

Australians Speak Out

Persuasive Language Styles

Rodney G. Miller



15: Reform Advocacy of Michael Kirby

*'...we should show Lalor's resolution to reform the law
to meet the requirements of our new, diverse,
more interesting and multi-cultural community'.⁶⁰⁴*

– Michael Kirby

Evident throughout Michael Kirby's voluminous public speeches and writing⁶⁰⁵ are many thoughtfully creative approaches to engage with people's minds and hearts. Kirby served from 1996 to 2009 as a Justice of the High Court of Australia and then remained active as a jurist and academic, with some key contributions in international law.

His communications demonstrate a commitment to justice and fairness through law reform that required uncommon clarity of thinking, along with a developed ability to show how the substantive and procedural aspects of the law affect people. Kirby's versatility and range as a public communicator to encourage listeners to focus on what matters is a continuous thread in his advocacy of law reform.

In 2016, when reviewing *Academic and Institutional Law Reform in Australia: Past, Passing and To Come*, he remarked that:

...if a systems and management expert were to assess the Australian constitutional system as it presently operates, they would be horrified by its inadequacy and indifference to orderly law reform.⁶⁰⁶

He concluded his detailed review of the status of this field by urging:

The voice of persuasion should be heard in the land. Until, in due course, the hostile forces are once again overcome and the optimism and idealism about systematic law reform in Australia is rekindled in a new generation of lawyers and citizens alike.⁶⁰⁷

Through the advancement of law reform, Kirby determined to make the world a better place, living and advocating the principle, ‘Never give up, never give up, never give up’.⁶⁰⁸

New Perspectives

He commonly invited listeners to accept new ways of looking at circumstances by assembling a sequence of briefly stated facts, ideas, or opinions that clarified circumstances. Through insights or assumptions in what he outlined, he thereby encouraged listeners to reach a different view from currently held beliefs. Kirby often used the type of polemic that Dascal described as *controversy*, which is between the other types of polemic of *discussion* and *dispute*. *Controversy* is used to persuade, by seeking resolution of competing positions through persuasion based on the weight of evidence, to find modified positions that might prove acceptable.⁶⁰⁹

On different occasions, Kirby used *discussion* polemic also, alone or in concert with *controversy*. This was so when he hosted the United States Justice, Antonin Scalia with a judicial group in Australia.⁶¹⁰ While welcoming Scalia and observing appropriate courtesies and formalities for such a visit, he invited Scalia through a problem-solving approach to acknowledge mistakes. Kirby pointed out that ‘originalist’ thinkers, such as Scalia, had not recognised the expressed original intention of the founders of the United States who developed its constitution. He shared suggestions from the founders that the document would need to be interpreted, adjusted, or changed to accommodate unforeseen or unforeseeable circumstances.

In this speech, too, Kirby outlined a case for United States judiciary to make use of the intelligence and experience of justices in other countries within the established terms of comparative law, concluding:

This is why an Australian lawyer will reject the ‘original intention’ notion of constitutional interpretation advocated by Justice Scalia and why Australian

law will not deny, but will acknowledge, the utility of international and transnational law. It is not ‘precedent.’ But, by analogy, it may sometimes be useful to our reasoning and helpful to our law.⁶¹¹

Kirby’s speeches and writing show his commitment to the combined power of facts, ideas, and opinions that unfold as reasoned and emotional evidence.

He sustained discussion through conventional, declarative, mainly simply structured sentences, packed with novel information or new ways of viewing matters. He showed a readiness to emphasise points using interpolation, or short sentences, or short breath groups, sometimes as brief as one or a few words.

Coherent Humour

Kirby often invited an audience to reconsider beliefs within a framework of human decency, sometimes drawing on his sense of humour. He showed a developed ability to use humour in speeches, well beyond the ability of many other public figures, as briefly described in Chapter Five. His use of humour is varied in type and purpose.

Unsurprisingly, he did not appear to use the favoured barbs of politicians, who will make a quick reply to mock someone, or cause injury to another, or seek to divert attention from their own actions. Rather, Kirby’s inclination to humour in his speeches took shape as a form of *meiosis*, sometimes euphemistically describing his own profession and by extension himself, as evident here highlighting Australia’s origins as a penal colony:

My only claim to address you today is one of historical title. In a sense, I am the descendant of a singular group of elderly gentlemen who played a vital part in populating Australia in its earliest years. I refer to the Judges of England.⁶¹²

Later in the same speech, following amusing well-known quips, such as ‘The French poet Paul Valery says that the future is not what it used to be’, he shared an incongruous coincidence of history to make a serious point:

When the First Fleet entered Botany Bay, they were not two days before the first perceived overseas threat to the infant colony arose. It did so in the form of French vessels under the command of Captain de la Perouse... The real challenge soon proved to be from within: from a hostile continent and the need to develop it.⁶¹³

Kirby could also make light on a serious point about his own commission, such as in an interview on the radio with John Laws. When Laws asked him to explain why he called his seven years as Chairman of the Australian Law Reform Commission ‘the lean years’, Kirby replied:

Well I think reforming the law is a difficult task, the law inevitably tends to get out of date and trying to drag it into the 20th century before the 20th century is over is not an easy task.⁶¹⁴

When seconding a toast moved by the State's Premier for his friend Sir Asher Joel's 80th birthday, Kirby lightly made a point about getting facts right. He described how an oversight in a *Who's Who* supplement caused him to write as Chancellor of Macquarie University to the 'widow' of a distinguished parliamentarian who had served for many years on the University Council. Accordingly, a few days later to his surprise he received a response from her to the effect:

Somehow a rumour has spread about my husband's untimely death... I am pleased to tell you that my husband is very much alive. In fact, he is sitting here with me, still opening letters of condolence. We will put your letter aside and accept it contingently—to be brought out on a future date: hopefully far away. Please believe me that we both appreciated the generosity of your sentiments—though not as much as their prematurity!⁶¹⁵

After relating this personal story, Kirby sustained his speech to honour Joel by sharing personal reflections on Joel's public and private kindness and thoughtfulness.

Visual Language

In a variety of ways, Kirby's communications show his ability to integrate visualisations of people and circumstance to advance or to emphasise the significance of a matter. He deftly recollected a vivid childhood memory during World War II, when at six years of age, he was 'commandeered' with other school children to line the street and wave a flag to honour the visit of a remarkable woman, Eleanor Roosevelt. He recalled this childhood experience to remind of her powerful role to spearhead the passage of the Universal Declaration of Human Rights (UDHR):

These high aspirations were probably going through the mind of Eleanor Roosevelt, that great champion of humanity and human dignity, as her car approached Concord in Sydney, Australia in 1944. The young school children waved to her. Even they knew that she was an important messenger that the future need not be like the past. And it was a duty of new generations to make it so.⁶¹⁶

The conclusion of this description with the imperative 'make it so' was interestingly emphatic, not only in its message but also in its resonance. Within long cultural assumptions, the phrase has connotations of authority in the military, from association with one of the most definitive orders that draws on a

ship captain's authority, having a long history in the Royal Navy. The phrase has also mustered some additional popular authority since 1987 as a favoured command of the captain of the iconic starship *Enterprise*, in the televised Next Generation version of *Star Trek* the popular culture phenomenon.

In 2015, for an Op-Ed in the *Sydney Morning Herald*, Kirby recounted his student days in the 1960s to reflect on his *alma mater's* finally welcoming 'gay' and 'queer' students. The Op-Ed began:

What would Sydney University's long-time, and formidable, Registrar (1955-1967) Miss Margaret Telfer, make of an occasion celebrating 'gay' and 'queer' students arriving in droves at the University of Sydney? Of the Chancellor and Vice-Chancellor actually welcoming them in the hallowed precincts of the Great Hall? And that strange rainbow flag floating above the clock tower in the quadrangle? 'Has the world been turned on its head, Sir Stephen?' she would no doubt ask Sir Stephen Roberts the University's grumpy Vice-Chancellor.⁶¹⁷

He followed the imagined reactions of these university leaders with perspective on the rhetorical questions:

We are now affirming the fact that the world has moved on, at least in Australia. We now know that homosexual, bisexual, transsexual and intersex people are part of the scientific reality. Pretending that they are not (and demanding that they should also pretend) is a game that is over... This leap took a long time coming. But at last, the nation's oldest university has accepted and even welcomed the truth about this matter. Gay people are everywhere. Get over it.⁶¹⁸

Kirby's Op-Ed recalled and parodied the stance and behaviours of a long-endured pretence that harmed 'gay' and 'queer' people and then recounted the different reality that now pertained.

Personal Ethos

For the very different genre of a eulogy for his former senior colleague at the bar and State Premier, Neville Wran, with apt sense of occasion Kirby said:

In his sense of personal reserve, energetic labour and cautious reform, Neville Wran held up a mirror to some core features of Australian society. That is why he was so successful in public life. We saw in the mirror talents that most of us aspired to in ourselves. Most liked what we saw. His comet has run its course. But the dazzling tail of bright light will last long hereafter.⁶¹⁹

Kirby has sustained a developed capacity for appropriate imagery, particularly by drawing on metaphors that dignify and celebrate the best in people and in humanity.

In 2016, for a speech in memory of the portrait artist Judy Cassab AO CBE, he was asked to keep the speech brief, so he first shared a vignette that reimagined an exchange reflecting this request. He then said:

And so, craving your indulgence and supplementation by memory and imagination, I offer a pen portrait of Judy Cassab. I will try to do it, as the Lord Protector Oliver Cromwell once commanded, ‘with warts and all’. And I will offer it in the impressionistic style. It will be no more than a stringbag of adjectives that come flooding into our minds when we think of Judy Cassab. She was one of Australia’s greatest artists—a mighty portraitist. Winner of this and that. But I want to speak of Judy the person. Judy the refugee. The mother. The human being.⁶²⁰

Accordingly, he crafted a word-portrait of the artist’s qualities, interwoven with adjectives as the lens through which to view her life fondly:

...joyful... Eyes and heart were smiling... professional... organised... disciplined... worried about faults of omission... concentration and devotion to the task were formidable... surprising... smart and determined... adaptable... proud... praise rained gently down on her... formal... inspirational... calm, self-contained and open to new ideas and challenges... Like the art of our beloved Aboriginal artists... Those who are looking at ... [your portrait] ... will join the dots together in their own minds... God will add the magic... God will be kind.⁶²¹

In the spirit of an observed wisdom, that words chosen to describe another often tell as much about the person choosing the words as the person described, these adjectives captured some of Kirby’s own qualities and capabilities so evident in his public address.

Values, Needs, and Priority

Likewise, for a nation, words in the public sphere tell much about the values, needs, and priorities of its people. As Chairman of the Law Reform Commission in 1980, Kirby reviewed historical situations to propose some areas of the Australian law requiring remedy, in a speech titled *The Australian Community and Anti-heroes*.⁶²² This was the Lalor Community Relations Address in Canberra, for which a notable speaker is invited annually to commemorate the significance of Peter Lalor and the Eureka Stockade in Australia’s history. Kirby built the metaphor of the anti-hero that served to animate⁶²³ some human qualities needed to reform the law, concurrently illustrating the multicultural character of Australia from colonial days.

In 1980, while the foment and reexamination of cultural assumptions brought to some focus through the policy reforms of the Whitlam Governments of the

early 1970s were continuing, Kirby began his Lalor Community Relations Address:

Foreign observers and newcomers to Australia must find some of our objects of national pride and celebration curious, to say the least.

We commemorate the modern history, in the knowledge that it began very largely by accident and as a direct outgrowth of Britain's loss of the penal colonies in America, following the American Revolution. Our colonial history started with nothing more than the establishment of a prison colony. The rough early settlers showed little tolerance and less respect for the Indigenous people of the continent, who had lived thousands of years in harmony with its special environment.⁶²⁴

He invited listeners to see their nation as others might see it, foreshadowing a framework to view both our nation's history and its future differently from conventional views. Kirby had set his purpose with a pattern of contrast and contradiction, to encourage a fresh look at history and the future.

Discursive Controversy

From the outset in this address, Kirby readily embraced controversy in a discursive mode. Evident were his versatility, creativity, and sense of humour, deployed to invite listeners to think afresh about laws to ensure justice and fairness. Through *discussion* polemic, he effectively described historical events to point toward changes needed to avoid mistakes in the future.

This constituted an effort to seek the truth through consideration of issues in Australia's problematic past, which included preoccupation with anti-heroes. Kirby incorporated and examined a range of nationally symbolic events, swiftly reassessing how to view them. He established a deliberative stance to assemble the weight of a case for persuading listeners of the need for ongoing law reform, which would accommodate human dignity within the needs of a multicultural nation:

So here we have it. A country began as a prison, over long contemptuous of people here thousands of years before, celebrating a pathetically unsuccessful and short-lived revolt, idolising a 'desperado', annually commemorating a failed military enterprise and dealing out a generally poor hand to many of its leaders: all to the tune of 'Waltzing Matilda:' a stirring song which itself condemns lawful authority. Do we have here a contra-suggestible nation of anti-heroes? Is it all as simple as this?⁶²⁵

In his brief individualistic review to focus Australia's self-perception of national values, heroes, and priorities, Kirby set the stage to recommend a reassessment of some of the nation's laws through the remainder of the speech.

He risked sharing a new way for us to view ourselves by highlighting concepts, emotions, and priorities, to open an audience's eyes and hearts. From this, Kirby outlined needed efforts in law reform to ensure that the law respected human values, to accommodate changes in circumstances or the ethnicity of citizens.

His language was direct, focused tangibly through proper names and recollected scenes, in shorter-than-average, mainly simple sentences, compared with 600-word passages of others noted in Appendix Two. Nonetheless, he used more than double the average number of past tense verbs and passive voice. This distanced material and helped to cast Kirby as an historical or neutral commentator. As he qualified matters, Kirby was inclined to use pairs, that is, two grammatical items together, such as two nouns or two adjectives together. With limited *anaphora*, namely the repeat of the same word at the beginning of successive grammatical units, and little other parallelism or use of compound clauses, he appeared simply to outline matters, while relying on contrasts and comparison to articulate a reevaluation of facts and opinions.

Historical Contrasts

Kirby used the formal vocabulary characteristic of historical review, 'objects of national pride and celebration', which was immediately and carefully evaluated as 'curious, to say the least', thereby establishing an overall pattern in the speech. The pattern was to follow up statements of shared understanding with contrast, antithesis, or contradiction, often at the emphatic end point of the sentence or passage.⁶²⁶ He commented about the stimulus for the annual address:

The Eureka Stockade in 1854 is celebrated. Yet this is a tale of a group of gold diggers who defied the legislative authority of government. *They broke the law...*⁶²⁷ [*my italics*]

which is followed with graphic, brief observations to recall and then reassess the event:

The leaders of the rising were tried for treason, though even in this there was an element of fiasco *as each accused was acquitted*.⁶²⁸ [*my italics*]

Again and again, in his quick succession of sub-narratives, Kirby stated a shared understanding, then outlined facts and observed contrasts to encourage reconsideration:

...In the very month of the Stockade, there was born the archetypal Australian anti-hero, Ned Kelly... *guilty* of the murder of three policemen and other innocent civilians. Yet *Ned Kelly* is *celebrated* today and *the judge* who tried him is *burnt in effigy* in Melbourne streets.⁶²⁹ [*my italics*]

Or further:

...at Gallipoli, showing... courage... fought bravely, *but unsuccessfully*...⁶³⁰ [*my italics*]

Then he interspersed a personal note of seeing this significant site of Xerxes's historic crossing of the Hellespont, to state an historical opinion that:

We celebrate Anzac because it was the first great battle, after our country was united in Federation, in which the spirit of its soldiers was tested.⁶³¹

A first impression from the opening of the speech was to expect a fresh view of well-known historical events.

Tangible Description

The descriptions in this opening included the settlement of Australia, events at Eureka, Ned Kelly's exploits and perception in popular thinking, and Gallipoli, along with the remembered failures and frustrations of prime ministers. Each was sketched using concrete nouns, including proper nouns (*observers, accident, settlers, prison, people, diggers, stockade, soldiers, rebel flag, Australia, Britain, America, American Revolution, Eureka Stockade, Queen's troops*). From the outset, many largely evaluative nouns that lack concrete referents also occurred (*pride, celebration, nothing, knowledge, outgrowth, loss, establishment, tolerance, respect, harmony*), which underscored the evaluative nature of his historical narrative.

Sentence lengths in the opening 600-words of the speech ranged from 37 words to just three, with eleven of the 35 sentences or short breath groups at twelve words or less—notably below a generally preferred average sentence length of 20 words. These contributed to Kirby's own short average sentence length of 18 words in this opening passage. The shortest sentences often highlighted key facts for emphasis, and, in the passage below, were combined with *anaphora* of 'they' that provided further emphasis. This also distanced 'them' (the anti-heroes) as 'others', through the repetition of this third-person plural pronoun:

They broke the law. *They* refused to pay taxes. *They* hoisted a rebel flag over a stockade. *They* resisted, with arms, a body of the Queen's troops sent by the lawful government. *They* were defeated in the assault. In fact it was all over in a matter of minutes.⁶³²

Kirby later in the speech described additional interpretations of the nation's search for heroes, including in the more contemporary events surrounding the dismissal of prime minister Whitlam in 1975.

Then he summarised these opening descriptions, to follow with a detailed outline of 'The Facts of Eureka' and a variety of interpretations of the event. He related that:

When Labor and Liberal politicians agree that this was an event important for Australia's national identity, democratic aspirations and resistance to unfair authority, we can safely assume that Eureka is a national and in no way a class, sectional or partisan event.⁶³³

This permitted further connection of his interpretation of the event as significant to the Australian legal system. He identified that '...one of the causes for which they [at Eureka] died was reform of bad, out-dated laws'. This led to Kirby's overtly drawing on the popular authority of the colonial poet, Henry Lawson 'Reform your rotten law, the diggers' wrongs make right...'⁶³⁴

Pathways from the Past

Accordingly, through an accumulation of emotional 'precedent' in Australia's history to support law reform, further supported in the iconic poet's words, Kirby had developed a platform for the remainder of the speech. He thereby accentuated the practical need for law reform to meet the needs of the increased number of migrants from a variety of ethnic origins in the community. He illustrated how details in the specific circumstances of migrants necessitated reforms of the law, to ensure justice for multicultural groups within the community. This constituted an artful and fresh approach to bring the emotional 'evidence' of deeply felt history, buttressed with popular literary support, to recommend a case for law reform that seriously considered the needs of migrant communities.

By assembling a combination of narrated facts interspersed with evaluation, Kirby revealed the harm to migrants' lives. He immediately interpreted and explained these specific cases to draw conclusions for recommended attention or action:

The distress experienced by women in illegal migrant situations, where there is family breakdown, violence or abuse is even more acute. These women are a silent group who through fear and sometimes through ignorance are unable to go to recognised authorities for protection and guidance. They are susceptible to blackmail, including from amongst their own number. It is for that reason that amnesties may be specially desirable to remove the causes of such injustice.⁶³⁵

This inductive assembly of facts, leading to a reasoned conclusion, was made more powerful by the understated nature of 'may' and 'desirable' in the recommendation, and supported by the pointed 'specially' to amplify the desirability of amnesties.

Reassessing Laws

Building a perspective for viewing historical and contemporary Australia, the entire speech was structured to focus on encouraging the reassessment of law. After outlining an Australian history of unrest and harm, conceded as important for Australian national identity through the enshrined democratic aspirations and resistance to unfair authority, Kirby also used this narrative to advocate the value of law reform to get ahead of any future harmful outcomes. He turned to self-reference, of why he, a judge, might be chosen for this address that commemorated law breakers, to pivot to motivating listeners, with a specific charge to the lawyers present to take action.

In a multicultural Australia, he noted that beyond legal procedures some substantive change to criminal law might also be needed. He concluded by neatly wrapping together as a cohesive narrative the continuity and value of sustained law reform. By focusing on the rebellion of Peter Lalor, who himself later served as a legislator in the Victorian state parliament, Kirby refreshed a reminder of the need to find ways less dangerous to individuals to reform the law, to meet the contemporary and future needs of a changing Australian society.

In closing, Kirby firmly advocated such reassessment, here using *anaphora*, pairs, and some of the few collective first-person pronouns, ‘our, we’, to help emphasise areas for us to commit to reasoned personal reexamination of the laws that govern our society:

Since these early days, the role in Australian life of people from countries other than the British Isles has increased apace... *Our* legal system should be sensitive to these changes. *Its* substantive rules, *its* procedures and *its* personnel should come to reflect, by orderly processes of *reform and renewal*, the changes which have taken place. Whilst clinging to the virtues of the legal system *we* have inherited, *we* should show Lalor’s resolution to reform the law to meet the requirements of *our* new, diverse, more interesting and multi-cultural community.⁶³⁶ [*my italics*]

By immediately preceding his conclusion with a direct extended appeal to the legal profession to ‘review our laws and procedures to take account of... changes’, Kirby accentuated key responsibilities for ‘reform and renewal’.

Advancing Justice

Through the development and advocacy of what he considered was truly important, Kirby honed a compelling language style to advance justice. Distillation of his power and personal approach were evident in a speech at the Charles Darwin University in the Northern Territory in 2012:

Some may say the media will speak up against such injustice. But the problem with the media is that it is a flighty and fickle champion. Indeed, it is often part of the problem, as the tabloid law and order campaigns against prisoners illustrate. We can do better. Most nations do better. Our record in Australia is not so perfect that we can leave things as they are.⁶³⁷

Kirby's varied speech and writing have continuously advanced his commitment to talk with, rather than speak at his audience. In an ongoing effort to ensure that laws evolve to meet the challenge of a changing society, Kirby has shown clearly both the need and a commitment to 'never give up'.

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Rodney G. Miller founded and for more than a decade edited the *Australian Journal of Communication*, while teaching communication, speech, and writing at Queensland University of Technology (QUT) in Brisbane, Australia. His writing is published by *The Australian* newspaper, The State University of New York Press, other universities, and The Royal Society of Queensland.

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