

AN EXCITING TIME TO BE A LAWYER

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# "An exciting time to be a lawyer"

## A conversation with Justice Kirby

**O**n 6 February, Justice Michael Kirby became a judge of the High Court, filling the vacancy left by Sir William Deane.

Justice Kirby, 56, a judge of the NSW Supreme Court for nearly twelve years and a former chairman of the Australian Law Reform Commission, is a prolific writer and speaker. Throughout his career he has expressed his views on a wide range of topics, including the independence of the judiciary, the power of the media, and human rights.

His outspokenness has brought some criticism (notably from the Victorian Premier), but he is widely regarded as an articulate, compassionate and astonishingly hardworking judge, and his appointment to the High Court has been applauded throughout the profession and across the political spectrum.

Shortly before Justice Kirby took up his new appointment, Richard Evans spoke to him in Sydney.



Justice Michael Kirby

*In a recent speech you compared our drug laws to the laws under which Oscar Wilde was arrested and imprisoned for his homosexuality a century ago. What was the point you were making?*

Every now and again we have to pause and ask ourselves, are we on the right track?

Even things which have been long accepted need to be re-examined. That is the obligation on an educated and civilised profession and society.

When we think we are sure we are on the right track, we have to remind ourselves of the occasions when history has shown we haven't been.

I think in the area of drug laws there is an increasing demand to reconsider the current approach.

It is interesting to see that a lot of the pressure is coming from within the organised legal profession.

I think this arises from the fact that lawyers have,

unfortunately, the obligation to deal closely with the fallout of the drug problem. They see at first hand the human side of the problem. The stereotypes which exist in society are shattered: all they see is a very inefficient legal approach to a very substantial social problem.

That is why I have been interested in this subject, but I always make the point that my duty as a lawyer and a judge is to obey and enforce the law.

and I do that and I have no problem doing that.

I hope I bring to it a degree of understanding and compassion, but it is not for me to substitute my own views on this subject for the opinions, which are expressed in the form of legislation, of Parliament.

*Every now and then the common law has a burst of creativity.*

*Do you think lawyers, because they deal with individual people, can help resist the stereotypes - even hysteria - generated by the mass media?*

When Chief Justice Brennan took his oaths of office he made the point that the law does not respond to the clamouring call of the mob.

It is a lawyer's function to stand out against the populist opinions and defend all people by the standard of the rule of law. That includes people who are extremely unpopular: minorities, and people accused of disgraceful conduct.

It is such people who need lawyers most, and when lawyers get to know them as their clients they realise that most of them have at least some redeeming qualities.

That is, in a sense, the challenge of the law: every day is a drama, and there are few issues that are absolute. The lawyer's role is to try to find just solutions.

ions according to law to the problems the lawyer grapples with.

This is difficult at the moment because society's values are changing. We shouldn't complain too much about that because some of the values needed to change, such as our attitudes to Australian Aborigines and Torres Strait Islanders, our attitudes to women, to gays, to the handicapped and to people of other countries who are less fortunate than us. *It is said that the ability to respond to change is the genius of the common law. Has this been happening in Australia?*

I think we are going through a period of major innovation. Every now and then the common law has a burst of creativity. It did so in Lord Mansfield's time, and at the end of the last century, aided and abetted by the great codifications of that time - and it is in the midst of such a burst now.

We in Australia have at last begun to realise that the links with the common law of England have been formally severed, and we must build a common law which is suitable for our own needs and society.

It gives us both the obligation and the opportunity that our forebears didn't have. For them, it was merely a matter of trying to discern the rule as it would be defined in London. Ultimately, that was the duty of Australian lawyers: to try to get into the mind of the Imperial law makers, either in Westminster Parliament or the Privy Council.

But even once that link was severed, it took lawyers about twenty years to see the change. Even when I was appointed President of the Court of Appeal in NSW in 1984, overwhelmingly the cases cited were English cases and it took an effort of will on my part to remind the lawyers that these were but comparative law.

The High Court later made that clear in *Cook v Cook*, and now I think the penny has dropped.

It was once said that lawyers are typically the captives of

their law school notes. They carry them through as their intellectual capital, and it takes an awful lot to get them to change.

It is happening now. Increasingly in the Court of Appeal in NSW, counsel, with the encouragement of the Bench, cite New Zealand, Canadian and other common law authorities, as well as the authority of the law of England.

Don't get me wrong: the common law of England is still a great treasury for our lawyers, but it isn't the only place to which we should go for guidance, and we should not still feel bound by it simply because their books are on our shelves.

*These changes must make it an exciting time to be on the Bench.*

I think there are many things that are exciting about the law today. Changes in the direction of greater justice for minorities, the growing internationalisation of the law, the greater use of international human rights principles to illuminate the solution to our domestic legal problems, and the greater honesty and the recognition of the legitimacy and limits of judicial creativity in the common law system - all of these are different from [what was happening when] I was educated at law school. The young lawyer of today is growing up in quite a different legal milieu.

Add to that the realisation that we now have our own separate common law which we must build for ourselves and you have got a really very exciting time in which to be a lawyer in Australia.

The down side is that at the same time there are all these changes in the practising profession, to which Sir Daryl Dawson has referred, especially time charging and the decline of the sense of social obligation.

*You share these concerns?*

I do. I don't think it should be exaggerated, because there are still many lawyers who will pursue many causes. And organised legal aid has come along and relieved some of the need

that was once met by senior members of the profession doing pro bono briefs.

But public legal assistance has its limits and we have to retain that sense of obligation which is a hallmark of a noble profession.

*There is a need sometimes for someone to take a stand for values other than free speech . . . That obligation will often fall on the judges, because no one else will do it.*

I would call the medical profession a noble profession. Why? Because in emergencies the medical profession, both by its own ethics and by law, accepts obligations to rush to the assistance of people in need.

The legal profession ought to have the same motivation, to quest for justice according to law.

I believe that most lawyers, certainly most young lawyers I know, do have that. What is slightly disappointing to me is that as I sat in the Court of Appeal for eleven and a half

years, I came to know the lawyers, the advocates, who were the top silks. And in major public law matters where true issues of justice, either to individuals or disadvantaged groups or the environment, were raised, it tended to be the same old faces of worthy people appearing. The lawyers from the big end of town didn't accept a just share of the burden.

That is disappointing, because it was not so when I was a young solicitor and barrister. In those days it was part and parcel of being a leader of the Bar to accept work for the Aboriginal Legal Service, the Council for Civil Liberties, and the other informal schemes that existed in those times.

It is a matter of responding to the basic purpose of the legal profession which isn't just to make money, it is to serve a rule of law in society.

*You have expressed concern about the power of the media, and the threat that it can pose to justice. What do you think courts and the legal profession can do to protect individuals from that power?*

This is very difficult. Because of the growing international character of the media, decisions are made in Atlanta which affect the news that we get in Australia. It therefore becomes very difficult for local law, even local ethics or local culture, to influence those decisions. And then the local media apes global media, and reproduces the same entertain-

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ment format where things are all extremes and the shades of grey are not seen.

The mixing up of fact and opinion is also a very disappointing feature of the current media. Even the ABC is, I think, not the professional organisation that it used to be in the sense of keeping opinions divorced from facts.

*My decade on the Australian Law Reform Commission . . . was tremendously important in my legal development.*

This is a rather sad development, because with the decline in standards has been a growth in power. I don't know what the answer to this is because parliaments tend to back off from developing the checks which may be necessary.

In any event, such checks are not easy to define because the protection of free speech and the avoidance of undue restriction is itself an important value of society.

But there is a need sometimes for someone to take a stand for values other than free speech and which are sometimes in competition with free speech. That obligation will often fall on the judges, because no one else will do it.

*You have been praised for writing clear and easily understood judgments. What do you think is the secret of good legal writing?*

It is difficult to give advice on this subject. I believe there is a feature of some human minds that permits them to speak in word pictures which are simple and direct and clear. Whether I have that is for others to judge, but I think it is difficult to teach people to communicate clearly.

I think I've got better at writing judicial opinions over the eleven and a half years, and one would hope so. And I see the same evolution in other judges whom I watch. There is a structure to judicial opinion that is pure syllogism really. But the elucidation of the policy issues is something which has interested me, partly because of my decade on the Australian Law Reform Commission.

That decade was tremendously important in my legal development. I worked very closely with a lot of the top academic lawyers in Australia. That is not the usual preparation for the High Court of Australia. I learned that I should strive to be more conceptual.

The common law solves problems and it disdains concepts, but in order to gain the principles that will lead to enduring development of the common law you have to conceptualise.

*Has your idea of the role of a judge changed during your career on the Bench?*

I don't think so. I was re-reading what I said in the Boyer Lectures in 1983, and I predicted then a lot of developments in the law. Many of them were attacked at the time as heresy and as ignorant, but most of them have come about. What I have to ask myself is what are the things that I don't perceive today in 1996 which are going to be important for the future of the law in the next century?

I will have to play a part in charting the course. We need lots of assistance from lawyers and law writers and legal academics and the community generally on the future directions of the law.

I got my perception of the judicial role at the feet of Julius Stone at the Sydney Law School. He was a great influence on me and a lot of other judges and lawyers throughout Australia. He taught principles of legal realism which were very refreshing at the time, and are now generally accepted, including by those who have the responsibility of doing something about it - the judges in the highest courts. ■