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THURSDAY 30 OCTOBER 1997

SYDNEY LAUNCH OF

LIONEL MURPHY - A POLITICAL BIOGRAPHY  
BY JENNY HOCKING

The Hon Justice Michael Kirby AC CMG

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This is the third or fourth "launch" of this book by Jenny Hocking. The principal launch was done by Neville Wran, Lionel Murphy's close colleague and friend, at the National Press Club in Canberra. There has been a Melbourne launch. A Sydney "launchette" by the author herself, which took place in Glebe last night. Now it is my turn. I am glad to have this opportunity because I counted myself a friend of Lionel Murphy. I am an admirer of his tremendous achievements in public life. As a judge, I am willing to acknowledge fully the utility of his fresh insights

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\* Justice of the High Court of Australia. President of the International Commission of Jurists.

about the law and the Constitution during his service as a Justice of our country's highest court.

It is interesting to observe the continuing flow of books about Lionel Murphy. Coinciding with this work by Jenny Hocking, published by Cambridge University Press in Australia, another book has hit the shelves. I refer to *Justice Lionel Murphy - Influential or Merely Prescient?* edited by Michael Coper and George Williams of the Australian National University. It was published by the Federation Press just a few weeks ago. That book is a text principally for lawyers. It traces Lionel Murphy's impact on the jurisprudence of the High Court. It includes a chapter by me on Lionel's legacy, being the text of an address I gave in the old Senate Chamber exactly ten years after his death. That was the second lecture in the Murphy Lecture series given by me. It was the tenth lecture in the series. It was one of six contributions in appreciation of Murphy's remarkable career that I have offered over the past decade.

The first was given in the presence of Ingrid Murphy, Cameron, Blake and other members of the Murphy family in a remarkable memorial held in a packed Sydney Town Hall soon after Lionel Murphy's death. It was an extraordinary event. Citizens of every rank filed into that enormous hall to fill it to the rafters to express feelings engendered by the passing of this powerful spirit. Some were there because duty and office required it. But most were there because of a deep feeling for this man who had given

his all for his vision of Australia. Perhaps some were attracted to that memorial service - as some may have come tonight to this "launch" - out of a sense of sorrow and remorse about the suffering to which Lionel Murphy was put in the last harrowing years of his life. One of the reviews of this book, written by Norman Abjorensen<sup>1</sup>, has remarked:

"History has shown that it takes a Lionel Murphy to flush out the peculiar vindictiveness lurking in the outwardly calm Australian psyche; stand on the toes of vested interests and the wrath uncoils with lethal intent.

It is doubtful whether any public figure in Australia, Evatt included, has had to endure so much calumny as Murphy - the whispering campaigns (often officially inspired), the smears, the innuendo: it was intensified by his perceived unorthodoxy, even within the Labor Party."

Perhaps some who attended the Sydney memorial and some who have come to the successive launches of this and other books about Murphy, are trying to express to their own inward spirits a feeling of sorrow for the pain that Lionel suffered and a feeling of sadness that mean-spiritedness is often the reward which Australians mete out to those who strive to serve them. In this, I would include Barwick as well as Murphy. Like Murphy, Barwick had faults. But he was a big figure who pursued with energy,

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<sup>1</sup> N Abjorensen, "The Quality of Murphy", *Canberra Times*, 11 October 1997, C1.

imagination and determination his vision of Australian society. One can differ with particular things he did. One can be critical about particular legal decisions. One can question occasional motivations. One can even suggest the possibility that a view was taken of the law which was wrong and can now be seen as wrong. But each of these men was an important and creative citizen of this country. They had more in common than either would have cared to admit. Each was certainly an Australian nationalist. Each engendered admirers and haters. In the calm of death, we, their fellow citizens, should accord each their due respect. We should set about the task, which belongs to history, of assessing the good and measuring the mistakes. But keeping our eyes, in each case, on the big picture.

Already, it has been suggested in media commentary that Jenny Hocking's book is a case "for the defence" of Lionel Murphy<sup>2</sup>. The critic condemns this extraordinary man's mighty contributions to Australia under the headline "High Court and low farce" - although that sounds perhaps like the language of the sub-editor. The critic describes Lionel Murphy as being "in the dock of history", with Jenny Hocking as "advocate - and counsel for the defence". I think a fair reading of this book will convince most

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2 Book Review by Michelle Grattan, *Australian Financial Review*, 25-26 October 1997, Weekend 8-9.

impartial Australians that Lionel Murphy sits in no dock as he awaits history's assessment. Of the crime charged he was acquitted. Legally, he stands innocent. But for his critics that is not enough. Is it beyond our sense of balance and proportion, in measuring the achievements of such a notable and restless man, to reach into an objective assessment of his works, aided by a biographer whose survey spans his whole life?

For some, there will never be anything in Lionel Murphy's life except his "raid" on the ASIO office in Melbourne, his advice on the "loans affair" and the trials and inquiries of his last years. But the value of Jenny Hocking's book is that it explores the subject's *entire* life. It puts the three events I have mentioned in the context of a broader survey about the life and times of a man, politician, minister and High Court judge. If it is sometimes more favourable to Murphy than some critics would like, it may be said, with all honesty, that this is the record of a person who spent literally years with the spirit of Lionel Murphy, explored his private papers, his public speeches and his judgments as no one else has yet done and emerged with affection and respect. Not the usual Australian sense of belittlement: lopping tall poppies, clawing down anyone who strives to make Australia a better place for its poor and disadvantaged citizens.

It is probably still too early for a wholly objective biography of Lionel Murphy to be written. His personality was so vivid that his spirit remains around the four corners of this continent to enrich

the lives of those who admired him and to irritate and aggravate those who hated him and blamed him for every conceivable social ill. On his death, Senator Brian Harradine, no great admirer of Murphy's politics, remarked in a prescient speech in the Senate<sup>3</sup>:

"Standing here, I cannot logically conceive, just because his body was riddled with cancer and he has died, that his mind is no longer active, that he is no longer in existence. After all, his mind gave searching consideration to such non-material and abstract concepts as justice."

I agree with that assessment of the enduring quality of something so spiritual as Lionel Murphys's search for social and legal justice. This book by Jenny Hocking brings out that quality in Lionel Murphy's life. By its review of his parental background, his early political life, his turbulent period as a Minister (when enormous achievements of legislation were secured) and his unorthodox but highly creative time on the High Court, the author offers a portrait of a citizen of enormous energy, great compassion and unyielding determination who had an impact on Australia that we do well to look at, reflect upon and evaluate.

Let us have honesty by all means. Let truth reign. But in his lifetime, Lionel Murphy had more than his fair share of

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<sup>3</sup> *Commonwealth Parliamentary Debates, Senate Hansard*, Vol S117, 22 October 1986 at 1703.

vindictiveness and mean-heartedness. In death, we owe something more to ourselves, if not to his memory.

The review of Murphy's family history by Jenny Hocking may at last lay to rest the ghost, raised during his unsuccessful effort to win endorsement for the Federal Seat of Phillip, that he was actually Jewish but had changed his name to seduce the right wing of the New South Wales Labor Party with false Irish credentials<sup>4</sup>. The rumoured Jewish ethnicity was a lie. Anyway, it may not have been a burden in Phillip as Syd Einfield showed. And the book reveals that Lionel Murphy would have needed more than his Irish name to win over his critics in the Labor Right.

A key to his life is found in the early chapters which reveal his fascination with science and technology. It lasted all his life. In his day, a science/law combination at university was extremely rare. It happened occasionally in Britain that a great lawyer (such as Lord Denning or Lord Reid) was a noted mathematician. But in Australia, the combination of science and law was virtually unique. It gave Murphy a perspective on the law which was somewhat peculiar. A conviction that rationality would ultimately triumph; that logic could always persuade; and that the future beckoned

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4 J Hocking, *Lionel Murphy - A Political Biography* (1997) at 61.



lawyers to the same open-mindedness and willingness to test new propositions as is commonplace in science. As he was to discover, such attitudes of mind were not common in the higher reaches of the legal profession. They are still not common, although his life made it easier for his successors to embrace a scientific approach to law.

An interesting point which Jenny Hocking brings out in the record of the political years is the consistent antithesis which Murphy provided to the equally determined lawyer politician, Garfield Barwick. They clashed over matrimonial law reform. They clashed over Barwick's *Telephonic Communications (Interceptions) Act*. They clashed over the necessity to bring ASIO under ministerial direction and accountability. Here were two powerful and opinionated Australians with different visions of where Australian society should go. But it is important also to note the things they had in common. Murphy was not a revolutionary. He was by no means an anarchist. On the contrary, by his activation of the Senate Committee system, his dedication to massive legislative reform, his determination to establish new reforming institutions and his work on the High Court, he demonstrated his Fabian commitment to the constitutional processes of Australia. He showed his faith in their capacity to deliver a fairer society. Properly harnessed, he was concerned that Australia's legal institutions had the ability to deliver justice to all.

This book also demonstrates how Murphy's thinking developed on certain points. He began quite sceptical about a Bill of Rights, left in the hands of unelected and conservative judges. But he came, in time, to embrace this idea, doubtless as he saw the repeated failings of Parliament and the lack of interest among many politicians concerning the needs for law reform which came spinning from his mind "like sparks from a catherine-wheel"<sup>5</sup>.

Another point emerging from Jenny Hocking's review of Lionel Murphy's political years was the many friendships across political lines. John Gorton and Andrew Peacock were just two of many Coalition politicians who saw his personal strengths and embraced his friendship, whilst often criticising his goals and castigating his willingness to adopt unorthodox methods. For such a restless, gregarious, party loving iconoclast, life in the High Court in Barwick's massive building, must have been a tremendous psychic change. Ingrid Murphy is recorded here as saying that after the appointment came "it was very quiet". Quiet is the ordinary environment of judicial deliberation. But I remember those days and I watched as Lionel Murphy adapted to the quiet. He was determined to succeed as a judge. He was committed to proving

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<sup>5</sup> Senator Gareth Evans, Address to the Senate, Commonwealth Parliamentary Debates, *Senate Hansard*, Vol S117, 22 October 1986 at 1696.

the sceptics wrong. He had a better understanding than many at that time of the great power and responsibility of the High Court. Ironically, it was Barwick's great success in placing the Court physically, facing the Parliament and the Executive Government in the constitutional triangle in Canberra, that symbolised what too few had seen. Trusted to these seven citizens is the protection of the Constitution and the enforcement and development of the law of this continental country. It is a formidable responsibility. It must be faithfully discharged whatever the calumny and whatever the personal abuse.

It would be tedious for me to venture once again upon an assessment of Lionel Murphy's contributions as a Justice of the High Court. Jenny Hocking has picked out a few salient cases. I was appointed President of the New South Wales Court of Appeal shortly before Lionel was diagnosed with cancer and not long before he died. At that time, few indeed were the citations of his judgments in the highest courts of Australia. But in the decade since his death, many of his then heretical insights have come to be accepted. Perhaps it was his embrace of scientific rationality and rejection of unquestioning obedience to "foreign" precedents that released his mind to look afresh at areas of the law which had atrophied. His blunt manner of expression of new principles and his seeming contempt for some old decisions (especially from England) at first damaged the persuasive power of his judicial writing. But now that it is understood that many of his ideas are trickling into the decisions of the High Court - and even where

rejected, providing a useful sounding board for another, legitimate point of view - the embarrassment once felt by advocates in citing his opinions is fading away. It is now not at all uncommon to have Murphy's opinions read to us. In the way of these things, many of them will doubtless come to represent orthodoxy until, with a further turn of the cycle, they are eventually seen as needing fresh scrutiny by new Murphys living in future times. That is, after all, the way our 800 year old legal system develops and changes.

I suspect that the cases of which Lionel Murphy would have been most proud would have included *Neal v The Queen*<sup>6</sup> where he declared that Mr Neal, an Aboriginal Australian, was entitled to be an agitator<sup>7</sup> and *McInnis v The Queen*<sup>8</sup> where, in dissent, he laid the foundation for the later decision of the Court in *Dietrich v The Queen*<sup>9</sup>. That case upholds the right of all persons facing serious criminal trials in this country to be protected by the judge against a trial that would be unfair for want of legal representation. But Murphy would also lay claim to the holdings about the implications to be found in the Australian Constitution. He regarded it as such

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6 (1982) 149 CLR 305.

7 (1982) 149 CLR 305 at 317.

8 (1979) 143 CLR 575.

9 (1992) 177 CLR 292.

basic lawyering to be alert to implications that it scarcely deserved justification. Any legal document, being made up of words, must yield its meaning not only from the words used but from the structure of the text and the implications necessarily to be derived from it. The declaration of the implications, especially in Chapter III of the Constitution dealing with the judicial power<sup>10</sup>, is an important ongoing challenge before the Court.

For accepting that challenge the Court has been severely attacked, repeatedly so by Professor Gregory Craven of the new Notre Dame Law School in Western Australia<sup>11</sup>. Yet Professor Craven's critique usually includes the suggestion that the Court has failed to give due weight to the implications of federalism contained in the Constitution. His opinions are therefore, I think, revealed as criticisms not of the drawing of implications (as Murphy taught) but of the particular implications which have been drawn which he, apparently, finds uncongenial. I have been trying to arrange an opportunity to speak to Professor Craven's law students as "an antidote" to his criticisms. We were unable to organise it when the Court visited Perth last week. But I shall persist. Perhaps copy of

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<sup>10</sup> See eg *Kable v Director of Public Prosecutions (NSW)* (1996) 70 ALJR 814; 138 ALR 577.

<sup>11</sup> G Craven, "The High Court of Australia: A Study in the Abuse of Power", Alfred Deakin Lecture, delivered at the University of Melbourne on 9 October 1997.

this book should be sent with compliments to the Notre Dame University Library.

When the criticisms of the Court, whether by Professor Craven or anyone else, become strident, it is appropriate to remember Lionel Murphy's address to the National Press Club recorded in Jenny Hocking's book<sup>12</sup>. This is what he said:

"The High Court is after all seven men appointed by governments, largely an elite, exercising a very great influence on Australian society. It is of the utmost importance that their decisions should be subjected to analysis and criticism by academics, parliamentarians, the public and the press ...

The judicial process including its law making has become more and more remote from the public by use of outmoded language, outmoded dress and outmoded ideas, as well as by the lack of publicity of the decisions of the courts. ... The social function of the Judges needs to be understood, studied, criticised and improved. A great responsibility is on the press of Australia to inform the public of what is being done in the courts, by what kind of people it is being done, why it is being done and whether it is being done justly."

Murphy's opinion about public criticism and commentary reflects, I think, that of most judges today. The lament is that the commentary on the courts and their doings is all too often trivial and uninformed or highly personal and motivated by short-term

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<sup>12</sup> Quoted in Hocking, above n 4 at 267-268.

political perspectives. Lionel Murphy was no stranger to these forces. Yet he embraced, and appealed for, public scrutiny because he believed that with it would eventually come public understanding and pressure of a proper kind for just outcomes.

There is a little quirk in the frontispiece to Jenny Hocking's book. Hidden away among the library cataloguing data (that part of a book frequented only by librarians, Mr Whitlam and High Court judges) there is the inscription "Murphy, Lionel 1922- ...". At first I thought that this might have been a mistake. An oversight of Lionel Murphy's death in 1986, so faithfully recorded in the book. But then it occurred to me that perhaps Jenny Hocking was trying to say that Lionel Murphy is still alive. Physically he is not. His physical form, so unforgettable, restless, energetic, striving, has gone forever. But his words are there in the parliamentary debates and in the *Commonwealth Law Reports*. His works and institutions are in the statutes of our Commonwealth. His mistakes are writ large and never forgotten by his critics. His enormous achievements are now recorded by Jenny Hocking. As a citizen in a fair land which is much the better for the life of Lionel Murphy, I welcome this illuminating biography. I congratulate the author and the publishers. I have great pleasure in being involved in this Sydney launch. I hope especially that young lawyers and young citizens, (full of bright hopes and restless optimism) will read and understand.

Ask yourselves why there are so many books written about Lionel Murphy, his life and works, and so few about the other forty Justices who have sat this century on the High Court of Australia? Even Barwick has had only two books - one by David Marr, which he hated, and *Radical Tory*, which he wrote himself shortly before his death. We still await a definitive biography of the great Chief Justice Dixon. Other important Judges, with interesting and varied lives, like Sir Victor Windeyer, have passed without the analysis they merited. Yet Lionel Murphy continues to exert fascination and to call forth books that tell of his colourful life and large achievements. The reason, I think, is that his spirit was one that demonstrated a quality of love for fellow human beings, an abiding concern for the under-privileged and disadvantaged, and a determination to turn high legal training into progressive action. It is to these many achievements that we who welcome this book respond with an answering love, with gratitude and with a sense of encouragement.