FOREWORD

The Hon Michael Kirby AC CMG*

I welcome this edition of *The Journal Jurisprudence.* An earlier edition was presented by Professor Thomas Boudreau of Salisbury University in the United States, as guest editor. That edition carried a Foreword by the Right Hon. Malcolm Fraser AC, CH. I pay tribute to the strong voice that Malcolm Fraser has offered, especially in recent years, on many issues of human rights law and practice.

When I served as a member of the Eminent Persons Group on the Future of the Commonwealth of Nations (2010-11), I consulted Malcolm Fraser and received from him wise and timely advice on what should be done to reinvigorate the Commonwealth of Nations. The recent troubled meeting of Commonwealth Heads of Government (CHOGM) in Colombo, Sri Lanka, indicates that the Commonwealth is in danger of losing its way and its commitment to the oft proclaimed values of democracy, the rule of law and human rights. In talking and writing about international law, it is always necessary to keep in mind the imperfections of the institutions and officials of international law and international co-operation.

In my lifetime, at least two leading Australian candidates missed out on election to international posts, where their success could have been transformative of the institutions concerned. These were Malcolm Fraser as proposed Secretary-General of the Commonwealth of Nations and Gareth Evans AC QC, as Director-General of UNESCO. Somehow in the geopolitics of international appointments, Australia's electoral voice has all too often been muted and ineffective. I hope that the present candidature of Professor James Crawford AC, SC, for election in 2014 as a Judge of the International Court of Justice, will be more successful.

I congratulate *The Journal Jurisprudence* and its editor, Dr Aron D'Souza on their vigorous efforts to expand the interests of Australian lawyers in the philosophical dimensions of their profession and Australian academics in the practical context in which conceptual problems of international law fall to be decided. This ambitious undertaking has been led

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in this edition by Mr Stephen Keim SC of the Queensland Bar. Mr Keim attracted national and international attention when he served as counsel for Dr Mohamed Haneef in a highly publicised trial. Mr Keim's successful representation of Dr Haneef's interests before the Australian courts brought not only victory for Dr Haneef but also a vindication of the judicial process in Australia and the rigorous application of the rule of law. I congratulate Mr Keim on the role that he has played in supporting this journal. And in demonstrating, once again, that the pursuit of human rights in Australia is the proper province of talented and persistent practising lawyers. It is an exercise that is, at once, intellectual and profoundly practical.

In this edition of *The Journal Jurisprudence*, Dr Richard Baker and Ms Vanessa Taylor contributed an article: "The Right to Health: A Right on the Rise?". Dr Baker is both a lawyer and a psychiatrist. He brings these two disciplines to bear on the insights that he and Ms Taylor offer in examining the contemporary idea of a human right to health and access to the best attainable health care. Although this article is written mainly for an Australian context, it has clear relevance to human rights in many countries.

In recent years I have participated in a number of international endeavours pertinent to health care. Thus the United Nations Development Programme Global Commission on HIV and the Law (2010-12) and the UNAIDS/Lancet Commission to Global Health are two bodies in which the universal right to health has been, or is being, closely analysed. Most especially, the issue of the right to health has arisen in recent months in the context of the global law on intellectual property (especially patent law). Global law on intellectual property develops substantially in the 19th and 20th centuries before the adoption of the universal human rights expressed in the United Nations *Charter* of 1945 and the *Universal Declaration of Human Rights* of 1948. Reconciling the human rights of all persons to access to attainable health with the recognised human right of inventors to just rewards for their inventions (and incentives of investment therein) is a topic upon which we are likely to hear much more in the future.

In his article "A Raw Deal by Design: Why Would Uganda Import Homophobia and Export Oil?", Mr Karl Muth, a lecturer in economics at Northwestern University in the United States draws attention to important issues of human rights. He describes the frequent lack of legal and social protections for sexual minorities in Uganda and the resistance of that country to efforts by western nations to procure changes to the law and public attitudes to sexual variation. Although the Eminent Persons Group on the Future of the Commonwealth unanimously recommended the repeal of laws against sexual minorities, including in Uganda, these laws are still observed there and in 41 of

the 54 countries of the Commonwealth of Nations. The process of change and reform is painfully slow. First hand research by Mr Muth adds a precious voice to the calls for reform expressed both in and outside of Uganda. Is this merely a western notion, discounted for the perceived needs of the people of Uganda? Or is it concerned with one aspect of universal human rights, as the decision of the United Nations Human Rights Committee in *Toonen v Australia*[1] suggested in 1992? Many judicial decisions in regional and national courts now support the approach in *Toonen*. It is therefore a legitimate role of lawyers and of civil society, to bring these developments to the attention of legal colleagues, and the general community, in Uganda.

An article by Professor Susan Bitensky examines "The Role of International Human Rights for a Comprehensive Historical Methodology in Resolving the Conflict between Positive Law and Natural Law Theories". Professor Bitensky holds a chair in international human rights law at Michigan State University in the United States. Her article examines one of the most important debates of international law today. It is a debate that lies at the foundation of the mandate of the Commission of Inquiry that I chair, established by the Human Rights Council of the United Nations, to investigate alleged human rights abuses in the Democratic People's Republic of Korea (North Korea).

Another article in this issue is addressed to a topic of growing importance in international human rights law, as well as the national laws of countries such as Australia. I refer to the article by Dr Torivio Fodder on Human Rights and Indigenous Peoples. Dr Fodder encourages the reader to engage with the challenges faced by indigenous peoples themselves. This is an important contribution to a field of legal endeavour crucial for Australia and other post-colonial, settler societies. The growing voice of indigenous peoples in the international forum advances the common concerns they share in many settler societies; but also beyond. Australia still has progress to make in this task. Dr Fodder's article offers perspectives that are timely and arresting. This is so even 45 years after the Constitutional Referendum of 1967 began a long overdue process of reform in Australia concerned with indigenous rights.

Another highly topical article is offered by Dr Mark Kielsgard of the City University of Hong Kong. He tackles the still highly relevant concern about "Counter-Terrorism and Human Rights: Uneasy Marriage, Uncertain Future". During my service as a Justice of

[1] See S. Joseph and M. Castan *The International Covenant on Civil and Political Rights Cases Materials and Commentary,* (3rd ed., 2013), 90 [3.48].

the High Court of Australia, the Court faced a number of challenges represented by the assertion of individuals in relation to counter-terrorism laws. These included the well-known case of *Thomas v Mowbray*.[2] The challenge of addressing the real and practical problems of terrorism at the same time as upholding the liberal values of democracy, the rule of law and constitutionalism, is not an easy one. Dr Kielsgard examines this challenge with insight, skill and proper insistence upon fundamentals.

This is a remarkably readable, timely and diverse collection of contributions upon issues that lie at the cutting edge of international and domestic human rights law. Mr Keim and Dr D'Souza and the authors are to be praised and thanked for sharing their insights with us. In the subjects that they have severally addressed, it would be surprising – even astonishing – if there were unanimity about the solutions that they offer. But no-one can doubt that they have addressed highly pertinent and topical questions. Fifty years ago there would have been little dialogue in the Australian legal profession or its journals, over any of the subjects dealt with in this issue of *The Journal Jurisprudence*. This simply goes to demonstrate that the catalogue of the law's concerns is never closed. The articles oblige us all to identify the underlying values by which, collectively and individually, we seek to resolve the hard questions presented to our generation. For this service I thank and praise the editors and authors alike.

[2] (2007) 233 CLR 307.