

Preface

I was once, by happenstance, the observer of a significant moment in Australian legal history. I was taking morning tea with Michael Kirby, a recent appointment to the Australian Conciliation and Arbitration Commission, in some anonymous Commonwealth office block in Sydney, when the telephone rang. "It's the Attorney," said Michael, looking shaken. "He says we should join him upstairs - he wants me to chair the Australian Law Reform Commission." Lionel Murphy knew unerringly what was best for Australia (if not always for himself): he greeted us with a lop-sided grin and a bottle of champagne. Michael's demurrers (he thought he should stay longer at the Commission, and he was only 35) were interrupted by the Attorney-General's toast: "To Justice Kirby - your first step to the High Court bench."

That was 1974, and however much water has flowed under the Harbour Bridge since, there was always an historical inevitability that Lionel's toast would one day ring true. Legal appointments in Australia are often a matter of luck: you are in the right place at the right time when your political or personal star-sign comes into alignment. In the regrettable absence (Federally and in all States) of a proper and impartial judicial appointments commission, a few potentially great judges wither on the vine (or at the Bar) while some mediocrities are preferred beyond their merits. But there is no appointments system yet devised which could keep Michael Kirby from the highest court: his infant words were, I am sure, uttered judiciously, and his first steps taken in a measured and dignified stride.

It is easy to poke fun at serious and solemn people: at Sydney University in the sixties I observed Michael Kirby at work, obsessively protecting the rights of those who would have been first to take the mickey out of him and his profession. As "student solicitor," his defence of Bob Ellis ("The best burglars burgle naked") has gone down in literature, and his work in the "Tharunka" and "Oz" cases helped to change our repressive obscenity laws. As a leading light for civil liberties, he was a friend indeed to the many anti-Vietnam and anti-apartheid protesters, to aborigines and underdogs who came before Sydney's irascible magistrates, several of whom were corrupt while two were certifiably insane. What I observed (and as President of the Students' Representative Council I would burden him with many clients) was his utter devotion to them, eighteen hours a day and invariably for free. His commitment and self-sacrifice made him almost too daunting to serve as a role model, but it was so conspicuous that nobody, in those otherwise irreverent days, made lawyer jokes.

It was unusual to have as a judge someone who had cut his legal teeth on civil liberties causes, and who had acted so frequently for the poor and oppressed. It was Lionel Murphy's genius to provide for the further education of young Michael by placing him at the helm of law reform. This was long overdue, for the common law - largely inherited from Britain - was not only unsuited in some cases to Australian needs, but was internally deficient (as Britain's great Lord Chancellor, Gerald Gardiner, had recognised a decade before by establishing a Law Reform Commission under the far-sighted guidance of Lord Scarman). Michael took the English model and improved upon it - most notably by involving the people in its business through public hearings

and by presenting the issues to them in lectures and newspaper articles. Many of the essays in this book owe their inspiration, and certainly their depth, to Michael Kirby's law reform period (he chaired the Commission from 1975 to 1984), during which he dragged a lot of Australian law into the late twentieth century. The experience has fitted him uniquely for the task of nurturing and fertilising that constitutional garden which we leave in the care of the High Court of Australia.

The other extraordinary aspect of Michael's career which finds reflection in this book is his contribution to the development of international Human Rights law. He is the best known Australian lawyer outside Australia, through his Presidency of the International Commission of Jurists and his service to OECDCO committees on data protection, the UNESCO work on the Human Genome Project and as UN Special Representative in Cambodia. What he has strived to achieve in fashioning Australian law, he has managed in some respects to repeat for a global community. But for all the revolution in communications brought about by the satellite and the fax machine, Australians who conquer the tyranny of distance must do so at severe personal cost. Those endless flights from Sydney for a lecture in London or a meeting in Geneva, often economy class (and always catching the tube rather than a taxi from Heathrow) must take their human toll, on a man who has been tireless in the work of building a better world.

Robin Cooke provides an illuminating introduction to Kirby the judge. It seems to me that the business of judging, at appellate level, has changed quite significantly in recent years, certainly in terms of public expectations. No longer is it a privilege; it is a public

position serving a democracy. It is not therefore enough to be a good lawyer (although that is a necessary condition): there must also be a fairly deft grasp of human rights principles, of the requirement of 'fairness' in all things, and a street-wisdom which will not be learned from textbooks or law reports. It is more difficult in Australia, lacking a Bill of Rights and with politicians who cynically seek publicity by knocking the judiciary. The American people are mostly proud of judicial activism, in defence of first principles which are valued because they once had to fight for them. In other countries, too, Supreme Courts are beginning to get the hang of human rights: there is some inspired jurisprudence emerging from South Africa, although from Canada (Bertha Wilson excepted) we still get wishy-washy judgements of interminable length. What the House of Lords will make of Britain's new Bill of Rights remains to be seen (Robin Cooke's presence there affords some reassurance). The Australian High Court has had to "imply" fundamental rights into the Australian Constitution, an anachronistic and uninspiring document: we should be proud of Federation, but ashamed at the political laziness which has left its original blueprint largely unaltered.

Hopefully, the recent Republican interest in the Constitution will bring some popular understanding of the importance of incorporating a Bill of Rights. Then, our High Court will compete for a gold medal in jurisprudence with the top courts of other countries. These essays show how well-equipped Justice Kirby is for the task of building on the recent work of Justices Mason, Deane and Gaudron, once he gets into his judicial stride. With slightly shorter steps, preferably: am I imagining it, or have the ALJ High Court reports doubled in length since his accession to its bench?

My only regret about this book is that it is not accompanied by a C.D. of the author performing 'live'. These are the occasions when the wisdom in his words is audible, almost tangible, in the controlled passion of his utterance, leavened with topical (but invariably polite) jokes and snatches of poetry. The packed audience in St-Martin-in-the-Fields church, London, on World Aids Day 1995, will never forget his delivery from the pulpit, not of a sermon but of a charter for compassionate law reform. Where doctors have failed to relieve suffering, Michael Kirby has shown that law really can be of help. He shows this time and again in the chapters of a book which makes you proud to be a lawyer, or - if you aren't - might at least make you keen to become one, like its author.

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