David Heilpern AM
On His Retirement

By Stephen Lawrence and Jeremy Styles

David Heilpern AM, radical lawyer, has retired from judicial office after 21 years on the bench of the Local Court of NSW.

As an academic he published a confronting study on young men in prisons, finding about a quarter were being sexually assaulted.

His subsequent appointment, as one of the state's youngest magistrates, was followed by a storm of criticism from the Police Association and the media.

Such criticism was never really to abate, though the subject matter would vary.

Scrupulously proper, careful, but often bold, David Heilpern was never likely to be a darling of the NSW Police or the 'shock jocks'.

Most of his judicial career was spent in country NSW, often in towns with large Aboriginal communities.

His judicial humanity was clear from the beginning to the end. He favoured the powerless to the extent the law allowed.

He sometimes backed accused people against police; he backed domestic violence victims against their oppressors. He recognised and felt the effect of the humanity passing through his Court.

With none of the jurisdiction of an inquiry body and only the cases brought before him, he skewered police who had engaged in misconduct. A well-crafted judgment on costs under the *Criminal Procedure Act* can be damming.

In 2000 he published on being a country magistrate (a humanist would of course reflect on the inherent limitations of judicial office):

> *A magistrate cannot stop domestic violence or alcoholism or turn around the economy of dying towns. What we can do is ensure that the law is upheld and that there is humanity and consideration in its application. In the words of Martin Luther King: 'Morality cannot be legislated, but behavior can be regulated; judicial decrees may not change the heart, but they can restrain the heartless.*

On the bench Magistrate Heilpern was assuredly self-assured. He was direct. He could be unforgiving. He had an abiding

Photo by Christian Gilles

intellectual engagement with both statute and common law. His judgments were frequently befitting of a more ponderous jurisdiction. In engaging with an intellectually difficult point, his eyes would alight.

Unlike most magistrates he was unafraid to speak publicly at conferences and seminars, or to publish on issues of moment.

In 2017 Magistrate Heilpern broke the judicial fourth wall and talked openly about the self. He provided leadership by revealing his struggle with vicarious trauma.

Justice Peter Hamill has followed in his footsteps. Both giving lie to the idea that judicial officers are 'out of touch'. They are the central actors in the drama, often a horror show really, that is our legal system.

His paper has been presented beyond borders and across the profession. It offers lawyers a public basis for self-reflection.

A brisk analysis of some of Magistrate Heilpern's record reveals:

He engaged directly in the debate over the criminalisation of offensive language in the modern era: (*Police v Butler* [2003] NSWLC 2 – a seminal and entertaining judgment – considering the offensiveness of the word '*fuck*'. He riotously declared, '*We live in an era where Federal Ministers use the word over the telephone to constituents and are not charged. Recently the word was used by Senator Schacht in the Senate. (*SMH *18 May 2002). Rupert Murdoch was heard on 'PM' saying 'fucking ABC' following an interview ('Media Watch' 20 May 2002). Since Connors we have been blessed with 'Chook Fowler' on our television rattling off 'fuck' as though it was the only word he could manage to say. Connors was before advanced microphones could pick up sporting heroes in football telling each other to 'fuck off' with regularity. They may be sin-binned but they are never charged. Jeff Kennet used the word in his last election advertising campaign – 'Jeff fucking rules'. One example is the* Sunday Telegraph *(Sept 5 1999 at page 55), where the full words are used, without warning, in a Sunday paper, where a correspondent refers to me as a 'fucking idiot' in response to my judgment. Ita Buttrose in her column in the* Wentworth Courier *wrote 'Walk down a city street and you can hear the F-word floating in the air like a bird on the breeze'. The then Police Commissioner agreed that he had used the word, and that his children have too. Kerry Packer used the word to describe his near-death experience. The president of the NSW parents and citizens association said that the word 'fuck' was acceptable in her house, but 'wog' was not').*

He was procedurally fair, having not breached the adverse inferences principle: (*Mears v Sydney Anglican Schools Corporation* [2013] NSWSC 535; *Borcherdt v Scott* [2013] NSWSC 285 (and affirmed in the CA: *Borcherdt v Scott* [2014] NSWCA 339)).

He was accepting of the religious convictions of others; albeit he erred in finding that an agnostic but conscientious objector to voting would not be guilty: (*Commonwealth Director of Public Prosecutions v Easton* [2018] NSWSC 1516).

He was careful (and right) in his application of mental health provisions: (*Benn v State of New South Wales* [2015] NSWSC 1672).

He was direct in his disaffection for professional incompetence: (see *R v MY; R v SP* [2012] NSWLC 12) and wanted practitioners to get to a real point!

His nose for an outcome was correct, in refusing to admit evidence where police had refused to bring or provide a warrant and provide it on request to an occupier (albeit the SC found it the right decision for a slightly different reason): (*Director of Public Prosecutions (NSW) v Roberts* [2016] NSWSC 1224; *Director of Public Prosecutions (NSW) v Karen Maree Roberts* (No 2) [2016] NSWSC 1789).

He dealt with a perturbing number of vexatious litigant matters, a true test of any judicial officer's humanist approach: (*Attorney General for the State of New South Wales v Mahmoud* [2015] NSWSC 899), including by roundly and correctly refusing to sign Court Attendance Notices alleging specious offences against Supreme Court justices (*Oliver Markisic v Attorney General for New South Wales; Dragan Markisic v Attorney General for New South Wales* [2011] NSWSC 776).

He was unafraid of declaring abuse of process and finalising matters by permanent stay: (*Police v Rankin; Police v Roberts* [2013] NSWLC 25**)** or by finding no jurisdiction:(*NSW Police v Pepper* [2016] NSWLC 15).

He described the law, completely and early, on the reasonable mistake of fact defence and its application to the novel drive with illicit drug offence: (*Police v Carrall* [2016] NSWLC 4) – a topic to which he would return and return.

He was correct in siding with the little guy (Mr. Lance Carr of Wellington) against the police and excluding evidence of the commission of a number of criminal offences against police following a wrongful arrest: (*DPP v Carr* [2002] NSWSC 194; 127 A Crim R 151). His Honour said, *'the evidence relating to resist police, assault police and intimidate police was obtained in consequence of an impropriety in the sense that the actions and words that flowed after the words 'you are under arrest' would not have occurred had the officer not acted improperly'*. The argument is now made perhaps most days of the week in Local Courts across Australia.

He also declined to exclude evidence on occasions and similarly published reasons: (*Police v Beckett* [2012] NSWLC 5).

A particular topic evaded him – the actual constitutionality of criminalising offensive behaviour in a free and democratic society– a recent constitutional challenge listed for hearing before him was withdrawn by police before consideration. (An Aboriginal man had burned the flag on Australia Day on the north coast. It may be that everyone was interested in the law).

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We know that personally, he was a parent of critically capable children (a burden on legal parents we know too well). He had personal practices which guided him. He often spoke openly and freely about his views.

It is a measure of his integrity and intelligence that his public legal personality reflected his private beliefs to the extent that the office would allow. His comments after retirement about the injustice created by the offence of driving with a detectable level of drugs are a clear demonstration of his character.

We have learnt from him. The profession should wish him well in his retirement. BN

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