THE SEVEN DEADLY SINS

The Hon. Justice Michael Kirby, CMG
*President of the Court of Appeal**

Court of Appeal: changing docket

After nearly 10 years as Chairman of the Australian Law Reform Commission, it was (as you will imagine) something of a shock to the system to return to the daily life of the courtroom.

I want to say something about the Court of Appeal, as I have found it. I then want to outline a modern catalogue of "deadly sins", as they are viewed from the Bench.

I will then refer to the issues of policy, which appear almost as vivid in an appeal court as in a Law Reform Commission.

I will conclude with things ancient and modern: a few observations about the Judicial Committee of the Privy Council, and the way of the future.

First a few rudimentary facts. They will be known to most lawyers.

The first Judges of the Court of Appeal of the Supreme Court of New South Wales were appointed to hold their commissions as Judges of Appeal from January 1, 1966. Since the establishment of the Court of Appeal, there have been twenty-two Judges of Appeal.

Three of them have later served as Justices of the High Court of Australia, namely Sir Cyril Walsh (1966-69); Sir Kenneth Jacobs (1966-74) and Sir Anthony Mason (1969-72).

I am the fifth President, my predecessors being Wallace, P, Sugerman, P, Jacobs, P and Moffitt, P.

The Court at any time has eight Judges of Appeal including the Chief Justice and the President. Happily, the Chief Justice is sitting in an ever increasing number of cases, despite his many other judicial and administrative burdens.

I say happily, because every lawyer in New South Wales knows of the outstanding qualities of Sir Laurence Street as a fine and innovative lawyer. His contribution to the development of declaratory relief is just one of his many monuments in the civil law side.

The work of the Court of Appeal comprises motions (which are taken on Mondays), short appeals (which are generally taken on Mondays and Tuesdays) and major appeals which are taken during the rest of the week. On average, Judges of Appeal sit nearly four days each week.

The work load of the Court is heavy and it is increasing. The statistics of completed reserved judgments over the last calendar years are as follows:

1980	227
1981	213
1982	269
1983	227
1984	221
1985	55 (2 months)

The last statistic shows the rapid, recent increase in the business of the Court of Appeal. If the current numbers of appeals continue at the present rate, it can be expected that, by the end of the year, the Court will be disposing of about 300 appeals.

This is a major increase in the Court's business. It can be attributed to the changing nature of the Court's work docket.

Nor is the nature of the work coming to the Court unchanged. In the past year, damages appeals, which lend themselves more readily to immediate ex tempore judgments, have decreased.

At present, they appear to constitute only about five per cent of the Court's work load. In the past damages appeals sometimes constituted up to 30 per cent of the business of the Court.

The space left by the decline of damages appeals has been quickly filled by appeals in challenging new areas of innovative legislation: administrative law, land and environment, equal opportunity and so on.

One of the most important decisions handed down by the Court of Appeal since my appointment concerned the rights of persons affected to have reasons stated by administrators in certain circumstances. *Osmond v Public Service Board of NSW*, unreported CA, December 21 1984 (1985) NSWJB.2.

Beyond gluttony and lust

As you would expect, the change in lifestyle in moving from the Chairmanship of the Australian Law Reform Commission to Presidency of the Court of Appeal is a radical one.

I must leave it to others to judge the success of it. But just to prove that the metamorphosis from law reformer to Judge is as orthodox and predictable as that from barrister to Judge, I wish to use this early opportunity to catalogue my seven deadly sins.

I call them the deadly sins because the original list of deadly sins has become, if not actually compulsory, at least something of a bore in modern society.

Nowadays, people do not get very upset about gluttony. Leo Schofield positively encourages it. And lust is promoted in some quarters as a modern consumer right.

However, seven deadly sins still exist in the courtroom. My catalogue includes lawyers':

- Failing to state at the outset the basic legal propositions which the lawyer hopes to advance in the course of the argument.
- Reading large passages of legal authority on the apparent assumption that literacy is confined to the Bar table and is lost upon elevation to the bench.
- Failing to plan adequately the structure of legal argument so that it moves swiftly and economically to the central factual and legal issues of the case.
- Failing to supply proper written submissions, and the chronology now required, in good time before the hearing.
- Failing to supply lists of legal authorities in time to permit the books to be got out.
- Squandering the great value of oral advocacy which remains, from first to last, to enter the judicial mind and to persuade.

**Notes of a speech delivered by the President of the Court of Appeal Mr Justice Kirby to a luncheon of the Sydney University Law Graduates Association at the Wentworth-Sheraton Hotel, Sydney, on Tuesday, April 16, 1985, in the presence of the Chief Justice, the Attorney-General, Judges and members of the legal profession.*

- Failing to add a proper touch of interest and humour to advocacy, including, worst of all, failing to laugh appropriately at judicial humour, injected deftly to relieve the tension or tedium of the court.

For the authoritative pronouncement these and other sins I invite your attention to Sir Anthony Mason's *The Role of Counsel and Appellate Advocacy* (1984) 58 ALJ 537.

Policy Issues

If I were to name the chief sin which I have noticed, moving from the Law Reform Commission to the Court of Appeal, it is the inability or unwillingness of some lawyers to address important policy questions which inevitably arise in the course of much appellate litigation.

By the time issues come to an appeal court, there are frequently important policy choices to be made.

Of course, it is not always so. Quite often the answer is clearly and authoritatively laid down by binding legal precedent. Sometimes, the legislation may be absolutely plain.

However, in very many cases, particularly where the meaning of the words in a statute is in question, both contentions being urged upon the court can find legal support.

It is then a case of examining the law books to find what the law is. This search should take the modern lawyer into a scrutiny of the underlying principles of the law.

American lawyers call this "policy", being more candid about such things. We, being more British, tend to talk of "legal principles".

However, it is important, at the appellate level, that lawyers should assist the courts in the identification, clarification and development of legal principle. This cannot be done by pretending that every problem has one only simple solution.

This "automation" theory of the law, I categorically reject — as if one only has to press the button to produce the result.

The process of appellate decision-making is much more complex. It relies heavily upon lawyers at the Bar table.

This is both their responsibility and opportunity to contribute to our living legal system.

Our basic problem in addressing issues of legal principle goes back to legal education. In the past, it was often thought sufficient to read vast slabs of earlier case law to an appeal court which would divine the solution to a present case from the interstices of past cases.

In the future we shall certainly look to the binding principles of the past and adhere to them. But we will do so with a clearer perception of the deep undercurrents of policy which our law reflects.

A remarkable anachronism

Whereas the changes I have outlined in the work of the Court of Appeal are clearly steps in the right direction, the phenomenon of the recent growth of Privy Council appeals is a most remarkable anachronism.

Before June 1984 there were relatively few appeals to the Privy Council from decisions of the Court of Appeal. In the year prior to June 1984 there were only three such appeals.

In June 1984, the rules governing appeal to the High Court of Australia were changed. Thereafter following the *Judiciary (Amendment) Act* 1984 (Cth) there were no appeals "as of right" to the High Court.

As befits the final, constitutional court of our country, appeals were limited to matters which were of sufficient importance to warrant the High Court's giving leave to appeal.

However, this wholly beneficial reform has had a most unintended result. It is that appeals are now being taken to the Privy Council in London *as of right* instead of to the High Court in Canberra, where *leave* is necessary.

The consequence is that the Australian legislation designed to enhance the role of the High Court of Australia (and, incidentally, of the Court of Appeal) is being circumvented.

See *Lloyd v David Syme & Co. Ltd,* unreported CA, March 15 1985 (1985) NSWJB.43; *A. Hudson Pty. Ltd. v Legal and General Life of Australia Ltd,* unreported CA, April 4, 1985 (1985) NSWJB.54.

Instead of the Court of Appeal being, as was planned, a final appeal court, subject to leave being given to appeal by the High Court of Australia, appeals are now being taken in increasing number to London.

In the nine months since June 1984 the number of appeals so taken has increased from three to 11. It is understood that more are pending.

The same thing is happening in the other Australian States. The result is:

- an increase in the number of appeals going to London;
- a proliferation of the problems of our legal system with its two final courts of ultimate authority;
- an undermining of the policy to make the High Court Australia's final court of appeal;
- an undermining of the policy to make the Court of Appeal a final court, save for cases where the High Court grants leave to appeal on grounds of the importance of the case.

There should be the earliest possible completion of the discussion between Australia and British authorities to determine residual appeals to the Privy Council.

It is uniquely difficult to work within a system where it was always necessary to check, and sometimes to reconcile, differing streams of legal authority emanating from London to Canberra.

Australian appeals to the Privy Council — this magnificent imperial anachronism into which new life has unexpectedly been breathed — should, in my view, be terminated without delay.

It has made many notable contributions to our jurisprudence in the past. But the time has come for Australian lawyers to shoulder the responsibility of their own legal system and to rise to the challenge which only legal independence from the Privy Council will facilitate.

Silicon before silk

It is likely that, in the next 20 years, many important changes will come about in the procedures of the court of Appeal. I would offer the following check list:

- the likely increase in the use of written argument, to reduce the time taken in oral argument;
- the increase in the time devoted to judges discussing cases between themselves;
- the increased use of single court judgements, to avoid the repetitious individual judgements which are such a feature of Australian courts;
- more attention to cost effectiveness of appeal procedures including time limits on argument, having regard to the public costs involved in providing appeal benches;
- growing interest of the court in monitoring the administrative progress of cases brought before it;

- possible introduction of "the Brandeis Brief", as in the United States, with identification and frank discussion of relevant policy issues involved in appeals, including economic and social data;
- introduction of pre-hearing conferences to permit more economic use of Full Bench time;
- possible introduction of two member appeal courts in minor and procedural appeals. This has already been introduced in England;
- introduction of computerisation and improved technological support.

In terms of technology, the courts lag far behind the rest of the community and even behind the legal profession.

We see the spectacle of major take-over battles, with millions of dollars turning upon them, and with seried rows of lawyers, every one with a computer and a word processor at the finger tips, whilst the judge must struggle along with manual typewriters, without benefit of word processor.

I have purchased my own personal computer to permit the organisation of legal material. I suspect that the judges will be the last members of the legal profession to have the computerisation of legal data made available to them from the public purse.

I simply gave up waiting and bought my own in Hong Kong.

If we expect the continuance of the highest standards of excellence in the judiciary, our community should be ready to pay for it. This may mean less emphasis upon ceremonial robes and more attention to computers, research assistance and word processors.

The battle cry for the legal profession, and for the courts, in the next two decades should be: Silicon before Silk!

Famous last words

At the time the President of the Court of Appeal, Mr Justice Kirby, was appointed to the Conciliation and Arbitration Commission in 1975, he was appearing with Mr Justice McHugh (then McHugh QC) in an equity case.

They were representing that fearless and tireless upholder of the interests of the BLF — Mr Norman Gallagher. In the course of the case the following exchange occurred:

KIRBY: I am going to take a job on the Arbitration Commission.
McHUGH: What! As a Commissioner?
KIRBY: No. As a Judge.
McHUGH: Michael, you are only 35. If you take that job you will sink like a stone. Nobody will ever hear of you again.

Encounters of a legal kind

STITT QC: I would like to put a couple of propositions to you.

WOMAN WITNESS: You would? My luck has changed at last.

HIS HONOUR: I think you had better wait until you hear what the proposition is.

At the next adjournment Stitt QC happened to be in the same lift as the witness and the exchange continued:

WITNESS: Still interested in that proposition?

STITT QC: You have to realise, whatever I get, my junior gets two-thirds.

Never ending stories

The inquest currently proceeding before Wilson, M, in respect of the Sutherland Bushfire (which occurred in January 1983) produces interesting statistics.

At the date of going to press, it had lasted 243 days.

There were 9400 pages of transcript of evidence and, with submissions, the transcript was approximately 12,000 pages long.

There were 13 appearances before the Magistrate, eight counsel and five solicitors.

Over the 243 days, six different people have assisted the Coroner. It is hoped that the inquest will conclude in June.

The bushfire lasted three days.

Invitation to contribute

Bar News welcomes contributions in the form of articles, photographs or cartoons on topics of interest to members of the Bar.

These may be a learned treatise or a matter for amusement.

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Contributions from members of chambers outside Sydney are especially welcome.

Please address all material to Ruth S. McColl at 7th floor, Wentworth Chambers, Sydney, NSW 2000 or DX 399 Sydney.