

The Honourable Murray Gleeson AC, QC

(b. 30.8.1938) (Chief Justice from 1998-2008)



AUSTRALIAN
CONSTITUTION
CENTRE



Gleeson has had one of the most interesting careers of the modern style of judges who have spent their entire working life in the law... The High Court's chief function is, of course, to interpret the constitution. This opaque document leaves a lot of scope for value judgments but Gleeson, unlike many members of the High Court since Federation, always took the view that political questions were better left to elected Members of Parliament.

By Michael Sexton

Murray Gleeson was born in Wingham NSW in 1938. From the age of 11 he attended boarding school in Sydney and then went on to study at the University of Sydney. He graduated with first class honour degrees in law and arts in 1962 and then spent one year as a solicitor before being admitted to the New South Wales Bar. Gleeson appeared as junior counsel in the High Court frequently, mainly in taxation, commercial and constitutional cases.

Gleeson became a QC in 1974 and his skill as senior counsel was highly regarded. During this period he appeared in the *PMA Case 1975*, which concerned one of the Section 57 double dissolution triggers of the Whitlam Government, and in the *Tasmanian Dam Case* in 1983. He also appeared in the Privy Council and won the last appeal by leave to the Privy Council from the High Court in 1980.

In 1984 Gleeson became the President of the NSW Bar Association and the following year received a AO for his service to the law. Gleeson was appointed Chief Justice of the Supreme Court of New South Wales in 1988. At the time of his appointment, he had appeared in the High Court on no less than 70 occasions, in many of the most important cases of the day. Gleeson was a staunch defender of the Court against the creeping tendency to view the legal system in purely economic terms.

In 1998 Gleeson was appointed to the High Court as Chief Justice, where he set a collegiate environment. He was known for his strong commitment to the Rule of Law and the independence of the judiciary. The Gleeson Court rejected a strict originalism approach to its decisions making. During this period the Court took into account the purpose and the meaning of the words of the Constitution when it was written and then identified contemporary applications. One example of this is the 1999 case *Sue v Hill* where the Court decided that the meaning of the words 'foreign power' in section 44 of the Constitution included the United Kingdom. At the time the Constitution was written we were all British subjects and the United Kingdom was not a foreign country to Australia.

Gleeson retired from the High Court in 2008 on the day before his 70th birthday in accordance with the Constitution. Since his retirement Gleeson has been involved in public life. In 2015 he was appointed to the referendum council which was set up to advise the Government on the next steps towards a referendum for the recognition of Aboriginal and Torres Strait Islander peoples in our Constitution.

Chief Justice Gleeson's quotes in constitutional decisions that encapsulate the vision of him as Chief Justice

1. Chief Justice Gleeson's understanding of the role of the Constitution is best encapsulated in his Honour's reasons in *Roach v Electoral Commissioner* [2007] HCA 43; 233 CLR 162. His Honour stated at [1] that:

The Australian Constitution was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon legislative power for the purpose of protecting the rights of individuals. It was not the outcome of a revolution, or a struggle against oppression. It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies. Although it was drafted mainly in Australia, and in large measure (with a notable exception concerning the Judicature – s 74) approved by a referendum process in the Australian colonies, and by the colonial Parliaments, it took legal effect as an Act of the Imperial Parliament. Most of the framers regarded themselves as British. They admired and respected British institutions, including parliamentary sovereignty. ...

(Principle: what is the Australian Constitution?)

2. In discussing the system of government established by the Constitution, Gleeson CJ stated in *Mulholland v Australian Electoral Commission* [2004] HCA 41; 220 CLR 181 at [6] that:

A notable feature of our system of representative and responsible government is how little of the detail of that system is to be found in the Constitution, and how much is left to be filled in by Parliament ...

3. His Honour continued at [9]:

The Constitution is, and was meant to be, difficult to amend. Leaving it to Parliament, subject to certain fundamental requirements, to alter the electoral system in response to changing community standards of democracy is a democratic solution to the problem of reconciling the need for basic values with the requirement of flexibility.

(Principle: democracy)

4 On the role of the Court in determining the constitutionality of legislative provisions, Gleeson CJ stated in *Singh v The Commonwealth* [2004] HCA 43; 222 CLR 322 at [5]-[6]:

... In a representative democracy, the will of Parliament is the most authentic and legitimate expression of public opinion. It may be imperfect, but it is through the political process, culminating in legislative action, that public policy is formed and imposed. It is not the role of the judiciary to give effect to an understanding of public opinion in opposition to the will of Parliament. When a law enacted by Parliament, which represents, or purports to represent, current community values, is declared unconstitutional and invalid, the judicial arm of government is imposing a restraint upon the power of a democratically elected legislature by reference to a written instrument, the Constitution. The source of the restraint is the legal effect of the instrument; not the will of the judiciary. The legal effect of the instrument is determined by the meaning of the text.

It is in the nature of law that rules laid down in the past, whether the past be recent or distant, bind conduct in the future. It is in the nature of a written, federal Constitution that a division of governmental power, necessarily involving limitations upon such power, agreed upon in the past, binds future governments. That the terms of the agreement were to have that future operation is a matter relevant to an understanding of their meaning, but the role of a court is to understand and apply the meaning of the terms, not to alter the agreement. Respect for the constitutional settlement is the primary obligation of a constitutional court. The source of this Court's power is the Constitution itself. There is no other. The role of the Court stems from the meaning and effect of the terms of that instrument. The stream of judicial review cannot rise above its source.

(Principle: what is the Australian Constitution?)

(key words: rules, the role of the Court, the Australian Constitution)

5. Writing extracurricularly, Chief Justice Gleeson described the importance of the rule of law as follows:

The importance of the rule of law lies partly in the power it denies to people and to governments, and in the discipline to which it subjects all authority. That denial, and that discipline, are conditions of the exercise of power, which in a democracy, comes from the community which all government serves. Judicial prestige and authority are at their greatest when the judiciary is seen by the community, and the other branches of government, to conform to the discipline of the law which it administers. The rule of law is not enforced by an army. It depends upon public confidence in lawfully constituted authority. The judiciary claims the ultimate capacity to decide what the law is. Public confidence demands that the rule of law be respected, above all, by the judiciary.

(Principle: the rule of law)

