

3053

LETTER FROM AN AGED JUDGE TO A DISILLUSIONED  
LAWYER

The Hon. Michael Kirby AC CMG

# LETTER FROM AN AGED JUDGE TO A DISILLUSIONED LAWYER\*

The Hon. Michael Kirby AC CMG\*\*

## *LETTER FROM A DISILLUSIONED LAWYER*

“Many years ago, in a speech to the graduating students of Southern Cross University (2007 in a paper entitled ‘*Defining Australian Identity*’), you observed the importance of the name of the law school there, being *The School of Law and Justice*. You noted in your address that “law without justice is an incomplete concept”. These words, and the meaning behind them (as I understand it), have become very significant to me in terms of my own circumstances and, particularly, my own practice of law about which I remain very conflicted and confused.

I very nearly did not renew my practising certificate for this new financial year, but did so at the last moment. My hesitation, no doubt contributed to by COVID-19 and its impacts, stemmed from the fact that I settled upon the view that the practice of law, certainly as I did it, could be viewed as a net draw on society; I took more than I gave, put more bad into the world than good. This was despite the fact that I had deliberately established a

---

\* Based on an exchange of letters in July 2020 between the Hon. Michael Kirby and an anonymous lawyer.

\*\* Former Justice of the High Court of Australia (1996-2009); President of the Court of Appeal of Solomon Islands (1995-6); President of the Court of Appeal of NSW (1984-96); Judge of the Federal Court of Australia (1983-4); Chairman of the Australian Law Reform Commission (1975-83); Deputy President of the Australian Conciliation and Arbitration Commission (1975-84). One time President of the International Commission of Jurists (1995-8) and Co-Chair of the International Bar Association Human Rights Institute (2017-).

commercial law firm with a view to improving access to law and the legal system, did my share of community/pro-bono work, and do some great work for some truly wonderful people (many of whom I am assisting to navigate the challenges of COVID-19). With my firm, I genuinely wanted to change the legal services paradigm, but I know that I completely failed to do so in any meaningful way. Realising these things is hard, mostly on my ego, but it has also left me agitated and more than a bit confused about what I should now do. Perhaps it was wrong of me to renew my practising certificate because my state of mind indicates that I am presently unfit for legal practice. Or perhaps I could add more to society by ceasing legal practice and becoming a gardener, aged care worker, garbage collector or something else with clear and obvious societal benefits, something which meets an ever-present need. If COVID-19 has done anything positive, it has been to shine a light on those essential workers without whom society as we know it would simply just collapse.

Having thought a lot about law and the delivery of legal services, I have come to the view that law and justice must go hand-in-hand, otherwise the practice of law will be contrary to the health and wellbeing of society. Law without justice is mostly destructive, I think. As I recently vented in frustration to the editor of 'Lawyers Weekly' (I did so by way of private email exchange), if traditional law firms are 'broken', as many self-proclaimed 'NewLaw' providers claim as being the case (I once also branded myself as a 'NewLaw' firm), it is not because they are traditional, but rather because they are run as businesses which do not recognise that the inherent function of lawyers/law firms is to enable access to the law and legal systems, so that just outcomes might be realised. It matters not whether the lawyers are

young or old, the technologies they do or don't use, nor really even the fees they charge – these are all peripheral, if at all relevant.

It seems to me that the only legitimate function of law is to enable us, as human beings, to live together in a society. If we could live in harmony without law, and completely trust in reciprocal love and respect for each other, law would be redundant (and probably unwelcome). But of course we do need law. Law provides the framework by which society becomes possible, and a healthy and productive society is a beautiful institution indeed. This doesn't mean, however, that all law and legal actions are used for just outcomes. This seems so self-evident as I write this. So the question then becomes, for me, what business have I in helping others use the law and legal systems for purposes that have no intent of harmony, and take no heed of justice beyond the interests of the person pursuing the legal outcome? As a so-called 'commercial lawyer', can I properly advise a client to compromise a tax debt which cannot (will not) be paid due only to choices/strategy of the taxpayer, to pursue rights under a shareholder agreement which, whilst arguable on the face of the document, are completely contrary to any notion of good faith, or assist a start-up to manufacture a good which, whilst very sleekly marketed and likely to be a commercial success, is almost certainly contrary to the interests of the planet (since much of it will end up in landfill to say nothing of the labour that might be exploited in its production). How am I to be the gate-keeper for such issues, who am I to say what is just or not? That surely is beyond my role as a lawyer for hire and yet, equally, surely I must take responsibility for what I put out into the world, including the actions of others that I enable through my practice of law?

And so I find myself very conflicted. I increasingly know right and wrong, good and bad, and also that these are nuanced concepts (although, I confess, my thoughts on all these things are continuing to develop). But there starts the slippery slope, because we lawyers argue it one way or the other, in the interests of the person who is paying us to do so. We, and I think I am mostly talking about commercial law firms here, use the law to get an outcome with little regard for whether the outcome is just, or good for the wellbeing of society. We exempt ourselves from these considerations (if we even think about them) by saying that the 'legal system' will do its job, and provide the outcome that is ultimately just and right. Where does that approach leave us if we proceed with a course of action knowing, indeed relying on the fact, that those impacted by it do not have the means to engage in a legal dispute? Or, where matters do arrive for judicial determination, the parties are represented by counsel whose skills are so unmatched that one party is far more effective at putting its case than the other? Any sensible person knows that the law is not necessarily the same as justice. I can live with that, I know the law is not perfect and that it is the best system we have, providing the most *opportunity* for just outcomes.

I am sorry – this is all a very long-winded way of asking: in your opinion, do I have the right to decline instructions where I feel that the engagement leads to nothing good, for no opportunity for justice or, perhaps worse, where I am engaged to achieve something which I think is detrimental to society/the environment as a whole? Have I any right to make a call on such things as a lawyer and where I am nonetheless satisfied that there is, technically at least, a proper legal basis? If I were a criminal lawyer, I would think not, all

accused being entitled to a defence. But I am not a criminal lawyer. And I know that, if I decline to act, there are plenty of others who will, so access is not denied. Is this mindset ok, or does it indicate that I am presently unfit to practice – that is my ultimate question I suppose.

Justice Kirby, really, I don't expect a response from you and indeed don't even know if this email will find its way to you. The very act of writing this note brings me some clarity of thought and relief, however momentary it might be. But if you do receive this, and feel so inclined, I would be eternally grateful for a short response from you, as I feel it would help me immensely. For completeness, I am presently minded to put my views into the public domain, perhaps with a letter to the Law Institute Journal or similar, but any views you should offer will remain completely private. Fact is, I just don't know if my thinking is right or not.

With my most sincere regards”

*REPLY FROM A RETIRED JUDGE*

“Thank you for your letter and for writing to me as you have done.

As it happens, last week 3 of my former colleagues on the High Court of Australia (Gleeson, McHugh and Heydon) decided not to renew their practising certificates. I am not sure that any of them had the same doubts about the law, its role and value, that you have expressed. But there departures leave an undoubted gap in the law.

Because the work of lawyers involves the application of law, and sometimes choices between applications that are apparently just or unjust, law as a profession is challenging and (as I think) often very interesting. Even fascinating.

Of course, one gets a different view of the law from the bench of the High Court of Australia or even from the bench of a Court of Appeal or the Federal Court. In that sense, my life has been very privileged. Especially on the High Court, I had constantly to address the issues you have raised. I always sought to find solutions that both complied with the letter of the law and also conformed to an available just outcome to the problem in hand. I acknowledge that a practising lawyer does not necessarily have the same privileges. He or she is often constrained by the letter of the law and cannot see any application that appears to be just or nearly so.

I am sorry that you feel discontented with your present life within the legal profession. On the assumption that you are considerably younger than I or my 3 colleagues above are, I am confident that you made the right decision by renewing your practising certificate and facing up to further time in a commercial practice where you often feel discontented by the personal and societal solutions to problems that you feel professionally bound to advise. I often tell law students that in my experience the best human rights lawyers were commercial or tax lawyers who had disciplined their minds so as to be able to produce many arguable propositions that less well-trained lawyers cannot produce. Ron Castan QC was a prime example. His main practice was in complex tax litigation. Yet it was he who successfully argued *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

Of course, even in unprepossessing circumstances, lawyers and their clients have choices. In my first year as a young solicitor, setting out on my life in legal practice, I had the duty to advise the managing director of an insurance company that his company would be entitled (for nondisclosure of risk, I think it was) to deny indemnity and reject the claim for insurance. The managing director, in the presence of the partner who was supervising my work, responded with words that I have never forgotten. "Thank you, Mr Kirby, for your very careful advice. I accept the accuracy of what you have told us is the law. However, I instruct you to pay the claim. I do not consider that it would be ethically all commercially acceptable to deny indemnity." I was very surprised by these instructions but I did as he had decided. It demonstrated that clients often have ethical choices. Of course, he may have considered that commercially it would be unacceptable to refuse him indemnity for considerations that he knew, and that I did not. However, at the threshold of my career (which then involved a great deal of insurance work that I enjoyed and did well) I confronted the distance that quite often arises between the law and justice. That confrontation continued throughout my career, including in the time that I sat on the High Court of Australia and the Court of Appeal of Solomon Islands: both final national courts.

In the High Court of Australia, I quite frequently had to reach conclusions on my view of the law which affronted my sense of societal or individual justice. A good illustration is *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365. The case involved the interpretation of the *Migration Act* 1958 and the question whether children were within the meaning of the word "person" requiring universal detention



for arriving in Australia without our Visa. The Family Court of Australia, exercising a guardianship jurisdiction, held that it did not. If the Parliament intended to lock up children indefinitely, it had to say that in clear language. But when I examined the language; the 2<sup>nd</sup> reading speech of the Minister; and other admissible material, I was obliged to join the rest of the court in a unanimous decision applying the Act to the children. They were returned from foster care in Adelaide. They and their parents then gave up. They were last seen returning through the Khyber pass to Afghanistan, where they may well have been murdered because they were of a hated minority Islamic community. How did I reconcile this with my ethics? I thought it was at least best that judges should where they had no real choice apply the law. A rule of Law Society is a step forward in human civilisation. If there had been a "leeway of choice " as my old Professor Julius Stone described it, I would have grasped the choice. But I did not feel, with integrity, that I could do so.

There are so many people in Australia today (including refugee applicants) who cannot get skilled lawyers. I know that you may need to make a decent income and may not be in a position to devote your life purely to pro bono work for lawyers, prisoners, Aboriginals or other vulnerable people. However, even if you were to increase the portion of your life which is devoted to pro bono work, I feel sure from what you have written that the ingredients of the pudding would be much more to your liking. Also when I was a young solicitor, my supervising partner encourage me to do pro bono work. His name was Bruce Holcombe. I honour his memory as I now write about him. He had graduated in law with first class honours. Most of his work was commercial. He made a great deal of money. But he was always supportive of my pro bono work for university students (through Sydney

SRC) and for down and out people (through the Council for Civil Liberties which I had joined). He knew that he would get the best out of me if I was happy. And my feelings were rather similar to your own. I could see, of course, the value of commercial legal work. But I thirsted for more. Fortunately, at a young age I was appointed to chair the Australian Law Reform Commission. Thereafter I had judicial appointments that gave me privileges and advantages that most lawyers do not have. However, pro bono work is there aplenty. I suggest you consider a remix of your practice so that you have the stimulus and satisfaction of cases. Even if you have lost a case like *Minister v B*, just working for justice for disadvantaged people and doing your very best to bring law into harmony with justice is a noble activity. At least, this is what I have found.

I hope that this advice does not sound too much like Pollyanna. I am a bit inclined to lapse into that error. However, it is the best way I can respond constructively and with practicality to the ultimate dilemma of the legal profession that you have posed in your letter to me. Not everyone can be a High Court Justice. Those who have that responsibility must, in my opinion, not be mechanical or formalistic in their approach to law. But even then, they will sometimes have no choice but to give effect to the law as they ultimately understand it. When that happens, all they can do is blame Parliament; blame earlier judges for their narrowmindedness; blame the lawyers for not working hard enough to find a just outcome that is acceptable.

Your letter shows that you are a highly ethical and principled person. This is another reason why I would hate to lose you from the practising profession. Hang in there and make a difference. There are many frustrations. But when

there can be success and you can contribute to achieving what you feel is a just outcome (especially for the vulnerable) that is a wonderful day in your life. It gives you a reason to love the law, despite its many failings.

With all good wishes and hoping that you can resolve this dilemma, satisfactorily to yourself.

Sincerely, your colleague in the law”