



AN APPEALING BIOGRAPHY

Ian Freckelton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and his legacy*, 2009, Thomson Reuters, hb \$150, pb \$80.

This massive tome, more than 1000 pages in length and 3.5 kilograms in weight, has been described by Geoffrey Robertson QC as a *festschrift* – a German term for a written celebration of a person's life.

Although Justice Kirby was the 40th justice appointed to the High Court of Australia, he is the only justice to be thus honoured. The only other jurists to have been celebrated in this academic way were Victoria's Sir John Barry and Queensland's Justice McPherson.¹

Many of Justice Kirby's predecessors did not rate a biography. Even the redoubtable Sir Owen Dixon did not become the subject of a biography until 30 years after his death.

More than 40 contributors have written laudatory essays about the celebrated jurist/public speaker/author/polemicist who began his judicial life as a member of the Arbitration Commission at the age of 35 and served an

equal number of years on various courts until he reached the age of "statutory senility" – 70.

The chapters are generally arranged in terms of legal rubrics, such as administrative law, citizenship law, corporate law, constitutional law (two chapters), and so on. There are also biographical chapters, such as the "inevitable judge", judicial practice, the law reformer, the internationalist and final thoughts.

Geoffrey Robertson criticises the fact that "the volume lacks any contribution from [Justice Kirby's] usual critics", but John Gava attacks Justice Kirby for "agenda judging", inconsistency and occasional impatience.

Moreover, traces of the anti-Kirby group emerge from time to time in the book. Justice Kirby's colleague, Roddy Meagher QC, for example, is quoted as saying that Justice Kirby "loves to make speeches. It does not matter what the subject is.

"He will speak on any aspect of the law, on modern medicine, on dental decay, on child welfare, on the activities of UNESCO, on the Arab-Jew problem, on music, on economics, on the Stock Exchange, and on the multiple complications of the computer.

"Recently he spoke to the Loya Jirga at Kabul, on 'The message of Islam', and to a gathering of senior monks at Phnom-Penh on 'The necessity for silence'."

Discussing the two ways he said judges go about writing their judgments, Meagher observed: "One is the way sometimes favoured by our President, Mr Justice Kirby, and others, which is to throw your mind into neutral, close your eyes, open your mouth, and let it all come out".²

According to AJ Brown, Meagher was responsible for spreading an apocryphal story that Justice Kirby mistakenly delivered a lecture on the value of breastfeeding to a gathering of African tribes, having misunderstood a phone call inviting him to speak on "press freedom", not "breastfeeding".

In fact, Justice Kirby was under no mistake about the nature of the invitation.³

Ian Callinan QC has predicted that on Justice Kirby's retirement "we will not be seeing less of him". (Shades of Lord Devlin's comment to Geoffrey Robertson on Lord Denning's retirement, "He'll be more of a menace off the Bench than on it".) Another former colleague, Michael McHugh, has observed: "I am not sure whether he would

Justice Michael Kirby was farewelled from the High Court of Australia on 2 February 2009, after a service of 13 years with the country's highest court.

agree with the view that he interprets the Constitution as if it was enacted this morning, but that is the effect of his constitutional philosophy".

Justice Kirby finds himself, as a "great dissenter", in distinguished company such as his predecessors Herbert Vere Evatt and Lionel Murphy.⁴ Even Sir Owen Dixon was once thus described, before he achieved ascendancy over the Court.

Like another great dissenter, Lord Denning, Justice Kirby puts himself in the category of "bold spirits" rather than "timorous souls". It is sometimes suggested that dissenters sitting on the final appellate court of a nation are rather futile. But Justice Kirby's predecessors have demonstrated that their unorthodox views are often vindicated in subsequent decisions.

All of these dissentients were in advance of their time. Like Henry Bournes Higgins, Justice Kirby considered that he had a responsibility to formulate his own views in his judgments, but he was readier than Higgins to subordinate his independence to the interests of justice and clarity and to sign joint judgments when it was appropriate.

Nevertheless, the observation that has been made about Lord Denning – that it is salutary to have one of him on an appellate court, but not so good to have seven of him – has also been directed at Justice Kirby.

What shines through in this book is the prodigious energy of the man.

To some extent this perspective is magnified by Justice Kirby's propensity to recycle his efforts. He delivers a speech, then adds a few footnotes and has the theme published as an article in a learned journal. But there are no fewer than 234 articles by Justice Kirby listed in the book's bibliography.

The range of topics is astounding – DNA, the Human Genome project, AIDS, Cambodia, boring speeches and so on.

His well-known habit of commencing work at 4.30am has facilitated this aspect. Julian Burnside QC tells a story of receiving a phone call from Justice Kirby at about 8am on a Sunday morning. Justice Kirby told him he had phoned Burnside at his chambers, "but you weren't there!".

An indefatigable traveller who refuses to travel first class, Justice Kirby once undertook a two-day visit to Canada to deliver a speech, but failed to make contact with his nephew Nicholas, who was then residing there. He emailed an apology to Nicholas, pointing out that "only a Kirby would travel all that way for two days". His nephew had the last say, responding that he read "only a Kirby" as "only one Kirby".

For most of his judicial life, Justice Kirby made no public disclosure of his longstanding homosexual relationship with Johan van Vloten.

He was admitted to the New South Wales Bar in 1967, after working at law firm Hickson, Lakeman & Holcombe. In November 1974, at the age of 35, he was asked whether he would consider appointment as deputy president of the Australian Conciliation and Arbitration Commission – beginning his federal judicial career.

In early February 1975, he accepted secondment to be the first Australian Law Reform Commission chair and in 1983 he was transferred from the Arbitration Commission to the Federal Court of Australia. In 1984, he was appointed president of the NSW Court of Appeal and in February 1996 he took up his appointment to the High Court of Australia.

Other positions have included Solomon Islands Court of Appeal president (1995-96), UN Special Representative for Human Rights in Cambodia (1993-96) and International Commission of Jurists president (1995-98). However, a strict recitation of Justice Kirby's career gives no indication of the influence he has had both professionally and personally.

At the official farewell on 2 February, LCA president John Corcoran related a short story to illustrate Justice Kirby's "international reach" [see "Farewell Justice Michael Kirby", April 2009 *LU*, page 30]. It seems that former federal Attorney-General Michael Lavarch was addressing a group of senior Indian judges but not making much impression until he mentioned the name "Michael Kirby". From then on interest was instantaneous.

Justice Kirby has been the recipient of numerous honours and awards but he has always valued his judicial work. As he says in "50 years in the law: a critical self-assessment" [see www.hcourt.gov.au/publications_05_2.html]: "I still regard it as a great privilege to have been an independent judge in a rule of law democracy. It is a great trust. The puzzle of decision-making and of explaining decisions in a convincing way was for me work that had no available intellectual equal".

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His detractors have sneered that he chose to "come out" – with an entry in *Who's Who* in 1999 – only after he had ascended the judicial ladder to the top rung. But Justice Kirby had experienced discrimination during most of his lifetime and was sensibly concerned about any further adverse reaction.

As AJ Brown remarks, "[F]ew would challenge Kirby's private assessments that had his sexuality been as widely known in public and media circles before his judicial appointments, then those appointments would have been far less likely".

Three years after the entry in *Who's Who*, Senator Bill Heffernan made disgraceful and unfounded allegations that Justice Kirby had

used commonwealth cars to trawl for homosexual encounters with young men.⁵

Senator Heffernan was later forced to apologise and concede that his allegations were baseless. Justice Kirby displayed characteristic grace in accepting the apology.

This was consistent with his tolerance towards those who attack him. Ian Barker QC and Justice Kirby's successor Dennis Mahoney have commented on the change in atmosphere at the New South Wales Court of Appeal when Justice Kirby ascended to the presidency because of his "untiring efforts to have cases before him attended by courtesy and good humour ...".

Despite frequent attacks from his colleague Justice Meagher, the Court, as Mr Barker says, "continued to work well and, largely because of Kirby P's influence, it remains a civilised forum".

When the Court was divided in opinion, he used his conciliatory talents and refused to pull rank. With counsel, he was interventionist and probing, but with unfailing good humour.

The many law students, lawyers and laypersons who are fans of the indefatigable, iconoclastic "celebrity judge" will find much in this well-organised and excellently written book to support their assessments and to provide further enlightenment and amusement. ●

GRAHAM FRICKE QC is a retired County Court judge who practised at the Victorian Bar for 21 years. He has taught law at Melbourne, Tasmania, Monash, RMIT, Deakin and Queensland, and written textbooks and six non-fiction works.

1. See N Morris and M Perlman (eds), *Law and Crime: Essays in honour of Sir John Barry* and A Rahemtula (ed), *Justice According to Law*. John Stone has described the first four chapters of volume 18 of the journal of the Samuel Griffith Society as a *festschrift* in honour of Sir Harry Gibbs. See the foreword.

2. After quoting this passage, the final contributor, Julian Burnside QC, observes that if Kirby manages his judgments with his mind in neutral, "it must be truly formidable to see him in top gear".

3. On his return from Zimbabwe, he was asked by his colleague, Gordon Samuels, "Kirby, is there nothing you will not speak about?". Kirby had the last say during a subsequent address: "After that jest [Samuels] was naturally elevated to vice-regal rank whose function specialises in this first sin [of boring speeches]".

4. Murphy dissented in 21 per cent of his cases, compared with Kirby's 48 per cent: *Appealing to the Future*, 42. In the US, another great polemicist, traveller and public speaker, Justice Douglas dissented in 41 per cent of his cases: see Fricke, "A tale of two maverick judges", www.law.anu.edu.au/nissl/Murphy.htm. Kirby's proposition that dissent "is an appeal to the future" forms the basis of the title of the book: *Appealing*, 1, n1. He has expressed the hope that some of his own dissents will one day become prevailing orthodoxy: *Appealing*, 44.

5. See *Appealing*, esp. at 331; also at 8, 10, 18, 66, 73, 75, 77, 400 and 488.