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JOHN JEFFERSON BRAY: A BIOGRAPHY
BY DR JOHN EMERSON

FOREWORD

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John Jefferson Bray served with distinction as Chief Justice of the Supreme Court of South Australia from 1967 to 1978 and as Chancellor of the University of Adelaide from 1968 to 1983. He derived from a distinguished colonial family. He was educated in expensive boarding schools. He won a rare doctorate of laws degree for research on aspects of insolvency and private international law. He took silk at an appropriate age. He appeared in lots of important cases, including in the High Court of Australia. For a time he served as deputy to the Lieutenant Governor of his State. On the face of things, the reader might think that someone who had followed this golden path to high judicial office and public service would be worthy; but unlikely to have lived a life that would set the pulse racing.

However, as John Emerson's new biography shows, Bray, whilst being an outstanding lawyer and judge, was anything but a stereotype. Especially in his time and place, South Australia in the second half of the twentieth century, Bray was unique: a one off. The central interest of this biography lies in unravelling the puzzle of how such a gifted legal scholar, advocate and judge could, at the same time, live a life that so outraged the orthodox expectations that ascended upon him. And how

* Justice of the High Court of Australia (1996-2009); Chair of the United Nations Commission of Inquiry on North Korea (2013-14).

he managed to remain steadfastly himself, despite the pressures imposed to conform to the contemporary standards of his class, profession and high offices.

Let there be no doubt that Bray was an exceptionally gifted lawyer and jurist. His LLD, like that of H.V. Evatt earlier in Sydney, was not honorary. It was earned by an outstanding, highly technical, thesis that, ironically, he was never once to utilize in his profession work. He had performed extremely well at school, particularly in studies that suggested that he was destined for the law: top in Scripture, third in English and in history. Although never a florid advocate or colourful courtroom personality, his sheer intellectual brilliance soon won him the top accolades at the Bar. He was appointed Queen's Counsel in 1957. He appeared in dramatic circumstances for the young Rupert Murdoch. This book gives examples of the ingenious legal arguments that he advanced for his clients, often with success.

It was when the new and reforming Premier of South Australia, Don Dunstan, unexpectedly appointed Bray as Chief Justice of the State that his mastery of the principles of the common law and his gifts of expression came to be recognised not only at home, but in judicial decisions in other States and eventually in the High Court of Australia and courts overseas. In 1997, after Bray's death in June 1995, I wrote a chapter for a book honouring him. I collected, and illustrated with many decisions, cases in which resort was made to his reasoning, simply because he was recognised as a great judge.¹

¹ M.D. Kirby, "Bray's Impact on Australia's Jurisprudence" in Wilfrid Prest (ed), *Portrait of John Bray* (Wakefield Press, Adelaide, 1997) 96-97.

Our legal system celebrates and utilises the writings of fine judicial minds. Bray was respected, I also suggested then, because of ‘the catholicity of his knowledge of the law’; because of the presence of a ‘powerful grasp of basic common law principles’ and because of his utilisation of ‘legal history, the wide spectrum of his learning and the power of his inquisitive intellect’. Yet I suggested, then, that a second quality helped to explain the influence of Bray’s judicial writings, both in the High Court of Australia and elsewhere. This was his love of words. ‘Some people’, I concluded, ‘have the power to express themselves in vivid word pictures... Only a small proportion of them are lawyers. But when to discontent with verbal formulae alone is added a very considerable power in the use of language, you have a judicial writer of rare talent. Such was Bray’.

Now, with this biography, there is evidence, far beyond the instances I deployed, to support my assessment written nearly 20 years ago. Bray delighted in language. He would probably have preferred to have been remembered as a poet and playwright rather than as a judge. In his judicial reasoning (sometimes in dissent) he could put things vividly and with unusual style. A lot of judicial writing is dense and impenetrable. This biography celebrates the life of a legal writer who did not think judicial writing had to be boring and unintelligible in order to be orthodox.

In my earlier reflection on Bray’s life, I recalled the last time I had seen him. It was in March 1993. A federal election was underway. Unexpectedly, it delivered the treasury benches of the Commonwealth once again to the outgoing government of Paul Keating, whom the pundits had predicted would lose. Bray and I had been invited to an

event in Adelaide, attended mostly by lawyers, examining Mr Keating's proposal that Australia should become a republic.²

Neither Bray nor I were fervent tabloid monarchists. Neither of us was attracted much to the hereditary principle, primogeniture or social rank as destiny. Yet we both saw certain advantages in retention of the Crown in the Australian Constitution. We felt that it should certainly have a voice before any final decision was made. As in many things, we saw eye to eye. In the event, in 1999, four years after Bray's death, a majority of the Australian electors, voting at referendum, thought likewise. The total vote in favour of the referendum proposal was 44.74% and that against was 54.40%. The republic was not carried nationally or in any State. The vote in South Australia against change was 55.92%.³

So far, I have indicated the features of this biography that would appear to promise a worthy but not especially exciting read. Yet the great advantage of Dr Emerson's work is that it reveals how, under the raiments of lecturer, Queen's Counsel, Chief Justice and University Chancellor, the person that was John Bray challenged elements in his society in a way that almost resulted in his destruction. Certainly, he was nearly passed over for the high offices that he so brilliantly fulfilled. He had many powerful enemies.

Bray had attributes that stopped conventional power-brokers in Adelaide and South Australia, in their tracks. He was a lifelong bachelor. This station in life was repeatedly raised against him. Later it was revealed

² The paper read on that occasion was M.D. Kirby, "Australia's Monarchy" in G. Grainger and J. Jones (eds), *The Australian Constitutional Monarchy*, ACM, Sydney, 1994, 87.

³ M.D. Kirby, "The Australian Referendum on a Republic – Ten Lessons" (2000) 46 *Australian Journal of Politics and History*, 510 at 528

that he had acknowledged the paternity of a child of a suggested youthful sexual indiscretion. But he rebuffed at least two serious approaches by women whom he had attracted, proposing marriage to him. And his unmarried status compounded rumours as to his sexuality that came to circulate. These rumours led to his close surveillance by police, continuing even when he was chief justice.

Then there was his unseemly 'lifestyle'. He distained official cars. He walked to work or caught public transport. This would never do. He refused to abandon visits to familiar pubs and drinking spots, where he had long mixed with friends, poets and people of the arts. Shocking. His "over-exalted view of bohemianism". Outrageous. He made no bones about his opposition to the prudish culture of censorship in his day that permeated Australian society. He questioned the enforcement of morals by the courts of law, particularly in things sexual. Stubbornly, unlike other judges, he would not even wear a hat. Little wonder that he was blackballed by the Adelaide Club and denounced by a drunken guest there, when he made one of his rare visits to that hallowed place.

Future generations will look with astonishment at the long-standing, prurient interest displayed in the minor question of whether Chief Justice Bray, in his private moments, was homosexual or had engaged in homosexual acts. Certainly, many of his friends were homosexual. Several of them tried to defend Bray, their friend, from scandal. One at least (Christopher Pearson) later claimed to have been his lover. Others accompanied him overseas, including to well-known gay venues. Many acquaintances assumed that he was gay and wrote to him on that assumption but were set aback by his discouraging replies.

It will be hard for future generations of Australians to recapture the hatred and animosity targeted at homosexuals at the time that Bray and his friends were living and working in Playford's South Australia. At that time, it would have been unsurprising that a person, of even modest talent and ambition, would deny their own sexual reality, if they were homosexual. People had been doing this for millennia; and still do so in many parts of our world. So Bray's reticence would be no surprise, whatever his orientation might be.

In one letter quoted in this book, Bray admits to enjoying the company of a male correspondent 'in and out of bed'. But he declares that 'romantic sexual attachments are no part of my plan of life'.

Bray may have been homosexual, bisexual, omnisexual or heterosexual in his orientation. His actual sexual life appears to have been very limited indeed: especially by today's standards. All of which would be uninteresting and immaterial to his talents but for the gross abuse of public power that the rumours called forth from police, legal and other authorities. It finally took an inquiry by Acting Justice White and a Royal Commission by Justice Roma Mitchell (both of the Supreme Court of South Australia) to demonstrate the monstrous lack of balance and proportion that subjected citizens high and low to police surveillance and intrusions into their adult, consensual, private lives. Bray suffered such wrongs with astonishing forbearance. Today's generation would be likely to be less forgiving.

This, then, is the ultimate fascination of the dichotomy at the heart of the life of John Jefferson Bray. It gives us a glimpse into the character of Australia's society and institutions, a mere 50 years ago. It illustrates

the serious over-reach of official power and its resistance, to the last, to dignity-respecting control over that power. The abuse of power, recorded in those pages, stands as a warning to us. It shows that no one is immune from such outrageous wrongs. Not even a gifted chief justice. Still less a fine poet. Even less the idiosyncratic and singular friend of liberty who was John Bray.

Michael Kirby

Sydney

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