# DAME ROMA MITCHELL: A VALEDICTORY TRIBUTE

*Hon Len King**

## THE JUDICIAL CAREER OF DAME ROMA MITCHELL

The *Adelaide Law Review* is honoured to present this tribute to Dame Roma Mitchell, who died last year after a career distinguished by her achievements as a lawyer, Justice of the Supreme Court, Chancellor of Adelaide University and Governor of South Australia. Dame Roma was a significant and inspirational figure in South Australian history. She is sadly missed, not least by the many South Australians for whom she was a mentor and friend. The Honourable Len King, who presided over the Supreme Court during the latter part of Dame Roma's judicial career, presents this tribute to her learning and humanity as a justice of the court during those years.

Roma Flinders Mitchell was, as is well known, the first female judge of a Superior Court in Australia. The sociological implications of that achievement have tended to deflect attention from the assessment of the quality of her judicial work and of her professional performance as a judge. It is probably too early for a definitive assessment of her contribution as a judge, but in this article I seek to survey her judicial career and in doing so to suggest some tentative evaluation of aspects of her work on the bench.

The capacity of any person who attains judicial office to discharge successfully the responsibilities of that office depends to a considerable extent on the appointee's pre-judicial legal experience, usually as a member of the practising legal profession. It is worth pausing therefore, before proceeding to a consideration of her judicial career, to look briefly at the career in legal practice that qualified Roma Mitchell for service as a judge.

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Her entire career in the legal practice was spent in the one legal firm. She entered articles of clerkship in the firm that was then called Nelligan and Angas Parsons. She became a partner in due course and continued as a partner in the firm under its various changes of names, until she retired to accept judicial appointment. The senior partner and dominant personality in the firm until his retirement was Mr J W (Joe) Nelligan QC. He was a counsel of outstanding ability in both criminal and civil cases. His forensic style was in the great tradition of Irish advocacy, eloquent and persuasive with a distinctly thespian quality. He was a great cross examiner, with the capacity to make his points with dramatic effect. His influence on juries when addressing them bordered on the mesmeric.

The young Roma Mitchell learned her advocacy as his junior counsel. She rarely appeared with him in the criminal jurisdiction because, as she later explained, it was thought that juries might be embarrassed by the presence of a women while hearing the type of evidence commonly heard in the criminal courts. It is difficult for most people nowadays to appreciate the strength of the feeling in both sexes in those days that respect for women demanded that they be shielded from the coarser aspects of human behaviour, and in particular from explicit references to sexual matters and foul language, and the depth of the reticence which men felt with respect to such matters in the presence of women. I have no doubt that Dame Roma's instincts would have been shared by Joe Nelligan. Strangely, the same reticence was not felt regarding her appearing in the matrimonial jurisdiction where the evidence was often at least as explicit as in criminal cases, probably because, there being no jury, the atmosphere was felt to be more professional.

The few women who were legal practitioners at that time tended to attract what we would now call family law clients. Dame Roma developed a large family law practice, her clients being mainly, but by no means exclusively, women. As her career progressed, she appeared as counsel in many hotly contested divorce cases as well as contested custody and property disputes.

Joe Nelligan had a trade union connection that yielded a considerable volume of work-related personal injury and workers compensation litigation in which Dame Roma was involved. It also gained her a high professional reputation in some union circles and that resulted in her involvement in something of a *cause celebre* in the industrial world, the struggle by Mr Clyde Cameron (later MHR and minister in the Whitlam Government) and other office holders in the South Australian branch of the Australian Workers Union against the national executive of the union. She was briefed as Queen's Counsel to lead for the South Australian officers in court proceedings concerning breaches of the rules by the national executive. It was an involved and protracted struggle which resulted in success for Mr Cameron and his colleagues and a triumph for their leading counsel.

Both before and after she took silk, Dame Roma appeared, at first instance and on appeal, in a wide range of important civil cases as well as very many in her specialist field of family law. Her legal practice equipped her admirably, by virtue of legal learning and forensic experience, for the judicial office for which she was destined.

Dame Roma was a judge of the Supreme Court of South Australia for over eighteen years. The court of which she was a member is a court of general jurisdiction exercising jurisdiction both criminal and civil, first instance and appellate. All members of the court then, as now, participated in all the jurisdictions of the court. Therefore Justice Mitchell, as she now was, therefore over a period of eighteen years sat on a constant stream of cases in all jurisdictions, both as a single judge and as a member of the Full Court. An attempt to do justice to a judicial career involving such a range of jurisdictions and types of cases and a long stream of individual decisions presents obvious problems of selection, characterisation and evaluation.

Justice Mitchell sat on the court while it was led by three Chief Justices. During the first relatively short period she was with Sir Mellis Napier. There followed a period of twelve years with Dr J J Bray. I have the privilege of presiding over the court in her last five years on the court. The character and personality of a Chief Justice undoubtedly influence what might be called the temper of a court. I think that it is true to say that there were differences, perhaps marked differences, in the temper and style of the court during those three periods. It is, I think, helpful to treat Justice Mitchell's judicial career by separate reference to those three periods.

When Justice Mitchell was appointed to the bench on 23 September 1965, the Chief Justice, Sir Mellis Napier, was in his eighties. He had been the dominant personality on the court for forty years. The appointment seems to have taken him by surprise. His first reaction was to decide that all members of the court must be addressed and referred to without distinction and she must therefore be known as 'Mr Justice Mitchell'. The absurdity of this was soon pointed out to him and he thereupon directed that all members of the court be known as 'Justice' without a prefix. This eminently sensible direction seems to have been received with ill grace by at least some of the male members of the court. The direction remained in force, however, until Sir Mellis retired, where upon the male members of the court reverted to 'Mr Justice', the female member remaining as 'Justice'.

To my mind this was unsatisfactory and introduced a undesirable discrimination in the title of judges of the same court. After Justice Mitchell's retirement, I, as the then Chief Justice, obtained the agreement of the then all-male court for judges to be addressed and referred to as 'Justice' without prefix. I felt it was important to resolve the matter at a time when it could be done without the issue becoming

personal, thereby avoiding the embarrassment, when the next female judge was appointed, that arose with Justice Mitchell's appointment.

Later the High Court dealt with the same problem in the same way. In South Australia we never adopted the English practice of referring to female judges as 'Mrs Justice', 'Miss Justice' or perhaps now as 'Ms Justice'. Having a woman as a member of his court was undoubtedly a considerable shock and perhaps embarrassment to an aged traditionalist such as Sir Mellis, but Justice Mitchell always asserted that he received her with kindness and treated her with courtesy and the respect due to a judge of his court.

Her judicial career commenced unspectacularly with the usual routine work. Her first reported case, in the *Estate of Coombe (deceased)*,[1] was a run of the mill case on the construction of a will. My first experience of her as a judge was in her third reported case, *Kellogg v Austral Steel Ltd*,[2] in which I led for the plaintiff. She managed the trial in her characteristically efficient, no-nonsense style and her confidence and decisiveness impressed from the beginning. The decision itself resolved a question of law of importance to workers seeking common law damages following receipt of workers compensation. The act required such workers to give notice of intention to bring the action for damages within six months of the receipt of workers compensation unless excused by mistake or other reasonable cause. It was settled by previous authority that mistake included a mistake of law but there was much confusion as to the distinction, if any for this purpose, between ignorance of law and mistake. After considering the authorities, her Honour refused to follow a decision of the full Supreme Court of Victoria, and resolved the matter for this state by holding that lack of knowledge of the statutory requirement was a mistake of law and therefore excused the worker.

The other important decision in which Mitchell J was involved during the Napier tenure of office, was the seminal case of *Drymalik v Feldman*.[3] It was a seminal case because it considered for the first time the meaning and effect of the word 'forthwith' in the section of the *Police Offences Act* that prescribes the duty of a police office exercising the statutory power to arrest on suspicion and because the interpretation adopted flowed through into a long line of subsequent cases dealing with the discretion of a trial judge to exclude evidence obtained unlawfully or improperly. Mitchell J was a member of the Full Court presided over by Napier CJ that held that a delay of three hours in bringing the suspect before a Justice of the Peace, during which time the suspect was interrogated, rendered the detention unlawful.

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1 [1965] SASR 391.
2 [1966] SASR 34.
3 [1966] SASR 227.

A great change occurred in the temper and style of the Supreme Court and in the environment in which Mitchell J pursued her judicial career when Dr John Bray succeeded Sir Mellis Napier as Chief Justice on 10 March 1967. Dr Bray was a scholarly judge who led the court by means of his erudition, his capacity for penetrating thought about issues of law and justice and his ability to express himself in lucid and felicitous prose. Roma Mitchell had been a friend of John Bray since their student days and she found the atmosphere of his court congenial and conducive to good judicial work. She was a member of the Bray court for twelve years, during which time that court achieved much fame and influence throughout Australia. Such was that influence that a High Court Judge remarked to me after Dr Bray's retirement that perhaps now the High Court could relax a little when considering appeals from the Supreme Court of South Australia instead of having to be constantly alert to the possibility that they were being seduced by the force of Dr Bray's intellectual power and persuasive literary style into allowing the law to take a direction of which they did not really approve! Mitchell J made her full contribution, as a member of the Bray court, to the mark that that court left on Australian jurisprudence.

Because Mitchell J was the first woman judge of a superior court in this country, it is natural that there be some focus on whether her judgments and judicial pronouncements were influenced by her sex. There are some traces of a feminine perspective in her judgments at times, but it is difficult to discern any significant differences in substance or in style from the judgments of her male colleagues, certainly none that could be attributed to her sex. There is not the slightest trace of bias in favour of women. Absence of bias is of course no more than should be expected of any judge, but Justice Mitchell's performance is not without interest in relation to current views about the need for what is called 'gender balance' on courts.

Some of her early cases are instructive in this regard. In *Hamlyn v Hann*[4] she wrote the leading judgment for the Full Court upholding the trial judge's decision to award two children, one a girl, nothing by way of damages for the death of their mother. She wrote:

> The appellant gave evidence that his first wife looked after the children perfectly and that she was a good mother. He employed a house keeper to look after the children until his remarriage in June 1963, and the learned trial judge found that there was no reason to think that the second wife would not be a good mother to the children. In my view there is no reason

4 [1967] SASR 387.

> established for varying the decision of the learned trial judge that the children should be awarded no damages for the loss of their mother.[5]

In *MacGillivray v MacGillivray*[6] she wrote the leading judgment for the Full Court upholding the trial judge's decision to award custody of a six-year-old girl to the father in preference to the mother.

Perhaps a feminine perspective appears in her judgment on an appeal in a case in which a man had been convicted of offensive behaviour in an attempt to pick up a young woman in the street. If so, it is a very balanced perspective. She wrote:

> I suppose that many young and many not so young men regard it as a pleasurable pastime to seek to attract a woman by parading before her in a motorcar. If the attempt is successful and she is enticed into the motor care it cannot be said that the conduct has been offensive to her. And, if the attempt is abandoned when the woman displays annoyance, fear or lack of interest, it seems to me that the conduct cannot properly be characterised as being offensive to a reasonable person. But where a girl or woman makes it clear by her words or actions that she has no wish to be pestered with the attentions of a man and he persists in following her in his motor car, then I believe that his conduct is calculated to arouse in her anger and resentment.[7]

The boot was on the other foot in another case, *Ellis v Fingleton,*[8] in which she dismissed an appeal by a woman against a conviction for offensive behaviour. Being required to pay the amount of a forfeited security bond to the clerk of the court at Adelaide, she dumped on the counter of the court office a pig's head in a repulsive condition to which was attached a cheque! The importance of the decision in which Mitchell J found the conduct to be offensive is her holding that to prove the charge it is not necessary to prove that any person was actually offended.

If I were asked to nominate a branch of the law in which Justice Mitchell's experiences and tastes as a woman influenced her interpretation and application of the law, I would nominate liquor licensing. She, like the other members of the court, was called upon to interpret and apply the radically reformed licensing laws and concepts embodied in the *Licensing Act 1967*. It seemed to me, as it did to Dr Bray, that the new act gave a central place in the licensing system to the hotel or full publican's licence, which provided for the supply of the full range of liquor facilities to the public, bar trade, liquor with meals and packaged liquor to take away. Of

5 Ibid 406.
6 [1967] SASR 408.
7 Ibid 412.
8 (1972) 3 SASR 437.

particular significance was the provision in s 22(2) that a retail storekeeper's licence (the bottleshop licence) was not to be granted 'unless the court is satisfied that the public demand for liquor cannot be met by other existing facilities', and the provision in s 47(e) that the licence cannot be granted in a new or expanding community if the licence would unreasonably restrict the grant of a full publican's licence.

Mitchell J was much less impressed by the centrality of the hotel as the primary means by which liquor requirements were to be met. In the era in which she formed her outlook, the hotel tended to be a bastion of male culture. Women were not admitted to bars but were restricted to dining areas and 'ladies' parlours' or 'ladies' lounges'. She herself would never have patronised a pub for the purpose of drinking and socialising, as distinct from dining. Her preference was to avoid hotel bottle departments and to purchase her supplies from liquor stores. This tended to influence her interpretation and application of the Act.

Her first encounter with the new Act was an appeal from a conviction of a publican for permitting the sale of liquor after closing time, *Minagall v Ingram.*[9] The publican claimed that he was protected by the provision that authorised the sale of liquor 'to persons taking bona fide meals'. The publican issued tickets to after hours customers entitling them to a meal but did not ensure that they obtained or consumed the meal. Mitchell J took a strict view of the publican's obligations and held that the offence was committed by supplying liquor to persons who, although possessed of the ticket, had not taken the meal provided.

*Buttery v Muirhead*[10] is the first instance of the tension between the differing views as to the place of bottleshops in the system. The Licensing Court had granted a retail storekeeper's licence subject to a condition that the licensee should not sell beer or spirits. The appeal came before a Full Court consisting of Bray CJ and Mitchell and Zelling JJ. The decision bears the hallmarks of a compromise between the divergent views as to the place of bottleshops. In the result, the condition forbidding the sale of spirits was deleted, but the condition forbidding the sale of beer remained. The influence of Mitchell J was unmistakable.

The bottleshop issue again came before a Full Court consisting of Bray CJ, Mitchell and Walters JJ in *Tomley Investments v Victoria Limited.*[11] The Licensing Court had refused an application for a retail storekeeper's licence holding that the s 22(2) onus had not been satisfied. Mitchell J wrote the leading judgment and held with Walters J that too stringent a test had been applied. The court (Bray CJ dissenting) ordered a new hearing by the Licensing Court.

9 [1968] SASR 236.
10 [1970] SASR 334.
11 (1978) 17 SASR 584.

The issue again arose before a Full Court of which she was a member in *Lincoln Bottleshop v Hamden*.[12] I presided as Chief Justice and Williams J was the other member of the court. The differences between myself and Mitchell J as to the bottleshop provisions emerged pretty clearly during argument in court and in subsequent consideration. In the end, however, we were all satisfied that the onus had only been met for wine, cider, mead and sherry, and the licence was so conditioned.

There can be no doubt, in my view, that Mitchell J was prepared to take a more relaxed view of the stringent criteria imposed by the legislation for the grant of a retail storekeeper's licence than that taken by both the Chief Justices with whom she sat on those cases. She was, after all, a bottleshop customer!

In *R v Brown*[13] the Bray court had to venture into the minefield of uncertainty surrounding the availability of duress as a defence to a charge of murder based on 'accessorial' liability. It provides an interesting insight into the way in which the Bray court operated. Mitchell J, together with Bright J, differed from Bray CJ and took a stricter and more cautious view than the Chief Justice who examined the topic, in an addendum to the joint judgment, in his customary erudite style.

A feature of Justice Mitchell's judicial style was her insistence on strict observance of legal requirements and an unwillingness to bend the law even for what might be thought to be a desirable end. An example is *Drage v Drage*,[14] in which she joined with Dr Bray in refusing to sustain a finding of adultery by a magistrate based on the uncorroborated admission of a husband, notwithstanding that the husband through his counsel repeated the admission in court and consented to the order for maintenance, custody and costs sought by his wife. Her Honour wrote: 'The evidence to my mind leads to the inevitable conclusion that the respondent for some reason which is not apparent, was anxious to make some admission upon which the wife might act'.[15] Despite the wishes of both parties, Mitchell J was not prepared to play the game.

Justice Mitchell was always very sensitive to any departure from procedural fairness or natural justice. Two examples may be mentioned. In *Rendulic v Bevan*[16] she applied the principles strictly and set aside a conviction by a magistrate at Andamooka on the ground that he had previously convicted the appellant of a similar offence, notwithstanding the inconvenience of arranging a new hearing at that inconvenient location, and notwithstanding the impossibility of selecting a magistrate who would not be aware of the previous conviction by reason of her Honour's

12 (1981) 28 SASR 458.
13 [1968] SASR 467.
14 [1969] SASR 484.
15 Ibid 491.
16 [1971] SASR 340.

judgment. A similar sensitivity was showed in *Ceruto v Ewens*,[17] where she allowed a defendant who claimed he had been unaware of the proceedings, which had been served but not personally, despite a considerable delay, to institute an appeal out of time and to have a new hearing of the charge.

Mitchell J believed profoundly in the importance of applying the law in a dispassionate and impartial manner whatever the circumstances and uninfluenced by the prevailing atmosphere and state of opinion in the circles in which she mixed. She demonstrated her steadfastness and objectivity in the heated atmosphere of the Vietnam War controversies. It is difficult now to recall or imagine the atmosphere of anger and fear that prevailed in the community at that time. Advocacy of civil disobedience, defiance of the draft for military service and massive street demonstrations instilled fear and outrage in conservative-minded citizens. It was difficult for judges and magistrates to retain their objectivity. Mitchell J did so, as appears from two cases to which I now refer.

In 1968 I was briefed by Mr Chris Sumner to appear for a young man who had been convicted by a magistrate of breach of a city bylaw and of disorderly and offensive conduct. He had distributed anti-war pamphlets opposing national service and urging young men not to register for the draft on the footpath outside the GPO. When arrested he had gone limp and had to be carried to the police conveyance. An appeal to a single judge was dismissed. On appeal to the Full Court, the majority consisting of Chamberlain J and Walters J dismissed the appeal. Mitchell J was totally uninfluenced by the prevailing atmosphere. In a dispassionate and clear-headed dissenting judgment, she held that the bylaw prohibiting distribution of pamphlets exceeded the bylaw-making power of the council and that the appellant's conduct was neither disorderly nor offensive.

The same dispassionate and clear-headed approach was evident in *O'Hair v Killian*,[18] a case arising out of the mass 'moratorium' demonstration that occurred in September 1970. The marchers had occupied the intersection of North Terrace and King William Street. Many, including the appellant, refused to comply with a lawful police direction to disperse. The appellant was convicted by a magistrate of failing to comply with the direction. He was also convicted on a charge that he hindered the Police Inspector who gave the direction 'while dispersing a crowd pursuant to Section 59 of the *Police Offences Act*'. The defendant had refused to plead, stating that he did not recognise the court. His attitude towards the court was not calculated to attract sympathetic consideration. An appeal came before a Full Court of which Mitchell J was a member. The offence of failing to comply with the direction was clearly made out and the appeal against that conviction was dismissed.

17 (1977) 17 SASR 249.
18 (1971) 1 SASR 1.

But Mitchell J's dispassionate style became evident when considering the hindering charge. The evidence clearly proved hindering before the police direction. But the charge had been particularised as hindering 'while dispersing a crowd'. Mitchell J was not satisfied that the evidence proved any act of hindering after the direction to disperse. There was power to amend the conviction to found it on the earlier hindering, but as the appellant had had no opportunity to answer that allegation she declined to amend. Hogarth J took a similar view. It was a somewhat technical decision in favour of an appellant whose conduct had done nothing to attract the sympathy of the court, arising out of an incident which attracted hostility and even fear in certain sections of the community, and again demonstrated the judge's devotion to fair and impartial application of the law irrespective of the circumstances.

This adherence to the strict application of the law irrespective of the merits of the litigant can be seen in other cases. In 1974 she was a member of the Full Court that considered an appeal by a Mr Willing who, some thought, made something of a nuisance of himself by challenging council bylaws on technical grounds and exposing other technical defects in council activities. The appeal was against the dismissal of a prosecution by Willing of a council employee for placing a notice on Willing's vehicle, contrary to a council bylaw. The defence was that the notice, an expiation notice, was authorised by s 64 of the *Police Offences Act*, which authorised an expiation notice 'if the offence is reported to' the council. The council employee had omitted to report the offence to the council before affixing the expiation notice. It was technical and was something of a nuisance charge, but it is characteristic of the Mitchell style that she was uninfluenced by such considerations. The placing of the notice was, in her view, unauthorised, and the council employee had committed the offence. Justice Wells agreed with her and the appeal was allowed and a conviction entered.

The same characteristic can be seen in prostitution cases. Mitchell J had a deep distaste for and disapproval of the trade of prostitution for its demeaning and degradation of women as well as their customers. But she was rigid in her insistence upon strict police proof of the case. In *Samuels v Warland*[19] the appellant was convicted of receiving money in a brothel. A police officer, masquerading as a customer, placed a twenty-dollar note on a cupboard at the request of the prostitute. The officer then disclosed his identity. Mitchell J, like the other two members of the court, held that the money had not been received and that the offence had therefore not been committed. But in *Atkinson v Samuels*,[20] sitting as a single judge on appeal, she held that the evidence proved that the defendant, although not the lessee of the premises but an employee, had control of the brothel and was therefore guilty

19 (1977) 16 SASR 41.
20 (1977) 17 SASR 129.

of keeping the brothel. However, she always insisted on proof. Thus in *Roberts v Hicks*,[21] where the other two members of the court strained to find some negligence against a motorist to enable them to award damages to an injured 12-year-old girl, Mitchell J dissented, being able to find that negligence had been proved.

Her experience of acting for injured workers in cases arising out of work-related accidents continued to influence her on the bench. While never wavering in her insistence on proof of a plaintiff's case, she retained a lively awareness of the problems facing injured workers – where the vital information is known only to the employer – as to the facts of an accident and managerial responsibility. In 1970 she tried a case, *Monaghan v Wardrope & Carroll and others*,[22] with which I am familiar as I was leading counsel for the plaintiff. Monaghan was sent by his employer, a contractor, to work on an oxygen heat exchange plant on BHP premises at Whyalla. There was an explosion and the plaintiff sustained severe burns to 80 per cent of his body. It was a difficult case because the plaintiff had no knowledge of the cause of the accident or the facts bearing upon responsibility for the safety of the operation. The plaintiff's case was dependent upon information gleaned from answers to interrogatories and discovery of documents. There was a complication when it turned out that the Australian company sued as the supplier of the plant was merely an agent for a German company of similar name. The judge's conduct of a difficult trial was exemplary and her carefully reasoned judgment drew commonsense inferences and fixed responsibility for negligence upon the plaintiff's employer and upon BHP as occupier. The German supplier was also held to be negligent. In the results, therefore, the plaintiff obtained judgment against his employer and against BHP, and the German company was held to be liable to them to contribute to the damages they had to pay to the plaintiff. The ease with which she moved in the field of employer liability is seen also in her lucid judgment in *Floreani Bros Pty Ltd v Wool Scourers (SA) Pty Ltd.*[23]

A notable case on the criminal side of Justice Mitchell's career was that of Fritz Van Beelen. She was a member of the Court of Criminal Appeal on the three occasions on which the case came before the court.[24] Van Beelen was convicted on circumstantial evidence, consisting in part of forensic scientific evidence, of the murder of a 15-year-old girl at Taperoo. On appeal, the Court of Criminal Appeal, presided over by Bray CJ and of which Mitchell J was a member, held that there were errors in the trial, including a misdirection by the judge, and ordered a new trial. Van Beelen was again convicted and again appealed. Before the hearing of this appeal, he applied to the court to take the evidence of an expert from England

21 (1976) 16 SASR 212.
22 [1970] SASR 575.
23 (1976) 13 SASR 313.
24 See (1972) 4 SASR 353, (1973) 7 SASR 117 and (1973) 7 SASR 125.

who would confirm expert evidence given for the defence at the trial. Funds were not available, however, to bring the expert from England. Mitchell J joined with Bray CJ and Hogarth J in holding that the court had no power to order a witness to come from England and that, as the proposed evidence would be merely confirmatory and other confirmatory evidence had been available in Australia but not called at the trial, the application should be refused. The same court considered the second appeal. In a joint judgment to which Mitchell J was a party, the court held that the omission to give the so-called Peacock direction was not fatal to a conviction on circumstantial evidence and that there was not sufficient grounds for disturbing the conviction. The case attracted considerable media attention because in the years that followed Van Beelen's applications for parole were refused because he refused to admit his guilt and that was considered to indicate that he was not fit to be released. Many years later another person claimed to have committed the crime. Van Beelen petitioned for the exercise of the prerogative. The Attorney-General referred the petition to the Court of Criminal Appeal, which however refused to set aside the conviction.

Some other cases decided by Mitchell J while a member of the Bray court are worth mentioning. In *Geodesic v Gaston*[25] she had a sortie into the field of copyright law, a branch of the law with which she had had no previous exposure at either bench or bar. She wrote the leading judgment in *Beck v Farrelly*,[26] the precursor of what became known as the rule in *Griffiths v Kerkemeyer*,[27] as to the award of damages for voluntary services rendered by relatives and friends to an injured plaintiff. Her judgment, it might be thought, demonstrated a capacity for subtlety of reasoning in skirting around some inconvenient pronouncements by the High Court. In her judgment in *Comalco v Dillingham*[28] there is an authoritative decision as to what constitutes a 'tender' in a building or other commercial context. Her judgment as a member of the Full Court in *Van Reesema v Giameos*[29] contained a valuable exposition of a concept of waiver in the law of contract.

In *Greenslade v Commissioner of Taxation*[30] she upheld the binding force of an agreement by a taxpayer to withdraw an appeal against the Commissioner of Taxation as part of a settlement, notwithstanding that the taxpayer and others who had contributed to the cost of the appeal now wished to proceed. The Commissioner was entitled to have the terms of the settlement enforced.

25 (1976) 16 SASR 453.
26 (1975) 13 SASR 17.
27 (1977) 139 CLR 161.
28 (1977) 17 SASR 82.
29 (1978) 17 SASR 353.
30 (1978) 19 SASR 474 .

The impact of the consideration that Mitchell J had given as Chair of the Criminal Law and Penal Methods Reform Committee, to which reference will be made later, is seen in a number of decisions in this period. In *Mann v Yannacos*,[31] as a member of the Full Court, she made the distinction, based on English authority, between the power to bind over to keep the peace and the power to bind over to be of good behaviour. She exhibited a consistent view that punishments such as short terms of imprisonment and licence disqualifications should not be imposed in times of high unemployment if the result would be that the defendant would lose his job.[32] In *Welden v the Queen*[33] she expressed a view as to the grant of bail following conviction and sentence. She considered that the general rule that bail in such circumstances should only be granted for exceptional and unusual reasons should now be interpreted 'in the light of changed attitudes to bail'. In *Cameron v Millard*[34] she held that the general rule did not apply to bail pending an appeal against conviction by a magistrate's court, especially if the sentence or the greater part of it would be served before the hearing of the appeal.

She wrote the leading judgment for the Court of Criminal Appeal in *R v Masolatti*,[35] which held that the fact that a person is of low intelligence and diminished responsibility should be taken into account as a mitigating factor in determining sentence for a crime.

In *Phillips v Kowald*[36] she made explicit reference to the third report of the Mitchell Committee and urged legislation to give effect to its recommendation that summary offences should be capable of being dealt with in the Supreme Court and the District Court so that all offences committed by an offender could be taken into account at the same time. This recommendation has now been put into effect.

The Bray court had something of a reputation for expanding the boundaries of the law in the direction that the court considered the law should take. Dr Bray was a profound legal thinker and capable by original reasoning from legal principle of nudging the law well beyond the limits of existing precedent in what he considered to be the desirable direction. I think that Mitchell J was more conservative in that regard. She had the cast of mind of a reformer, as her work on the Criminal Law and Penal Methods Reform Committee showed. But she considered that law reform was for parliament, not for courts. I detect in her judgments no inclination to judicial activism. She adverted to the question only once, so far as I am aware, in her

31 (1977) 16 SASR 54.
32 *Gardner v Janic* (1975) 12 SASR 495; *Felstead v Giersch* (1976) 14 SASR 27.
33 (1977) 15 SASR 320, 321.
34 (1978) 19 SASR 161.
35 (1976) 14 SASR 124.
36 (1976) 14 SASR 59.

judgments. That was in the case of *Lyle v Christian Ivanoff*[37] in which a magistrate had disqualified himself on the ground that he, like the complainant, the Justice of the Peace who received the complaint and counsel for the complainant, were all members of the public service. In agreeing with the other members of the Full Court that the magistrate was not disqualified, she referred to the view that magistrates should not be members of the public service but stated that she subscribed to the view 'that whether a Magistrate should be subject to the *Public Service Act* or not, is a matter of policy, and not one for decision by this court'.[38]

The judgments manifest a dedication to the principle that the law should be applied, where possible, so as to uphold and not to derogate from human rights, or, as she would have said in those days, the civil liberties of the citizen. To that extent they foreshadow the approach to human rights that she later exhibited as Chair of the Human Rights Commission. She had had some exposure to privacy issues in *Dun and Bradstreet v Lyle*,[39] although she held that a credit agency could not be convicted of failing to disclose information, in response to a request by the subject of the information, if the subject was already aware of the information. She was always strict in her attitude to proof in criminal matters and was devoted to upholding and enforcing the traditional onus of proof on the prosecution: see *Larwood v Newbold.*[40] Where legislation abridges the rights of citizens subject to compliance by the authorities with conditions, judges are often ambivalent. Courts are required to interpret statutes so as to achieve the intention of the legislation. There is often a tension between the achievement of that objective and insistence on observance of the statutory pre-conditions. Mitchell J's dedication to the sanctity of the rights of the citizen brought her down firmly on the side of strict enforcement of the conditions. She was consistent in this throughout her judicial career. Examples may be given. In *Micklem v Lloyd*,[41] where the early closing legislation required the Secretary of Labour to determine whether a shop was exempted from the early closing provisions within a reasonable time of registration, the determination was made about twelve months after registration and her Honour held that that was not within a reasonable time thereby leading to the dismissal of the charge of after-hours trading.

In *Scotts Transport v Boys*[42] proof of a charge of being the owner of an overloaded vehicle depended upon an evidentiary provision which rendered admissible a certificate signed by the registrar or 'a deputy registrar or other officer lawfully acting or deemed to have lawfully acted on behalf of the registrar'. The

37 (1977) 16 SASR 476.
38 Ibid 492.
39 (1977) 15 SASR 297.
40 (1975) 1 SASR 440.
41 (1975) 12 SASR 435.
42 (1978) 18 SASR 537.

certificate tendered in evidence expressed to be signed 'for the registrar of motor vehicles'. Her Honour held that, as the certificate did not state on its face that the signatory was a deputy registrar or an officer of the department, it should not have been admitted into evidence. She refused to apply the presumption of regularity and allowed the appeal against the conviction.

Her tenderness for civil rights is again apparent in her evident distaste for the provision of the *Road Traffic Act 1975* (SA) that has the effect of making the breathalyser reading conclusive as to the blood alcohol concentration of a motorist and of excluding evidence to the contrary, which she described in *Richardson v Fingleton* as 'certainly draconic'.[43]

Mitchell J's respect for human rights included respect for people's religious beliefs. She observed complete impartiality and detachment when religious beliefs became an issue in cases before her. In *Wellington v Wellington*,[44] a custody case, she said:

> It is not my function to prefer one type of religious upbringing to another. I respectfully agree with the views expressed by Carmichael J in *Evers v Evers* (1972) 19 FLR 296 that a court exercising jurisdiction in matrimonial causes should not discriminate against any parent in an application for custody upon the ground that the child whose custody is sought is likely to be brought up as a Jehovah's Witness.[45]

The last judgment of significance Mitchell J wrote during the Bray court period (although Dr Bray was not a member of the bench in this particular case) was in *R v Barker*.[46] She alone of the judges committed herself to the view, vindicated by later by judgments of the High Court, that the principle in *Bunning v Cross*,[47] which confers on a trial judge a discretion to exclude evidence illegally or improperly obtained, applies to confessions obtained while the accused was unlawfully detained. She adhered to that view in *R v Killick*,[48] despite the fact, as she said,[49] that 'different views are held by members in this court'. She also said:

> While this is no place to ruminate upon necessary reforms to the criminal law, it does seem to me that there is a case for giving to the police power to do legally what nowadays they can do only illegally, and what this case

43 (1980) 24 SASR 511, 516.
44 (1976) 14 SASR 321.
45 Ibid 326.
46 (1978) 19 SASR 448.
47 (1978) 141 CLR 54.
48 (1979) 21 SASR 321.
49 Ibid 327.

> has illustrated they do in fact do illegally although possibly with the best motives, namely question a person whom they have arrested before charging him when they had no opportunity of questioning him prior to his arrest.[50]

This was a recommendation of the Mitchell Committee and has since been enacted into law.

In *R v Dean*,[51] as trial judge, she excluded statements by the accused to police during an interrogation that occurred prior to the accused being taken before a Justice of the Peace. In *R v Sutton*,[52] however, she admitted, as trial judge, evidence of an interrogation during a period of illegal detention though the accused had not been brought before a justice, saying 'although it is rarely that I am willing to admit evidence illegally obtained, this seems to me to be one of the few occasions in which justice demands that it should be admitted'.[53] In that case she referred to the recommendation of the Mitchell Committee that there should be power to detain for a limited period for questioning.

Dr Bray retired in November 1978 and thus ended, after twelve legally fruitful years, the period of Mitchell J's association with that court. With my succession as Chief Justice, the style and atmosphere of the court undoubtedly changed. I was dedicated to the efficient use of the resources committed to the court so as to minimise delay and deliver expeditious justice. This involved a new emphasis on judicial administration and case management. Judges who had been very much their own masters found that they were expected to work as part of a team in the strictly managed court. Not all the older members found it easy to adapt. Mitchell J had no difficulty, though. Efficiency and organisation appealed to her temperament and she understood the necessity of the new measures if the increasing workload were to be managed. She was a loyal collaborator in the new system and was always supportive and helpful. She spent some five years on the court that I had the privilege of leading.

I have already referred to a number of her judgments delivered during the final five years of her tenure of office. There are many others that justify mention because she delivered some of her most interesting judgments during that five-year period.

Quite early in this period she presided over the Court of Criminal Appeal when hearing an appeal against a conviction for fraudulent misapplication of money as a director of a body corporate in contravention of s 189 of the *Criminal Law*

50 Ibid 328.
51 (1981) 26 SASR 437.
52 (1982) 33 SASR 203.
53 Ibid 207.

*Consolidation Act 1935* (SA). The appellant contended that a proprietary company was not a body corporate within the meaning of the section. In rejecting this contention, her judgment, in which Williams J joined, traced the history of the section from the early English statutes and is of particular interest in that regard.

Mitchell J always felt considerable concern about the capacity of publicity to prejudice a fair trial. She was particularly concerned about the publication of evidence given at preliminary hearings and its effect upon subsequent trials. In *Miller v Samuels*[54] the committing magistrate refused to suppress from publication evidence whose admissibility would be subject to challenge at trial. The judge had no hesitation in reversing the magistrate's decision.

In *Crafter v Webster*[55] Mitchell J was called upon to decide a number of important points arising out of the electoral laws. She was sitting as a Court of Disputed Returns to decide a petition lodged by Mr G Crafter, the previous sitting member for the District of Norwood, against Mr Frank Webster who had been declared elected for the District by a majority of 33 votes. The election was impugned on thirteen grounds. Their resolution involved the elucidation of numerous points of electoral law and the judgment is of importance in that area of law. The issues are too numerous to be analysed in this article and I must content myself with stating that in the result the election was declared void on a number of grounds.

She resolved another contentious point of considerable practical importance in *Savaglia v MacLennan & Briggs*.[56] The plaintiff sued the driver of a car in which he was a passenger for damages for injury sustained in a collision. The third party insurer alleged that the driver was intoxicated and that the plaintiff had voluntarily accepted the risk of travelling with him. It sought leave to intervene in the action, as it asserted that there was a conflict of interest between it and its insured, the driver. The judge refused the application, holding that the issues in relation to the plaintiff's action could be completely adjudicated if the insurer exercised its right to take over the defence, and that the plaintiff's action was not the proper vehicle for the resolution of issues between the insurer and its insured.

Her Honour dealt with the once-familiar problem of the liability of a householder for injury to a milkman who tripped on an uneven pathway while delivering milk. She held that the uneven pathway was not an unusual danger so as to render the household liable as occupier.[57]

54 (1979) 22 SASR 271.
55 (1980) 23 SASR 321.
56 (1980) 24 SASR 314.
57 See *Bartlett v Robinson* (1980) 25 SASR 552.

She presided over the Full Court and wrote the leading judgment in the notable case in which soldier settlers on Kangaroo Island sued the State of South Australia for losses sustained in consequence of relying on advice given by officers of the Department of Lands that the land was 'suitable for fat lamb and wool production'. She upheld the trial judge's finding that the officers owed a duty of care to the plaintiffs in relation to the advice given and that they were in breach of that duty, and that was the decision of the court. The damages were reduced somewhat but the judgment on liability was upheld.

Her Honour wrote the leading judgment for the Full Court in *Emerald Securities v Tee Zed*,[58] which dealt with the effect of ss 132–134 of the *Real Property Act 1975* (SA) where a mortgagee's notice of sale has not complied with the requirements of the mortgage.

In *Douglass v Lewis*[59] Mitchell J had to consider whether the proceedings of the Royal Commission into the administration of a government department were covered by absolute privilege or only qualified privilege for the purpose of the law of defamation. Her judgment contained an analysis of the authorities on the subject and concluded that it was an occasion of qualified privilege only.

*Skaventzos v Meadows District Council*[60] was a planning case and was concerned with issue estoppel. The question in the case was whether the proposed use of land was a continuance of an existing lawful use. Mitchell J wrote the leading judgment of the Full Court, over which she presided. The issue was whether the applicant for planning approval was estopped by a previous conviction for unlawful use of the land as a shop without consent from now contending that that use had been lawful. Her Honour considered the principles governing issue estoppel and held, as did the other members of the court, that the applicant was estopped.

In writing the leading judgment of the Full Court in *Von Doussa v Owens*,[61] Mitchell J supported the power of a company inspector to demand answers in an investigation under the *Securities Industry Act 1981* (SA) by declining to accept as reasonable grounds for refusal to answer that an undertaking not to disclose had been given.

The income tax liability of a prominent Port Adelaide footballer, Peter Woite, came under consideration by Mitchell J in *Commission of Taxation v Woite*.[62] The taxpayer had received $10 000 from the North Melbourne Football Club for his

58 (1981) 28 SASR 214.
59 (1982) 30 SASR 50.
60 (1982) 30 SASR 100.
61 (1982) 30 SASR 367.
62 (1982) 31 SASR 223.

signature on a Form 4, which precluded him from playing for any other Victorian club, but did not obligate him to play for North Melbourne. He had also been offered $5000 by the Richmond club. In fact he did not go to Melbourne and continued with Port Adelaide. Her Honour held that the $10 000 was not part of his football earnings and was not taxable income.

The use that can be made of the rules of court for the purpose of examining persons that may have relevant information before trial is illustrated by her Honour's judgment in *Skujins v Nominal Defendant.*[63] The plaintiff brought an action against the nominal defendant for damages for personal injuries sustained in a road accident caused by an unknown vehicle. Some weeks after the accident the plaintiff saw a similar vehicle and traced the owner who then made statements indicating that she might have relevant information. Her Honour held that the relevant rule of court (then Order 37 Rule 7) permitted an order that the owner of the vehicle be examined before a Master of the Court as to what information she might have concerning the accident.

In *Langley v State of South Australia*[64] she held that the judge's staircase in the Supreme Court Building, which she herself had negotiated on countless occasions, was dangerous and that a judge's secretary was entitled to damages for injuries sustained when falling on them.

In 1983 her Honour was Acting Chief Justice for some 4½ months during my absence. This was the final stage of her judicial career. She presided over the Full Court regularly during that time. I now refer to several cases decided during that period.

In *Christie v Bridgestone*[65] the Full Court over which she presided settled a question that had been much discussed in the legal profession for thirty years and had been the subject of conflicting judicial opinions. There was a view that the *Wrongs Act 1936* (SA) s 27A(3) (the apportionment provision) required the judge to reduce damages for contributory negligence irrespective of whether contributory negligence had been raised on the pleadings and there was some judicial authority for that view. This view was put to rest by the Full Court, Mitchell ACJ writing the leading judgment, which held that there could be no reduction for contributory negligence unless it was pleaded.

She presided as Acting Chief Justice over the Full Court that held that an accountant who had arranged for his clients to transfer land to a family company was liable in

63 (1983) 32 SASR 223.
64 (1983) 32 SASR 260.
65 (1983) 33 SASR 377.

damages for not advising them that any profit on a sale by the company within twelve months would be taxable.

In *Bromley v Dawes*[66] Mitchell ACJ wrote the leading judgment for the Full Court which held that the administrative action of the Director of Correctional Services in moving a prisoner from one section of the prison to another for security reasons, provided it was not an indirect method of punishment without due process, was not open to review by the court even though it might involve some deprivation of privileges.

Some of Justice Mitchell's most important work during the years in which she served on the court of which I was Chief Justice was in the criminal jurisdiction. Although she had done little criminal work in legal practice, she had an instinctive feel for the work of the criminal court, a sound grasp of the principles of the criminal law and a commonsense practical understanding of how criminal justice ought to operate.

One interesting judgment that Acting Chief Justice Mitchell wrote as the leading judgment for the Court of Criminal Appeal concerned a charge of the theft of goats that were running wild in herds in fenced paddocks on station properties.[67] The trial was conducted on the basis that the goats were *ferae naturae* and that there was an onus on the prosecution to prove that the owners of the land had so reclaimed and so confined the goats as to give the owners qualified property in them. On the appeal, however, it was submitted that the goats were *domitiae naturae* and that the property in the goats enjoyed by the owners of the land upon which they were pastured was absolute and there was no need of proof of reclamation or confinement. Mitchell ACJ examined the authorities and concluded that the goats were *domitiae naturae*. The appeals were dismissed.

Mitchell J wrote the leading judgment for the Court of Criminal Appeal in the case of *R v Perry (No 5)*.[68] The High Court ultimately took a different view from the Court of Criminal Appeal as to the proper outcome of this case, but the judgment of Mitchell J nevertheless stands as an important discussion of the principles governing the admissibility of similar fact evidence in criminal cases.

In *R v Duvivier*[69] Mitchell J, who presided over the Court of Criminal Appeal, held, as did Zelling J, that provocation was a defence to a charge of attempted murder. Attempted manslaughter is not an alternative verdict open on a charge of attempted murder. An alternative charge of wounding with intent to do grievous bodily harm

66 (1983) 34 SASR 73.
67 *R v Drinkwater* (1981) 27 SASR 396.
68 (1981) 28 SASR 417.
69 (1982) 29 SASR 217.

was included in the information and the appellant was liable to conviction on that charge. She expressed no opinion, although Zelling J did, as to whether the appellant could have been convicted of attempted manslaughter if that had been included as an alternative charge in the information.

In *R v Corak & Palmer*[70] she wrote a judgment, as a member of the Court of Criminal Appeal, on the difficult topic of the admissibility against an accused person of statements made in his absence, which are said to be in furtherance of a common purpose to which the accused was a party.

In *R v Forrester*[71] her Honour had to determine how to proceed where a person accused of murder who had been found by a jury to be not fit to plead was now claimed to be fit to plead. There was little guidance to be had from precedents. She decided, contrary to the argument of the Director of Public Prosecutions, that the issue would have to be decided by another jury.

Her Honour's attitude to dealing in hard drugs is made clear by the decision of a Court of Criminal Appeal over which she presided to increase the sentence of persons convicted of importing heroin from eight years with a four-year nonparole period to fifteen years with an eight-year nonparole period.

*R v Smith*[72] is an interesting case. Mitchell ACJ presided and wrote the leading judgment. She held that evidence was admissible from witnesses who were not at the scene of the crime but were acquainted with the accused, who could recognise photographs taken by security cameras at the scene of the crime as being likenesses of the accused. There was no suggestion that the accused had changed his appearance or that the witnesses were in any better position to make the comparison of the photos of the accused than the members of the jury. There was precedent for the view taken by the court but the last word on the subject may not have been spoken.

Identification was also the subject of her judgment as Acting Chief Justice in *R v Manh*[73] and in it she endorsed the passage in the judgment of Wells J in R *v Easom*[74] as to the direction on the topic to be given by a trial judge.

A Court of Criminal Appeal led by her Honour as Acting Chief Justice asserted the power of the court to stay criminal proceedings. This power was to be exercised only with due deference to the constitutional role of the Attorney-General to present

70 (1982) 30 SASR 404.
71 (1982) 31 SASR 312.
72 (1983) 33 SASR 558.
73 (1983) 33 SASR 563.
74 (1981) 28 SASR 134.

for trial, where the continued presentation of an accused after one or more abortive trials would amount to abuse of process. The court found no occasion to exercise the power in this particular case.[75]

The Court of Criminal Appeal, over which she presided as Acting Chief Justice, had to consider two important points in *R v McBride*.[76] As to the first, it decided, the Acting Chief Justice delivering the leading judgment, that in a jurisdiction such as South Australia where the felony murder rule exists it is sufficient to constitute the crime of murder if death is caused in the commission or furtherance of a felony involving violence or danger, and it is not necessary to prove that the accused agreed to or consented to the co-offender committing the particular act of violence which caused death. As to the second point, Mitchell ACJ discussed the controversial case of *R v Lowery*,[77] but decided that on the facts in *McBride* evidence of sadistic tendencies and disposition on the path of the co-offender would have no relevance.

The last reported judgment of her Honour's judicial career is *R v Palliaer*,[78] in which she wrote a judgment laying down the correct approach for a sentencing judge in relation to a suspended sentence. The judge is required to consider and determine the appropriate sentence and then to consider whether it is expedient to suspend the sentence.

So a distinguished judicial career came to an end. At a special sitting of the Supreme Court on 28 September 1983, tributes were paid to her judicial work by the Attorney-General, the President of the Law Society and by myself as Chief Justice.[79] Her period of service on the court had extended over eighteen years, during four of which she had been senior judge. She had had two periods of service as Acting Chief Justice, the second of the two periods being the last four and a half months of her judicial career.

As I see no reason to revise my then assessment of her judicial qualities, I may be permitted to quote a passage from my speech on the occasion of her retirement:

> As important as any of these qualities which I have mentioned are her composure and decisiveness. An outstanding aspect of her judicial work has been her capacity to clarify complex issues in her own mind, to reach prompt and correct decisions, and to express the reasons for those decisions clearly, incisively and without delay. These qualities, together

75 *R v Donald* (1983) 34 SASR 10.
76 (1983) 34 SASR 433.
77 [1974] AC 85.
78 (1984) 35 SASR 569.
79 The proceedings are reported in (1983) 33 SASR v.

> with her tireless industry, have enabled her to sustain an astonishing output of judicial work and to find time still for an extraordinary range of other activities. If I were asked, however, to identify the outstanding characteristics of her Honour's judicial career, I think I would identify a quality which I may describe as a practical humanity, a deep and abiding sympathy with the weaknesses of those who come before the Court, and with the hardships and vicissitudes of the lives of many of them, sympathy qualified nevertheless by realistic understanding of the requirements of justice.[80]

As this article is concerned only with Dame Roma's judicial career, I will not discuss other facets of her extraordinary public life. Two aspects of that public life other than her work on the bench were, however, so connected with that work that some mention of them is required.

In 1972 the state government established the Criminal Law and Penal Methods Reform Committee. Justice Mitchell was the Chair and her colleagues were Professor Colin Howard and Mr David Biles. The committee during the next few years produced a series of reports making recommendations for a thorough and comprehensive overhaul of the criminal and penal laws. Those reports, without in any way diminishing the importance of the input of the other members, can be regarded as a monument to Justice Mitchell's industry and reforming zeal tempered by good sense. I stress industry because she carried a full judicial workload throughout the period of the committee's work. The reports have had a major and pervasive influence on law reform in this state. Most of the recommendations in the reports had been approved for drafting into legislation before I ceased to be Attorney-General in June 1975. Subsequently other demands on the time of parliamentary counsel and on parliamentary time delayed their implementation. Gradually, however, implementation occurred.

I am indebted to Mr Matthew Goode, who was a driving force as legal officer in the Attorney-General's office in securing implementation of many of the Mitchell Committee's recommendations, for detailed information as to the recommendations that have been implemented. Some, indeed, have been implemented in modified form and others have been overtaken by time and events and have not been implemented at all. But it is fair to say that the majority have been implemented and they have modernised and transformed large areas of criminal law and practice.

In 1978 Justice Mitchell conducted a Royal Commission to enquire into and report upon the dismissal of the then Police Commissioner, Harold Salisbury. Mr Salisbury had, on his own admission, misled the government in answering requests for

80 Ibid vii.

information as to the nature and extent of the activities of the section of the Police Department known as the Special Branch. In consequence the government, relying on the misleading information supplied to it, had misled the parliament and certain other concerned bodies and individuals. The government caused the governor to dismiss Mr Salisbury. There was an outcry among some sections of the media and the public and the government appointed Justice Mitchell as Royal Commissioner to enquire into the dismissal and to report whether the dismissal was justifiable in the circumstances.

Justice Mitchell reported in due course that the dismissal was justifiable. The report is of enduring public importance because of its vindication of the constitutional authority of the elected government in a democratic system. Mr Salisbury had sought to justify his conduct by stating that his duty was to the law and 'to the Crown and not to any politically elected government or to any politician or to any one else to that matter'. Justice Mitchell disposed of that contention in words of continuing constitutional importance. She wrote:

> That statement, in so far as it seems to divorce a duty to the Crown from a duty to a politically elected government, suggests an absence of understanding of the constitutional system of South Australia, or, for that matter, of the United Kingdom. As I understand his evidence he believed that he had no general duty to give to the government information, which it asked, but he regarded it as politic to give such information as, in his view, was appropriate to be general knowledge. Of course the paramount duty of the Commissioner of Police is, as is that of every citizen, to the law. The fact that a Commissioner of Police is 'answerable to the law and to the law alone' was adverted to by Lord Denning MR in *R v The Commissioner of the Metropolis; Ex parte Blackburn*. That was in the context of the discretion to prosecute or not to prosecute. No government can properly direct any Policeman to prosecute or not to prosecute any particular person or class or persons although it is not unknown for discussion between the executive and the police to lead to an increase in or abatement of prosecutions for certain types of offences. That is not to say that the Commissioner of Police is in any way bound to follow governmental direction in relation to prosecution. Nor should it be so. There are many other police functions in respect of which it would be unthinkable for the government to interfere. It is easier to cite examples than to formulate a definition of the circumstances in which the Commissioner of Police alone should have responsibility for the operation of the Police Force.
>
> It is one matter to entrust to the Commissioner of Police the right to make decisions as to the conduct of the Police Force. It is quite another to deny

> the elected government the right to know what is happening within the Police Force. Of course there are some matters of detail in to which the government should not enquire. In the context of the Special Branch work the South Australian Government has recognised that situation in that it has never sought to identity the persons who are the subjects of records. But it believes itself entitled to know the general nature of the work done by Special Branch and of its relationship with outside agencies including ASIO. That view, shared by Hope J in so far as it relates to the association with ASIO – I believe it to be correct.

She went on to say:

> Of course in South Australia since the 1972 amendment to the *Police Regulation Act*, following a report of the Royal Commission 1970, on the September Moratorium Demonstration, the Governor may also, under Section 21(1) of the Act, give directions to the Commissioner for the control and management of the Police Force.

How are we to assess a judicial career of such length and diversity? The dominant impression left by a survey of her decisions is that of a practical, down-to-earth judge, delivering efficient and impartial justice to the litigants in the cases before her. She was not much given to conceptualising the law and not given at all to activism in expanding the known boundaries of existing law. Although quite reform-minded, she considered that reform was for parliament, not for the courts. So far as the courts have a role in developing, expanding and reforming legal principles it was a role, in her view, to be performed by the High Court. She saw her role as a judge of a state supreme court as primarily of that of doing justice in the cases before her in accordance with legal principles settled by existing authority.

Decisiveness and promptness were the hallmarks of her judicial work. No litigant before her suffered through indecisiveness or delay. She controlled her court and work with unfailing efficiency.

Justice Mitchell was a strong judicial character. She could be absolutely relied upon to do strict impartial justice according to law whatever the circumstance or pressures. She was never in danger of being influenced by a prevailing atmosphere or by a desire for the good opinion of others. She adjudicated in cases of considerable political and social sensitivity, but none dared suggest, even in whispers, that she ever deviated from the path of justice according to law as she saw that path in the circumstances of the case.

For all her strength and strictness, she was a humane and compassionate judge. She understood people, their problems, their aspirations and their weaknesses. Whether

in sentencing an offender or assessing a litigant or witness, her insight into and understanding of people were outstanding. She was intolerant of humbug and humbugs, and would stand no nonsense, but severity was not part of her nature.

Her judgments exhibit shrewdness, a grasp of legal principle, and a keen sense of justice, seasoned with humanity, tolerance and compassion. They are the ingredients that make up an outstanding and memorable judicial career.