

PEOPLE IN THE LAW
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PEOPLE IN THE LAW

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New South Wales

The Hon Justice MD Kirby AC, CMG



The appointment of its President, Justice Michael Kirby, to be a justice of the High Court of Australia, will affect the New South Wales Court of Appeal significantly. In his 12 years of office his influence has been considerable and it can be said, certainly with the benefit of hindsight, that as the law has come to be developed during that time his appointment as President was not merely opportune but inspired. However, the loss to the Court of Appeal and to New South Wales of that immediate influence must be measured against the gain to Australia as a whole of the service of a judge who, indisputably, is a great judge, widely-experienced and respected. The Court of Appeal will move forward under new leaders and new influences but they will be different. On a less important note, no longer will cartoons peopled by Saint-like stick figures pass along the Bench. It is not even certain that plates of hot buttered raisin toast will continue a feature of fortnightly judges' meetings.

Justice Kirby's work required him, not only to

listen to argument and decide cases, but to control and guide debate between judges and advocates, the advocate often a litigant appearing without professional representation. Frequently, arguments, which the inexperienced and sometimes the experienced do not present clearly or completely, must be patiently teased out and better formulated and the advocate helped to meet the opposing case. In this role Justice Kirby is brilliant. He is an outstanding presiding judge. He performs the task with a mixture of fairness and firmness, with care and concern for those involved and above all with great courtesy and some humour. He respects the dignity of all who appear before the court. His voice is the voice of encouragement. New Senior Counsel announcing their appointments in the President's Court will not forget the words of welcome directed to each individually. Nor will their families and friends. Not surprisingly he has twice been called upon to chair committees of the Organisation for Economic Cooperation and Development (OECD) on Privacy and Data Security and in February 1994 acted as the Independent Chairman of a Constitutional Conference of Malawi.

What of his written work as a judge? One particular feature of a Kirby judgment is the care he takes to articulate the gist of the arguments and to express precisely in ordered and numbered form the arguments for and against a particular proposition so that these can be measured and balanced before any conclusion is stated. There is perhaps a tendency, some would say, to reach too far for supporting authority or ideas found in judicial and other writings in and out of Australia and beyond what commonly would be regarded as the resources of the common law; to consider, for example, the implications to be drawn from international statements of basic human rights. If all that or any of it is a fault in a judge of an intermediate appellate court, the perceived need

to keep bright the image of the common law and to ensure that the reader, whether a justice of the High Court on appeal, a judge applying the decision, a litigant or an interested member of the public, has as full an opportunity as possible to understand and review the thinking behind the decision explains the practice. This may not please some other judges, but it is the way of this judge.

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Justice Kirby produces his judgments quickly and apparently easily. The first draft circulated reads logically and well. But the deceptive simplicity and speed of production masks a capacity to maintain a high level of intense concentration for long periods of time, in short, extended hard work. His Honour is recognised as an extremely hard worker. Few people appointed to judicial office spring to the task like Athene from the head of Zeus fully armed with the qualities of judging that he has achieved. The product of Fort Street Boys High School, the cradle of many eminent judges, at Sydney University, as well as graduating in Arts and Economics, he obtained his Degree as Master of Laws with first class honours and served as a Fellow of the Senate. His continued connection with universities has seen him Deputy Chancellor of the University of Newcastle and, from 1984 to 1993 Chancellor of Macquarie University. From Newcastle he has received an Honorary Doctorate of Letters and from Macquarie an Honorary Doctorate of Laws. In 1974 he was appointed a Deputy President of the Australian Conciliation and Arbitration Commission. In 1983 he joined the

Federal Court. In 1984 he became President of the New South Wales Court of Appeal and August 1995 President of the Court of Appeal of the Solomon Islands. Few come better qualified to the administration of justice in an age, when traditional rules have been diluted in favour of wider duties and greater rights, than one who for nine years between 1975 and 1984 was the Foundation Chairman of the Australian Law Reform Commission and who has served such bodies as the Administrative Review Council, the Australian Council of Multi-Cultural Affairs and the Executive of the Commonwealth Scientific and Industrial Research Organisation.

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What is perhaps most extraordinary is that Justice Kirby was able to keep up with his judicial work while frequently away from the Court of Appeal engaged in tasks of not merely national but international importance. Apart from the activities already mentioned he has taken an active part in UNESCO. In March 1991 the Director General appointed him a member of the International Jury for the UNESCO prize for the teaching of human rights. He served as member of the global commission on AIDS of the World Health Organisation and took part in numerous judicial conferences of the Commonwealth Secretariat. For the International Labour Organisation (ILO) he was part of a mission to South Africa in 1992-1993 to examine that country's labour laws. In November 1993 he was appointed the Special Representative of the Secretary General of the United Nations on Human Rights for Cambodia and in September 1995 to the Ethical Legal and Social Issues Committee of the Human Genome Organisation of the United States. Since 1994 he has been a

Commissioner of the International Commission of Jurists (ICJ). In 1995, he was elected ICJ President. Also in 1995 he was appointed to the Editorial Committee of the Commonwealth Association for Education in Journalism and Communication. Justice Kirby has done this work without shedding or shirking any part of his judicial load in the Court of Appeal. It would not normally be desirable for the President to be away from the court frequently or for prolonged periods. It is certainly not something to recommend to any President of lesser capacity. But some, and Justice Kirby is one, recognise that each of us has only a limited time within which to achieve stated goals. To that end every moment counts. If his priorities include time with family and friends, they do not include leisure or the safety and consolation of a regular retreat to a calm home life. Rose Bay has no claim to match the call of Cambodia. His priorities are to give virtually all of his time to the enormous range of tasks he has undertaken. But none who has appeared before him in the Court of Appeal would regard the high level of justice he administers as one whit the worse for his commitment in other areas. Indeed this experience has enhanced the depths and understanding of his judgment.

Such time as remains he has devoted to writing books, articles, papers and speeches about an endless range of topics. The Supreme Court Library catalogue lists hundreds. He has written about the issues genomic research presents: (1993) 67 ALJ 894. In 1994 he addressed the inaugural Judicial Orientation Program on Judicial Stress: (1995) 2 (September) *Judicial Review*. In 1983 he gave the Boyer Lectures, six lectures in which he endeavoured to interpret the judiciary to a general audience. He invited the audience to come "behind the purple curtain" and discover those responsible for maintaining our judicial tradition. In July 1987 *The Australian Law Journal* noted (at 382) that in April of that year Justice Kirby had completed a 10-day visit to New Zealand, in the course of which, at the invitation of the President of the Court of Appeal of New Zealand he took a seat on that court, delivered lectures at the Victoria University, Wellington and Canterbury University, Christchurch and addressed the annual dinners of the New

Zealand Law Society in Wellington and the Southlands Law Society in Invercargill. The themes of these lectures and addresses related to the future of the judiciary, the impact of science and technology upon the law and the possible entry of New Zealand into an Australian Federation. This is but an instance of what for the judge is a regular pattern. In particular he has argued repeatedly in writing and in speech for the human rights of those who suffer from AIDS. In this context it is appropriate to observe that his Honour is a Christian brought up in the Anglican faith.

Justice Kirby has no fear of publicly proclaiming on television, the radio and elsewhere his beliefs. He does it adeptly whether discussing the law and those who administer it or those other topics which have fired his concern or attention. His capacity to talk clearly and persuasively when interviewed on television has worked for the benefit of the law and better community understanding. To the extent to which members of the public are aware of who the judges are they are aware of Justice Kirby.

His work within and outside the law was recognised by his creation in 1983 a Companion of the Order of Saint Michael and Saint George and in 1991 a Companion of the Order of Australia. In that year he was also awarded the Australian Human Rights Medal. The respect and affection in which the legal profession and the wider community hold him was evidenced by his farewell ceremony in the Supreme Court on 2 February and the ceremony of welcome in the High Court on 6 February 1996. The speeches on both occasions were outstanding but most memorable was that of the judge himself in the Banco Court where, as he came to the end, he said:

"And so, literally, I now lay down this mantle. Never again will I be President. Never again will I sit as a judge under the Royal Coat of Arms, which have reminded me that I shared the residual prerogative of the Sovereign to ensure, if I could, that justice is done in our courts for all people. Never again will I wear the crimson and fur, which remind me of the lineage of the judges of our tradition, stretching back for nearly 800 years — an institution far greater than any of us. ...

Never again will I put on the horsehair wig and the traditional robes which remind me to strive to be larger than my mortal self and which stamp on me the anonymity of institutional service.

'When, to the sessions of sweet silent thoughts I summon up remembrance of things past ...'

I shall think of this occasion and all of you present and of the privilege I have enjoyed in your company and with your assistance I go to my new functions with humility, optimism and fresh objectives. But I shall never forget the precious decade that I have been privileged to serve in this Court."

In part these words reflect a preference for the traditions and certainties of our existing system of constitutional government to the uncertainties of a republican system.

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The way in which Justice Kirby, born in 1939 and therefore still comparatively young, a highly-trained and competent judicial officer, responds to his new office must be left to the future. In large measure the cases and arguments before the court delimit the work the judge does. But the compassionate, the caring and the concerned, of whom Justice Kirby is one, invariably respond to put right injustice if and to the extent that is humanly possible. Speaking at his welcome in the High Court he acknowledged his long journey to that moment and confessed that towards the end of it, stealing a look across Lake Burley Griffin, he sometimes thought of what might have been. What might have been, is. Beyond doubt a wise,

just and experienced judge has joined the High Court of Australia.

SIMON SELLER