; connoting "*recognised as*".⁹⁹

Chief Justice French and Justices Gummow, Hayne, Kiefel and Bell JJ in a unanimous decision of the High Court in *AB*¹⁰⁰ expressed the view that –

the central issue with which the legislation grapples [is] that the sex of a person is not, and a person's gender characteristics are not, in every case unequivocally male or female. As the definition of "reassignment procedure" makes plain, a person's gender characteristics may be ambiguous.

⁹⁴ *The State of Western Australia v AH* (2010) AMLC 30-025 at 36,058 [115] Pullin JA agreed that it was necessary to apply community standards in order to answer the question posed by the [Act, at \[124\]](#).

⁹⁵ at [105].

⁹⁶ at [110].

⁹⁷ at [197].

⁹⁸ at [206].

⁹⁹ at [205].

¹⁰⁰ at [23].

Australia and the US

On 10 June 2016 an Oregon Circuit Court Judge ruled that Jamie Shupe, who was born male, who began transitioning to female in 2013 and who identifies as neither male nor female, could legally change her gender from female to “*non-binary*” by a notice posted “*in a public place in Multnomah County*”. It was reported as the first known ruling of its kind in the United States of America.

The distinction between this and the High Court of Australia cases discussed is that Shupe was able to petition the Court for the ruling without any gender re-assignment process having taken place.

However, Oregon law does not allow genders other than male or female on driver’s licences and US federal law requires a male or female specification on documents such as passports.¹⁰¹

In Australia currently, passports can be issued with sex identifications of ‘*M (male), F (female) or X (indeterminate/unspecified/intersex)*’, with the ‘X’ identification available as long as the relevant person can provide a letter from a medical practitioner certifying that they are intersex.¹⁰² This recommendation was also picked up in 2013 when the Federal Government released the *Australian Government Guidelines on the Recognition of Sex and Gender*.¹⁰³ The *Government Guidelines* are a set of guidelines relating to sex identification and record keeping that apply to ‘all Australian Government departments and agencies’.¹⁰⁴ They came into force on 1 July 2013 and are intended to be fully implemented by 1 July 2016.¹⁰⁵ The *Government Guidelines* differentiate between sex and gender, and set out that the ‘preferred Australian Government approach is to collect and use *gender* information’, whereas ‘*[i]nformation regarding sex would ordinarily not be required*’.¹⁰⁶ Importantly, they require that where sex/gender information is collected and recorded, ‘individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified)’.¹⁰⁷

¹⁰¹ <http://www.pbs.org/newshour/rundown/oregon-court-rules-that-nonbinary-is-a-legal-gender/>; <https://www.theguardian.com/world/2016/jun/16/jamie-shupe-first-non-binary-person-oregon> .

¹⁰² Department of Foreign Affairs and Trade (Cth), *Sex and Gender Diverse Passport Applicants: Revised Policy*, Australian Passport Office
<<https://www.passports.gov.au/web/sexgenderapplicants.aspx>>.

¹⁰³ Australian Government, *Australian Government Guidelines on the Recognition of Sex and Gender* (July 2013) (*‘Government Guidelines’*)<
<http://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF>>.

¹⁰⁴ *Ibid* 2.

¹⁰⁵ *Ibid* 8.

¹⁰⁶ *Ibid* 3 (emphasis in original).

¹⁰⁷ *Ibid* 4.

TOPIC 3: COURT-MADE LAW AND ADVOCATE'S IMMUNITY

Common Law or Court-made law

The Common Law is the law which is derived from custom and judicial precedent, which had its genesis in English Court decisions; rather than statute law created by the Parliament.¹⁰⁸

Advocate's immunity

The doctrine of '*advocate's immunity*' is a common law rule which provides that lawyers are protected from a charge of negligence that is intimately related to litigation.

In a decision delivered on 4 May 2016 in [Attwells v Jackson Lalic Lawyers Pty Ltd](#)¹⁰⁹ the High Court considered whether immunity from liability applies to work done by a Barrister or Solicitor **out of court** which leads to a decision affecting the conduct of a case **in court**. It was addressing the issue of the limits of what is commonly referred to as 'advocate's immunity'.

*Attwells v Jackson Lalic Lawyers Pty Limited*¹¹⁰ raised the question of whether advocate's immunity extends to negligent advice to compromise proceedings by an out-of-court settlement.¹¹¹

Chief Justice French and Justices Keifel, Bell, Gageler and Keane, in *Attwells*, held that advocate's immunity "*does not extend to preclude the possibility of a successful claim against a lawyer in respect of negligent advice which contributes to the making of a voluntary agreement between the parties merely because litigation is on foot at the time the agreement is made. That conclusion is not altered by the circumstances that, in the present case, the parties' agreement was embodied in consent orders.*"¹¹²

Australia is the only common law country which recognises advocate's immunity.

In a 1988 decision of *Giannarelli v Wraith*¹¹³ the High Court of Australia recognised and applied a principle adopted by the House of Lords in 1969 in *Rondel v Worsley*¹¹⁴ to hold that at common law an advocate cannot be sued by his or her client for negligence in the

¹⁰⁸ R S French, "The Common Law and the Protection of Human Rights", Anglo Australasian Lawyers Society, 4 September 2009, <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj4sep09.pdf> ; <http://www.duhaime.org/LegalDictionary/C/CommonLaw.aspx> .

¹⁰⁹ [2016] HCA 16; *Attwells & Anor v Jackson Lalic Lawyers Pty Limited* [2016] HCATrans 48 (8 March 2016)

¹¹⁰ (2016) 90 ALJR 572; [2016] HCA 16

¹¹¹ [2016] HCA 16 at [4].

¹¹² Ibid at [6].

¹¹³ (1988) 165 CLR 543.

¹¹⁴ [1969] 1 AC 191

conduct of a case in court, or in work out of court which is intimately connected with the conduct of a case in court.

The Courts created the immunity as a part of the development of judge made common law for public policy reasons. The justification for the immunity was to avoid the adverse consequences for the administration of justice of re-litigating issues determined in concluded cases.¹¹⁵ The Courts have applied the immunity not only to barristers, who appear before the Court, but to solicitors doing work out of court which leads to a decision affecting the conduct of the case in court.

The existence of the immunity was reaffirmed by the High Court in Australia in 2005 in *D'Orta-Ekenaike v Victoria Legal Aid*,¹¹⁶ despite a 2002 decision of the House of Lords revoking it in England: the case of *Arthur JS Hall & Co v Simons*.¹¹⁷

The New Zealand Court of Appeal followed the House of Lords in approving the immunity in 1974 in *Rees v Sinclair*¹¹⁸ and then revoking it in 2005 in *Lai v Chamberlain*.¹¹⁹

The High Court's reasoning in *D'Orta-Ekenaike* was that for a client to demonstrate negligence on the part of an advocate in the conduct of litigation, re-litigation of the concluded issues would be an inevitable step. However, it was essential to the public confidence in the finality of proceedings that litigation should not be re-opened except in a few narrowly defined circumstances. They described that as "the finality principle".

The High Court stressed that the immunity does not attach to an advocate by reason of some special status accorded to the advocate above other professionals. The Court said that the immunity applies by reason of the advocate's participation in court proceedings, for which other participants: judges, witnesses and jurors hold immunity. It is not the pressure of the courtroom which affords the advocate the immunity, since for example a surgeon is under the same kind of strain whilst operating and no immunity from suit attaches to any negligence in the operating theatre.¹²⁰

Justice Kirby (true to his nick-name, "The Great Dissenter") dissented in *D'Orta-Ekenaike*, pointing out that the High Court had held to legal account architects, civil engineers, dental surgeons, specialist physicians and surgeons, anaesthetists, electrical contractors, financial advisers, police officers, builders, pilots, solicitors (giving out-of-court advice) and teachers, and asked –

¹¹⁵ *Giannarelli* per Mason J at 555.

¹¹⁶ (2005) 223 CLR 1.

¹¹⁷ [2002] 1 AC 615

¹¹⁸ [1974] 1 NZLR 180.

¹¹⁹ [2005] 3 NZLR 291.

¹²⁰ *D'Orta-Ekenaike*, per McHugh J at [188]; http://www.thymac.com.au/publication/advocates-immunity-from-suit-goddard-elliott-a-firm-v-fritsch-2012-vsc-87/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original

*So why are the lawyers in this case entitled to be treated in such a special, protective and unequal way? Is this truly the law in Australia...?*¹²¹

The answer, according to the High Court in the recent *Attwells* case, is 'yes', but the immunity does not apply to cases where the advocate's advice leads to an out-of-court settlement, even if that results in a Court making an order which flows from that settlement;¹²² and it does not apply to advice given as to what case to commence.¹²³

CONCLUSION

The High Court is called upon to answer many and varied complicated questions. The answers are not obtainable by the mechanical application of an understanding of words in a written law or to be drawn solely from rules created in cases which have been decided before. The real task of the High Court is for the Judicial officers who make up the Court to apply their collective wisdom to the disputes brought before them, taking into account the will of the Parliament, as expressed in legislation and the historical experience of the Courts in deciding any similar cases which may have gone before and to attempt to provide justice to the citizens of the nation where government or other citizens might otherwise deprive them of the fundamental rights and freedoms which are regarded as applicable to them in accordance with the international norms of a democratic society.

¹²¹ *D'Orta-Ekenaike*, Kirby J, at [210].

¹²² [2016] HCA 16, at [6].

¹²³ [2016] HCA 16, at [50] and [128].