# Teaching Australians Civics:
## QUOTALS Dinner Speech
## 15 August 1997

The Hon. Justice Michael Kirby AC CMG*

One of the chief failures of a century of federal government in Australia has been the omission to teach succeeding generations about the Constitution and how this country is governed. The result is a shocking level of ignorance about civics. This ignorance reveals itself in what passes for the constitutional "debate" in this country. It extends even to some of our leaders. In a sense, this ignorance undermines our country's commitment to constitutionalism and the rule of law. We should be moving urgently to correct it. That should be a major objective of the celebrations of the centenary of the Constitution in 2001.

The ignorance of which I speak is not confined to one side of politics. It has infected some federal and state legislators and political leaders. It reaches truly shocking levels of misunderstanding. It is getting worse. It tends to be cumulative in its effect.

Take the comments of two State Premiers from the one side of politics. One called a judgment of the High Court "ranting and raving". Another described the majority judges in a recent case as "loopy". One suggested that the High Court was making the country "ungovernable" because he did not like a decision which his State had fully argued and which had gone against its submissions.

It has become commonplace to stereotype the judges as "Capital C conservatives" or "Capital A activists" as if judges or their decisions fitted neatly into the political categories that politicians know. Another leader suggested that the High Court was wrongfully delaying an important judgment. Conduct of this kind on the sporting field in Australia could result in a spell in the sin bin. But political comment on judges, amounting to personal denigration and reflections on their motives, has increasingly become the norm. One offender urges the other on to more and more extravagance.

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* Justice of the High Court of Australia. President of the International Commission of Jurists. Honorary D Litt *Newcastle* and *Ulster*, Honorary LLD *Macquarie*, *Sydney* and *Ntl Law School India*.

On the other side of politics a former Federal Minister this week cast what he was pleased to call "a plague on the high and mighty". He had previously described the majority in an important High Court decision as "basket weavers". But now he was at it again. The judges lacked "common sense". He would rather have the politicians "decide ... policy than High Court judges". At least, he said, politicians "know they need a majority of Australians to vote for them if they want to be re-elected. High Court judges have no need for majority support to keep their jobs until their dotage – and it shows!"

This commentator clearly implies that the decisions of the High Court on the meaning of the Australian Constitution should be decided by popular appeal, not by legal authority. They should be determined by political choice not by the rule of law. They should bend to "common sense" and throw away legal analysis.

There are a few elementary points to be made about all of these comments. The judges do not choose their cases. They cannot put problems off, as politicians sometimes do. They have a complaint by a litigant that a particular law is unconstitutional. They have to decide that challenge. They must do so by reference to an unchanging constitutional text, conceived in the 1870s and written in the 1890s. They must yield their personal opinions to that text and the earlier decisions upon it. They are just not able to turn the problem over to the politicians or popular opinion. One would have thought that a long serving Minister of the Crown would have understood this. Alas, not so. Some politicians and many others turn not a few of the difficult problems of this country over to the High Court. Its judges must continue to do their duty, as they have for nearly a century. But it seems that they must now do so in a political culture of increasing personal denigration and name-calling. It ought to stop.

You can search the newspapers in 1948 after the High Court rejected the Chifley Government's bank nationalisation[1] and you will not find a single word questioning the integrity of the High Court judges. Likewise, after the Court overruled the Menzies Government's Communist Party Dissolution Act in 1951.[2] The same in 1956 when the Court struck down the then Arbitration Court system.[3] Similarly after the Tasmanian Dam case in 1983.[4] Most of these were majority decisions. But the governments and politicians of the day recognised that the nation needed a constitutional umpire. In the Australian nation, that umpire is the High Court. But now some players want to attack the umpire personally. It is a development that reflects an increasingly graceless time. It deserves careful re-consideration.

No judge's decisions are beyond criticism. In a democracy, criticism is healthy. Most judges of my acquaintance welcome and reflect upon public criticisms of their reasoning. The High Court's decisions themselves uphold a high measure of free speech in this country. But epithets like "ranting and raving" and "basket weavers"

1 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1.
2 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.
3 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
4 *The Commonwealth v Tasmania* (1983) 158 CLR 1.

deserve nothing but contempt from the people. The message should go out clearly. Criticise decisions. Object to reasoning. Propound alternatives. Suggest analogies from other places. But leave off the personal attacks and common namecalling. Otherwise this conduct becomes cumulative. It debases our polity. It encourages others to join in the verbal and personal abuse. The price will be paid by a loss of community confidence in the institutions vital to the protection of a free society – the independent, neutral and pr ofessional courts. I have seen countries where the power of the courts has been eroded by unrelenting political attacks. Let me tell you, when you take the independence of the judges away, all that is left is the power of guns or of money or of populist leaders or of other self interested groups.

As the centenary of the Australian Constitution approaches, we need to teach our citizens about our constitutional system and how it works, including in the High Court of Australia. We need to teach children in their schoolrooms. It also seems, sadly, that we need to teach some who should know better.