

## ESSAY

### SIR RONALD WILSON: AN APPRECIATION

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*[Sir Ronald Wilson (known by his own wish to all as Ron Wilson) was short in stature and long in energy. He was a person who devoted himself passionately to all causes in which he believed. Most of these were derived from or constituted by his religious faith and found expression in relation to the law. From humble beginnings to the highest judicial office, he preserved his own unique humanity and contact with people. This is a story of his life in the law and beyond.]*

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#### I BEGINNINGS

Geraldton is a port and fishing centre on the west coast of Australia approximately 492 kilometres north of Perth, the capital city of the State of Western Australia. Ron Wilson was born there on 23 August 1922. He was the youngest son of a family of five.<sup>1</sup> He died on 15 July 2005 aged 82.<sup>2</sup>

Ron started life under conditions of family loss and financial hardship. His mother died before he was five; his father, a solicitor, was substantially disabled

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<sup>1</sup> Antonio Buti and Justice Ralph Simmonds, 'Sir Ronald Wilson — A Brief View of His Life' (2005) 32(7) *Brief* 16, 16.

<sup>2</sup> Ron's life is well told in his own words in 'From Basement to Bench: An Interview with Sir Ronald Wilson First Published in *Brief* in February 1994' (2005) 32(7) *Brief* 6. See also Buti and Simmonds, above n 1; Antonio Buti, *Sir Ronald Wilson: A Matter of Conscience* (2007).

by a stroke when Ron was seven and died when Ron was 12.<sup>3</sup> After the stroke, his father's practice had gone downhill.<sup>4</sup> Ron recalled that when the bank foreclosed on it, he had buried the authorised reports, for which there was no market value, in the backyard of the family home.<sup>5</sup> The ultimate tree of knowledge may perhaps now be growing in Geraldton.

Ron therefore grew up looking to an older brother. At 14, he had to leave school and take a job as a messenger with the Geraldton Local Court.<sup>6</sup> The seeds were all there to make him a person capable of surviving in a tough environment. At 17, he moved to Perth, working as a records clerk at the Supreme Court and studying in his private time to complete what was then styled as a Leaving Certificate.<sup>7</sup> Among the treasures of the Francis Burt Law Museum is the typewriter Ron is said to have used during these years. In a 1994 interview, Ron said that he had learned to type because when he was a teenager working in the Records section of the Crown Law Department, he was required to sit for an administrative exam which included typing.<sup>8</sup> He had done quite well in that exam and so kept typing afterwards.

Ron was heading to the end of his teenage years when Hitler led his peoples and others into overturning the world order then in existence. It was in the Second Australian Imperial Force ('AIF') and later the Royal Australian Air Force ('RAAF') that Ron sought to serve the resistance to Nazi lawlessness.<sup>9</sup> He ended up flying Spitfires in Britain with a Royal Air Force ('RAF') squadron until 1945.<sup>10</sup> There he must have seen the effect on life of a world no longer ruled by law.

#### *A Legal Education*

When the war was over, Ron was one of a number of ex-servicemen who took the opportunity of enrolling in tertiary education under the Commonwealth Reconstruction Training Scheme.<sup>11</sup> He commenced in arts and after one year enrolled in a law degree. Surprising as it may seem today,<sup>12</sup> the only law school then in his home state was the Law School of the University of Western Australia ('UWA'). The ex-servicemen brought to that School a maturity, a determination and a vitality in the study of law; people who had faced danger in battle were not about to waste time in re-establishing themselves in civilian life. Ron was no exception and brought all his energy and talent to graduating. He graduated with first class honours in 1949 as one of only 16 graduates, nine of whom attained

<sup>3</sup> 'From Basement to Bench', above n 2, 6. See also Buti and Simmonds, above n 1, 16.

<sup>4</sup> 'From Basement to Bench', above n 2, 6.

<sup>5</sup> *Ibid.*

<sup>6</sup> Buti and Simmonds, above n 1, 16.

<sup>7</sup> Above n 3.

<sup>8</sup> *Ibid.*

<sup>9</sup> 'From Basement to Bench', above n 2, 6–7. See also Buti and Simmonds, above n 1, 16.

<sup>10</sup> 'From Basement to Bench', above n 2, 7.

<sup>11</sup> *Ibid.* See also Buti and Simmonds, above n 1, 16.

<sup>12</sup> 'From Basement to Bench', above n 2, 7. See also Buti and Simmonds, above n 1, 16.

first class honours.<sup>13</sup> The class included two future Supreme Court judges, a future Dean of the UWA Law School and future distinguished legal practitioners.

It was many years later, in 1956, when Ron interrupted his professional practice and undertook study for a Master of Laws ('LLM') on a scholarship which he won to the University of Pennsylvania.<sup>14</sup>

### B *Family Life*

Around this time in 1955, Ron married Leila Smith. Together, they shared a life in their church and the law. Their family ultimately included Bruce, Helen, Geoffrey, Robyn and Ian. At his funeral and memorial services, Geoffrey, Ian and grandson Michael made eloquent and moving tributes to Ron's life.

### C *Religious Belief*

While it is perhaps not currently fashionable to seek to define someone by their religious beliefs, it has to be said Ron was first and foremost a deeply committed Christian. His faith was expressed through the Uniting Church in Australia and one of its predecessors, the Presbyterian Church. It was not something separate from his civil engagements. Rather it permeated his entire outlook and activities. If there is one single element which explains and knits together his views, involvements and achievements, it was his Christian view of what should be justice in the world. Within the church, he spoke in Christian terms. Outside the church, he spoke in terms of justice and human rights. But in reality, for him, they were indivisible. When the Uniting Church came to be formed, Ron urged the choice of the description 'uniting' rather than 'united', the former signifying an ongoing mission and challenge to a church properly addressing human needs and injustices in the world. In an address in 2000 to Families and Friends for Drug Law Reform, he said that it is not only theologians who have testified that love is the fundamental law of life, citing Cicero as having said in 46 BC: 'we have a natural propensity to love our fellow human beings, and this after all is the foundation of all law'.<sup>15</sup>

In 1951, Ron was state President of the Youth Movement. He participated in the youth work of the Presbyterian Church, and through it became familiar with the Church's mission work in respect of Aboriginal peoples and hence, developed an understanding of their needs.

In 1965, two years after assuming the role of Queen's Counsel, Ron became the first lay person appointed as Moderator of the Presbyterian Church.<sup>16</sup> Later, in 1988, he assumed the Presidency of the new Uniting Church of Australia — for the advent of which he had worked tirelessly and effectively.<sup>17</sup>

<sup>13</sup> Above n 12.

<sup>14</sup> 'From Basement to Bench', above n 2, 15. See also Buti and Simmonds, above n 1, 16.

<sup>15</sup> Sir Ronald Wilson, 'Address' (Speech delivered at the Fifth Annual Remembrance Ceremony, Families and Friends for Drug Law Reform, Canberra, 13 November 2000) <<http://www.ffdlr.org.au/memorial/SirRonaldWilson.htm>>.

<sup>16</sup> 'From Basement to Bench', above n 2, 13. See also Buti and Simmonds, above n 1, 16–17.

<sup>17</sup> *Tributes Paid to 'Visionary' Sir Ronald Wilson* (17 July 2005) ABC News Online <<http://www.abc.net.au/news/newsitems/200507/s1415968.htm>>.

Among the many tributes paid to Ron at the time of his death was Fred Chaney's testimony that his life illustrated 'humane Christian conservatism'.<sup>18</sup>

#### D Professional Practice

When Ron graduated, it was a requirement for admission to practice that a graduate serve two years of articles of clerkship. He persuaded the Crown to seek an amendment to the *Legal Practitioners Act 1893* (WA) to permit articles to be taken with the Crown Solicitor.<sup>19</sup> He was not only the first person to be articulated outside a private law firm, but also the first to be paid a salary of substance, determined in his case by the applicable Crown rates.<sup>20</sup> Ron was admitted to practice in the Supreme Court of Western Australia in March 1951.<sup>21</sup> He was then 29.

Given Ron's earlier employment history with the courts in Geraldton, it was probably not surprising that Ron sought to make his professional career in the Crown Law Department. By 1959, when he was 37, Ron had become Chief Crown Prosecutor.<sup>22</sup> His energy, talent, application, rigour and determination saw him engaged in major litigation of the time. Those who knew him in this role described him as relentless in properly and professionally advancing the case of his client, the State of Western Australia.<sup>23</sup> Some have found it difficult to reconcile the Ron of human rights fame with the Ron of prosecutorial fame. The answer is possibly that whatever Ron did, he did to the maximum of his capacity, sparing nothing in application and preparation. His nickname, the 'Avenging Angel', evoked both the goodness of the man as well as his total devotion to duty, whatever that duty might be. When the task was to secure a conviction and penalty, he went all out for that result. When the task was to defend human rights, the same man went all out for that result.

In 1961, Ron was appointed as Crown Counsel, an acknowledgment of his increasing involvement in civil work.<sup>24</sup> In 1963, Ron took silk at the age of 41, becoming the youngest person to then have received that distinction.<sup>25</sup> It must also be remembered that at the time, and even for some years afterwards, there was regular debate as to whether silk should be granted to those outside private practice, namely, persons engaged by the Crown. In a later interview, Ron told of the endeavours of those in private practice to have him cross the divide from the Crown.<sup>26</sup> However, he considered that the best briefs were with the Crown and he did not want to move.<sup>27</sup> Additionally, he watched with pleasure as younger Crown officers succeeded in practice and especially when one was elected

<sup>18</sup> Fred Chaney, 'Sir Ronald Wilson' (2005) 32(7) *Brief* 19, 19.

<sup>19</sup> 'From Basement to Bench', above n 2, 7.

<sup>20</sup> *Ibid* 7–8.

<sup>21</sup> *Ibid* 8. See also Buti and Simmonds, above n 1, 16.

<sup>22</sup> Buti and Simmonds, above n 1, 16.

<sup>23</sup> 'From Basement to Bench', above n 2, 14.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid* 10.

<sup>27</sup> *Ibid*.

President of the Law Society, bringing to an end the idea that the Crown was a permanent underclass.<sup>28</sup>

Ron led the prosecutions of John Button (for the manslaughter of his girlfriend Rosemary Anderson) and Darryl Beamish (for the murder of Jillian Brewer) in 1959.<sup>29</sup> These were murders to which the serial killer Eric Edgar Cooke confessed before he became the last person hanged — for other murders for which he had already been convicted.<sup>30</sup> In recent years, each of these convictions has been overturned by the Western Australian Court of Criminal Appeal upon the presentation of additional evidence.<sup>31</sup> It may be that their convictions were not only the product of the approach of the times, but also the unrelenting advocacy of the prosecutor.

Ron's successor as Solicitor-General has written:

From early in his practising career his abilities as an advocate were apparent. He appeared in a wide range of jurisdictions and quickly developed a reputation for thoroughness in research and preparation, incisiveness in submission and eloquent mastery of matters of fact.<sup>32</sup>

#### E *Solicitor-Generalship*

In 1969, at the age of 47, Ron became the first Solicitor-General of Western Australia.<sup>33</sup> Up to that time, much constitutional litigation in the High Court had been done for the State of Western Australia by the appropriate officers of the State of Victoria. As Western Australian Crown Counsel, Ron had ended that practice, assuming the responsibility for Western Australia's constitutional litigation in the High Court and becoming adept in it. Not surprisingly, he would have seen the need for Western Australia to take the same steps as some other states and establish the office of Solicitor-General.<sup>34</sup> In that role, he faced a decade of major constitutional litigation as Western Australia made the dramatic transition from a rural to a resource economy. He gave pivotal advice during this period to governments of both major political persuasions, taking pride that it was treated with the same respect regardless of the political character of the government. From 1973, he chaired the Barristers' Board (now the Legal Practice Board) and so played a major part in setting professional standards.

During Ron's tenure as Solicitor-General, he played a significant role in the creation of the District Court in 1969–70 and the decision of Western Australia to accept the option provided for in the *Family Law Act 1975* (Cth) to establish the Family Court in Western Australia as a state court.

<sup>28</sup> *Ibid.*

<sup>29</sup> T F Percy, 'The Button and Beamish Cases' (2006) 33(6) *Brief* 8, 9.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Button v The Queen* (2002) 25 WAR 382; *Beamish v The Queen* [2005] WASCA 62 (Unreported, Steytler, Wheeler and McLure JJ, 1 April 2005).

<sup>32</sup> K H Parker, 'Dedication to Sir Ronald Wilson' (1990) 20 *University of Western Australia Law Review* 205, 205.

<sup>33</sup> Buti and Simmonds, above n 1, 16.

<sup>34</sup> The office was established by the *Solicitor-General Act 1969* (WA).

It was also during this period that he argued Western Australia's case in *New South Wales v Commonwealth* ('*Seas and Submerged Lands Case*').<sup>35</sup> Ron said that the outcome of this case was probably one of his greatest professional disappointments.<sup>36</sup> He felt that had he led with the argument he had put as the third counsel for the state, the result may have been different.<sup>37</sup> His successor has described him as 'a principal architect' of the offshore constitutional settlement leading to the enactment of the *Commonwealth Seas and Submerged Lands Act 1973* (Cth).<sup>38</sup>

#### F Constitutional Predictions

At the 14<sup>th</sup> Legal Convention of the Law Council of Australia held in Adelaide in July 1967, Ron, then Crown Counsel, joined with Peter Durack MLA, then a member of the Western Australian Parliament and a barrister and solicitor of the Supreme Court of Western Australia (and subsequently one of the longest serving Attorneys-General of the Commonwealth) to present a paper titled 'Do We Need a New Constitution for the Commonwealth?'.<sup>39</sup> Early in the paper they stated:

The question as to whether the *Constitution* should be replaced or amended is not only, or even primarily, a question of law for lawyers; it is richly spiced with politics, calling for the application of those value judgments that confront politicians charged with the responsibility of government.<sup>40</sup>

After acknowledging that the application of Dicey's analysis of federalism<sup>41</sup> and certain facts of Australian life supported a unificatory approach, they concluded that:

for the foreseeable future the answer to Australia's governmental problems lies in a constructive approach to federalism, a flexible relationship, undergirded by a common concern for the welfare and development of every section of the community and for the projection of a proper image of the Australian nation on the international scene.<sup>42</sup>

They called this a process of maturation, described as 'cooperative federalism'.<sup>43</sup> They were able to point to the development of uniform legislation in the *Uniform Companies Act*<sup>44</sup> which they considered to be a landmark. After examining possible methods of cooperation the authors said:

<sup>35</sup> (1975) 135 CLR 337.

<sup>36</sup> Buti and Simmonds, above n 1, 17. See also 'From Basement to Bench', above n 2, 10.

<sup>37</sup> 'From Basement to Bench', above n 2, 10.

<sup>38</sup> Parker, above n 32, 207.

<sup>39</sup> P D Durack and R D Wilson, 'Do We Need a New Constitution for the Commonwealth?' (1967) 41 *Australian Law Journal* 231, 231.

<sup>40</sup> *Ibid.*

<sup>41</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (7<sup>th</sup> ed, 1908) 167.

<sup>42</sup> Durack and Wilson, above n 39, 232.

<sup>43</sup> *Ibid.* 233.

<sup>44</sup> *Companies Act 1962* (ACT); *Companies Act 1961* (NSW); *Companies Act 1961* (Qld); *Companies Act 1962* (SA); *Companies Act 1962* (Tas); *Companies Act 1961* (Vic); *Companies Act 1961* (WA). See generally Rob McQueen, 'An Examination of Australian Corporate Law and Regulation 1901–1961' (1992) 15 *University of New South Wales Law Journal* 1; Geoffrey

The trend and pace of change in modern times, both within and without Australia, underline the need for a strong central government. In the domestic field, such a government must have adequate power to cope with the challenges of national development and the demand for social services of the type and quality appropriate to an affluent society. In the international field, the central government must, as a matter of power, be fully equipped for responsible and effective participation in such affairs, whilst at the same time, as a matter of policy, the existence of a federation will have a real influence in the formulation of any programme which may ultimately become effective as domestic law by virtue of international arrangement. In the face of complex economic structures the central government must have adequate powers of controlling the economy.<sup>45</sup>

However, they continued:

The recognition that the Commonwealth must increase in stature and power to meet the needs of the times must not blind us to the vital significance of the many important areas of law which properly remain the responsibility of the States.<sup>46</sup>

The authors then embarked on a review of the adequacy of the legislative power then possessed by the central government.<sup>47</sup> This occurred in the context of the Joint Committee on Constitutional Review's report published in 1958.<sup>48</sup> They noted that the Committee had recommended that the Commonwealth's concurrent powers be clarified or enlarged with respect to navigation and shipping, aviation, scientific and industrial research, nuclear energy, broadcasting, television and other telecommunication services, industrial relations, corporations, restrictive trade practices, marketing of primary products, and economic powers.<sup>49</sup> The authors endorsed the conclusions of the Committee, subject to certain reservations which they set out.<sup>50</sup>

In relation to finance, they stated:

If the States do not receive an adequate share of the total revenues raised throughout Australia, the danger we see is not that the Commonwealth will steadily extend its control, thereby moving us closer to a unitary form of government, or that the States will embark upon the imposition of new and heavier imposts on the people, although both these are possible. The danger is that nothing or very little will be done at all and that the real and proper demands for better homes, schools and hospitals and a faster rate of development will be denied.<sup>51</sup>

Sawer, 'Federal-State Co-Operation in Law Reform: Lessons of the Australian *Uniform Companies Act*' (1963) 4 *Melbourne University Law Review* 238.

<sup>45</sup> Durack and Wilson, above n 39, 234.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> Joint Committee on Constitutional Review, Parliament of Australia, *Report from the Joint Committee on Constitutional Review* (1958). See also *ibid* 234–6.

<sup>49</sup> Durack and Wilson, above n 39, 234.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid* 238.

With respect to s 92 of the *Australian Constitution*, the authors were against simple repeal, instead favouring a single comprehensive amendment protecting trade from discrimination.<sup>52</sup>

In relation to the judicial power, the authors considered that it raised major difficulties.<sup>53</sup> These were, first, the creation of a concept of federal jurisdiction leading necessarily to a bifurcated system of courts.<sup>54</sup> Secondly, the way in which the concept of federal jurisdiction was defined.<sup>55</sup> Thirdly, the confusion and difficulty that arises from a state court being possessed in relation to the same matters of both state and federal jurisdiction concurrently.<sup>56</sup> Fourthly, the complicated devices which the Parliament of the Commonwealth had adopted to channel all appeals on federal matters to the High Court and to make that tribunal the final arbiter of important constitutional issues.<sup>57</sup>

Their view was that they were unable to see any justification, given the character of the High Court as an ultimate court of appeal, for the concept of federal jurisdiction.

In relation to human rights, the authors did not favour any departure from the arrangement in Australia whereby fundamental freedoms derived their authority from custom and extra-constitutional conventions.<sup>58</sup>

As to the amendment procedure, they considered that s 128 of the *Australian Constitution* should be amended to substitute for the referendum a process of ratification by at least two-thirds of the states so as to preserve the importance of the states in the federation whilst at the same time introducing more flexibility than the present procedure.<sup>59</sup>

In conclusion, the view of the authors was that a new constitution was not needed, but that the existing document needed to be thoroughly reviewed with the object of extensive amendment and that review should be undertaken by a constitutional convention.<sup>60</sup>

In concluding comments, Ron stated that the paper did not foresee a 'basic change' as 'practicable' at the time.<sup>61</sup> However, 'given a maturing of powers, a growth of responsibility and a wider vision on the part of the Commonwealth and the States, there [wa]s much value to be found in a federal system of government.'<sup>62</sup> This was especially so in a 'far-flung' country such as Australia.<sup>63</sup>

I have taken some time to return to the content of this paper because it is a rare example of an occasion where Ron publicly expressed his views on issues

<sup>52</sup> Ibid 239.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid 239–40.

<sup>58</sup> Ibid 242.

<sup>59</sup> Ibid 243.

<sup>60</sup> Ibid 250.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

relating to constitutional law before his elevation to the High Court and subsequent participation in the making of constitutional decisions.

## II HIGH COURT OF AUSTRALIA — 1979–89

It was in 1979 that Ron was appointed to the High Court of Australia. At the time, a leading Jesuit thought: ‘they have just put a saint on the High Court’.<sup>64</sup>

It is hard now to recapture the Western Australian legal profession’s sense of isolation and the remoteness it felt from the possibility of one of its number being appointed to the highest court in the nation. Ron’s acuity had led him to being deeply respected by the solicitors-general of all the states. It had earned him respect also from the members of the High Court. According to his successor as Solicitor-General of Western Australia, by this time Ron had ‘developed a national reputation as one of the outstanding counsel appearing regularly before the High Court’ and was ‘an acknowledged authority in the field of constitutional law’.<sup>65</sup> Apparently, he had declined an earlier opportunity to join the High Court.<sup>66</sup> His transition from Western Australian Solicitor-General to High Court member followed without controversy. It was, however, a step of great magnitude as far as the Western Australian legal profession was concerned.

One of the legacies of Ron’s wartime flying experience was that he was able to handle the gruelling air travel requirements to and from Canberra. Consistently with his Presbyterian upbringing, he sought to make it even more gruelling by travelling economy class. He departed on midnight horror flights to be in Canberra for hearing the next morning. Such was his physical strength. In a later interview, Ron accounted for his use of economy travel as a lesson he had learned from F T P Burt QC (later Chief Justice of Western Australia) who had flown economy to London for an appeal to the Privy Council.<sup>67</sup> Ron said this had helped launch him on the path of living by the credo ‘live simply that others may simply live’.<sup>68</sup>

Ron’s record on the High Court is in the Commonwealth Law Reports for all to assess. My most direct contact with it was when I visited him in his chambers (then upstairs in the Supreme Court of Western Australia environment he knew so well) to make arrangements to be sworn in as a Deputy President of the Administrative Appeals Tribunal. He asked me to remain in his chambers while he took a call from another Justice of the High Court, bantering with him pleasantly concerning the contents of some reasons. As he put the phone down he turned to me and said ‘well, now you know how we do it!’ I think he must have thought that an incoming tribunal member needed some training.

<sup>64</sup> Frank Brennan, ‘The Law and Politics of Human Rights in An Isolated Country without a Bill of Rights’ (Speech delivered at the 2003 Sir Ronald Wilson Lecture, Alexander Library Theatre, State Library of Western Australia, 12 May 2003). See also ‘The Sir Ronald Wilson Lecture’ (2005) 32(7) *Brief* 20.

<sup>65</sup> Parker, above n 32, 206.

<sup>66</sup> Buti and Simmonds, above n 1, 17.

<sup>67</sup> ‘From Basement to Bench’, above n 2, 9.

<sup>68</sup> *Ibid.*

## A Constitutional Decision-Making

Early in his life on the High Court, Wilson J gave the leading judgment in *Western Australia v Wilsmore*<sup>69</sup> which reversed a decision of the Full Court of the Supreme Court of Western Australia. The decision meant that a proviso in s 73(1) of the *Constitution Act 1889* (WA), requiring the concurrence of an absolute majority of members of the Western Australian Legislative Council and Legislative Assembly for any change to the *Western Australian Constitution*, applied only to a Bill proposed to have such effect.<sup>70</sup>

In *R v Toohey; Ex parte Northern Land Council*,<sup>71</sup> Wilson J was in the majority in holding that, absent obvious parliamentary exclusion, the courts will review an exercise of power whether by the representative of the Crown, a Minister or some other person in body, and determine whether that exercise is within the scope of the grant.<sup>72</sup> In the course of giving his reasons, Wilson J said:

The steadily expanding role of the State in recent decades provides increasing occasion for the individual citizen to feel aggrieved as the result of administrative action with a consequent need to ensure that the principles of administrative law relating to judicial review of such action remain sufficiently flexible to meet the requirements of justice without imposing unreasonable restraints on the freedom of government action.<sup>73</sup>

The interpretation of the external affairs power is a matter of continuing and current focus in the High Court.<sup>74</sup> In *Koowarta v Bjelke-Petersen* ('*Koowarta*')<sup>75</sup> and *Commonwealth v Tasmania* ('*Tasmanian Dam Case*'),<sup>76</sup> Wilson J was in the minority. In *Koowarta*, his Honour agreed with the reasoning of Gibbs CJ,<sup>77</sup> and readily accepted the proposition that Australia was under an obligation to the world community 'to prohibit and eliminate racial discrimination in all its forms'<sup>78</sup> in accordance with the *International Convention on the Elimination of All Forms of Racial Discrimination*.<sup>79</sup> Nevertheless, Wilson J said that if the existence of the obligation necessarily brought into existence an 'external affair' within the meaning of s 51(xxix) of the *Australian Constitution*, 'it must likewise hold good for all the other important obligations which arose out of Australia's international relations.'<sup>80</sup> His Honour said, however, that '[b]oth economically and socially the earth is now likened to a global village where the international community concerns itself increasingly with matters which formerly were

<sup>69</sup> (1982) 149 CLR 79.

<sup>70</sup> *Ibid* 102 (Wilson J).

<sup>71</sup> (1981) 151 CLR 170.

<sup>72</sup> *Ibid* 269–87.

<sup>73</sup> *Ibid* 281.

<sup>74</sup> See, eg, *XYZ v Commonwealth* (2006) 227 ALR 495.

<sup>75</sup> (1982) 153 CLR 168.

<sup>76</sup> (1983) 158 CLR 1.

<sup>77</sup> *Koowarta* (1982) 153 CLR 168, 244 (Wilson J).

<sup>78</sup> *Ibid* 248, quoting *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195, art 5 (entered into force 4 January 1969).

<sup>79</sup> Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

<sup>80</sup> *Koowarta* (1982) 153 CLR 168, 248.

regarded as only of domestic concern.<sup>81</sup> Consequently, '[t]here is now no limit to the range of matters which may assume an international character, and this situation is unlikely to change'.<sup>82</sup> In those circumstances:

The effect of investing the Parliament with power through s 51(xxix) in all these areas would be to transfer to the Commonwealth virtually unlimited power in almost every conceivable aspect of life in Australia, including health and hospitals, the workplace, law and order, the economy, education, and recreational and cultural activity, to mention but a few general heads.<sup>83</sup>

The consequence of '[s]o broad a power, if exercised, may leave the existence of the States as constitutional units intact but would deny to them any significant legislative role in the federation'.<sup>84</sup> He therefore concluded that both ss 9 and 12 of the *Racial Discrimination Act 1975* (Cth) were beyond the legislative powers of the Commonwealth.<sup>85</sup>

In the *Tasmanian Dam Case*, Wilson J commenced by stating that he understood

the ratio decidendi of *Koowarta* to be that s 51(xxix) empowers the Parliament to enact a law of purely domestic operation on a topic with respect to which it would not otherwise have power provided that the law is directed to the implementation of a treaty obligation on a topic of international concern having the capacity to affect Australia's relations with other countries.<sup>86</sup>

Wilson J then turned to the consideration of the *Convention Concerning the Protection of the World Cultural and Natural Heritage* ('*World Heritage Convention*'),<sup>87</sup> which was addressed by ss 6 and 9 of the *World Heritage Properties Conservation Act 1983* (Cth). The issue was whether that was a valid exercise of the external affairs power.<sup>88</sup> In his Honour's opinion, the relevant provisions of the *World Heritage Convention*

while in themselves constituting external affairs which the Commonwealth may be competent to pursue, [did] not bear any relevant relation to the competence of the Commonwealth to enact the legislation ... under challenge.<sup>89</sup>

Wilson J rejected the contention that the 'mere fact of entry' into the *World Heritage Convention* brings into being an external affair arming the Commonwealth with legislative authority,<sup>90</sup> and

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid 252.

<sup>86</sup> Ibid.

<sup>87</sup> Opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

<sup>88</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 187.

<sup>89</sup> Ibid 189.

<sup>90</sup> Ibid 199.

the further submission ... that the protection of the world's cultural and natural heritage ... [was] sufficiently a matter of international concern carrying with it a capacity to affect Australia's relations with other nations [as] to attract the external affairs power.<sup>91</sup>

Returning to his Honour's view in *Koowarta*, Wilson J said that he remained

convinced [that] an expansive reading of [the external affairs power so] as to bring the implementation of any treaty within Commonwealth legislative power pose[d] a serious threat to the basic federal polity of the *Constitution*. Such an interpretation, if adopted, would result in the Commonwealth Parliament acquiring power over practically the whole range of domestic concerns within Australia.<sup>92</sup>

His Honour added:

The natural incentive of governments in the pursuit of their policies to resort to the legislative powers available to them would afford little assurance to the States of a stable framework in which to pursue the residual responsibilities and opportunities left to them.<sup>93</sup>

Wilson J continued:

It seems to me that if a whole range of legislative and executive authority which formerly resided in the States is capable of being subsumed under paramount Commonwealth laws then the very constitutional structure of the States is undermined. Of what significance is the continued formal existence of the States if a great many of their traditional functions are liable to become the responsibility of the Commonwealth?<sup>94</sup>

In concluding his reasons, Wilson J emphasised that the politics of the issue of whether Tasmania should proceed with the construction of the dam was not of concern to the Court which decided the matter only with regard to important issues of constitutional interpretation.<sup>95</sup>

In *Gerhardy v Brown*,<sup>96</sup> Wilson J wrote a relatively short judgment. However, his Honour joined in the view that the state legislation there in issue bore upon its face 'the clear stamp of a special measure such as is contemplated by' the *International Convention on the Elimination of All Forms of Racial Discrimination*.<sup>97</sup> However, Wilson J could not resist stating that

[i]t may be true that some of the problems surrounding the implementation of the Convention would be minimized if it were possible to place acts of benign discrimination, including well-motivated legislative acts, altogether beyond the reach of the Convention on the ground that such assistance to a deprived racial group was not embraced within the evil to which the Convention is directed.<sup>98</sup>

<sup>91</sup> Ibid 193–4.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid 204.

<sup>96</sup> (1985) 159 CLR 70.

<sup>97</sup> Ibid 113.

<sup>98</sup> Ibid 113–14.

Towards the end of his tenure on the High Court, Wilson J participated in delivering reasons in *Mabo v Queensland*.<sup>99</sup> His Honour recognised the importance of the case stating, '[t]he existence of traditional rights in the Murray Islands as claimed by the plaintiffs is a question which may raise complex issues of fact and law of fundamental importance to all Australians.'<sup>100</sup> The central issue raised was whether the *Queensland Coast Islands Declaratory Act 1985* (Qld) was inconsistent with ss 9 or 10 of the *Racial Discrimination Act 1975* (Cth). In s 3 of the *Queensland Coast Islands Declaratory Act 1985* (Qld), it was provided and declared that certain islands upon being annexed and becoming part of Queensland and subject to the laws enforced in Queensland were vested in the Crown in the right of Queensland. Wilson J said '[t]here is no escape from the conclusion that, in s 3 of the Act, the legislature has made its intention transparently clear. As to the wisdom or justice of that intention, the responsibility must rest squarely with the legislature.'<sup>101</sup>

The significance of s 3 of the *Queensland Coast Islands Declaratory Act 1985* (Qld) was that it extinguished all rights to native title on the assumption that such rights could be established. Wilson J concluded that s 3 was inconsistent with s 10(1) of the *Racial Discrimination Act 1975* (Cth), but not with s 9, where the issue could not be answered in advance of the exercise of the relevant power.<sup>102</sup> In the result, his Honour concluded that the *Racial Discrimination Act 1975* (Cth) did not have the effect of rendering the *Queensland Coast Islands Declaratory Act 1985* (Qld) invalid or ineffective. However his Honour stated, apparently with some feeling:

Of course, a deep sense of injustice may remain. This is because formal equality before the law does not always achieve effective and genuine equality. The latter will only be achieved by reason of the former when the factual circumstances in which the different groups are placed are comparable. The extension of formal equality in law to a disadvantaged group may have the effect of entrenching inequality in fact.<sup>103</sup>

Finally, given the views that Wilson J expressed in his Honour's earlier paper at the 14<sup>th</sup> Legal Convention of the Law Council of Australia in relation to the future of s 92 of the *Australian Constitution*, it is interesting to note that Wilson J was among the members of the Court, indeed by then senior puisne judge, in *Cole v Whitfield*.<sup>104</sup> That decision had the effect of bringing to an end the previously existing jurisprudence concerning s 92 of the *Australian Constitution*. In future, the Court would look to see whether '[a] law will discriminate against interstate trade or commerce if the law on its face subjects that trade or commerce to a disability or disadvantage or if the factual operation of the law produces such a result.'<sup>105</sup>

<sup>99</sup> (1988) 166 CLR 186.

<sup>100</sup> *Ibid* 200.

<sup>101</sup> *Ibid* 201.

<sup>102</sup> *Ibid* 204.

<sup>103</sup> *Ibid* 206.

<sup>104</sup> (1988) 165 CLR 360.

<sup>105</sup> *Ibid* 399 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

B *Criminal Law*

As Crown Prosecutor in Western Australia, Ron had made his initial forensic reputation in the criminal law. He was the product of a code state, rather than one where the criminal law derived from the common law. It can be surmised that he would have brought to the High Court considerable and relatively recent experience in the conduct of criminal proceedings from the viewpoint of counsel.

Antonio Buti and Justice Ralph Simmonds have said that Wilson J's most important criminal decisions related to the processes associated with the criminal justice system and issues of fairness to the accused.<sup>106</sup> They cite *MacPherson v The Queen*,<sup>107</sup> *Van der Meer v The Queen*,<sup>108</sup> *Zecevic v Director of Public Prosecutions (Vic)*,<sup>109</sup> his dissent in *Barton v The Queen*,<sup>110</sup> as well as his decisions in *R v O'Connor*<sup>111</sup> and *Williams v The Queen*.<sup>112</sup>

In *Stephens v The Queen*,<sup>113</sup> Wilson J joined with the rest of the High Court in enunciating the proper approach to the use of an unsigned and disputed record of interview. In *Ilich v The Queen*,<sup>114</sup> Wilson J joined with Dawson J and the majority in applying s 371 of the *Criminal Code (WA)* in relation to fraudulent taking or fraudulent conversion amounting to stealing. Wilson and Dawson JJ held that a mistaken overpayment did not prevent property in the whole amount passing to the creditor so that the accused had neither fraudulently taken the surplus nor converted it upon discovering the overpayment.<sup>115</sup>

In *Walton v The Queen*,<sup>116</sup> Wilson J joined with Dawson and Toohey JJ in relation to the admissibility of hearsay evidence having relevance to a deceased's state of mind.<sup>117</sup> In *Ryan v The Queen*,<sup>118</sup> his Honour's view was that of the majority, namely, that s 569(1) of the *Crimes Act 1958 (Vic)* did not enable the Court to increase sentences on certain counts of handling.<sup>119</sup>

Wilson J dissented in *He Kaw Teh v The Queen*.<sup>120</sup> The Court there held that the presumption that mens rea was required before a person could be guilty of a grave criminal offence was not displaced in relation to s 233B(1) of the *Customs Act 1901 (Cth)*. That section provided that any person who imported or exported prohibited imports or has them in their possession or attempts to obtain possession is guilty of an offence. Wilson J considered that 'the omission of the words "without reasonable excuse" from par (b) ... ha[d] the effect of removing mens

<sup>106</sup> Buti and Simmonds, above n 1, 17.

<sup>107</sup> (1981) 147 CLR 512.

<sup>108</sup> (1988) 82 ALR 10.

<sup>109</sup> (1987) 162 CLR 645.

<sup>110</sup> (1980) 147 CLR 75.

<sup>111</sup> (1980) 146 CLR 64.

<sup>112</sup> (1986) 161 CLR 278.

<sup>113</sup> (1985) 156 CLR 664.

<sup>114</sup> (1987) 162 CLR 110.

<sup>115</sup> *Ibid* 129. Gibbs CJ was a lone dissident: at 111–20.

<sup>116</sup> (1989) 166 CLR 283.

<sup>117</sup> *Ibid* 296–306.

<sup>118</sup> (1982) 149 CLR 1.

<sup>119</sup> *Ibid* 16–22.

<sup>120</sup> (1985) 157 CLR 523, 546–63.

rea as an element of the offence which [wa]s to be positively established by the prosecution in making out a prima facie case.<sup>121</sup>

Additionally, Wilson J participated in *Lowe v The Queen*,<sup>122</sup> in which the High Court spelt out the conditions under which it would not grant special leave to appeal against sentence. In *Ibbs v The Queen*,<sup>123</sup> Wilson J joined in the judgment of the Court reversing a decision of the Supreme Court of Western Australia in the application of the penalty for sexual penetration without consent provided for by s 324D of the *Criminal Code* (WA). The Court held that the maximum penalty prescribed by that section was reserved for the worst type of case falling within it, and not as an appropriate penalty for the worst type of case falling within each of the categories described in the definition of 'sexual penetration' in s 342F.<sup>124</sup> Finally, nearing the end of his tenure on the High Court, in *Duke v The Queen*,<sup>125</sup> Wilson J joined with Dawson J in concluding that the primary judge had not erred in refusing to exercise a discretion to exclude evidence of a confession which was disputed and uncorroborated.<sup>126</sup>

### III LIFE AFTER THE HIGH COURT

Ron's career did not end when he chose to retire from the High Court after a decade. In a later interview he ascribed his decision to retire to his assumption of office as President of the Assembly of the Uniting Church in 1988, although he had been persuaded to stay nine months on the Court after that appointment.<sup>127</sup> During the 2007 Sir Ronald Wilson Lecture, the lecturer, Ron Merkel QC, said that while on the Court Ron had been cautious and conservative but that in his later activities more of his own personality shone through.<sup>128</sup> Perhaps Ron knew that he had more to give in areas outside the structured environment of the Court.

#### A *University Chancellorship*

In 1980, during his tenure on the High Court, Ron assumed the chancellorship of Murdoch University. This he continued through to 1995.<sup>129</sup> It was said that his long tenure was because he wished to make it plain to those seeking to locate the members of the High Court in Canberra that there were important reasons why Court members should reside in their home state or territory.

Characteristically, he involved himself deeply in the development of a fledgling university, the existence of which was from time to time challenged. He argued for the establishment of a law school. When it came into being it ended the monopoly of the senior law school at UWA and brought healthy competition

<sup>121</sup> Ibid 557.

<sup>122</sup> (1984) 154 CLR 606.

<sup>123</sup> (1987) 163 CLR 447.

<sup>124</sup> Ibid 451–2 (Mason CJ, Wilson, Brennan, Toohey and Gaudron JJ).

<sup>125</sup> (1989) 180 CLR 508.

<sup>126</sup> Ibid 510–11.

<sup>127</sup> 'From Basement to Bench', above n 2, 14.

<sup>128</sup> Ron Merkel, 'The Death of Legal Principle' (Speech delivered at the Sir Ronald Wilson Lecture 2007, Alexander Library Theatre, State Library of Western Australia, 10 May 2007).

<sup>129</sup> Buti and Simmonds, above n 1, 18.

to legal education in Western Australia. His influence was undoubtedly also behind Murdoch University's initiative in later establishing a Theology School.

### B Human Rights

Within a year of his retirement from the High Court, Ron embarked upon the role of President of the Human Rights and Equal Opportunity Commission, which he continued until 1997.<sup>130</sup> Additionally, he became Deputy Chair of the Council for Aboriginal Reconciliation.<sup>131</sup> In that role he tackled some of the most difficult issues of justice facing the nation. From 1995, he was Joint Chair of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families ('Bringing Them Home Inquiry'), which produced the now landmark report *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*.<sup>132</sup> This brought to the fore all his considerable personal talents and professional experience, as well as his beliefs and humanity as an individual.

Among the recommendations of the inquiry were that an apology be given for separation, to be participated in by Parliaments and churches, as well as restitution, rehabilitation and monetary compensation.<sup>133</sup> Additionally, the inquiry recommended that there should be a national 'Sorry Day' and that the Commonwealth should implement the *Convention on the Protection and Punishment of the Crime of Genocide*.<sup>134</sup> These and other recommendations entered the political realm and became the subject of intense debate and, by some, intense anger.<sup>135</sup> Of this Ron said, 'I had never been exposed to such pain before.' The report still challenges our nation.

### C Propriety in Government

Rest was not yet to be Ron's reward. In 1991, he became one of three jurists appointed to the Western Australian Royal Commission into Commercial Activities of Government and Other Matters ('WA Inc Inquiry').<sup>136</sup> It handed down its report in 1992, making a range of recommendations with respect to the conduct of government in Western Australia.<sup>137</sup>

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Commonwealth of Australia, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

<sup>133</sup> Ibid 284–94, 302–13, 415–21. See also Buti and Simmonds, above n 1, 18.

<sup>134</sup> Opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951). See also National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, above n 132, 292–5.

<sup>135</sup> Karen Brown, 'Judge Farewelled as Man of Rare Courage', *The Australian* (Sydney), 23 July 2005, 1, 7.

<sup>136</sup> Alan Ramsey, 'A Role in the Fall of a Labor Mate Conveniently Omitted from the Eulogies', *The Sydney Morning Herald* (Sydney), 20 July 2005, 17.

<sup>137</sup> See Western Australia, Royal Commission into Commercial Activities of Government and Other Matters, *Report of the Royal Commission into Commercial Activities of Government and Other Matters* (1992) vol 6, pt 1 ch 27, 2–6. See also Buti and Simmonds, above n 1, 16.

*D Appreciation*

Over the years, and particularly after he retired from the High Court, Ron made clear on a number of occasions that he regarded himself as primarily an advocate.<sup>138</sup> He left little doubt that such was the role that he most preferred. I suspect it is the role in which he would most like to be remembered. Whether it was the law or public policy which required advocacy, Ron was prepared to do it thoroughly, going to the heart of the issues no matter how controversial or difficult they were.

His other distinguishing characteristic was humility. In both the Bringing Them Home Inquiry<sup>139</sup> and the WA Inc Inquiry,<sup>140</sup> Ron was the senior legal figure involved. Yet he allowed those around him to take the lead, doubtless making no less contribution himself. Even in relation to his appointment to the High Court he later said that he was only there out of a sense of duty as the other members were much better trained than he was.<sup>141</sup>

Ron's contribution was marked by high honours, both public and academic. Both UWA and Murdoch University awarded him honorary doctorates. These acknowledgements of his contribution did not, however, emulate the impact which his fearless addressing of issues of justice had made in the wide arena of the public. In some small measure they are recalled annually in Law Week in the Sir Ronald Wilson Lecture presented by the Francis Burt Law Education Centre as the community legal education centre for the Law Society of Western Australia. Yet it was Ron who once said to me that the honorific could perhaps be dropped from the title of the lecture.

Ron Wilson was a great Australian, a great Western Australian and a great lawyer. He led with humility and with talent. His memory is secure in Australian public and legal history and in the hearts of those who worked with him or observed him in his professional and public endeavours. It is fitting that after his life the vast reach of his ideals should be remembered both for its merit and its continuing inspiration.

<sup>138</sup> 'From Basement to Bench', above n 2, 8, 14.

<sup>139</sup> National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, above n 132.

<sup>140</sup> Royal Commission into Commercial Activities of Government and Other Matters, above n 137.

<sup>141</sup> 'From Basement to Bench', above n 2, 10.